

**Judgment 30/2013**

**Dr Eberhard Braun as Insolvency  
Administrator of Walter Marketing  
GMBH & CO KG & Brantridge Estates  
Limited  
Royal Court  
23<sup>rd</sup> October 2013**

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**Two applications: i) Plaintiff sought order that his action be restored to the *Rôle des Causes en Preuve* pursuant to rule 86(b) of the Royal Court Civil Rules, 2007 - action became *périmée* before the end of 2010; and ii) Defendant applied for the Plaintiff's action to be struck out pursuant to rule 52 of the 2007 Rules.**

**Approved Text  
23.10.2013**

**IN THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)**

**Between:**

**DR EBERHARD BRAUN  
AS INSOLVENCY ADMINISTRATOR OF  
WALTER MARKETING GMBH & CO. KG**

**Plaintiff**

**-and-**

**BRANTRIDGE ESTATES LIMITED**

**Defendant**

**Application to restore action to Witness List/Application to strike out  
Hearing dates: 22<sup>nd</sup> and 23<sup>rd</sup> July 2013**

**Judgment handed down: 23<sup>rd</sup> October 2013**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**Advocate for the Plaintiff: R G Shepherd**

**Advocate for the Defendant: K M Le Cras**

**Cases & legislation referred to:**

The Royal Court Civil Court Rules, 2007

The Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009

The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011

Practice Direction No. 2 of 2008

The Royal Court (Costs and Fees) Rules, 2008

European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969)

The Human Rights (Bailiwick of Guernsey) Law, 2000

*Ogier v Grand Havre Holdings Ltd* (25 September 2007; [2007-08] GLR N-15)

*McNamara v Gauson* (unreported, 9 February 2010) and [2009-10] GLR 387

Guernsey Annandale Tile Company (1980) Limited v Haines (1997) 24.GLJ.82  
Ozannes v Mourton (unreported, 16 August 2012)  
Arrow Nominees Inc v Blackledge [2000] 1 BCLC 709  
Annodeus Limited v Gibson (unreported, 2 February 2000, HC) and (unreported, 22 June 2000, CA)  
Khalili v Bennett [2000] EMLR 996  
Kent v Griffiths [2001] QB 36  
Gallienne, *Traité de la Renonciation par la Loi Outrée*  
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  
Stoneman v Pannell Kerr Forster (unreported, 19 November 1999) and (1999) 27.GLJ.69  
Birkett v James [1978] AC 297  
Scanfield Limited v Carr (unreported, 16 August 2002)  
Henniger v Robinson [2006-06] GLR N-10  
IFS Investments Ltd v Manor Park (Guernsey) Limited (unreported, 13 April 2010)  
Allen v Sir Alfred McAlpine & Sons Ltd [1968] 1 All ER 543  
Tabata v Hetherington *The Times*, 15 December 1983

## Introduction

1. This judgment concerns two applications dated 30 July 2012. The Plaintiff seeks an order that his action against the Defendant be restored to the *Rôle des Causes en Preuve* pursuant to rule 86(b) of the Royal Court Civil Rules, 2007. The Plaintiff concedes that his action became *périmée* before the end of 2010, although the parties are not agreed on the precise date when that happened. The Defendant has applied for the Plaintiff's action to be struck out pursuant to rule 52 of the 2007 Rules. It does so on two bases. The first is that the Plaintiff's action is time-barred by virtue of German law, the consequence of which is that the Cause therefore discloses no reasonable grounds for bringing the action. The alternative is that the Cause should be struck out for want of prosecution. The Plaintiff was represented by Advocate Shepherd and the Defendant by Advocate Le Cras, both of whom made clear and helpful written and oral submissions to the Court, for which I am grateful.
2. The Plaintiff's claim has been made in his capacity as the Insolvency Administrator of Walter Marketing GmbH & Co. KG (hereafter referred to as "Walter Marketing"), a German limited partnership. The prayer to his Cause seeks a declaration that certain payments made by Walter Marketing to the Defendant between December 2000 and August 2003 before it was placed in insolvent administration on 31 December 2003 constituted gratuitous benefits for the purposes of section 134(1) of the German Insolvenzordnung, which states (in translation) that "*a gratuitous benefit granted by the debtor may be contested unless it was made earlier than four years prior to the request to open insolvency proceedings*", and so are liable to be set aside. The prayer also seeks judgment in respect of the amounts so paid (DM616,785.79 and €388,052.48), together with interest.
3. The Defendant has denied the Plaintiff's claim. It asserts that the payments represented interest due to the Defendant in respect of a loan made by it to the three German limited partnerships which owned Walter Marketing. The loan had been made to enable the three owners to invest in Walter Marketing. It says there was an obligation under the Walter Marketing partnership agreement to make the payments and so Walter Marketing acted as agent for its three owners when doing so. In accordance with section 267 of the German Civil Code, the Defendant was obliged to accept the payments tendered by Walter Marketing and, by doing so, lost its rights against the three owners of Walter Marketing in respect of those monies. The amounts paid were not gratuitous because Walter Marketing acquired a corresponding claim against its three owners in respect of the amounts paid to the Defendant.

4. In his Réplique, the Plaintiff has denied that Walter Marketing was acting as agent of its three owners when making the payments to the Defendant and put the Defendant to strict proof of any agency agreement existing. The Plaintiff also avers that Walter Marketing did not receive any corresponding claim capable of being pursued against the owners of Walter Marketing, in particular because of the financial condition of those limited partnerships at the relevant time.

## Evidence

5. The evidence in support of the Plaintiff's application to restore is provided by the Second Affidavit of Sharon McHugh, sworn on 25 July 2012. The evidence in support of the application to strike out is contained in the Third Affidavit of Herbert Towing, sworn on 15 June 2012, and the Ninth Affidavit of Advocate Le Cras, sworn on 30 July 2012. The latter appears to encompass the evidence contained in the former, albeit that the former also refers to the Ninth Affidavit of Advocate Le Cras, which is a little odd because Mr Towing's own Affidavit was sworn more than six weeks before that of Advocate Le Cras. Whilst I take the evidence given of the prejudice to the Defendant at face value, these anomalies should not exist in such sworn evidence and they highlight the need to take care when progressing drafts in tandem to reflect the actual order of deposing to the evidence and, ideally, the evidence tendered should avoid unnecessary repetition. Although the directions given by the Court permitted evidence to be lodged in response, both parties chose not to adduce further factual evidence responding to the evidence of the other.
6. Expert evidence on German law was also adduced on behalf of both parties in relation to the primary aspect of the Defendant's strike-out application. The Defendant instructed Regina Rath, Counsel at Simmons & Simmons LLP in Frankfurt. Her two Affidavits were sworn on 10 July 2012 and 11 January 2013 respectively. The Plaintiff instructed Professor Dr. Ulrich Haas of the University of Zurich. His Second Affidavit was sworn on 9 November 2012. Immediately prior to the hearing of these two applications, I granted leave to the Plaintiff to file and rely on the Third Affidavit of Professor Dr. Haas, sworn on 14 March 2013. I did so on the basis that, if the Court was being required by the parties to resolve a question of German law, it would best assist the Court to have the fullest information available to it for that purpose. Further, had the experts been present to give oral evidence, the issues addressed in Professor Dr. Haas's Third Affidavit could have been put to him on behalf of the Plaintiff by Advocate Shepherd when inviting comment on the evidence in Ms Rath's report. They could also have been put to Ms Rath for her comment. Had Advocate Le Cras not withdrawn her request for such an opportunity, I would also have given the Defendant permission to lodge any further comment from Ms Rath (or a different German law expert) before the conclusion of the hearing.
7. During the course of determining the Plaintiff's application for leave to file the Third Affidavit of Professor Dr. Haas, I was surprised that no reference was made to the new regime for expert evidence contained in the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009 and the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011. The Law was brought into force on 28 April 2011 and rule 21 of the 2011 Rules provides that the new regime applies to proceedings begun before the commencement of the Law, which these proceedings were, unless the court otherwise directs (and there has been no such direction in this case) or the trial or hearing had begun before the date of commencement (which is inapplicable). Accordingly, the provisions of the new regime apply to the present application to strike out. Perhaps the most significant provision, which could (and arguably should) have been used by the Plaintiff, is that contained in rule 12, enabling a party to put written questions to an expert instructed by another party about the latter's report. What should have happened, rather than delaying an application to adduce expert evidence for which no permission had been given, was that the Plaintiff should have put relevant questions to Ms Rath in respect of the content of her Second Affidavit in accordance with rule 12.

