



Rogers v Moerman
Royal Court
15th September 2017

JUDGMENT
41/2017

Appeal of an eviction order from the Court of the Seneschal of Sark

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

ON APPEAL FROM THE COURT OF THE SENESCHAL OF SARK

Between **SUSAN ELEANOR ROGERS** **Appellant**

-v-

SEBASTIEN BERNARD JOEL MOERMAN **Respondent**

Judgment handed down: 15th September 2017

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Appellant: Advocate N.J. Barnes

Counsel for the Respondent: Advocate M.G. Ferbrache

Cases, Texts & Legislation referred to:

de Carteret v Surcouf (unreported, 24 September 1999)
de Carteret v Mann and Mann (unreported, 13 July 2006)
The Royal Court Civil Rules, 2007
The Eviction Actions Order, 1986
Proudfoot v Hart (1890) 25 QBD 42
Payne v Haine (1847) 16 M & W 541
Shiloh Spinners Ltd v Harding [1973] AC 691
Pothier, *A Treatise on the Law of Obligations, or Contracts* (Davies translation)
The Stay of Evictions Laws 1946 and 1954
Roger v Roger [2003-04] GLR 1
The Reform (Sark) Law, 2008
Morton v Paint (1996) 21.GLJ.61
The Human Rights (Bailiwick of Guernsey) Law, 2000
Brežec v Croatia [2014] HLR 3
McDonald v McDonald [2017] AC 273
Stone v Hickman [2007-08] GLR Note 23
McGraddie v McGraddie [2013] UKSC 58

Thomas v Thomas [1947] AC 484

The Reform (Election of Conseillers) (General Provisions) (Sark) Ordinance, 2008

Porter v Magill [2002] 2 AC 357

R (Barclay) v Lord Chancellor and Secretary of State for Justice [2010] 1 AC 464

McGonnell v United Kingdom (2000) 30 EHRR 289

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) [2000] 1 AC 119

Burton v Law Officers of the Crown (unreported, 6 September 2006)

Introduction

1. This is an appeal from an eviction order made by the Seneschal pursuant to the judgment he handed down on 3 March 2017 following a trial that took place on 17 February 2017. The Seneschal stayed the execution of the eviction order until 30 September 2017. The making of the eviction order is being appealed by the tenant, Susan Rogers, on grounds that raise a mixture of procedural and legal, including evidential, issues.
2. The Notice of Appeal dated 3 April 2017 was substituted by agreement with a more expansive Notice dated 18 May 2017. A typographic error in that Notice was corrected at the start of the hearing. A tenth ground of appeal was added after lunch on the second day of the appeal hearing. I acceded to the application to add it because I considered it was something that had already been aired by Advocate Mark Ferbrache, who appears on behalf of the Respondent, as one of the better arguments available to the Appellant, although he noted that it was not the case the Respondent, Sébastien Moerman, needed to meet because it was not pleaded, and I felt that any prejudice to the Respondent could in due course be dealt with when considering the appropriate costs order. More importantly, it potentially opened up a means to achieve a just outcome if the Appellant's principal arguments about the procedural decisions and the substantive arguments on the law did not find favour with me.

Background

3. La Tour is one the Sark's tenements. The owner of that tenement until his death on 9 March 2013 was Dennis Hurden. There is a dwelling across the yard from the tenement house, which is known as La Tour Cottage. It has been occupied since approximately 1992 by the Appellant, who is the step-daughter of Dennis Hurden. That occupancy resulted in the granting of a lease of La Tour Cottage by Dennis Hurden to the Appellant dated 17 August 2001. The lease was expressed to be for the lifetime of the Appellant at an annual rent of £50 payable in advance on 1 January each year. The lease contains covenants by the tenant and covenants by the landlord in clauses 2 and 3 respectively. There are three particular covenants given by the Appellant as tenant that have been raised in this case:

"(c) to use and occupy the Cottage as a good tenant;

(d) to keep the structure of the Cottage and all its exterior and interior in good and tenable repair and condition properly decorated and clean and tidy;

...

(n) to yield up the Cottage at the end of this Lease in at least as good a condition as it was at the beginning in accordance with the Tenant's covenants."

Clause 4 of the lease provides:

"If any covenant on the part of the Tenant shall not have been observed or performed or if the Tenant abandons the Cottage then it shall be lawful for the Landlord (but without prejudice to any right in respect of any previous breach of covenant by the

Tenant) to retake possession of the Cottage and thereupon this Lease shall terminate."

4. As further noted in the Seneschal's judgment, this lease was registered with the Greffier on 17 August 2001 and appeared to him to be typical, except in its term, of what he described as a "modern" Sark lease. He explained that his impression was that "*the Lease was originally intended to provide Ms Rogers some security and was a family arrangement*". Towards the end of the judgment, he also highlighted that he felt that a lease drawn up in 2001 by a well-respected firm of Guernsey advocates must be compliant with human rights principles.
5. The Appellant apparently experienced no concerns being raised about her performance of her obligations under the lease when her step-father was her landlord. Upon the death of Dennis Hurden, the tenement was inherited by his son, Antony Hurden. By 2015, Antony Hurden caused an inspection of La Tour Cottage to be undertaken by Phil Godwin. A copy of the inspection report was sent to the Appellant under cover of a letter dated 30 October 2015 from his Advocates, Mourant Ozannes. That letter identified various areas of the property that required attention or repair under clause 2(d) of the lease. A deadline of 4 December 2015 for compliance was imposed. The letter also referred to clause 2(c). The Appellant's attention was drawn to the consequences of non-compliance as specified in clause 4.
6. A further letter from Mourant Ozannes dated 18 January 2016 to the Appellant noted that some work had been undertaken but that not all of what Mr Godwin has identified had been carried out. There had been a follow-up inspection by Mr Godwin on 17 December 2015. Accordingly, Antony Hurden had arranged for Stuart Pearce of CCD Architects to undertake an inspection of the Cottage on 20 January 2016. Following that inspection, a detailed letter was sent to the Appellant on behalf of Antony Hurden by Mourant Ozannes dated 9 March 2016. A deadline for the works identified in that letter to be carried out of 27 May 2016 was fixed. Again, reference was made to the Appellant otherwise forfeiting the lease. On behalf of the Appellant, Advocate Barnes, who continues to represent her in these proceedings, replied on 21 March 2016. He stated that the Appellant would endeavour to complete the works in the time specified but noted that the term of the lease was such that he queried why there was any particular reason to have them completed by that date. The Seneschal's comment on these events is that he found "*there was developing considerable animosity between landlord and tenant*".
7. Antony Hurden sold La Tour to the Respondent by way of a conveyance passed before the Court of the Seneschal of Sark on 13 April 2016. This purchase was expressly subject to the existing leases and tenancies of parts thereof. The Respondent wrote to the Appellant on 4 May 2016. He regretted that he had not had time to discuss matters with her before he left Sark, and explained that he had been given various surveys by Antony Hurden, had seen the letter of 18 January 2016 and was instructing Advocate Ferbrache to confirm the position. That was done by way of a letter dated 12 May 2016 from Advocate Ferbrache. Notice was given that Mr Pearce would be attending to inspect the interior of the Cottage on 18 May 2016. Further, because the Respondent was having work carried out at La Tour, the possibility of the outstanding dilapidations to the Cottage being undertaken by his workmen, but at the Appellant's expense, was raised. A second letter dated 13 May 2016 referring to an issue about a shed was subsequently sent to the Appellant. This was followed up by letters dated 23 May and 9 June 2016. Advocate Barnes replied on behalf of the Appellant on 23 June 2016. He requested a copy of the lease, which was provided on 30 June 2016, along with Advocate Ferbrache's comments on the issues, other than the dilapidations, that had been raised.
8. By way of a hand-delivered letter dated 17 September 2016, the Respondent provided the Appellant with a Schedule of Dilapidations setting out work required to be undertaken pursuant to the lease. His letter of 27 September 2016 refers to a brief meeting and asked the Appellant to indicate whether or not she intended to carry out the required repairs or whether

she wished his contractors to do so at her expense. If she chose to do them herself, they would need to agree the time frame in which they would be completed. Advocate Barnes replied to the Respondent on 28 September 2016, enclosing a copy of the Schedule with the Appellant's comments on it "*indicating that either the defects have been dealt with or that no further action is required*". It was accepted before the Seneschal that this comment did not accurately reflect the position.

9. By letter dated 17 January 2017 (despatched by e-mail the following day), Advocate Ferbrache wrote to Advocate Barnes, setting out a summary of the history and referring to an inspection carried out by Mr Hewlett of CCD Limited on 16 January 2017. That inspection showed that "*certain repairs identified have either not been carried out or have been carried out unsatisfactorily*". Reference was also made to the shed for which no development permission had been obtained. Advocate Ferbrache concluded his letter by explaining that he had been instructed to issue a Notice to Quit. That Notice to Quit was served on 19 January 2017. An updated Schedule of Dilapidations on which the Respondent was relying was attached.
10. Advocate Barnes responded on behalf of the Appellant by e-mail on 24 January 2017 as follows:

"Thank you for your letter of 18th January and the attached schedule. My client will contact her builder and decorator to go through the list with a view to carrying out any work that may be required by the terms of the lease.

In respect of item 19 the crack in this wall appears to have been present when Ms Rogers first occupied the property 24 years ago as it was revealed when she removed the plaster about 20 years ago. The filler in the crack was already there.

In respect of item 10 and the broken panes of glass these were in that condition when she first moved in.

The lease at clause 2(n) requires Ms Rogers to yield up the property in at least as good a condition as it was at the beginning of the term, it does not require her to make any improvements.

The remaining defects referred to in the schedule are minor and will be remedied by my client's contractors shortly and do not entitle your client to determine the lease."

11. Advocate Ferbrache's response, a little under 90 minutes later, suggested that, as before, the Appellant might helpfully annotate the Schedule of Dilapidations with her comments. Advocate Barnes replied on 26 January 2016, indicating that various works would be undertaken by the contractors mentioned (Rodney Laylor, Chris Drillot and Gavin Nicolle).

Proceedings

12. A summons dated 2 February 2017, returnable at noon on 17 February 2017, was served on the Appellant. It refers to breaches of clause 2(c) and (d) and the service of the Notice to Quit.
13. On 10 February 2017, Advocate Barnes sent an e-mail to Advocate Ferbrache thanking him for supplying a copy of the summons and the supporting documents. (It was explained to the Seneschal that Advocate Barnes had been away when these documents had arrived at his office, which is why it took some days for him to take instructions from his client before responding in respect of them.) He asked him if he would specify precisely in what respects the Appellant was alleged to be in breach of the sub-clauses of the lease identified, indicating that this would enable him to file defences and any other materials on which he might wish to rely. He suggested that in the meantime the proceedings be adjourned. Advocate Ferbrache's

response, again sent about 90 minutes after receipt, referred to the Appellant already knowing the case against her because she had been served with the Schedule of Dilapidations and provided her responses. The request for the proceedings to be adjourned was rejected. Advocate Barnes forwarded this exchange, along with an application dated 15 February 2017 seeking these further and better particulars of the case of the Respondent (as Plaintiff), to the Greffier at 16:20 on 15 February 2017.