8. Both Advocates acknowledged that it had not been sensible to leave the making of the application in respect of the Third Affidavit of Professor Dr. Haas until the morning of the first day set down for hearing the restoration and strike out applications. In those circumstances, I took a pragmatic view about the course of action most in keeping with the overriding objective in rule 1 of the 2007 Rules. In my view, justice would not have been served by requiring the Plaintiff to comply with the 2011 Rules, thereby delaying further the resolution of the two applications and, in order to have the fullest information available about relevant German law, decided that the Affidavit should be admitted into evidence. In a case such as this involving foreign law, section 20(2) of the 2009 Law provides that it is the function of the presiding judge to “*decide which evidence is to be preferred in determining the proceedings*” and I took the view that, in the particular circumstances of this case, which I accept may be regarded as exceptional, where the Plaintiff would be precluded from pursuing his action if I were to find against him, some latitude should be given in this regard.

### History of proceedings

9. The parties have produced an Agreed Chronology. In reaching my decisions, in particular on the restoration application, I have had regard to all of it, but highlight a number of key dates to place matters into context. As can readily be seen, these proceedings have been underway for more than seven years and the events concerned stretch back even longer, these proceedings having been commenced on the final day available to the Plaintiff.
10. When the Plaintiff’s Cause was initially tabled on 3 February 2006, the Defendant did not appear and judgment in default of appearance was given. The confusion about the commencement of the proceedings was quickly resolved because service had been obtained using the Defendant’s registered office address which was in the process of being changed. The Defendant duly sought leave to present a Requête Civile approximately one month later, and the default judgment was set aside on 17 March 2006. The Plaintiff’s Summons for Defences was returnable on 31 March 2006. On 28 March 2006, the Defendant made an application for security for costs and the Summons for Defences was adjourned pending the outcome of that application. In the meantime, the parties dealt with the question of the costs flowing from the successful Requête Civile and prepared for the determination of the Defendant’s application for security for costs. On 25 August 2006, Deputy Bailiff Collas (as he then was) handed down his judgment making a costs award on the Requête Civile. Judgment on the Defendant’s application for security for costs was given on 23 November 2006, during the course of which, the Deputy Bailiff recorded “*I have been told that the proceedings were issued in Guernsey, rather than Germany, because the decision to commence proceedings was taken shortly before a prescription deadline*” (para. 5).
11. The Defendant’s Defences were tabled on 16 February 2007. Because they contained *Exceptions de Fond* and *Exceptions de Forme*, they were adjourned sine die to enable a Réplique and answers to be filed, which occurred on 4 April 2007. Thereafter, the fairly positive progress that had been made with the case in the first year of its life slowed quite considerably. Within that period, the 2007 Rules entered into force and directions needed to be sought in accordance with Practice Direction No. 2 of 2008. However one looks at it, preparation for the hearing of the *Exceptions de Fond* took quite some time. The main issue turned on whether or not the proceedings had been commenced in time or were time-barred. This was an issue to determine in accordance with German law. Expert evidence needed to be obtained and filed. Skeleton Arguments were submitted and the hearing of the *Exceptions de Fond* finally took place on 30 June 2009, with judgment being handed down on 30 July 2009, a copy of which has been exhibited to the Ninth Affidavit of Advocate Le Cras.
12. During the end of the period occupied by working towards the hearing of the *Exceptions de Fond*, the parties were also trying to resolve the amount of the costs in respect of the Requête Civile required to be paid by the Plaintiff, culminating in an agreed amount being put into a Consent Order made by the Court on 8 May 2009. Having dismissed the Defendant’s

*Exceptions de Fond*, the action proceeded quickly to the tabling of substantive Defences on 23 October 2009, followed by the Plaintiff's application dated 2 November 2009 to set a date for a case management conference. By way of a Consent Order made on 5 November 2009, the case management conference was fixed for 27 November 2009. However, on 27 November 2009, the Court was presented with a further Consent Order, which was duly made that day.

13. The Consent Order of 27 November 2009 is a short but significant document to which I will have to return in detail in due course. Sadly, it is not a very impressive piece of work. It appears to have been produced by, or on behalf of, Advocate Wessels. It was signed by Advocate Le Cras, albeit her signature appears above her typed name referring to her as "*Advocate for the Plaintiff*", when she has throughout represented the Defendant. The other Advocate's signature is, I believe, that of Advocate Wessels, although there is no typed name identifying it and that signature appears above the words "*Advocate for the Defendant*". In the body of the Order there are two paragraphs numbered 2. The second of them simply records "*Costs in the case*". It is the first two operative paragraphs that matter and they read:

- “1. *The Plaintiff is to lodge and serve a Replique by 31 December 2009.*
2. *The Case Management Conference listed for 27 November 2009 be adjourned to the first available date after 31 January 2010.*”

14. The explanations for the making of this Consent Order and what then followed are contained in an exchange of e-mails between the parties' legal advisers. On 25 November 2009, the Defendant's side raised no objection to the case management conference being adjourned "*on the basis that your client files and serves his Replique by the end of December*", proposing that it "*be adjourned until the end of January, although it may need [to] be adjourned again if our client's German legal expert is away all or most of January*". On 18 December 2009, the Plaintiff's side sought a one week extension of the deadline in which to file the Réplique because of "*unexpected absences between Christmas and the New Year*". That extension was agreed the same day.
15. On 22 December 2009, a letter was sent on behalf of the Defendant to the Deputy Bailiff, enclosing a copy of a bill of costs received from the Plaintiff on 24 November 2009 and, in accordance with rule 5(1) of the Royal Court (Costs and Fees) Rules, 2008, making a request for taxation of that bill of costs so as to preserve the Defendant's position, but also requesting that such a taxation should not take place whilst the parties attempted to resolve the issue. That letter, and a corresponding letter to the Plaintiff's Advocates the same day, acknowledged that no costs order had been made by the Court. Further correspondence between the parties was exchanged on this topic but the letter of 22 December 2009 is accepted by the Plaintiff as being the last communication with the Court.
16. On 5 January 2010, the Plaintiff's side sought a further extension of one week for the filing of the Réplique. The following day, Advocate Le Cras responded consenting to that request and suggesting "*an updated Consent Order revising the date for the Replique to 15 January*" and that "*we put the CMC back by a couple of weeks also to the first available date after 15 February 2010*". The final sentence of her message was "*If possible we should aim to agree directions before any CMC, in which case the CMC might be able to be dispensed with*".
17. On 15 January 2010, the Plaintiff's side sought another extension of one week for the filing of the Réplique and, in return for the Defendant's agreement, indicated that a similar approach would be likely to be taken in respect of extensions of time in favour of the Defendant, should they be sought later in the proceedings. The Defendant's consent was forthcoming on 18 January 2010. The Defendant's side then wrote to the Plaintiff's Advocates on 29 January 2010 noting the extensions agreed but commenting that the Réplique had still not been served. The Plaintiff's Advocates replied as follows on 16 February 2010:

“... we understand that our client is currently in the process of arranging for translations of documents which are relevant to the arguments we wish to put forward in the Replique and it is for this reason that we have been unable to serve the Replique on you. We have asked our client to let us know when we should expect to receive both the information required and the translated documents and we will let you know as soon as we hear back.”

18. The matter then went to sleep and it was during this period that the action went *périmée*. By letter dated 9 February 2012, the Plaintiff’s Advocates sent a copy of a Réplique dated 28 June 2011, which had been filed at the Greffe on 29 June 2011. No explanation was given as to why it had not been served, as required, on the Defendant’s Advocates at the same time. The letter also proposed that “*the matter be listed for a case management conference and would be grateful to hear from you as to convenient dates*”. The Defendant’s Advocates replied on 15 March 2012, raising the question of whether the action had become *périmée*, indicating that they were seeking instructions on that issue and other matters raised on behalf of the Plaintiff. Further correspondence ensued, during which the following matters are probably the most significant. On 26 April 2012, the Plaintiff invited the Defendant to consider consenting to the action being restored to the *Rôle des Causes en Preuve*. On 4 May 2012, the Defendant indicated that in any event it regarded the action as being time-barred under German law. Both sides thereafter slightly delayed the making of their respective applications, which took place on 30 July 2012.
19. Before considering in detail the law on *péremption* and strike out applications so as to determine the parties’ applications, I need to address two preliminary matters raised, in particular, by Advocate Shepherd on behalf of the Plaintiff. The first involves the relationship between the Court’s jurisdiction to restore a case that has become *périmée* and to strike it out for want of prosecution, which has been addressed in previous decisions, and how they fall to be dealt with in this case. The second is something that has not been addressed in this context before, namely the impact of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) (hereafter referred to as “the ECHR”), as given further effect domestically by the Human Rights (Bailiwick of Guernsey) Law, 2000.