14. The Court of the Seneschal of Sark duly convened at noon on 17 February 2017. There is a full transcript of the hearing.
15. The first thing that happened was that Advocate Barnes pursued his application on behalf of the Appellant/Defendant for further and better particulars. Advocate Ferbrache had the opportunity to respond. In the course of his submissions, Advocate Ferbrache indicated that he would not be pursuing any allegations about the shed. In effect, this meant that the only sub-clause on which the eviction order was being sought was clause 2(d). Mention was made of the Greffier's office hours as being the reason why the Court was not aware until the day of the hearing that the application had been lodged. (As an aside, I am slightly troubled that Advocate Barnes was apparently unaware of these office hours because I think everyone who practises in Sark should familiarise themselves with the arrangements that operate in that jurisdiction.) The Seneschal chose to retire for what turned out to be a short luncheon adjournment to consider his decision as to whether to adjourn for this purpose. Resuming at 1.30 pm, the Seneschal rejected the application, being satisfied that the existing Schedule of Dilapidations with comments was sufficient for everyone to proceed on. The Seneschal indicated that he doubted there would be sufficient time to hear the witnesses in what remained of the afternoon.
16. Advocate Ferbrache indicated that he no longer intended to call the Respondent himself, relying solely on Ben Hewlett. Advocate Barnes sought an adjournment of the hearing on the basis that he was not ready to proceed. He indicated that he had not had the chance to speak to the people who had carried out the work and who would be carrying out the remainder of the work. Looking at the response given on 26 January 2017 with Advocate Ferbrache, the Seneschal noted that Chris Drillot was mentioned and identified that he was present in Court, adding that he did not know if he had attended as a potential witness or as a member of the public. After a brief exchange between the Seneschal and both Counsel, the Seneschal decided he was going to proceed with the case.
17. There was no opening from Advocate Ferbrache. He had outlined the case when responding to Advocate Barnes' application for further and better particulars of the alleged breaches of the lease. Mr Hewlett was called as a witness. He referred to his report on which he had included the most recent comments from the Appellant and confirmed that not all of the repairs set out in it had been carried out and some of those that had been done had not been done satisfactorily. Mr Hewlett was cross-examined by Advocate Barnes. At the conclusion of the cross-examination, Advocate Barnes suggested that the next move would be to carry out a site visit.
18. The Seneschal first stated that he was not averse to doing that and suggested it could be done at that point. He invited comment from Advocate Ferbrache, who wanted to know the purpose of holding a *vue de justice*. Advocate Barnes explained that the idea was to go and see the Cottage to see its current state and to see whether it is in such a condition that it merits an eviction. There was further discussion as to whether Advocate Barnes could indicate what it was said had been done by reference to the Schedule of Dilapidations and what had not been done. The Seneschal then stated that it would help if there was a clearer view of what the Court would be being invited to look at. It was at this point that Advocate Ferbrache briefly re-examined Mr Hewlett. Following a short break, Advocate Barnes was able to indicate that a number of further repairs had been undertaken, with four items being ticked. As a result, the Seneschal doubted that there was any benefit in wandering up the road to see

what had been done. Advocate Ferbrache agreed and indicated he had no further re-examination of Mr Hewlett and closed the case for the Plaintiff.

19. In response to the Seneschal pointing out that Advocate Barnes did not look happy, Advocate Barnes said he had not carried out his own inspection of the Cottage himself to enable him to conclude the case. The Seneschal offered Advocate Barnes the chance to do so, including offering the loan of a bicycle. There was some discussion about the time of the return boat to Guernsey on which Advocate Barnes was booked and the time available. Advocate Ferbrache offered Advocate Barnes a space on his return charter vessel, which would mean that more time was available for the hearing. The Seneschal then adjourned the hearing to 3 pm to enable Advocate Barnes to examine the property with the Appellant.
20. When Advocate Barnes returned, he sought to persuade the Seneschal that he should also visit the Cottage, but the Seneschal was satisfied that the photographs with which he had been supplied were sufficient. The Appellant then gave evidence. She was cross-examined and then re-examined. The Seneschal asked her about her relationship with Dennis Hurden and whether, when the property went out of the family, the lease had been reviewed and considered. Advocate Ferbrache confirmed that the Respondent would not be entitled to forfeit the lease if the breach were small, de minimis or trivial.
21. Advocate Barnes then sought to call Chris Drillot as a witness. The Seneschal was concerned that Mr Drillot had been present in Court throughout. Advocate Barnes indicated he had not intended to call him as a witness at the start of the hearing. Advocate Ferbrache objected because the Plaintiff had closed his case and there might need to be an opportunity to recall that witness. The Seneschal said he was not going to allow Advocate Barnes to call Mr Drillot because, although Advocate Barnes had sought to differentiate between a civil trial and a criminal trial, the Seneschal stated it is not the norm in Sark that witnesses to be heard sit through the whole hearing.
22. Having been refused the opportunity to call Mr Drillot as a witness, Advocate Barnes indicated that he would wish to call a different contractor who had not been in the courtroom. The Seneschal queried what benefit there would be from hearing from Mr Drillot, adding "*I am perfectly prepared to accept Ms Rogers' statement that he is going to come and do the work. It seems good enough to me.*" In the light of that, Advocate Barnes accepted that there was no need to call any more witnesses.
23. Advocate Barnes closed the case on behalf of the Appellant. He observed that the defects were minor. He acknowledged that there were "*obviously two or three of them that need attending to to make sure that there is not any further water penetration, because that would affect the fabric of the building and put the property at risk*". He touched upon the position in English law, explaining, but without reference to any authorities, the concept of relief from forfeiture, indicating that "*We do not have any of that*", but suggesting that the way the law applied needed to be fair to both sides, providing for a reasonable amount of time in which to do the repairs. It would be wrong to forfeit the lease in these circumstances.
24. Advocate Ferbrache closed the Plaintiff's case referring to the unchallenged evidence of Mr Hewlett that there were repairs that had not yet been completed, or completed satisfactorily. He highlighted that the Schedule of Dilapidations had been served on the Appellant in September 2016 and that time had been given since then to complete them. In relation to clause 2(n), he drew attention to the position in English law, suggesting that position could be applied in Sark, that in order to keep in good repair the premises have to be brought into a state of good repair first. Consequently, if there was a breach of covenant found, and there were breaches admitted by the Appellant, the right to forfeit under clause 4 existed and entitled the landlord to an eviction order. Advocate Barnes sought the opportunity to revert on some of the law that Advocate Ferbrache had covered, especially on clause 2(n).

25. The Seneschal closed the hearing by reserving his judgment, recognising "*the seriousness and the implications of evicting a person from their home*". Advocate Ferbrache then added that the Plaintiff/Respondent was "*stating in open court, whilst the court does not have the power to stay, our client would offer three months*". Advocate Barnes did not comment further, but the Seneschal said, before closing the Court

"... there is absolutely no question of an eviction order happening immediately. That just does not happen nowadays, I imagine, even in Sark. If that is the way that it is going to go, it is not going to happen like that but I need to have a good long think about this. We have heard an awful lot today. It is quite a painful business, I suspect."

Seneschal's judgment

26. The Seneschal identified three questions for him to address. The first was whether the lease had been breached. He referred to both clause 2(c) and clause 2(d) being under consideration. The second question related to the extent of the breach or breaches found and whether that has any bearing on whether the lease should, or should not, be terminated. Finally, he asked himself whether there were any extenuating circumstances of human rights issues.
27. On the first question, the Seneschal referred to the surveys that had been carried out on the Cottage, starting in September 2015 and the fact that the previous landlord, Antony Hurden, had required the remedial works to be completed by 27 May 2016. The Seneschal found that "*the roof finial, the split corner in the felt roof and the damp penetration around the door area, although easily remedied, had not been attended to before the onset of winter 2016/17, or by the summons date*". He was not persuaded by the Appellant's explanations relating to the winter weather and that her contractors were busy elsewhere. He felt that she lacked any sense of urgency. He concluded that there was a breach of clause 2(d). In respect of clause 2(c), he referred to the shed issue and pointed out that the Appellant had been at odds with both of her landlords since the death of Dennis Hurden.
28. On the second issue, he indicated that he believed that "*had the matter not come to Court at this time, the repairs would eventually have been completed to the standard required by the surveyor and the satisfaction of the landlord*". However, because 14 months had passed, he felt that the landlord's patience had run out. His principal finding was set out as follows:

"Those repairs that remain to be completed consist of minor repairs to the guttering, a capping on the pyramidal roof, some facia [sic] boards, a minor felt roof patch, good standard decoration to windows and interior. But the period of time that these have been left unattended could have resulted in more extensive damage where internal inspection is impossible; a point made by the surveyor. Of more significance is the damp plaster around the doorway and the crack in the internal fireplace wall. This second item was the subject of a Structural surveyor inspection (18 August 2016) resulting in recommendations, which have been ignored. These two are not trivial and I would have expected them to have been focused on immediately following the CCD report."

Accordingly, on the basis of his finding that here had been a "*sturdy reluctance*" by the Appellant to address her landlords' requests for remedial action, he considered the breach of clause 2(d) "*constitutes sufficient grounds to terminate*" the lease. As regards clause 2(c), the Seneschal regarded that as following the breach of clause 2(d), on the basis that not keeping a property in good repair means one is not being a good tenant.

29. On the final issue, he stated that he needed to be sure the Appellant fully understood what was at stake. He referred to her evidence, in which she had confirmed that she understood the effect of clause 4. He was satisfied that "*she must have been aware of the consequences of*

continued inaction". He believed the lease, prepared by Advocates, must have been human rights compliant and had "given passing consideration to Articles 1 and 8 of the First Protocol of the European Convention on Human Rights", and whether they had any impact, and felt that they did not influence the outcome of the case.

30. Having found that the eviction order followed from the breaches he had determined had occurred, the Seneschal simply stated, without explanation, that there would be a stay of execution until 30 September 2017. He made no order as to costs. The final paragraph of his judgment, effectively a postscript, reads:

"This has been an extraordinarily difficult judgment to conclude and I apologise to the Parties for the length of time it has taken to deliver. The decision to order this eviction has not been taken lightly or without certain qualms, but by ordering a stay in excess of six months there is time to make alternative arrangements or, better still, seek a mutually agreeable solution between the Parties."

Grounds of appeal

31. The Appellant's Re-Amended Notice of Appeal contains the following ten grounds:

1. *The Seneschal wrongly took into account what had passed between the previous landlord of the Property and the Appellant when*
 - a) *no evidence had been proved as to what had occurred, and/or*
 - b) *what had occurred between the Appellant and the previous landlord was irrelevant to the proceedings before the Court.*
2. *The Seneschal wrongly misinterpreted the evidence that was before him by referring to a letter from the Appellant's Advocate to the Respondent of 28 September 2016 which incorrectly indicated that there were no outstanding repairs for the Appellant to undertake when in fact that letter enclosed a schedule of dilapidations marked up by the Appellant indicating that certain works had been done but that there was further work to undertake and indicating that it would be undertaken. The Seneschal wrongly misinterpreted the letter (and ignored the schedule) by treating it as a refusal to carry out any repairs.*
3. *The Seneschal's decision was not compliant with Article 8 of the European Convention on Human Rights in that it was completely disproportionate for the Court to deprive the Appellant of her home for breaches of the repairing covenant which the Seneschal said himself could, and were likely to be, remedied.*
4. *The decision of the Seneschal was vitiated by his relationship, or his failure to declare his relationship, with the Respondent, of which the Respondent was unaware at the date of the hearing, namely that the Seneschal had proposed the Respondent as a Conseiller for the elections to Chief Pleas to be held on 14 December 2016. A fair minded and informed observer would have concluded that there was a real possibility that the Seneschal was biased in favour of the Respondent. The Seneschal ought not to have sat or ought to have disclosed his relationship with the Respondent and offered the Appellant the opportunity to object.*
5. *The Seneschal wrongly decided that the Appellant was in breach of the repairing covenant and that the Respondent was entitled to terminate the lease:*

- a) *without considering that the Appellant should be allowed a reasonable time within which to carry out any repairs, and/or*
- b) *in wrongly deciding that the Appellant had been given a reasonable amount of time to carry out the repairs, and/or*
- c) *in deciding that, if the Appellant was in breach of the terms of the lease, the Respondent should be permitted to terminate the lease when such an outcome was wholly disproportionate given the value of the lease for the Appellant (a home for the remainder of her lifetime) as against the prejudice to the Respondent (a delay in the execution of relatively minor repairs to the property), and/or*
- d) *in deciding that the Appellant was in breach of the repairing covenant when clause 2(n) of the lease provided that the Appellant was not required to yield up the property in any better condition than it was at the beginning of the lease and there was no evidence as to the condition of the Property at that time.*

6. *The Seneschal wrongly deprived the Appellant a fair hearing in breach of the rules of natural justice by failing to order further and better particulars, proceeding to hear the case when the Appellant's advocate was not ready, refusing the Appellant a site visit or vue de justice, preventing the Appellant from calling a witness.*

7. *The Seneschal wrongly found that the Appellant was in breach of Clause 2(d) when there was no evidence that the property was in any worse condition than it was at the commencement of the lease.*

8. *The Seneschal wrongly failed to grant the Appellant relief against forfeiture and/or wrongly failed to exercise his discretion in respect thereof.*

9. *The Seneschal wrongly found that the Appellant had failed to repair damp plaster around the doorway and a crack in the fireplace wall.*

10. *The Seneschal wrongly failed to give the parties an opportunity to address them on the question of a stay of eviction and wrongly decided that the Appellant should only be granted a stay of eviction only until 30th September 2017 when he ought to have decided bearing in mind:*

- a) *The minor nature of the breaches*
- b) *The value to the Appellant of her interest in the property*
- c) *The fact that the Plaintiff had no alternative accommodation*

That the Appellant should be granted a stay of eviction for the remainder of her lifetime upon condition that she carried out the outstanding repairs and kept the property in good repair."

32. At the start of the hearing, Advocate Barnes chose not to pursue ground 2. In respect of grounds 1 and 3 to 9 (ground 10 only having been added towards the end of the hearing), Advocate Barnes distilled his submissions into the following six points:

- (a) the effect of clause 2(n) limiting the Appellant's repairing obligations under the lease;

- (b) whether there had been a fair hearing, particularly as he had not been ready to proceed on 17 February 2017;
- (c) the absence of any reasonable period during which the Appellant could carry out the repairs;
- (d) the decision not to give relief from forfeiture;
- (e) the impact of Article 8 of the European Convention on Human Rights; and
- (f) the recusation issue.

When Advocate Ferbrache responded, he followed the order of the grounds of appeal as pleaded.

33. I propose to deal with the grounds of appeal and Counsel's submissions on them in a slightly different order. I will deal first with the questions of substantive law raised and, so far as relevant, any issues arising from the evidential findings, on the basis that if the Seneschal got the law wrong the procedural issues become of less significance. Thereafter, I will deal with those procedural issues, including the question of apparent bias and recusation.

Preliminary comments

34. In *de Carteret v Surcouf* (unreported, 24 September 1999), this Court (Bailiff Carey) drew attention to the particular responsibilities of Counsel appearing before the Seneschal:

"The Seneschal is not a lawyer. If serious litigation such as this is to be conducted before him it is incumbent on counsel to work together to identify the issues which he is being asked to decide and to do all they can to prepare and present the case in a way that he can come to a reasoned decision."

These important words of guidance to the Bar were repeated in *de Carteret v Mann and Mann* (unreported, 13 July 2006) by Deputy Bailiff Collas (as he then was) at para. 43. Advocate Barnes appeared in both cases. The following was also stated in *de Carteret v Surcouf*:

"Final speeches need careful preparation where you have a lay judge such as the Seneschal and in retrospect I feel that despite the problems of travel, it may have been unwise of Counsel to attempt to go straight into complicated final speeches in a matter such as this. The proceedings were recorded and it was quite clear that the Seneschal would have to reserve judgment. Counsel could have gone away after the evidence and returned with full submissions, preferably in writing, so that the Seneschal could clearly digest them. The way in which the case was presented was in part responsible for the Seneschal being led into error."

35. Although there are no particular procedural rules governing matters before the Court of the Seneschal of Sark, there is no magic in the overriding objective in rule 1 of the Royal Court Civil Rules, 2007. Any court will always seek to deal with cases justly, whether that is set out explicitly or not. The Court of the Seneschal of Sark is no exception. The list of matters in rule 1(2) of the 2007 Rules can be regarded as summarising the matters to which anyone constituting the Court of the Seneschal of Sark is likely to have some regard. What has been said previously about the responsibilities of Counsel is a facet of rule 1(4) of the 2007 Rules, which provides that *"The parties are required to help the Court to further the overriding objective."*

36. As far as I can ascertain, there was little communication between the Advocates prior to the hearing on 17 February 2017. There was the exchange of e-mails the preceding Friday about whether further and better particulars should be provided. There appears, though, to have

been no discussion as to what might happen at the hearing. There was no discussion about whether witnesses should be ready to give evidence. Any legal issues to be raised, and in particular questions of construction of the lease itself and whether relief from forfeiture was available and, if so, on what basis, do not appear to have been raised in any prior discussions between Counsel. From what was said about their means of transport on 17 February 2017, it even seems that they did not travel to Sark together, which at the very least would have provided the opportunity for some discussion. No consideration was given as to the desirability of someone other than the Seneschal constituting the Court.

37. I recognise that Advocate Barnes may have thought that this was simply a first hearing, where the Cause would be tabled by the Respondent as Plaintiff and, once it was apparent that the eviction order sought was opposed, directions would be given leading to a trial. However, to turn up and seek an adjournment founded on not being ready to proceed is not, in the light of the guidance of which he must have been aware, a good place from which to start. I find it astonishing that Advocate Barnes had not visited La Tour Cottage before the hearing began. If nothing else, I think he should have travelled to Sark earlier than he did on 17 February 2017, and probably should have gone across the day before, despite what other commitments he may have had, in order to have been properly prepared for the hearing. Further, he should have been proofing any potential witnesses and ensuring that anyone who the Appellant might wish to give evidence on her behalf was aware of the need to be cautious of sitting through the hearing of other witnesses' evidence.
38. Although the impression I have formed is that Advocate Barnes' lack of adequate preparation can be regarded as the cause, at least in part, of some of the problems that then arose, reading the transcript of the hearing, it seems that Advocate Ferbrache was keen to conclude the hearing on that very first day, and took decisions about how to conduct the matter with a view to not having to return on another day. Highlighting article 1 of the Eviction Actions Order, 1986, which applies in Guernsey, to which the Seneschal stated he had had regard, which provides that "*Except where the Court otherwise orders an eviction action shall be dealt with summarily*" was, I feel, designed not only to oppose the application for further and better particulars, about which I will comment further in due course, but also to give the impression that everything would be done in one sitting were a similar action to take place in Guernsey. The procedure before this Court in similar circumstances would not, of course, have resulted in the making of an eviction order that was opposed at the first tabling of the Cause. Such an order can be made by consent but, as soon as a defendant appears on Friday morning and indicates that the action is defended, there will be a separate trial and directions given in respect of it. The reference to the action being dealt with summarily means that further pleadings are not required, and other steps commonplace in an ordinary civil action dispensed with, unless the Court considers that some or all of those steps are desirable. My overall impression of the hearing before the Seneschal, despite the occasions on which he afforded time to Advocate Barnes to take further instructions, is that there was a degree of haste involved that, with the benefit of hindsight, might have been better to have been avoided. It is perhaps significant that the appeal hearing occupied two days, whereas the trial was really a long half-day.

Construction of lease

39. Advocate Barnes submits that that Seneschal misdirected himself in law because he should not have found that there was any breach of clause 2(d) of the lease because that sub-clause has to be read in the light of clause 2(n). There had been no evidence adduced about the state of the Cottage at the start of the lease. Consequently, the Seneschal was unable to decide whether the level of repair undertaken reached the level required to be able to yield up the premises in as least as good a condition as it was at the beginning. This is a combination of the grounds in paragraphs 5(d) and 7 of the Notice of Appeal. In making that submission, Advocate Barnes acknowledges that there is nothing specific qualifying the effect of clause 2(d). However, the lease falls to be construed as a whole, which means the level of repair

required is reduced if the Cottage was in a comparatively poor state at the outset. He also accepted that clause 2(d) contains a full repairing covenant.

40. In response, Advocate Ferbrache has sought to de-bunk the heresy he suggests a number of people perpetuate in these circumstances by reference to English cases that explain that in order to comply with a full repairing covenant it may be necessary to bring the demised premises up to the requisite level of repair first. This may, of itself, be a reason why the premises have been let on preferential terms. In other words, instead of requiring a market rent and/or the payment of a premium for granting the lease, the landlord takes the benefit of the works that will need to be carried out by the tenant at the tenant's expense. A poor property, which will cause the landlord expense before it can be let (or, where the circumstances permit, sold, although the latter has less bearing in Sark where a tenement remains indivisible), is renovated without that expense in return for occupancy for a time on preferential terms, in the knowledge that the end product will be the landlord's reversion being at the enhanced value of the renovated property.
41. This approach to a repairing covenant is set out by the English Court of Appeal in *Proudfoot v Hart* (1890) 25 QBD 42. In the absence of any domestic authority deciding something different, I am content to adopt the reasoning given in this case. The clause in issue in that case was slightly different, in that the tenant agreed that he would "*during the said term keep the said premises in good tenantable repair, and so leave the same at the expiration thereof*". The term was for three years only. Lord Esher MR explained (at page 50):

"What is the true construction of a tenant's contract to keep and deliver up premises in 'tenantable repair'? Now, it is not an express term of that contract that the premises should be put into tenantable repair, and it may therefore be argued that, where it is conceded, as it is in this case, that the premises were out of tenantable repair when the tenancy began, the tenant is not bound to put them into tenantable repair, but is only bound to keep them in the same repair as they were in when he became the tenant of them. But it has been decided - and, I think, rightly decided - that, where the premises are not in repair when the tenant takes them, he must put them into repair in order to discharge his obligation under a contract to keep and deliver them up in repair. If the premises are out of repair at any time during the tenancy the landlord is entitled to say to the tenant, 'you have now broken your contract to keep them in repair;' and if they were out of repair at the end of the tenancy he is entitled to say, 'you have broken your contract to deliver them up in repair.'" I am of opinion that under a contract to keep the contract in tenantable repair and leave them in tenantable repair, the obligation of the tenant, if the premises are not in tenantable repair when the tenancy begins, is to put them into, keep them in, and deliver them up in tenantable repair."