### **The *péremption* and strike out jurisdictions**

20. Restoration following *péremption* and striking out for want of prosecution continue to be two distinct jurisdictions, although there are similarities. The apparent convergence of them arises first from para. 13 of the judgment of the Court of Appeal in *Ogier v Grand Havre Holdings Ltd* (25 September 2007; [2007-08] GLR N-15) delivered by Sumption JA (as he then was):

“Both parties submitted that there was an inherent illogicality about the [Lieutenant] Bailiff’s decision to strike out the action for want of prosecution in circumstances where he would have restored it to the roll under Rule 50. The criteria to be applied for restoration to the roll were considered by this Court in *Guernsey Annandale Tile Co. v Haines*, 16 Oct. 1997, 24 GLJ 48,42. Although the two jurisdictions are distinct, the criteria are very similar to those which guide the courts in deciding whether to strike out for want of prosecution. In particular the question whether the delay was excusable and prejudicial arise in both jurisdictions. It is not impossible but must be very rare for a court to strike out for want of prosecution a case which it would have been prepared to restore to the roll. We do not know how the Lieutenant Bailiff squared this particular circle in the present case because he does not give his reasons for concluding that the action might properly be restored to the roll.”

and then from the comments relating to that passage made by the Deputy Bailiff in *McNamara v Gauson* (unreported, 9 February 2010):

- “50. *To what extent should the Court’s approach to Rule 50 applications differ from its approach to strike out applications? The objective that underpins them both is the same, namely the need to ensure that a plaintiff who has commenced proceedings progresses the action with due diligence and without delay. It is therefore logical that the criteria to be considered by the Court should be similar in both applications.*
51. *There remains, however, a fundamental difference between the two in that the plaintiff has the onus, in a Rule 50 application, to persuade the court to grant an indulgence whereas, in an application for strike out for want of prosecution, it is the Defendant who must persuade the Court to exercise its discretion in his favour.”*

(In both cases, the references to “Rule 50” are to the predecessor to rule 86 in the 2007 Rules.)

21. Advocate Le Cras suggested that the Deputy Bailiff had clarified his comments when giving judgment in the same case in respect of an application for leave to appeal ([2009-10] GLR 387):

- “39. *In Guernsey Annandale, the Court of Appeal said that little helpful analogy can be drawn from English cases. In the later case of Ogier, the Court of Appeal said that the criteria to be applied on an application to restore an action are very similar to the criteria applied by the English on an application to strike out a claim for want of prosecution. It said: “In particular the question whether the delay was excusable and prejudicial arises in both jurisdictions”.*
40. *In my opinion, we have come closer to the English practice because we have expressly adopted rules of court modelled on the English rules. However, péremption is a unique feature of Guernsey law. There is no reason why we should borrow criteria from the English strike out cases when deciding whether to restore an action which is perimée. My understanding of the judgment in Ogier is that the Court of Appeal said the criteria are very similar, they did not say they are the same and they did not say that we must apply the Birkett v. James test.”*

adding, at para. 45, that “*the Guernsey Annandale approach was, if anything, more stringent and less likely to assist the plaintiff”.*

22. I take the view that, because the Court of Appeal in the Ogier case determined the appeal on the basis of the strike out jurisdiction on which Lieutenant-Bailiff Hancox had founded his decision, para. 13 of the judgment can properly be treated as *obiter*. The criteria set out in Guernsey Annandale Tile Company (1980) Limited v Haines (unreported, 6 November 1997), to which more detailed reference will be made in due course and to which I will refer hereafter as “the Haines factors”, remain valid unless other developments in Guernsey law demonstrate that they need to be modified. In Ozannes v Mourton (unreported, 16 August 2012), I saw no reason to depart from them (see para. 15 of that judgment) and, subject to dealing with Advocate Shepherd’s argument founded on Article 6, ECHR, that remains my view. The distinction, if there is one, is perhaps that case law from England on those elements of the Haines factors where there is direct overlap, in particular the issues of excusability of the delay and its prejudicial effect to which Sumption JA referred, can be treated as offering much more assistance than was previously thought when dealing with a restoration application. However, the exercise of the Court’s direction should, in my judgment, continue to be guided by the Haines factors, as supplemented in other cases, under the overall umbrella of seeking to do justice between the parties.

23. In some cases, these issues will surface because the Court is dealing at the same time with a Plaintiff's restoration application pursuant to rule 86(b) of the 2007 Rules and a Defendant's strike out application pursuant to rule 52. The procedural quagmire facing Lieutenant Bailiff Hancox in the *Ogier* case, as he describes it in the opening 10 paragraphs of his judgment, may go some way towards explaining how he came to address both applications in what might seem to be an inconsistent manner. Hearing argument on both applications at the same time is, in my view, a good use of Court resources. However, I take the view that logic dictates that the restoration application must, of necessity, fall to be determined before determining the strike out application. This is because, in the absence of extant proceedings before the Court, there will be nothing to strike out. By approaching the competing applications in this order, I believe that it properly recognises that the burden of establishing that the case is a proper one for restoration clearly rests with the Plaintiff. However, it is also clear from the *Haines* factors that some of the principles that apply to strike out applications on the ground of want of prosecution can be weighed in the balance. In the particular context of this case, a significant factor will be to consider whether restoring an action that is otherwise susceptible to being struck out on the German law ground would be a meaningless exercise.

### Human rights

24. On behalf of the Plaintiff, Advocate Shepherd submitted that rule 86 of the 2007 Rules must be read and given effect in a way that is compatible with the Plaintiff's Convention rights. In doing so, he relied on section 3 of the Human Rights (Bailiwick of Guernsey) Law, 2000. For these purposes, the 2007 Rules fall within the definition of "*subordinate legislation*" in section 17(1) of that Law. The Convention right engaged is Article 6, providing that "*In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

25. The cases to which he referred in support of this submission were strike out claims in the courts of England and Wales in which the question of how Article 6, ECHR affects such an application has been considered. He placed particular reliance on a passage from the judgment of Evans-Lombe J in *Arrow Nominees Inc v Blackledge* [2000] 1 BCLC 709 where, after analysing a raft of authority, His Lordship stated (at p. 724):

*"In the light of this authority I conclude that it is not a proper exercise of the court's power under the rules or its inherent power to strike out a claimant's case where the claimant has been found to be in contumacious breach of the rules or an order of the court or even is guilty of conduct amounting to a fraud on the court and so a gross contempt, if it can be shown that notwithstanding the claimant's conduct there is no substantial risk that a fair trial of his claim cannot follow."*

Advocate Shepherd submitted that if a litigant, as in that case, who had deliberately forged documents and was in contempt of court was allowed to proceed with his litigation, it was difficult to understand why the Plaintiff in the present case, who was guilty of omissions rather than contemptuous actions, should be more severely punished, provided always that there was no substantial risk to a fair trial being conducted. He also referred to the decision of Neuberger J (as he then was) in *Annodius Limited v Gibson* (unreported, 2 February 2000), during which he commented, citing the *Arrow Nominees* case, that "*To dismiss a claim where the claimant appears to stand a reasonable chance of success and of recovering substantial damages is a strong thing to do*". In making these submissions, he was clearly suggesting that the central question for the Court to consider is whether a fair trial can take place if the Plaintiff's action is restored to the *Rôle*.