(This approach was consistent with the way it had been put in *Payne v Haine* (1847) 16 M & W 541.)

42. In relation to the question of how to attribute a definition to "good tenantable repair", the Master of the Rolls expressed his agreement with what Lopes LJ gave as a suitable meaning (at page 55):

"What is the meaning of 'good tenantable repair'? That expression appears to me to mean such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class that would be likely to take it."

I take the view that there are a number of points that can be derived from these authorities that apply to the present case.

43. The notion of "good tenantable repair" is not entirely objective. Adding "and" between "good" and "tenantable" seems to me to add nothing on the basis that "good", "tenantable" and even "habitable" have been regarded in the older cases as if they were synonyms. Although it was expressly not explored before the Seneschal, who I imagine is familiar with the position of La Tour Cottage, or before me, the positioning of a dwelling directly facing the tenement house across a yard rather paints a picture of a dwelling that is in such close proximity to the home of the owner of the tenement that it is not as marketable for letting as premises having a more "independent" existence. Its use for a family member, possibly even as a dower unit, seems more likely than for a complete stranger. The size of the premises must, in my view, also be a factor to bear in mind. If the premises are too small to accommodate a family, the type of "reasonably-minded tenant" who would be interested in occupying it is potentially different. These are further factors that could have been introduced into the consideration of whether the Schedule of Dilapidations properly reflected what was needed to bring this Cottage in Sark up to the standard required by clause 2(d) or whether the persons undertaking the inspections that led to that Schedule of Dilapidations were judging matters against a standard other than that applicable to this particular Cottage in its particular location.
44. The obligations in these English cases differ from the Appellant's obligations under her lease of La Tour Cottage because she is not required to leave the premises in good tenantable repair at the time of the lease ending. Accordingly, it could not be said in the same way as Lord Esher put it, that the bringing of the premises up to a standard and maintaining it at that level thereafter is engaged. In principle, clause 2(n) would, if Advocate Barnes is correct, mean that there would be no breach of covenant at the end of the lease if the Cottage were at that time not in good and tenantable repair. However, in my judgment, this construction overlooks the words at the end of clause 2(n), which I regard as significant. When yielding up the Cottage, the Appellant is obliged to leave it in "*as good a condition as it was at the beginning in accordance with the Tenant's covenants*" (emphasis added). I consider that this makes clause 2(n) subject to the rest of the Tenant's covenants, including clause 2(d). Accordingly, rather than clause 2(d) being qualified by the lower standard of the Cottage by reference to the beginning of the term, it is actually clause 2(n) that is qualified by express reference to other covenants and, in particular, clause 2(d). This means that clause 2(d) must be given its ordinary meaning, so that the standard of repair required is simply "good and tenantable". It further means that I am not persuaded that the Seneschal misdirected himself on the way to construe these provisions of the lease. In any event, the fact that Advocate Barnes accepted before the Seneschal that there were breaches of clause 2(d) makes it harder to regard the Seneschal as having fallen into error when finding that there had been breaches.
45. For these reasons, I reject the grounds of appeal relating to how to construe clause 2(d) by reference to clause 2(n).

Relief from forfeiture

46. In his closing submissions, Advocate Barnes touched on the issue of relief from forfeiture, but did not refer to any authority as he now has. Before I turn to the way the House of Lords described the position in English law, I can set the scene by reference to the same two appeals from Sark to which I have already referred in which this doctrine was mentioned.
47. In *de Carteret v Surcouf* (*supra*), the Bailiff was voicing his concerns about the effect on the seigniorial estate if he acknowledged that leases were valid and, having recounted the position in Guernsey in respect of congé, he commented:

"If one takes a long lease [in] Guernsey one is faced with the difficulty of raising money on the leasehold interest created because there is no relief from forfeiture for breach of covenant."

In *de Carteret v Mann and Mann* (*supra*), the Deputy Bailiff treated that as a being an obiter comment and drew attention to the legislation that had been enacted in 1946, the Law giving the Court increased power to stay execution in actions for eviction, "*which gives some protection to tenants but does not give relief from forfeiture*" (para. 51). That judgment continues:

"52 *The Seneschal's decision suggests that the customary law in Sark may have evolved differently from the customary law in Guernsey. Long leases granted at a premium for a substantial number of years have become a very important feature of property ownership in Sark but are much less common in Guernsey. So it is possible the customary law may have evolved differently in each Island.*

53 *It is well accepted that the coutume does develop over the centuries. The maxim "coutume fait loi et la meilleure loi est la coutume du pays" refers to such development. Such development cannot change the fundamental and substantive common law (see *Singleton v Le Noury* Guernsey Court of Appeal 5 June 1990, page 18). I do not consider that the grant of relief against forfeiture is as fundamental as the principle of "nul servitude sans titre" which concerned the Court of Appeal in that case.*

54 *It may be that the coutume in Sark has already developed to the point where it has become established that a tenant can apply to the court for relief against forfeiture, even though such relief would not be available in Guernsey. ...*

56 *In England, relief against forfeiture is largely considered to be an equitable remedy and is now, I am told, statutory. Whilst it is proper to look at related systems of law (*Vaudin v Hamon* Orders in Council XXIV p. 154, at p. 165), caution must prevail when looking at English law in relation to matters of land law and to principles that have derived from, or substantially from, equity. I was not referred to any commentators on Norman customary law nor to any developments in French law which may be more persuasive than English law in this context.*

57 *If a landlord were to seek to determine a long lease granted at a very substantial premium in circumstances where the tenant has committed a trivial breach of covenant, it might be grossly unfair if the lease were determined at great financial loss to the tenant. In such cases justice might dictate that the tenant be granted relief against forfeiture but it is for the Sark Court to consider these matters in a Sark context at first instance. I do not wish to express any view that might influence that decision one way or another."*

48. Although the Appellant's lease was not granted to her at a premium, a lease for her lifetime at a peppercorn rent can, I think, properly be regarded as a valuable interest, and there would be a significant financial impact on her if her lease falls to be determined. I believe that this type of situation may well have been one that the then Deputy Bailiff would have included in his final paragraph as where there could be an injustice and where further thought on the question of whether relief from forfeiture operates in Sark would be appropriate. The question was expressly left open before, but now falls to be considered on the facts of this case.
49. Advocate Ferbrache had commented during the hearing before the Seneschal that he accepted that a landlord could not forfeit a lease for breaches that were de minimis, which I believe has been translated by the Seneschal into consideration of whether any breach is trivial or not. This is not, though, the same as there having been full argument on the question of relief from forfeiture as a means of affording a tenant equitable relief from the otherwise harsh rigour of a strict application of the contractual position, ie, there is a breach of covenant, so forfeiture follows. It seems to me that the approach taken by the Seneschal was confined to considering

the nature of the breach and, if it were more than trivial, clause 4 operated to entitle the landlord to forfeit the lease.

50. The analysis of the position on which Advocate Barnes relies is found in *Shiloh Spinners Ltd v Harding* [1973] AC 691. The speech of Lord Wilberforce first noted (at page 723G) that:

"... we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result."

His Lordship then explained why he did not consider that the intervention of statute in some areas had fully occupied the field, thereby removing recourse to the earlier equitable principles in appropriate cases (at page 725A):

"... where the courts have established a general principle of law or equity, and the legislature steps in with particular legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law."

Lord Wilberforce similarly rejected any suggestion that there was good reason for not having relief from forfeiture for breach of a repairing covenant because the courts could not supervise the doing of the work and his conclusion (at page 725C) was as follows:

"The present case, in my opinion, falls within the class of case in which it would be possible for a court of equity to intervene. When the appellants assigned a portion of their leased property, retaining the rest, which adjoined and was supported by the portion assigned, they had an essential interest in securing adequate protection for their buildings, in having the site fenced, in preventing unauthorised access through the assigned property. The covenants were drafted accordingly. The power of re-entry was inserted by way of reinforcement of the contractual obligation which it must have been perceived might cease to be enforceable as such. Failures to observe the covenants having occurred, it would be right to consider whether the assignor should be allowed to exercise his legal rights if the essentials of the bargain could be secured and if it was fair and just to prevent him from doing so. It would be necessary ... to consider the conduct of the assignee, the nature and gravity of the breach, and its relation to the value of the property which might be forfeited. Established and, in my opinion, sound principle requires that wilful breaches should not, or at least should only in exceptional cases, be relieved against, if only for the reason that the assignor should not be compelled to remain in a relation of neighbourhood with a person in deliberate breach of his obligations."

Lord Simon of Glaisdale, whilst in general agreement with Lord Wilberforce, went further, by way of "marginal comment" (see page 726H):

*"I would ... hold that equity has an unlimited and unfettered jurisdiction to relieve against contractual forfeitures and penalties. What have sometimes been regarded as fetters to the jurisdiction are, in my view, more properly to be seen as considerations which the court will weigh in deciding how to exercise an unfettered jurisdiction (cf. *Blunt v. Blunt* [1943] A.C. 517; *Kara v. Kara and Holman* [1948] P. 287, 292). Prominent but not exclusive among such considerations is the desirability that contractual promises should be observed and contractual rights respected, and even more the undesirability of the law appearing to condone flagrant and contemptuous disregard of obligations. Other such considerations are how far it is reasonable to require a party who is prima facie entitled to invoke a forfeiture or penalty clause to*

accept alternative relief (e.g., money payment or re-instatement of premises) and how far vindication of contractual rights would be grossly excessive and harsh having regard to the damage done to the promisee and the moral culpability of the promisor. (I do to intend this as an exhaustive list.) It is these internal considerations which may limit the cases where courts of equity will relieve against forfeiture, rather than any external confine on jurisdiction."