26. On that point, Advocate Le Cras highlighted the way the Court of Appeal dealt with the learned judge's reasoning (unreported, 22 June 2000) as indicating that the question of whether a fair trial was possible was being given undue prominence. Ward LJ was critical about the level of concentration on whether there was a substantial risk that a fair trial could not be held on at least some part of the case (para. 69) and proceeded to draw attention to the approach that should be adopted under the Civil Procedure Rules, which at that time were still comparatively new. Advocate Le Cras submitted that these were matters already adequately covered by the 2007 Rules and highlighted what Hale LJ (as she then was) had said about the impact of Article 6, ECHR in *Khalili v Bennett* [2000] EMLR 996 (at para. 49):

*“National laws are entitled to regulate their domestic procedures, and this includes prescribing timetables and steps which have to be taken within a limited period of time. If a claimant has not complied with those rules, then normally he will not be able to complain under Article 6.”*

In response, Advocate Shepherd referred to what Her Ladyship had stated at para. 46:

*“But the overriding principle is justice. Furthermore, under rule 1.3 of the Civil Procedure Rules, both parties are required to help the court to further the overriding objective. It may, therefore, no longer always be appropriate for defendants to sit back and wait for the claimant to do nothing when there are several steps that they themselves could have taken to have the matter disposed of earlier.”*

27. Advocate Le Cras reminded the Court that engaging Article 6, ECHR means considering it both from perspective of the Plaintiff and the Defendant. She referred to what Lord Woolf MR had said in *Kent v Griffiths* [2001] QB 36 (at para. 38):

*“Courts are now encouraged, where an issue or issues can be identified which will resolve or help to resolve litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. There is no question of any contravention of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) in so doing. Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although a strike out may appear to be a summary remedy, it is in fact indistinguishable from deciding a case on a preliminary point of law.”*

28. These cases are helpful in the sense that they indicate that the Court remains master of its own procedure. Advocate Shepherd did not seek to invoke Article 6, ECHR to argue that there has been a violation of the Plaintiff's human rights by his action becoming *périmée*; the existence of the *péremption* doctrine was not questioned in that way. There was no suggestion that a failure to restore the Plaintiff's action would be an unlawful act for the purposes of section 6 of the 2000 Law. The submission made was that, using section 3 of the 2000 Law, the Court must read and give effect to rule 86 in a Convention-compatible manner. There is nothing in the actual words used in rule 86(b) that calls for any different construction to them being given after the commencement of the 2000 Law than the similar wording in the previous Rule 50 would have attracted previously. I do not, therefore, regard Advocate Shepherd's submission as being an interpretation argument. Instead, he has invited the Court to bear Article 6, ECHR in mind when exercising its discretion as to whether or not to restore the Plaintiff's action to the *Rôle*.

29. I am satisfied that it is, of course, appropriate to bear in mind affording a fair trial within a reasonable time to all parties who come before the Court. I doubt, however, whether doing so really produces any outcome in law different from what is already set out in rule 1 of the 2007 Rules. The overriding objective is for the Court to deal with cases justly. In particular, by rule 1(3):

“The Court must seek to give effect to the overriding objective when it –

- (a) exercises any power given to it by these Rules, or
- (b) interprets any rule.”

30. The similarities to the approach underpinning sections 3 and 6 of the 2000 Law and the impact of Article 6, ECHR are plain to see. When the Court is exercising the discretionary power to restore an action to the *Rôle* it must seek to deal with the matter justly and rule 1(2) sets out some particular considerations to take into account. There are echoes of what Chadwick LJ noted in the *Arrow Nominees* case (*supra*) (at para. 55): “a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court”. These are, therefore, all relevant factors to take into consideration when deciding, in the light of the *Haines* factors, whether the case should be restored to the *Rôle*, further remembering that there is potentially a subtle difference between the Court deciding to take a positive step terminating a claim, thereby ending a litigant’s access to justice, and the operation of the customary law having extinguished a claim arising from inactivity for a year and a day where the Court is subsequently invited to exercise its discretion to breathe life back into the otherwise dead claim. I take the view that it is accurate to describe the action as “dead” rather than “dormant” by reference to page 312 of Gallienne’s *Traité de la Renonciation par la Loi Outrée*, where he wrote “La péremption d’instance ... est l’extinction ou l’anéantissement d’une poursuite, par la discontinuation des procédures pendant un certain terme déterminé par la loi” and added on pages 313 and 314, “La péremption anéantit complètement la procédure, sans que l’on puisse jamais se prévaloir d’aucun des actes, or les oppose. Les effets qu’auraient pu produire ces actes, sont donc également détruits”.

### **Péremption principles**

31. In *Ozannes v Mourton* (*supra*), I outlined many of the salient features of the law relating to this long-standing legal procedural bar and do not need to repeat them all in detail here. Terrien’s *Commentaires du Droit Civil tant public que privé, observé au pays & Duché de Normandie*, Livre IX, Chap. XXXIX states:

“En toutes clamours & procédures 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 monsté procedure puis an & jour.”

and the principles were helpfully explained in *William Place Investments Ltd v States of Guernsey* (1995) 20.GLJ.52 by reference to a passage on page 313 of Gallienne’s work:

“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.”

32. As the cases following the making of the Civil Procedure Rules in England and Wales on the interrelationship between the overriding objective and human rights demonstrate, applications to strike out for want of prosecution should now be rare. In Guernsey, compliance with the

2007 Rules should similarly mean that such applications, or applications by Plaintiffs to restore actions to the *Rôle*, will now be rare. As the present case shows, there will be occasions when a Plaintiff overlooks the need to do something within the year and a day and one of the issues raised by Advocate Shepherd on behalf of the Plaintiff is what degree of blame, in whole or in part, can be attributed to the Defendant and the Court for failing to take steps in the proceedings.

33. Both Advocates agreed that the guiding principles to be applied on restoration applications are those set out in the Guernsey Annandale case (*supra*, 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.”*

34. Rather than set out here what has been said in other cases dealing with the application of particular aspects of what falls to be considered, I propose to cover them when dealing with the factors in turn. However, I have reminded myself of the comments of Deputy Bailiff Day in Stoneman v Pannell Kerr Forster (1999) 27.GLJ.69:

*“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.”*

### **Striking out for want of prosecution**

35. The legal test applied by the Court in deciding whether or not to exercise its discretion to strike out a pleading for want of prosecution pursuant to rule 52(3) of the 2007 Rules is that derived from the speech of Lord Diplock in *Birkett v James* [1978] AC 297:

*“The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.”*

This is the approach regularly adopted by this Court (see, eg, *Scanfield Limited v Carr* (unreported, 16 August 2002)).

36. As can be seen from the use of “and” then “or” in the second limb of the test, there are alternative routes that can be followed where the allegation is that the plaintiff or his lawyers have been responsible for “inordinate and inexcusable delay”. Accordingly, in order to reach the stage of considering whether to exercise its discretion, the Court will need to be satisfied that the delay concerned is both inordinate and inexcusable and also that it either means that a substantial risk has arisen that it will not be possible to conduct a fair trial when that trial stage is eventually reached or that it has caused, or is likely to cause, serious prejudice to the defendant as between itself and another party to the action. If a Defendant is able to plot either of those pathways, the exercise of the Court’s discretion to strike out would still need to be exercised in such a way that it deals with the case justly (rule 1 of the 2007 Rules) and balances the Convention rights of the parties bearing in mind the access to a fair trial afforded by Article 6, ECHR.

## Discussion

### *Relevant dates*

37. Although no issue arises as to whether the Plaintiff’s action has become *périmée* and neither Advocate believed that the outcome of the Plaintiff’s application to restore would turn on the exact dates that fall to be taken into account, I have reached the following conclusions about the dates of the relevant stages of the proceedings. However, as expected by Counsel, even if I am wrong to choose the dates I have and should have had regard to a shorter period, the decision I have reached on the Plaintiff’s application would not be different.
38. In relation to the date from which time runs when considering when the action will go *périmée*, I consider that the letter sent on behalf of the Defendant on 22 December 2009, purporting to seek a taxation of the Plaintiff’s bill of costs when the Court had not at that stage made an award of costs cannot properly be regarded as a procedural step in the proceedings. Accordingly, I treat the Consent Order made on 27 November 2009 as being the relevant starting date for the *péremption* period. The correspondence between the parties’ Advocates in early 2010 quite clearly cannot be regarded as delaying the start of that period (see, eg, Lieutenant Bailiff Hancox at first instance in the *Ogier* case (*supra*)).
39. Nothing was then done by, or on behalf of, the Plaintiff until the filing of his Réplique on 29 June 2011. By this time the action was already *périmée* and had been since 28 November 2010. However, the Plaintiff’s Advocates failed to serve a copy of this Réplique on the Defendant until 9 February 2012. In *Henniger v Robinson* [2006-06] GLR N-10, Lieutenant Bailiff Talbot QC indicated that a party was required “to take some active procedural steps on an *inter partes* basis” to avoid an action going *périmée* (see para. 52). Adopting similar reasoning, until the Defendant was alerted by the Plaintiff to some step having been taken in the proceedings, the Defendant could not consider whether it wished to raise an *Exception de*

*péremption* or to renounce its right to do so. The consequence, therefore, is that the period of delay to be considered is at least in excess of 26 months. Indeed, following correspondence between the parties' Advocates, it was not until the application to restore was made on 30 July 2012 that formal steps were taken involving the Court. The period under consideration must, therefore, be measured in terms of years rather than being a short period of just weeks or a few months beyond the date when the action went *périmée*.

*The Haines factors*

40. 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*". It was acknowledged on behalf of both parties that the effect of not restoring the action will be that the Plaintiff no longer has a claim capable of being pursued against the Defendant. Advocate Shepherd submitted that such a serious consequence should weigh heavily on the Court's mind.
41. Although Advocate Shepherd referred to the Plaintiff's case being a strong one, I accept the submission of Advocate Le Cras that this is not a relevant consideration. In that regard, I note what Deputy Bailiff Day said in *Stoneman v Pannell, Kerr, Forster* (unreported, 19 November 1999, at page 21H):

*"Whether the Plaintiff has a strong case against the Defendants is not for me to determine, but, unlike many road accident cases where liability is clear (though quantum, with its attendant difficulties, may well be in issue), this Plaintiff's case must, at best, be arguable. Depending upon the strength of his case, the Plaintiff will be, to a greater or lesser extent, prejudiced. That prejudice, in my view, is entirely self-inflicted."*

At this stage of this action, all I can do is read the pleadings and the evidence adduced in support of both parties' Applications. I am unable to do more than infer that there is an arguable substantive case on behalf of the Plaintiff. If the Cause disclosed no cause of action (and here I put to one side the limitation points made in support of the Defendant's strike out Application), then steps could and probably should have been taken to strike it out on that basis much earlier.

42. In simple terms, therefore, I recognise that a decision not to restore the action to the *Rôle* will mean that the Plaintiff no longer has a claim against the Defendant and that amounts to prejudice towards him. Against that simple conclusion, I must balance the fact that the Plaintiff was aware that he chose to commence his proceedings in Guernsey on the very last day when German law permitted him to do so and, as noted by Deputy Bailiff Day in *Scanfield Limited v Carr* (*supra*), "*the later the plaintiff starts his action, the higher his duty to prosecute it with diligence*".
43. The second *Haines* 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 périmée*". In *IFS Investments Ltd v Manor Park (Guernsey) Ltd* (unreported, 13 April 2010), 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*". In the present case, the period is considerably longer than in some of the previous cases before this Court. It is in relation to this factor that there is a more direct read across to the "*inordinate and inexcusable delay*" element of the English law strike out jurisdiction.

44. In *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543, 561, Salmon LJ stated:

*"... the defendant must show:*

- (i) *that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.*
- (ii) *that this delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.”*

45. In the *Scanfield* case (*supra*), the Court cited with approval the words of Cumming-Bruce LJ in *Tabata v Hetherington* *The Times*, 15 December 1983 that the delay must be “*materially longer than the time which was usually regarded by the Courts and the profession as an acceptable period*”. When this was put to Advocate Shepherd, he quite properly conceded that the period of inaction of his firm on behalf of the Plaintiff was unacceptable by reference to what the Guernsey Bar expected. The consequence is that I have no difficulty in finding that the delay following the making of the Consent Order on 27 November 2009 was inordinate.
46. The evidence in support of the Plaintiff’s restoration application does not persuade me that this delay was excusable. The correspondence exchanged up to the early part of 2010 demonstrates that the Plaintiff’s Advocates accepted that the ball was in their court. The conclusion I feel bound to reach is that they then took their eye completely off that ball for way too long. This is not a case where the delay that needs to be explained was a short delay. The length of the delay was compounded by the Plaintiff’s Advocates’ failure to serve on the Defendant’s Advocates a copy of the Réplique when it was filed with the Greffe on 29 June 2011. The conduct of the Plaintiff’s case at this time was, in my view, so far below what can now be treated as a credible excuse that the inordinate delay is also inexcusable.
47. Advocate Shepherd sought to analyse the entirety of the period from when the action was commenced to show that the speed at which matters had proceeded was partly the fault of the Defendant and its Advocates and partly the fault of the Plaintiff and his Advocates. Whilst the overall conduct of the proceedings can be relevant in the exercise of the Court’s discretion to restore, I take the view that the sharpest focus must be concentrated on the period from the last procedural activity involving the Court to the next time at which the Court is engaged. Where that is a lengthy period, clearly attributable to the Plaintiff’s side, it inevitably weighs heavily in the balance. Moreover, in this case, the Plaintiff has disregarded a direction given by the Court to lodge and serve a Réplique by a specified date. Whilst that date was contained in a Consent Order, it still amounts to a direction given by the Court, albeit with the agreement of the parties rather than being imposed on the Plaintiff. As the Court noted in *McNamara v Gauson* (*supra*), “*It is a different matter to come along after the action has become perimé and to seek leave of the Court to restore the action when the Plaintiff has chosen to ignore a direction of the Court*” (para. 88), which is likely to incur the Court’s disapproval (see para. 49 of leave judgment in that case).
48. Perhaps in order to compensate for such an obvious inordinate and inexcusable delay, Advocate Shepherd emphasised that the new procedural regime under the 2007 Rules is such that it is not only the Plaintiff who bears the responsibility for progressing an action. (This issue also relates to the limitation point under German law, to which I will turn in more detail in due course.) In doing so, he drew attention to rule 1(4) of those Rules, which provides that “*The parties are required to help the Court to further the overriding objective*”, which is to deal with cases justly. He also submitted that the onus was on the Court, pursuant to paragraph 2 of the Consent Order of 27 November 2009 proactively to list the case management conference that was being “*adjourned to the first available date after 31 January 2010*”. However, both he and Advocate Le Cras accepted that it was not the general understanding of the Bar that the Court would, of its own initiative, list a matter in this way

but rather that one or other of the parties' Advocates would include the case on its firm's agenda for a suitable sitting of the Interlocutory Court.

49. By rule 38(1) of the 2007 Rules, "*The Court shall actively manage cases*". I fully appreciate that this is a general duty that the Court has undertaken and that it arises from the institution of proceedings. The extent to which active case management is appropriate will necessarily be different in each case and the extent to which the Court can perform this duty is, I suspect, largely dependent on the parties' cases being fully pleaded. In a case such as the Plaintiff's, where the entitlement to prepare, file and lodge a Réplique is utilised, the scope for active case management before the holding of the case management conference is potentially quite limited.
50. Advocate Shepherd has also relied on rule 42(1) of the 2007 Rules, which provides:

*"The Court shall not adjourn a case management conference without fixing a new date, time and place for the adjourned case management conference to take place."*

In doing so, he has been forced to suggest that paragraph 2 of the Consent Order of 27 November 2009 did not comply with this rule. Taking that paragraph of the Order in isolation, there may be some force in the argument. However, an alternative interpretation of the wording is that, instead of referring expressly to 5 February 2010, which was the first Friday following 31 January 2010, and so the first available Interlocutory Court at which the adjourned case management conference could be heard, the parties and the Court understood that greater flexibility should be introduced into the timetable for this case because the case management conference hearing would necessarily have to await the Plaintiff complying with paragraph 1 of the Order by lodging and serving his Réplique. In those circumstances, rather than incurring the additional expense of further Consent Orders pushing the timetable backwards, it is perhaps understandable, although not necessarily strictly in compliance with the 2007 Rules, that the parties invited the Court to make the Consent Order in the form submitted.

51. Another way of looking at rule 42(1) is in the light of rule 42(4), which provides that "*So far as practicable, the resumption of an adjourned case management conference shall take place before the Court which conducted the first conference*". The implication is that this rule applies to a case management conference that has actually started, rather than an order postponing the day on which the case management conference will first be held, which is what the Consent Order did. By reading rule 42 in its entirety, I incline to the view that it deals only with a situation where a case management conference has actually begun and so is not directly in issue in the present case.
52. If I am wrong in reaching that conclusion, I still find Advocate Shepherd's submissions on this point unattractive. In my experience, the style of the Consent Order submitted to and made by the Court is not unusual. As I have just said, the underlying intention appears to be to acknowledge that further procedural steps are required before the Court is fully re-engaged in progressing the action. Further, I believe that it is consistent with the long-standing practice of the Guernsey Bar that, having left the next stage open-ended in this way, bringing the matter back before the Court rests with either party making a further application to an Interlocutory Court, even if only for a general review and, despite rule 39(2), that the profession would not take kindly to the Court starting to list cases of its own volition in this type of circumstance. Whether it is correct or desirable for the Court to become more proactive, whether in this or some other way, does not need to be resolved in respect of this case. For present purposes, I do not find that the excuse for the delay in progressing this action lies with the Court or, indeed, with the Defendant, Advocate Shepherd having accepted that he could not point to any Guernsey case saying a defendant has the same obligation as a plaintiff does to progress an action, but rests squarely on the Plaintiff's side failing to engage at all for well in excess of 18 months.