51. Since this case, the possibility of granting relief from forfeiture for breach of a covenant outside of the circumstances that are governed by statute has re-emerged. The reasoning confirms that it had always existed as a principle available in the courts of equity, but that it had incorrectly been regarded as no longer available. In other words, this was not the creation of a new form of equitable relief. Whether a court would be prepared to relieve from the rights of re-entry conferred by the terms of the contractual relationship between the parties would depend on the facts. By way of example of what might be engaged, a defendant seeking relief was likely to need to show that he is able and willing to make good the premises, where consideration of whether the tenant had already had a reasonable opportunity to carry out the repairs, in full knowledge of the terms of the covenant, would become a relevant consideration.
52. Given the way in which the Deputy Bailiff in *de Carteret v Mann and Mann* (*supra*) had voiced his concern that he had not been addressed on anything set out in the commentators on Norman customary law, Advocate Barnes has looked but found nothing explicit about relief from forfeiture. He has, however, found some material in Pothier's *A Treatise on the Law of Obligations, or Contracts*, as translated by William Davies, on penal obligations. He had in mind Lord Simon's reference in the same breath to forfeitures and penalty clauses. Pothier's Fifth Principle (para. 345) is that "*The penalty stipulated in case of the non-performance of an obligation may, when excessive, be reduced and moderated by the judge.*" Although the majority of the commentary that follows deals with damages being reduced, it does also include the comment that the reduction of excessive penalties "*should take place in commutative contracts, because the equity which ought to prevail in these contracts does not permit of one of the parties to profit and enrich himself at the expense of the other, and it would be contrary to this equity, that the creditor should enrich himself at the expense of the debtor, by requiring from him a penalty too excessive, and manifestly beyond the damage which he has suffered from the non-performance of the primary obligation*".
53. This is not quite the same as explicit reference to relieving against the consequences of a landlord re-entering premises as a result of a tenant's breach of covenant, but there are sufficient similarities that I am prepared to regard it as a form of support for the principle that the Sark Court may have been minded to invoke any equitable jurisdiction it had to avoid what would otherwise be regarded as a manifest injustice.
54. Sark does not have legislation equivalent to Guernsey's 1946 Law and its 1954 amendment (known by the collective title as the Stay of Evictions Laws 1946 and 1954). Alderney also has such legislation, so Sark is the only jurisdiction within the Bailiwick which does not afford some protection to tenants against the consequences of eviction. A report of the former General Purposes & Advisory Committee to the Easter 2012 meeting of the Chief Pleas of Sark recommended that a future Chief Pleas should perhaps consider introducing similar protection. The Seneschal's judgment indicates that had had given consideration to the regime under the Stay of Evictions Laws anyway.
55. In the light of all of this, Advocate Barnes submits that the Court of the Seneschal of Sark exercises a general equitable jurisdiction and so is able to afford a tenant relief from forfeiture. In support of his submission that courts in Guernsey follow English equitable principles, he relies on what was said in para. 19 of *Roger v Roger* [2003-04] GLR 1:

"Guernsey law has, as we understand it, generally followed and applied English equitable principles in appropriate cases, and we see no reason to exclude the possibility of proprietary estoppel being invoked in an appropriate case."

56. There is, of course, a distinction between proprietary estoppel, relating to an interest in land, and relief from forfeiture, which affects the enforceability of a landlord's contractual right of re-entry. However, as a general statement of approach, and recognising that the Court of the Seneschal of Sark is not a creature of statute and so enjoys a general jurisdiction to dispense justice as the only court in the Island of Sark, I am satisfied that it is appropriate to recognise that those sitting in that Court, and in any appellate court, will give full effect to equitable principles so far as it is appropriate to do so. I do, though, echo the caution voiced by the former Deputy Bailiff that where questions of rights associated with land are concerned, the application of what would pertain if the case were being determined in an English court without any further enquiry is surrounded with the dangers inherent in the law of unintended consequences. Accordingly, just because a particular outcome would follow through applying English law does not mean that the same outcome will always arise in the Sark context.
57. That said, I am clear in my own mind that one of the overriding features of Sark's judicial system is to dispense justice in accordance with what is regarded as fair in Sark. The Reform (Sark) Law, 2008, as amended, provides in section 6 that the Seneschal must, among other things, be ordinarily resident in Sark. Section 7 provides that the Deputy Seneschal must also be ordinarily resident in Sark. Lieutenant Seneschals can be appointed under section 8. They are not required to be resident in Sark, although they must have legal qualifications. What this means is that the Island's principal judge may well, as at present, be a lay person, although it would be permissible for a legally-qualified person living in Sark to be appointed to the office of Seneschal. The very scheme of the provisions governing Sark's judiciary enables cases where conflicts arise or someone with a legal background is more suited to constituting the Court to be allocated to a Lieutenant Seneschal but, for the other cases, the regime is for those decisions to be taken by one of the resident judges. As shown by the Seneschal's judgment, he is alive to the need to hear argument on any legal question and reaches his decisions in the light of what Counsel argues before him. However, perhaps the most significant feature of the scheme that is in place as a result of the 2008 Law (and under previous enactments) is that justice appropriate to Sark is available to those who form a part of Sark's special community from someone living among them.
58. These considerations lead me to the conclusion that a judge in the Court of the Seneschal of Sark will be minded to apply the full extent of what are regarded as equitable principles elsewhere, so far as doing so does not conflict with anything established in the law, when plainly to ignore that legal position would be wrong.
59. Advocate Ferbrache has placed the Respondent's opposition to the submissions of Advocate Barnes first on the basis of what was said in *de Carteret v Surcouf*, which he suggests should be relied upon here, namely that relief from forfeiture is unavailable. He refers to the concession at the hearing before the Seneschal from Advocate Barnes that "*we do not have any of that*", which was made at the end of his exposition on English landlord and tenant principles. He has also drawn attention to the five aids to navigation referred to in *Morton v Paint* (1996) 21.GLJ.61 and submits that they are not satisfied here. As an alternative, he suggests that the facts as found by the Seneschal show that it would have been denied to this Appellant in any event. This is because her admitted breaches of covenant were "wilful".
60. In my view, the reference to the aids to navigation in *Morton v Paint* is irrelevant in the context where what is at stake is the application of equitable principles that have always existed, even if they may not have been utilised. In that regard, I accept the submission of Advocate Barnes that, if relief from forfeiture exists, it is not something new being introduced or developed but instead involves invoking a principle that has lain dormant for many years.

That in itself begs the question as to whether those long years of it lying dormant mean that it has disappeared. However, much in the same way that it was dealt with in *Shiloh Spinners Ltd v Harding* (*supra*), I am not persuaded that that is a good reason not to recognise that it is available in an appropriate case. Where the eviction of a tenant enjoying a lease for her lifetime at a peppercorn rent is involved, I am satisfied that the doctrine should be treated as available in Sark.

61. There are certain particular features of how the position has developed in Sark differently from the rest of the Bailiwick of Guernsey that reinforces my view. Guernsey and Alderney have chosen to legislate to enable stays of execution of eviction orders to be granted in the discretion of the court making the order. Sark has not yet done so. I am not deciding on this appeal whether relief from forfeiture operates in Guernsey or Alderney and it does not automatically follow that the approach in respect of Sark can be followed in those Islands. When *de Carteret v Mann and Mann* was decided, the Human Rights (Bailiwick of Guernsey) Law, 2000 had not been brought into force. That only occurred on 1 September 2006. In my opinion, had the 2000 Law been in force at that time, there could well have been firmer grounds for concluding that relief from forfeiture, or some other discretionary means of reaching a fair outcome through the development of the customary law as it relates to relieving against harsh outcomes affecting a person's home, exists in Sark.

Human rights

62. It is appropriate at this stage to touch briefly on the impact of the 2000 Law on the question. This is raised expressly as the third ground of appeal.
63. In the Seneschal's judgment, he explains that he gave passing consideration to what he saw as the competing Convention rights of the parties. The impression is that he treated the respective rights as cancelling each other out. He drew attention to the rights of the parties as Article 8 and Article 1 of the First Protocol.
64. Advocate Barnes refers to *Brežec v Croatia* [2014] HLR 3 as an example of a case in which a violation of Article 8, ECHR was found because domestic law simply led to the conclusion that there was no entitlement to occupy premises. By extension, he argues that the absence of any regime in Sark law for relief from forfeiture means that a single minor breach of the lease would entitle a landlord to re-enter, which should be regarded as a violation of Article 8. The facts of the *Brežec* case are quite different from the present because the applicant there had moved into a flat in a publicly-owned building as an employee where her employer subsequently became a private enterprise. Eviction was sought on the ground that there was no legal basis on which to occupy the flat. The reasoning in this case was as follows:

"49. *However, when it comes to the decisions of the domestic authorities in the present case, their findings were restricted to the conclusion that under applicable national laws the applicant had no legal entitlement to occupy the flat. The national courts thus confined themselves to finding that occupation by the applicant was without legal basis, but made no further analysis as to the proportionality of the measure to be applied against the applicant, namely her eviction from the flat she had occupied between 1970 and 2010.*

50. *By failing to examine the above arguments, the national courts did not afford the applicant adequate procedural safeguards. The decision-making process leading to the measure of interference was in such circumstances not fair and did no[t] afford due respect to the interests safeguarded to the applicant by Article 8."*

65. During the hearing, Advocate Ferbrache mentioned, almost in passing, that the *Brežec* decision had been commented upon recently by the United Kingdom Supreme Court in *McDonald v McDonald* [2017] AC 273. In those circumstances, I permitted both Advocates

to lodge any written submissions on that case that they wished to make after the conclusion of the hearing. Advocate Barnes chose to do so, but Advocate Ferbrache indicated that no further response on behalf of the Respondent was considered necessary. Advocate Barnes suggests that the *McDonald* case draws a distinction between situations where there is no legislative provision, as in Sark, in which case Article 8 may be capable of being invoked in a dispute between private parties and situations where the legislature has provided a framework. The headnote reads:

"... that the purpose of the Convention was to protect citizens from having their rights infringed by the state; that, although article 8 might be engaged when a judge made an order for possession of a tenant's home at the suit of a private sector landlord, the tenant's article 8 rights could not be invoked to justify a different order from that which was mandated by the contractual relationship between the parties, at least where there were legislative provisions, such as section 21(4) of the Housing Act 1988 and section 89(1) of the Housing Act 1980, which the democratically elected legislature had decided properly balanced the competing interests, including the Convention rights, of private sector landlords and residential tenants when their tenancy contract had ended; and that, accordingly, since nothing in the jurisprudence of the European Court of Human Rights supported a contrary conclusion, when a judge was asked to make an order for possession against the residential tenant of a private landlord pursuant to domestic statutory provisions he was not required to consider the proportionality of such an order."

This conclusion was reached after having regard to the cases from Strasbourg, of which *Brežec* is one, in which Article 8, ECHR had been given greater prominence in a private dispute. The explanation given in the judgment of Lord Neuberger PSC is:

"41 To hold otherwise would involve the Convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is, as we have mentioned, to protect citizens from having their rights infringed by the state. To hold otherwise would also mean that the Convention could be invoked to interfere with the AIP1 rights of the landlord, and in a way which was unpredictable. Indeed, if article 8 permitted the court to postpone the execution of an order for possession for a significant period, it could well result in financial loss without compensation - for instance if the landlord wished, or even needed, to sell the property with vacant possession (which notoriously commands a higher price than if the property is occupied). ...

43 More broadly, it would be unsatisfactory if a domestic legislature could not impose a general set of rules protecting residential tenants in the private sector without thereby forcing the state to accept a super-added requirement of addressing the issue of proportionality in each case where possession is sought. In the field of proprietary rights between parties neither of whom is a public authority, the state should be allowed to lay down rules which are of general application, with a view to ensuring consistency of application and certainty of outcome. Those are two essential ingredients of the rule of law, and accepting the tenant's argument in this case would involve diluting those rules in relation to possession actions in the private rented sector."

66. Advocate Barnes suggests that this case can be distinguished. It is, of course, not binding on this Court and so does not need to be distinguished in the strict sense of that term. It contains strongly persuasive guidance as to the approach that might be taken as a matter of Sark law. To that extent, I recognise the need for caution in adopting the reasoning without more ado just because this is a private landlord and tenant dispute. In particular, I can see the strength in the argument of Advocate Barnes that the absence of any legislative overlay leaves the

field more open that it would be had the Chief Pleas of Sark already legislated along the lines of the Stay of Evictions Laws. In the absence of any protection provided through legislation, it becomes more incumbent on the Court of the Seneschal of Sark to engage in a full balancing exercise to see whether the outcome dictated by the contract could be viewed as penal in nature. If it can, having regard to the Convention rights engaged is a means by which any customary law or application of equitable principles can be developed to seek to achieve a just outcome.

67. This approach respects the fact that Article 8 is not being directly engaged. To do so in a private dispute would not be appropriate. Instead, a proportionality assessment is capable of being used by a tenant such as the Appellant to argue that the Court should carefully analyse what breaches of the lease are found to exist and then to consider whether the clause permitting forfeiture of the lease is designed to secure observation by the tenant of her covenants. The number of breaches and the time already allowed to rectify them become relevant considerations. A view can also be taken about how quickly, running from the date of the hearing, the breaches can be rectified. The consequences of not giving any additional time if it is acknowledged that the breaches are capable of being remedied and that the tenant indicates a preparedness to undertake the required repairs then have to be balanced against the interference resulting to the landlord, who would otherwise expect to gain possession of the demised premises as a result of the bargain between the parties. The issue of proportionality could be engaged before deciding whether the eviction order should be made in the first place, ie, as relief from forfeiture, or it might be engaged in determining whether it is appropriate to order a stay of an eviction order on terms, ie, akin to the approach under the Stay of Eviction Laws in Guernsey. If nothing happens, the interference with a tenant's Article 8 right to respect for her home may not be justified. If something happens, at whichever stage is appropriate, then the Convention rights of the tenant are unlikely to be violated.
68. To the extent that the Appellant advances Article 8, ECHR as an independent ground of appeal, consistent with the approach in cases such as *McDonald*, I reject that argument. Although the Court of the Seneschal of Sark is a public authority for the purposes of the 2000 Law (as is this Court), Article 8 is primarily concerned with interferences by the state with a person's home and so cannot be invoked directly when a private landlord seeks possession for breach of covenant. The way in which Article 8 can be given effect in a case such as this is to consider whether the customary law of Sark, including those equitable principles that can properly be relied upon, mean that the rigours of a strict interpretation of the contractual position fall to be ameliorated because to find otherwise would be unjust as being disproportionate. In this way, I consider that the impact of the 2000 Law in circumstances where the legislature has not otherwise intervened to afford protection to a tenant involves considering whether the clause on forfeiture should be treated as being penal because the breaches of covenant involved do not justify re-entry. This approach supports my conclusion that the law of Sark does recognise relief from forfeiture in appropriate circumstances.

Operation of relief

69. Although the Seneschal did not articulate his approach by reference to the equitable notion of relief from forfeiture, he did consider if there were any extenuating circumstances that he should take into account. Save for his decision to stay the effect of his eviction order, he did not find that there was anything warranting the type of outcome for which Advocate Barnes had argued.
70. In these appeal proceedings, Advocate Ferbrache relies heavily on the Seneschal's finding that there had been "*a sturdy reluctance*" on the part of the Appellant to carry out the remedial action required by her landlord. He has drawn attention to the usual way in which an appellate court is required to respect the findings of fact made by the trial court, unless there was no evidence on which the finding could reasonably have been arrived at, or for some

other reason the finding is perverse (see, eg, Stone v Hickman [2007-08] GLR Note 23). Another way of describing the principle can be found in Lord Reed's judgment in McGraddie v McGraddie [2013] UKSC 58 to which he also refers, quoting from the speech of Lord Thankerton in Thomas v Thomas [1947] AC 484, 487:

"(1) Where a question of fact has been tried by a judge without a jury, and there is no misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it mistakenly so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

His Lordship then referred to the applicable test for an appellate court intervening as being only when satisfied the judge was "*plainly wrong*".

71. These are familiar issues in appeals to this Court, whether from Sark, Alderney or the Magistrate's Court. Subject to what follows, I have no intention of disregarding the benefit the Seneschal had of seeing and hearing the witnesses. When it comes to his findings based on the materials placed before him, including the photographs and the accompanying text in the reports, the position is slightly different.
72. Because the Seneschal did not address his mind directly to the issue of whether there should be relief from forfeiture in this case, his findings necessarily need to be interpreted in a way that involves considering how he might have approached the issue had he fully considered it. This is because, if the outcome would be the same, there would be no merit in remitting the case for a determination on this issue.
73. The Seneschal's conclusion that there had been some unwillingness to undertake the repairs on the Schedule of Dilapidations provided to the Appellant by the Respondent is a finding that he was entitled to make. The explanations offered by the Appellant of the reasons why she had not done more than she had since September 2016 were simply not accepted by the Seneschal. He was entitled to reject those explanations. It is possible that it follows that the Seneschal would have concluded that this amounted to wilfulness on the part of the Appellant and that, in such a situation, he would not be minded to afford her the relief from forfeiture that would otherwise be available. Certainly the implication from Shiloh Spinners Ltd v Harding (*supra*) is that a finding of wilfulness may mean that it would be inequitable to grant relief from forfeiture. The difficulty I have, though, is that the Seneschal did not consider the extenuating circumstances in terms of whether the breaches found were indeed wilful and, even if they were, whether the indication he gave during the hearing (found on page 47 of the transcript) that:

"I am perfectly prepared to accept Ms Rogers' statement that he [ie, her contractor] is going to come and do the work. It seems good enough to me."

meant that a proper consideration of all the circumstances of the case would have resulted in the Appellant being given a short time in order to complete the repairs still outstanding in order to avoid an eviction order being made.

74. A further factor in this regard relates to the assessment made by the Seneschal of the reasonableness of the time already given to the Appellant to undertake the repairs. In my view, this is a relevant consideration for anyone seeking to obtain relief from forfeiture. It

also has an impact on the conclusion as to whether the breach really is wilful. The Seneschal is criticised by Advocate Barnes for referring on more than one occasion in his judgment to the period of 14 months over which these matters had been raised with her. It is possible that the Seneschal paid too much attention to what had occurred before the Respondent purchased La Tour from Antony Hurden. On one analysis, the deadlines fixed by Antony Hurden had passed without compliance, which rather informed the stance taken by the Respondent, although no further fixed time had been given by which the repairs needed to be carried out. On another analysis, and in my view the preferred one, there had been a tacit waiver of what had happened previously, and any time to comply was starting to run again from the moment when the Schedule of Dilapidations was provided. No real explanation was given by the Seneschal of how the Appellant could view the Respondent's initial indication that they would need to agree the timeframe within which the work should be carried out, after which no time was then agreed between them. As such, the Notice to Quit could be regarded as having come out of the blue. Advocate Barnes certainly relied on the only complaint that was live before the Seneschal being non-compliance with the Respondent's Schedule of Dilapidations, and his criticism of the Seneschal's reference to the position beforehand has some justification. It could be viewed as simply the recitation of the factual history, but the comment about "*sturdy reluctance*" appears to have some of its foundation in the dealings of the Appellant with her previous landlord.

75. My provisional view, therefore, is that, although I do not go behind the Seneschal's factual findings, I am concerned that he was not making these findings on the basis of knowing how they might or might not impact on his decision to make an eviction order. His judgment suggests that he was considering principally whether the breaches he found were trivial or not. This was on the basis that the submission of Advocate Ferbrache led him to think that he would not need to make the eviction order if there was nothing going beyond trivial. It strikes me that he equated this test with whether or not clause 2(d) had been broken whereas it could be broken by a minor breach and what Advocate Ferbrache was indicating, at least on the basis of how I interpret what he said at the hearing, was that the Respondent would not have been troubling the Court if the breach were only minor. The problems would have been resolved between the parties. There is a difference between explaining that the case would not have been brought and the position once the case has been brought. As Advocate Barnes submitted to the Seneschal, as a matter of principle, clause 4 is engaged on any breach, however small, and that was the reason why the Seneschal was being invited by him, although possibly not as clearly as would have been desirable, to consider making an order for the works to be completed within a specified time, in which case, subject to an appropriate order as to costs, the Appellant would not be evicted but, if she did not comply, the eviction order would then follow. My reading of the transcript and the judgment that followed leads me to think that the Seneschal's findings were made without him being fully aware of the consequences of them. He did not fully address his mind to the possibility that he could decline to make the eviction order sought on the basis of the equitable principle of relief from forfeiture. This arose, I fear, from the haste with which the hearing was conducted and Advocate Barnes not being adequately prepared.

Perceived bias and recusation

76. No complaint was made by either party to the Seneschal sitting on this case. However, the Appellant now argues that the Seneschal should have recused himself, recognising that he might be perceived to be biased or, at the very least, he should have drawn attention to the parties, and particularly to the Appellant, that he had nominated the Respondent in the election for Conseiller that had taken place in December 2016. The Appellant was given leave to file an Affidavit, sworn on 7 June 2017, in which she explains that she only discovered that the Seneschal had nominated the Respondent on or about 23 March 2017 when one of her acquaintances handed her an article published in the Sark News (which I take

to be a reference to *The Sark Newspaper*) referring to her case before the Seneschal, in which this nomination was highlighted.

77. On behalf of the Respondent, Advocate Ferbrache has pointed to the fact that nominations for the office of Conseiller are publicised. Accordingly, the Appellant should be fixed with constructive notice of the nomination so that the absence of actual notice until after the judgment was delivered should not be treated as excusing her failure to make any application to recuse on 17 February 2017. The publication of the candidates' names occurs both by way of a notice displayed in the official notice boxes and in the Sark Gazette (section 5(6) of the Reform (Election of Conseillers) (General Provisions) (Sark) Ordinance, 2008). The Appellant's Affidavit exhibits a copy of the Notice issued by the Returning Officer after the close of nominations on 25 November 2016. It shows that 12 nominations were received. As a result, the candidates were in due course declared elected unopposed, there being fewer candidates than there were vacant seats. The Notice shows that the Respondent's nomination was the fourth to be received by the Returning Officer. It was received on 18 November 2016. The Seneschal proposed the Respondent and his nomination was seconded by Conseiller Maitland. At the time that nomination was made, the Respondent did not know that there would not be a contested election. Through being proposed and seconded by two persons so well-known in Sark, it seems to me to be a reasonable inference to draw that the Respondent wished his candidature to be taken seriously.