53. The third *Haines* factor is “*The position of the defendant, and the effect on the defendant and the defendant’s case if the action is restored*”. If the action were to be restored, in the overall scheme of the proceedings to date, Advocate Shepherd submits that the Defendant will not be prejudiced, or at least not seriously prejudiced, whereas, conversely, if the Plaintiff’s action is not restored and the Defendant no longer faces these proceedings, he suggested it would produce an “*undeserved windfall*”. The absence of prejudice arises because any costs burden occasioned by the delay can be addressed through appropriate costs orders and the evidence to be adduced at trial will principally be expert and documentary evidence, so the delay thus far will not seriously prejudice any witness giving factual evidence. Put another way, the dimming of memories to which reference is made in a number of previous cases is not an issue, or not a significant issue, in this case. In response, Advocate Le Cras submitted that the Defendant would be hugely prejudiced were the Plaintiff’s action to be restored. Mr Towning, the principal witness on behalf of the Defendant, is an elderly gentleman whose powers of recall will have been affected by the delay. Moreover, the Defendant is a small company where the ongoing threat of proceedings has already been hanging over it for an excessively long period and it should be relieved from being placed back into that position when the fault of the Plaintiff was as culpable as it has been. Advocate Shepherd, however, referred to the case being a commercial one, commenting that the strains of litigation have to be accepted as forming part and parcel of the normal vicissitudes of commercial life.
54. In the context of this factor, Advocate Shepherd highlighted the English law strike out cases focusing on whether the serious prejudice caused by the inordinate and inexcusable delay means that a fair trial between the parties cannot take place. Whilst this remains a factor to bear in mind on a restoration application, I take the view that there is less of a direct read-across between the strike out and restoration jurisdictions than was suggested on behalf of the Plaintiff. I consider that there must be some distinction between a situation where the Plaintiff’s action has been extinguished through *péremption* and where the Court is being invited to take a positive step to terminate proceedings for want of prosecution. In the former case, a fair trial is already no longer possible through the operation of Guernsey’s customary law. The Plaintiff’s claim has been extinguished unless and until the Court exercises its discretion to restore the action to the *Rôle*. In the latter situation, the Plaintiff’s claim is still alive, but susceptible to being terminated if the Court exercises its discretion to strike out. Whilst this distinction is properly reflected in the different burdens of proof attaching to the respective applications, I also take the view that this means that the English law strike out cases cannot be read completely into the restoration jurisdiction of this Court in the manner suggested. Unlike the basis for striking out for want of prosecution, where all elements of the test must be satisfied before the Court considers whether to exercise its discretion to terminate proceedings, the test for restoration is more open-ended. Ultimately, it turns on whether it would be fair and just in all the circumstances to restore the action or leave the position as it is under the customary procedural law on *péremption*. In reaching a conclusion on that broad issue, giving effect to the overriding objective in rule 1 of the 2007 Rules will, as I have said, serve as well as anything to meet the parties’ Convention rights.
55. This is not a case where the Defendant is liable to face fresh proceedings brought by the Plaintiff, meaning that little is gained through not granting the restoration application, on appropriate terms, and putting the Plaintiff to his election as to whether he still wishes to pursue his claim. In this case, that option does not exist because everyone acknowledges that fresh proceedings would be statute-barred. The choice, therefore, is the stark one between restoration, and the prejudice to which the Defendant is then put and dismissing the application where the consequences are that the Plaintiff’s claim cannot be pursued.
56. It is in the context of this third factor that the issues of German law arise, to which I will turn in more detail shortly. In essence, were the action to be restored under the Court’s discretion pursuant to rule 86(b) of the 2007 Rules, the Court would then be called upon to determine the Defendant’s strike out application. It would, therefore, be a pointless exercise to restore

the case only to strike it out. The view to be taken on determining the Defendant's strike-out application is, therefore a relevant consideration under this third factor. For the reasons I set out below, I have reached the conclusion that the Defendant's strike out application would be successful and will explain my reasoning on the Plaintiff's restoration application on that basis and also on the alternative basis that I am wrong on that point.

57. I do not believe that the fourth and fifth factors are relevant to my consideration of this case. Neither party has asserted any special circumstances or raised anything particularly pertinent to the Guernsey circumstances of this litigation. In that regard, I take into account the consequences highlighted in the *Stoneman* case (*supra*) to which I have already referred.

*Overriding objective*

58. As required by rule 1(3) of the 2007 Rules, I have also taken into account the overriding objective "*to deal with cases justly*". In doing so, I have borne in mind the Convention right for parties to have a fair trial, within which is their entitlement to have appropriate access to justice. Whilst I am conscious that a decision to refuse to restore the action means that the Plaintiff will have no opportunity to pursue his proceedings against the Defendant, I do not regard that reason alone as justifying the Court exercising its discretion in favour of restoration. It is clear from the procedural chronology and, in particular, the earlier judgment of the Court confirming that the Plaintiff's proceedings had been commenced on the final day before the end of the limitation period, that this was a case that should be progressed in a timely fashion. The justice of the matter cried out for the dispute to be resolved at the earliest opportunity. The need to obtain translations of documentation should have been addressed as a matter of priority by the Plaintiff and his legal team. However one looks at it, the onus was on the Plaintiff to pursue his case, so I take the view that he must have understood the potential consequences of failing to do so.
59. Both parties have been on an equal footing throughout (see rule 1(2)(a)). They have been assisted by experienced Advocates. By allowing this matter to "slip off the radar", the parties have not really complied with the obligation in rule 1(4) "*to help the Court to further the overriding objective*", particularly when it comes to "*ensuring that [the case] is dealt with expeditiously and fairly*" (rule 1(2)(d)). Accordingly, having had a full opportunity to bring these proceedings before this Court, however loose the connection with Guernsey is, the Plaintiff's failure to take a procedural step for the lengthy period concerned, in my view, points more towards the just outcome being to allow the customary law of Guernsey to take its course rather than the Court exercising its discretion and restoring the action.

**Conclusion on *péremption***

60. I have, therefore, reached the conclusion that this is not a case where the Court should exercise its discretion to restore the Plaintiff's action. The delay in taking the required procedural step is a significant one. The longer the delay, the more compelling the reason for it must be. In this case, the explanation given in Ms McHugh's Affidavit is far from compelling. The only conclusion I can reach is that the Plaintiff's Advocates lost sight of this matter completely for far too long. The commissioning of translations of documents should have been chased as soon as any delay in the envisaged timescales was foreseen. The Plaintiff's Advocates should have kept the Defendant's Advocates aware of what was happening. It would have been very simple for a further Consent Order extending the deadline for the filing of the Plaintiff's Réplique and the timing of the case management conference to have been prepared and lodged with the Court. Such an order may have been made without further comment or the Court may have wished to convene the parties to hear further explanation of what was happening. In this manner, the action would not have become *périmée* and the present application would have been avoided. The fact that such simple means of resolving matters were not carried out strongly suggests that the Plaintiff's Advocates forgot all about their conduct of this matter. The situation was made still worse when the Réplique was finally lodged with the Court but a copy not served on the

Defendant's Advocates. That was really adding insult to injury. However eloquent Advocate Shepherd's submission were, they cannot compensate for what can only be described as woeful inadequacies in the conduct of this case.

61. In reaching that decision, I have taken into account that this is a case where the memories of witnesses are of less significance because of the likelihood that much will turn instead on documentation. As such, the negative effect of the dimming of memories is not as great a factor in the balance as it would be in a case involving personal recollection of events. However, set against that factor, the impact of litigation hanging over a defendant for a considerable period of time cannot be disregarded. This is one of the reasons why dealing with cases justly encompasses dealing with them expeditiously. The old adage "justice delayed is justice denied" remains as valid today as it was previously. A defendant who maintains a defence to an action is entitled to have the claim against him dealt with as promptly as is appropriate in the circumstances. I am also conscious that the regime under the 2007 Rules is designed to ensure that all parties play an active part in progressing matters. However, I take the view that Advocate Shepherd expects too much when he suggests that the Defendant's Advocates ought to be treated as equally to blame for the action becoming *périmée*. Where it is clear to the Defendant, as it was in this case, that the Plaintiff had assumed responsibility for the next stage in the proceedings, this Island's customary procedural law relating to *péremption* still entitles the Defendant to sit back and leave the Plaintiff to take the next step. If that were not the case, the Defendant would be obliged to alert the Plaintiff that the case is about to become *périmée*, which would be tantamount to requiring the Defendant to alert the Plaintiff to save his own action from being extinguished. I do not regard that as consistent with the Defendant's Advocate's obligations to do the best for his or her client. Accordingly, until the principle of *péremption* is modified or abolished, which may well require primary legislation, despite rule 1(4) of the 2007 Rules, I take the view that it is not incumbent on a defendant or an Advocate representing a defendant to forewarn a plaintiff or those representing him that the spectre of *péremption* is looming.
62. The decision I have reached is also not dependent on my conclusion as to the outcome on the Defendant's strike out application. If I had simply been determining a restoration application without there also being an application from the Defendant to strike out the Plaintiff's Cause, I would still have chosen not to exercise the Court's discretion under rule 86(b) of the 2007 Rules to restore the action for the reasons given. In effect, the fact that restoration would be a pointless exercise because I would then move straightaway to grant the Defendant's application to strike out pursuant to rule 52(2)(a) bolsters the conclusion I have reached.
63. The Plaintiff's application dated 30 July 2012 is, therefore, dismissed.