78. The Advocates agree that the test to be applied where there is a suggestion of apparent bias is that expressed in *Porter v Magill* [2002] 2 AC 357 at the end of para. 103 in the speech of Lord Hope of Craighead:

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

79. During the hearing, I questioned whether the observer used in this test is someone who is in Sark or further afield, eg, in Guernsey or in England (although the question could simply be posed as to whether it is an assessment to be made in the Sark context only). As a result, Advocate Barnes reminded me of what Pill LJ had said in the Court of Appeal in *R (Barclay) v Lord Chancellor and Secretary of State for Justice* [2010] 1 AC 464 (at para. 67), which I note followed on from quoting the passage setting out the Bailiff's concerns in the earlier of the *de Carteret* cases, and which led to His Lordship referring to the smallness of the community aggravating the problem.

80. I am not persuaded that this passing reference provides an adequate answer to the question I posed. Everyone knows that Sark is a small community. This comment, in my view, needs to be placed in the context in which it was made. The question under consideration was a structural one rather than specific to a particular case and the submissions of the parties had earlier in this section of the judgment been summarised as follows:

"55 The need to ensure impartial and independent adjudication, and to preserve the appearance of it, is heightened in a small community such as that of Sark, it is submitted by the claimants. However fair-minded he is, the Seneschal's lack of legal training is inevitably a disadvantage in assessing the circumstances in which recusal is appropriate. Unlike lay judges in other jurisdictions the Seneschal does not have a legally qualified colleague or clerk to advise him on the law, including its requirements as to judicially appropriate conduct and fair procedure.

56 The Seneschal is protected, in judicial terms, it is submitted by the defendants, because his appointment, formerly for three years, is now for life and he may be removed from office only by the direction of the Lieutenant Governor and "for good cause": section 6(2). The claimants submit that in the circumstances the

life appointment has made the position worse. The Seneschal's multiplicity of roles, enjoyed without limit of time, make it impossible for him to be chief judge."

At para. 65, Pill LJ returned to the possible benefits of combining roles, which he then rejected:

"In a small jurisdiction there may well be administrative advantages in combining legislative and executive functions with judicial functions in one office. There will be cost savings and an office may be more attractive to applicants if the comprehensive duties of a Seneschal are to be continued on Sark. ... I do, however, see the combination in Sark of the judicial with the other functions of the Seneschal as inconsistent with the article 6 requirement to establish by law an independent and impartial tribunal. Subject to the limitations noted, Sark is a separate jurisdiction. That being so, it does require that the principal judicial officer (and the Court of the Seneschal shall be the sole court of justice in Sark and shall be constituted by the Seneschal sitting alone (section 5)) is not linked with the executive and legislature in the manner and to the extent that the Seneschal is."

At para. 66, His Lordship continued by also explaining that *"The population of Sark, though small, is likely to engage in economic, administrative and financial activities which may well give rise to significant litigation. Social welfare considerations, requiring a judicial determination, may also arise"*. It is against that background that the comment in para. 67, which I now quote in full, was made:

"This is not slavish adherence to an abstract notion of separation of powers but a recognition that it follows from the Seneschal's functions in his non-judicial capacity in Chief Pleas, as already described, that his independence and impartiality are capable of appearing open to doubt. In this respect, the smallness of the community aggravates the problem. The same people and issues with which he is likely to be dealing when presiding at Chief Pleas, including issues arising from the Reform Law itself and the Guernsey Human Rights Law, may be the subject of litigation in his court. My conclusion on this aspect of the appeal in no way impugns the good faith or competence of the present Seneschal."

81. When there was no appeal from this decision of the Court of Appeal, Sark was required to make structural changes. The Seneschal is no longer *ex officio* the person to preside at the meetings of the Chief Pleas because a distinct office, now known as the Speaker, was created. In this manner, the structural concerns about the fairness of proceedings before the Court of the Seneschal of Sark have been addressed. Accordingly, I regard the comments made by Pill LJ about the smallness of the community as relating to the structural issues that were central to that case rather than the specific issues in a case such as the present one.
82. The analysis undertaken in that case, though, satisfies me that the question of apparent bias is not to be viewed solely in respect of what is regarded as appropriate in Sark, but requires wider consideration. At para. 58, Pill LJ referred to the way the issue had been addressed in some Scottish cases:

"In Starrs v Ruxton 2000 JC 208 Lord Prosser, considering the position of temporary sheriffs in the administration of justice in Scotland, stated, at p 232:

"But I am inclined to see independence – the need for a judge not to be dependent on others – as an additional substantive requirement, rather than simply a means of achieving impartiality or a perception of impartiality. Independence will guarantee not only that the judge is disinterested in relation to the parties and the cause, but also that in fulfilling his judicial function, generally as well as in individual cases, he is and can be seen to be

free of links with others (whether in the executive, or indeed the judiciary, or in outside life) which might, or might be thought to, affect his assessment of the matters entrusted to him.”

That passage was cited by Lord Bingham of Cornhill in the Privy Council in Millar v Dickson [2002] 1 WLR 1615, para 9. Lord Bingham also cited, at para 26, the speech of Lord Steyn in Brown v Scott [2003] 1 AC 681, 708:

“and it is a basic premise of the Convention system that only an entirely neutral, impartial, and independent judiciary can carry out the primary task of securing and enforcing Convention rights.”

Lord Bingham concluded [2002] 1 WLR 1615, 1628:

“The conduct of trials at all stages by an independent and impartial tribunal is in my view recognised by the Convention and the authorities, subject to waiver where that is permissible, as a necessary although not a sufficient safeguard of the citizen’s right to a fair trial. It is a safeguard which should not, least of all in the criminal field, be weakened or diluted, whatever the administrative consequences.””

His Lordship then referred to McGonnell v United Kingdom (2000) 30 EHRR 289 and referred to the approach taken to breaches of Article 6, ECHR as set out in para. 51 of the Strasbourg Court’s judgment:

“The question is always whether, in a given case, the requirements of the Convention are met. The present case does not, therefore, require the application of any particular doctrine of constitutional law to the position in Guernsey: the court is faced solely with questions of whether the bailiff had the required ‘appearance’ of independence, or the required ‘objective’ impartiality.”

83. As soon as the issue is shown to involve consideration of these objective standards of the European Convention, the notion that this issue as it applies in the present case can be viewed through the eyes of an observer in Sark is dispelled. The fair-minded observer must, though, be an “informed observer”. Such an informed observer will, in my view, be conversant with the historical position in Sark and the reasons for the structural changes to which I have referred. Further, such an informed observer will be aware of the public service to the Island of Sark that the current Seneschal has undertaken previously and the way in which nominations for political office in Sark are often made by a reasonably contained group of persons.
84. There has been no suggestion that the Seneschal, having nominated the Respondent for this office approached hearing the action involving these parties from a biased position. His good faith and competence as the Seneschal are not being challenged. The Appellant’s complaint is that, having given his support publicly to the Respondent, and having done so just months before the hearing, anyone who is a fair-minded and informed observer looking at the decisions taken by the Seneschal at the trial and at the findings he made and the outcome, will conclude that there is a real possibility that some or all of those decisions were reached by him because he was biased.
85. The position is not quite the same as pertained in R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) [2000] 1 AC 119, where it was ruled that Lord Hoffmann’s association with Amnesty International through his directorship of a company limited by guarantee that was its charitable arm, and indirectly through his wife’s association, resulted in him being disqualified from participating in the appellate process before the House of Lords. That connection had not been known at the time of the appeal hearing in which Lord Hoffmann participated. As Lord Browne-Wilkinson explained (at page 135E):

“If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisations as is a party to the suit. There is no room for fine distinctions if Lord Hewart CJ’s famous dictum is to be observed: it is ‘of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done’ (see R v Sussex Justice, ex p McCarthy [1924] 1 KB 256 at 259).”

His Lordship had earlier described the principle of bias in the following terms (at page 132G):

“The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.”

That passage was quoted in Burton v Law Officers of the Crown (unreported, 6 September 2006) in which the Court referred to the informed observer recognising that the professional training of the judiciary in Guernsey enabled an Assistant Magistrate and the Deputy Bailiff himself not to be swayed by the involvement of a Deputy Sheriff, who is an officer of the Royal Court, as a witness in the case.

86. I take the view that it is most unfortunate that the issue that has now been raised on behalf of the Appellant was not identified before the hearing of the Respondent’s action on 17 February 2017. It may be that this is another aspect of Advocate Barnes not being fully prepared for the case to proceed on that day. Had the issue been identified, whether by one or other of the parties, or by the Seneschal himself raising it and enquiring whether either party wished to make any application, the case may not have proceeded before the Seneschal at all or, if it had, this Court would at least have had the benefit of the Seneschal’s reasoning for his decision to hear the case. Instead, I am left operating effectively in a vacuum of information, which is not entirely satisfactory.
87. I consider that I should proceed on the basis that the Seneschal himself and the Respondent both remembered that the Seneschal had been the Respondent’s proposer for the office of Conseiller. As I have said, this occurred only months before the proceedings were commenced. It is, therefore, surprising to me that it was not raised by the Seneschal. The implication is that it simply did not cross his mind. Alternatively, it crossed his mind and he concluded that it did not constitute a reason for him to recuse himself. However, if it crossed his mind and he then chose not to raise it with the parties’ Advocates, it rather suggests that he lost sight of his responsibilities in this regard. That is why I consider it more likely that it simply did not cross his mind. Further, I suspect that it did not cross the Respondent’s mind either that this was something that needed to be raised by his Advocate either with the Court itself or at least with Advocate Barnes. I suppose it is possible that the Respondent thought everyone in Sark, including the Appellant, must have been aware of who had proposed him for the office of Conseiller and that any decision by her not to raise it was taken on the basis that there was a tacit waiver.