#### **Defendant's strike out application**

64. In light of my decision on the Plaintiff's restoration application, I do not need to proceed to rule upon the Defendant's strike out application. However, I must in fairness to the parties set out my reasoning in relation to the application, particularly insofar as it relates to the claim that the action became time-barred even before the end of the *péremption* period.
65. The parties are agreed about how this issue arises but disagree about how the underlying legal principles apply in this case. As settled by the earlier judgment of the Court on the Defendant's *Exceptions de Fond*, the Plaintiff's cause of action under section 134 of the German Insolvenzordnung is governed by German substantive law. The Plaintiff's action was commenced on the very last day available to him under the limitation period, as extended by agreement, which is also a matter of German substantive law, rather than procedural law. As such, it applies to the proceedings before this Court. By virtue of commencing the action, the limitation period is treated as "suspended" in accordance with section 204 of the German Civil Code ("the BGB"). However, section 204(2), BGB shows that such a suspension is not unlimited:

*“Suspension ... ends six months after the final and absolute decision in the proceedings commenced, or after they end in another way. If the proceedings come to a standstill because the parties do not pursue them, the date of the last act in the proceedings by the parties, the court or other body responsible for the proceedings takes the place of the date when the proceedings end. Suspension commences again if one of the parties continues the proceedings.”*

66. The parties do not agree as to the date on which the standstill asserted on behalf of the Defendant occurred, deploying similar arguments to those advanced in respect of when the *péremption* period commenced. However, the exact date is largely academic, because there is no dispute that, whatever date is selected, more than six months passed from it before the proceedings were continued. Accordingly, subject to the contentions of the Plaintiff that follow, it is also agreed that the suspension of the limitation period was lifted at the end of those six months and, because there was no time left to run on the limitation period on which the Plaintiff can rely, on the same date as the suspension was lifted, pursuing the Plaintiff’s action became time-barred as a matter of German substantive law.
67. There are, however, two areas of dispute that affect the determination of the Defendant’s application. The first relates to within whose sphere of responsibility the blame for the standstill arising falls. The Plaintiff submits, with caution and all due respect to the Court, that the fault lies with the Court rather than with the Plaintiff, whereas the Defendant attributes the blame to the Plaintiff. The second issue is whether, if the fault lies with the Plaintiff, there is a legitimate reason discernible to the other party explaining the party’s omission to prosecute the case.

*Sphere of responsibility*

68. There appeared to be some confusion between the parties as to the proper approach to take to the sphere of responsibility issue. In the opinion of Professor Dr. Haas, this issue falls to be determined by reference to the *lex fori*. Despite that opinion, he proceeded to give his view, apparently based on the instructions he received about the operation of Guernsey law, that, although the Plaintiff had failed to lodge and serve his *Réplique*, as required by the Consent Order of 27 November 2009, the sphere of responsibility still lay with the Court because of its obligation to progress the case management conference. Ms Rath, on the other hand, offers the opinion that the limitation period issues generally are subject to German substantive law, so everything relating to the limitation period must be determined by reference to German substantive law, including within whose sphere of responsibility the fault for non-prosecution lies. On this basis, Professor Dr. Haas further comments that Ms Rath’s opinion that under German law the fault can be placed on the Plaintiff is wrong and that the application of German law leads to the conclusion that the fault lies with the Court. On behalf of the Defendant, Advocate Le Cras submits that it does not matter because both routes lead to the same conclusion, which is a view with which I would agree.
69. Although I can understand why Ms Rath offers the view that, because all these considerations about the limitation period are in the realm of German substantive law, the *lex causae* must apply, I prefer the view of Professor Dr. Haas that the question of the sphere of responsibility should be determined by reference to the *lex fori* and so Guernsey law. If that were not the case, this Court and the Advocates appearing before it would not know what the state of the proceedings were without having regard to expert evidence. That seems to me to be an unsatisfactory position and it would appear to oust the application generally of the 2007 Rules. Once the parties chose to litigate their dispute before the Royal Court, it must follow that the general conduct of the case follows domestic procedural rules unless and until they are displaced by the rules of German law. In terms of applying a limitation period, the parties acknowledge, as previously confirmed by the Court, that this is a question of German substantive law. The existence of a standstill provision in respect of the limitation period is

also a question of German substantive law. In this regard, it is different from Guernsey procedural law, which retains the customary law *péremption* doctrine. However, the way in which that standstill provision operates should, in my judgment, be determined by reference to Guernsey considerations rather than importing wholesale the law of Germany to this question. I regard that as being the only satisfactory way to achieve certainty.

70. Applying Guernsey law to the question of within whose sphere of responsibility the task of progressing the case lay, there is no need to have further regard to the opinions of the two German law experts. As I indicated when I was dealing with the second *Haines* factor, I am not persuaded by Advocate Shepherd's submissions that the Court's duty pursuant to rule 38(1) of the 2007 Rules actively to manage cases or, more specifically, the prohibition in rule 42(1) of adjourning a case management conference "*without fixing a new date, time and place for the adjourned case management conference to take place*" means that the Court had the responsibility to take the next step. To accept that submission would mean that both parties would be able to sit back and await the listing, on the Court's own motion, of the case management conference. As both Advocates acknowledged, this has not been the practice of the Guernsey Bar to date.
71. The wording of the Consent Order of 27 November 2009 was agreed by the Advocates and put before the Court to be made. The next procedural step in this action was for the Plaintiff to lodge and serve his Réplique. Everyone involved, including the Court, understood that the case management conference would be deferred until that pleading had been lodged and served. The wording of the Consent Order may not have been as explicit as it should have been, but that was, in the context of this case, perhaps understandable because the precise date on which the Plaintiff's Réplique would be prepared was not known, given that it was largely conditional on obtaining the translation of the documents. What should have happened, of course, was that a fresh Consent Order would have been agreed pushing the dates back. What should also have happened is that the Advocates should have agreed a specific date to which the fixture for the case management conference was being adjourned. Whilst it may be convenient to them to refer to "*the first available date after*", the problem is that the phrase lacks certainty. As I have already pointed out, one interpretation of the words "*the first available date after*" is the first Friday after the date specified when the Court is sitting, ie, avoiding Good Friday and any other Fridays when the Interlocutory Court does not sit. Another interpretation would simply be to treat it as the next working day after the date specified, although the difficulty with that construction may be the uncertainty created through not knowing the availability of a judge and a courtroom at the time of making such an order. Given that the usual practice is to apply to an Interlocutory Court pursuant to rule 39 of the 2007 Rules for a date for a case management conference to be fixed, and the date so fixed will often be at a subsequent Interlocutory Court (unless it is clear that the matter warrants a specific appointment at a different time), once a case management conference date has been given to take place at an ordinary Friday morning sitting of the Interlocutory Court, whether by Consent Order or following a hearing, the adjournment of that fixture by way of a Consent Order put before the Court by the parties really should be to a future Interlocutory Court and not left open-ended.
72. In this case, reading the Consent Order of 27 November 2009 as a whole, I am confident that the parties and the Court all understood how the case would be progressed. The Plaintiff needed time to lodge and serve his Réplique. An estimate of the time needed was given. The case management conference was to follow no earlier than approximately one month later, thereby allowing the parties to consider their positions in the light of the latest pleading. In short, until the Plaintiff completed the next step, the pleadings were still open and the case could not sensibly be progressed any further because the issues to be dealt with at the case management conference depended, at least in part, on any further issues raised by the plaintiff in his Réplique. Accordingly, it was within the Plaintiff's sphere of responsibility to prosecute the case and not within the Court's.

73. If, however, I am wrong to reach that conclusion, and I should be applying German law to this question, the experts disagree about how this issue should be resolved. By reference to the German Code of Civil Procedure (“the ZPO”), they both recognise that German procedural law places the management of proceedings that have been substantiated with the court. Professor Dr. Haas gave as an example that “*the responsibility of setting a date for the hearing of oral argument lies in principle within the sphere of responsibility of the court because the date of the hearing for oral argument is determined by the court ex officio (sections 216 and 272 ZPO)*”, concluding “*if the proceedings come to a standstill because the court has not scheduled a hearing for oral argument, Suspension will not end*”. Ms Rath then refers to section 697 ZPO, which she says “*states that if the Plaintiff omits to substantiate his claims upon respective court order, then the court will not fix a hearing date ex officio, but only upon the other party’s request*”. She explains that the general principle of German procedural law that the parties are obliged to substantiate their claims and to provide evidence in a reasonable time is the “principle of party disposition” (“*Dispositionsmaxime*”). In his Third Affidavit, Professor Dr. Haas further explains that Ms Rath has incorrectly referred to this principle, which properly should be the “*Dispositionsgrundsatz*”, being the power of the parties to have the content and course of the proceedings fully at their disposal. In his opinion, the relevant principle is that of “party presentation” (“*Verhandlungsmaxime*”), which he says is “*concerned with the presentation of factual material to the court*” and he proceeds to explain that “*a party’s failure to substantiate its claim in accordance with the principle of party presentation is not an impediment to the court in advancing the proceedings*”.
74. Whilst the experts’ difference of opinion about the relevant principle and its effects is academically interesting, I have concluded that this does not assist me in resolving where the sphere of responsibility lies in this case. Professor Dr. Haas has explained the principle of party presentation he says applies by emphasising that it concerns presenting the court with factual material. Whilst pleadings contain the material facts on which the parties rely (but not the evidence), their purpose arguably goes wider than that. To that extent, therefore, even on the evidence of Professor Dr. Haas, the applicable principle appears to be that advanced by Ms Rath as relating to the content and course of the proceedings, whether properly called the “*Dispositionsgrundsatz*” or the “*Dispositionsmaxime*”. I note what Professor Dr. Haas says about the relevance of these matters to summary proceedings for a payment order but find that that aspect of his expert opinion is addressing a slightly different issue raised in Ms Rath’s evidence rather than the fundamental question of within whose sphere of responsibility matters lay at the time of the Court ordering the Plaintiff to file an additional pleading within a specified time, which he then failed to do. Further, I note that Professor Dr. Haas refers to section 139 ZPO, highlighting the passage that states that “*The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely*”. Whilst the stages of lodging pleadings used in Guernsey may not have any direct German equivalents, insofar as the Court was engaged in the process, it directed the lodging and service of a Réplique by the Plaintiff. However strong the role of the judge in managing German proceedings, having made an order for a party to do something to set out completely that party’s case, I consider that that would fulfil the Court’s role for the time being, as explained by Ms Rath, and that the next step would have been the convening of a further hearing conditional on compliance with that element of the Court’s order. This factor supports the conclusion that the responsibility for progressing the case lay with the Plaintiff.
75. For these reasons, if I had needed to consider which of the experts’ opinions to prefer in accordance with section 20(2) of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009, I would have preferred the evidence given by Ms Rath. Accordingly, I would then find that the application of German law to the question of the sphere of responsibility also leads to the conclusion that it rested with the Plaintiff rather than with the Court.

*Legitimate reason for non-prosecution*

76. In the light of my conclusion on the first issue, I also need to consider the Plaintiff's argument that he has a legitimate reason for not pursuing the case, meaning that there is no standstill in the proceedings within the meaning of section 204 BGB, with the consequence that the suspension of the limitation period attributable to the commencement of the proceedings would not be lifted. The Plaintiff has asserted that the need to obtain translations of documents and the time taken in relation to that step amount to a "good reason" for the length of the delay involved because of the Plaintiff's desire to complete his pleadings fully and accurately and to put the best case before the Court that he could. Once again, the parties' experts do not agree about the correct legal approach.
77. As with the first issue, Professor Dr. Haas gives the opinion that this question falls to be determined by the *lex fori*, whereas Ms Rath says that the entirety of these questions about the limitation period are governed by substantive German law and so fall to be determined by the *lex causae*. For similar reasons to the question relating to the sphere of responsibility, I prefer the evidence of Professor Dr. Haas that this is a procedural question to which the concept of substitution applies. An assessment of whether or not the justice of this case can only sensibly be undertaken by having regard to the explanation tendered by the Guernsey Advocates acting for the Plaintiff. I strongly suspect that they were operating in accordance with Guernsey procedures rather than importing wholesale the law of Germany in this regard. It would, in my view, be artificial to suggest that it is realistic now to decide this question by reference to what may or may not be accepted by a German Court in circumstances where it may not be able to identify any helpful parallels to the procedure that would normally be followed in a case proceeding in its own jurisdiction.
78. Applying Guernsey principles to this question, I have no hesitation in finding that the Plaintiff did not have a legitimate reason for failing to take any further step in the proceedings for such a long period of time. Whilst it is true that the correspondence exchanged between the two firms of Advocates shows that the Defendant's Advocates knew the reason why the preparation of the Réplique was not being done as quickly as originally envisaged, the Plaintiff's Advocate's letter of 16 February 2010 explaining the position ended with the words "we will let you know as soon as we hear back". Thereafter, they failed to keep the Defendant and his Advocates informed of what was going on. There has been no suggestion in the evidence given on behalf of the Plaintiff that anyone from his team was pushing the translators to get a move on. The position, as I have said, is that this case appears to have been overlooked throughout the relevant period. Whilst there is clearly some overlap with the findings I have made on the Plaintiff's own restoration application, I similarly find that the reason advanced and the way it was handled on behalf of the Plaintiff cannot be treated as a good reason for not taking any further step in the action as required to avoid a standstill taking effect. In particular, given the length of the period of inaction, all that is required is to demonstrate the absence of a good reason a minimum of six months before any further step was taken. I am quite clear that the Plaintiff lost any good reason that might possibly have existed in or around early 2010, at the time when the parties' Advocates were corresponding, by the latter part of 2010, ie, by six months before the filing of the Réplique on 29 June 2011.
79. Again, if I am wrong to apply the *lex fori* and should be applying the *lex causae* to this issue, I would prefer the evidence of Ms Rath and reach the same conclusion. Because Professor Dr. Haas stated that this was a question for Guernsey procedural law, he did not expand on the position under German law. Therefore, the only evidence on this issue referring to German law is that from Ms Rath and she indicates that the reasons advanced do not amount to a legitimate reason. As the only evidence on the issue before the Court, I accept that and conclude that the Plaintiff cannot establish a good reason, or a legitimate reason, for not pursuing the case, with the result that the standstill of six months then operated against him before he filed his Réplique, at which point the action was time-barred and could not be pursued further.

*Want of prosecution*

80. The alternative basis for the Defendant's strike out application is that the Plaintiff has failed to prosecute his case in the manner expected. Again, I do not need to determine this issue and will confine myself to the very general comment that, having concluded that the Plaintiff's delays in progressing are too great in the circumstances to warrant the action being restored to the *Rôle*, my finding that there has been inordinate and inexcusable delay can be applied without further comment and is such that, notwithstanding that would most likely largely be a "paper case" and less dependent on the recollections of the witnesses, it leads me to conclude on balance that there is a substantial risk that it is no longer possible to hold a fair trial and, in any event, that the lengthy period during which no contact was made with the Defendant's Advocate means that the people involved with the Defendant, particularly Mr Towning, could sensibly assume that the Plaintiff had abandoned pursuit of this action, and that forming such an assumption only to have it reversed is likely to cause serious prejudice as between the parties. This is, therefore, a case where I would have been minded to strike out the Plaintiff's action had there been anything left to strike out.

*Conclusion on strike out application*

81. For all the reasons given, had I needed to determine the Defendant's application to strike out the Plaintiff's action dated 30 July 2012, I would have granted it, principally under rule 52(2)(a) of the 2007 Rules but, if necessary, under rule 52(3). I can also add that I would have treated paragraph 1 of the Defendant's application seeking an order that the Plaintiff's action be struck off the *Rôle des Causes en Preuve* because it had become *périmée* as being unnecessary because of the explanation of the doctrine given by Gallienne, as translated and quoted in *William Place Investments Ltd v States of Guernsey* (*supra*) to which I referred earlier.

**Disposition**

82. In all the circumstances I have described and for the reasons given, the Plaintiff's application dated 30 July 2012 for the restoration of his action to the *Rôle des Causes en Preuve* is dismissed. As a consequence, the Defendant's application to strike out the Plaintiff's action, also dated 30 July 2013, does not need to be determined, but would have been granted had the need arisen.
83. In the absence of any alternative applications in relation to costs, in order to achieve some finality to this action, I would be minded to award the Defendant its costs on the standard recoverable basis in respect of all the proceedings, save for any specific costs where orders have already been made. However, if either party wishes to seek a different outcome, a written application should be made within 14 days of the handing down of this judgment.