88. I do not, however, think that it is appropriate to treat what happened in that way. In a similar manner to the *Pinochet* case, the question I have to determine is whether the fair-minded and informed observer would now think there is a real possibility that the proceedings were affected by apparent bias and not whether there was any tacit waiver of the Appellant's entitlement to raise that issue. Accordingly, I am not persuaded that there is any foundation in Advocate Ferbrache's submission on constructive notice. The trial was either a fair hearing or it was not. Albeit with some reluctance, I have concluded that it was not a fair hearing because the Seneschal erred in not, at the very least, raising the question with the parties as to whether he should continue to constitute the Court. As I have already said, I think this was a genuine oversight on his part. Further, given the strong words of guidance about the duties of Advocates appearing before a lay judge in Sark, both Advocates should recognise their own shortcomings in not having identified this as an issue that needed to be addressed.
89. Although Pill LJ in the *Barclay* case stressed that the decision of the Court of Appeal was not slavish adherence to any doctrine of separation of powers, I cannot overlook the fact that the Seneschal, who had been Deputy Seneschal at the time, has since consciously worked his way through the consequences of that decision, making choices as to how best he can serve his Island community for the benefit of Sark, and opting to seek appointment as the Seneschal of Sark. My reason for referring to that experience is that it must have been clear to him as Seneschal that there should be some clear water between the judiciary and those who are members of the Chief Pleas. It is unusual for a judge to be seen to be supporting openly anyone for political office. However, given the smallness of Sark, I am not going to go as far as to say that the Seneschal (or the Deputy Seneschal) cannot nominate persons for the office of Conseiller, but a decision to do so has consequences. These consequences arise from the public display of support that is inherent in being either a proposer or seconder of a candidate. In my opinion, this position is indistinguishable from being an identifiable supporter of a body that is then involved in litigation. It may not fully equate to being a close friend of the person proposed (or seconded), but I do regard the notoriety (through publication) associated with proposing or seconding a candidate to be indicative of a level of association that brings into question whether hearing a case involving that person as a party, as has been the position here, offends against the level of impartiality that is required.
90. I appreciate that the scheme of the judiciary in Sark means that the Seneschal (and the Deputy Seneschal) being required to be ordinarily resident in Sark are likely to know the parties appearing before them, as well as their witnesses, who also live on the Island. If one of the parties to a case is a family member or there is a financial interest that the Seneschal (or Deputy Seneschal) has, applying the usual principles, recusation must follow. Indeed, the office of Lieutenant Seneschal was created to enable cases in which both resident judges are conflicted to be heard by someone who is, and importantly is seen to be, independent of the parties and impartial. The position in respect of apparent bias is necessarily more nuanced. However, when considering if it is a case on which he can properly sit, the Seneschal is obliged to consider not only whether he believes he can come to it with an open mind but also whether there is a real possibility that others will consider that he is unable to do so because of what it is that he would otherwise be being asked to decide. When that second limb is assessed in this case, having proposed the Respondent for the office of Conseiller, the Seneschal should, in my judgment, have recognised that the complaint now made about apparent bias could have been advanced and he should, at the very least, have invited the parties' comments. Accordingly, whilst I am not going so far as to say it was wrong for the Seneschal to have proposed the Respondent for the office of Conseiller, I do agree with Advocate Barnes that the consequences of him then proceeding to determine the Respondent's action without first seeking any waiver, or hearing any application that might have been forthcoming to recuse him, means that the Seneschal has fallen into procedural error and I will have to consider what effect that has on the proceedings that he heard.

Other procedural complaints

91. Before I explain the consequences of that conclusion, I can put the concerns that arise from the possibility of impartiality into the context of the various decisions that the Seneschal took at the trial, in part because they form the basis for a further ground of appeal advanced by the Appellant (para. 6). Because each of these decisions went against the Appellant, there is a suspicion that the Seneschal reached these decisions simply because he was minded to favour the Respondent because of their association. However, to leap to that conclusion would be to do the Seneschal an injustice because I take the view that it was open to him to reach each of the conclusions for which Advocate Barnes now criticises him.
92. The first relates to the Seneschal's rejection of the application for further and better particulars of the Cause. In his judgment, the Seneschal explains that he rejected an adjournment for two reasons. The first was the last minute nature of the application and the second was that he could not understand what further information could be forthcoming from the Plaintiff and he was satisfied that a document in the Court bundle (at B5) was sufficient. The transcript shows that the brief oral judgment delivered by the Seneschal on resuming the hearing after a short luncheon adjournment did not refer to the lateness of the application, simply being:
- “Advocate Barnes, I am going to reject your application to adjourn because firstly, I am unable to see what further information could possibly be forthcoming from the plaintiff. Though I understand the point you are making about the summons not particularising the dilapidations, I think that is what your point was, there is the causes of that alleged breach. I believe that the schedule at B5 is more than enough for all of the parties and this court to understand the nature of these dilapidations and the actions that have or have not been taken to remedy them. So, having said that then, that is out of the way, I think we should proceed.”*
93. I do not think that the Seneschal fell into error in refusing this application for further and better particulars. He had been referred to the Evictions Action Order, 1986, which showed him that, in an eviction action in Guernsey, the matter would be dealt with summarily unless there was a different direction. Consequently, as long as it could not be suggested that the tenant against whom the eviction order was being sought did not know the case that needed to be met, there would not be a requirement for full pleadings. What Advocate Barnes really needed to know was the case the Appellant had to meet. If the case were limited to the dealings she had with the Respondent, starting with the Schedule of Dilapidations provided by him in September 2016, rather than extending to cover her prior dealings with Antony Hurden, the need for any further and better particulars fell away. Similarly, in respect of any alleged breach of clause 2(c) of the lease, clarification as to how it was said the Appellant was not being a good tenant might have been needed but, on behalf of the Appellant, Advocate Ferbrache abandoned any reliance on that sub-clause. As soon as the contest between the parties was restricted in this way, I am satisfied that it was appropriate for the Seneschal to reject the application for there to be fuller pleadings, because there was no need for a Defence to be prepared and so no need for the alleged breach of clause 2(d) to be particularised further. The Schedule of Dilapidations, which had been attached to the Notice to Quit, was treated as being the operative document containing those particulars. The position is quite different from the inadequacies of the pleadings referred to in *de Carteret v Mann and Mann* (*supra*). Because the decision was, in my view, a decision the Seneschal could properly take, it matters not who was constituting the Court when it was taken and does not impact on whether or not there was a fair hearing.
94. The second complaint is that the Seneschal then rejected Advocate Barnes' request for an adjournment because he was not ready to proceed. There was comparatively little argument about this aspect of the proceedings. All that Advocate Barnes said was that he had not had a chance to speak to the Appellant's contractors who had carried out the work already undertaken and who would be carrying out the remainder of the work. Advocate Ferbrache objected to any adjournment because he had understood the request for an adjournment had

been premised on the application for further and better particulars. He considered it strange that an Advocate could turn up and say that he did not have the appropriate instructions. The Seneschal asked Advocate Barnes if he had a choice to proceed despite Advocate Barnes' contentions and Advocate Barnes replied that he did. So the Seneschal decided to proceed.

95. On this appeal, Advocate Barnes remains concerned that the Seneschal's decision did not pay proper attention to the potential consequences arising from the lack of preparation under which he had sought to explain he was labouring. Advocate Ferbrache suggests that Advocate Barnes had placed undue reliance on succeeding on the application for further and better particulars of the Cause and that the Respondent should not now be penalised for Advocate Barnes not having done what he should have done in readiness for the hearing.
96. I do not think that the Seneschal can be said to have failed to give the Appellant a fair hearing just because he refused an application to adjourn based on the Appellant's Advocate not having done the things he really should have done before this hearing. It is apparent that the Appellant wanted to resist the Respondent's action for an eviction order. In those circumstances, there should have been some dialogue between the Advocates as to whether the case was ready to be heard on 17 February 2017. In other words, they should have been discussing whether it was necessary to warn witnesses or whether it was to be treated as a directions hearing leading up to a trial on another occasion. I still struggle to understand how Advocate Barnes can have thought it feasible to attend at the hearing listed for noon on 17 February 2017 without first having been to the Cottage himself and without having proofed those persons who he might have wished to call to give evidence on behalf of the Appellant. Further, once the application for further and better particulars had been argued and the Seneschal adjourned for 45 minutes for lunch, during which time he would consider his decision, there has been no explanation as to why that time was not used fruitfully to make the type of enquiries that Advocate Barnes then said he still needed to make. I do wonder how the cross-examination of the Respondent's only witness, Mr Hewlett, could have been conducted without Advocate Barnes having done the things he complained he had not had time to do. Moreover, the timing of the request for a *vue de justice* remains a mystery. I have noted that the transcript does not show Advocate Barnes putting up much of a fight when the Seneschal indicated he was minded to proceed with the hearing. His suggestion that the adjournment should have been granted on the basis of making an appropriate order as to the costs being wasted was not something he articulated in front of the Seneschal. Accordingly, if this element of the trial is viewed in isolation, I am not persuaded that the Seneschal's decision to proceed means that the Appellant did not get a fair trial.
97. The next procedural criticism made on behalf of the Appellant relates to the request for a site visit. In many respects, it was unsatisfactory for this not to have been dealt with at the start of the hearing. The request was made when Advocate Barnes had finished cross-examining the only witness called on behalf of the Respondent. Indeed, this was done before any re-examination. Quite why Advocate Barnes raised it at that point is unclear. It is almost as if it were an afterthought. Advocate Ferbrache queried the purpose for undertaking a site visit. As an alternative way to progress matters, he suggested that Advocate Barnes might be asked to clarify what works it was said by the Appellant had been completed and those that had not been undertaken. This was, of course, entirely consistent with the stance he was adopting that all the Respondent needed to do to obtain an eviction order was to satisfy the Seneschal that there was a breach of clause 2(d), meaning that any admission by the Appellant that something that was more than trivial still needed to be done would prove the Respondent's case. The Seneschal appears to have vacillated about whether there should be a site visit. He started by thinking there was ample time for it to take place but then changed his mind, as he is entitled to do, and decided not to attend on site. He was satisfied that "*There is ample photographic documentation here of what needs to be done, what is done, what is not done, and this list just demonstrates that there is more to do. I am sure those works will be done.*"

(transcript, page 27). When Advocate Barnes looked unhappy, the Seneschal decided to give him time to attend on site to see for himself what was there and adjourned for 38 minutes.

98. Once again, I find that the discussion had with the Seneschal as to whether there should be a site visit cannot, in and of itself, be criticised. Having said that, had the case that Advocate Barnes wanted to advance been fully explained to the Seneschal, the purpose of there being a site visit might have been clearer to him. Even if he had had it explained to him that the Appellant was acknowledging that there were still some items on the Schedule of Dilapidations that needed to be completed and that she was inviting the Seneschal to assess for himself whether they were such that he should not make an eviction order but fix a time within which they must instead be carried out, and failure to comply would result in an eviction order being made, the Seneschal may have been inclined to accede to the request that the Court should undertake a site visit. One of the problems with looking back now at what happened is that the conduct of Advocate Barnes did not assist the Seneschal to make the decisions he was being asked to make in any structured way. As soon as the application for further and better particulars was dismissed, the proceedings were less structured than would have been desirable. Having seen the photographs in the various reports, I feel that I have a reasonable impression of what was in issue. The Seneschal, I imagine, was (and is) in an even better position to know the Cottage at least a little and assess, with the benefit of those reports, whether the work still required falls into one or another category, as he then set out in his judgment. I also regard it as significant that the Seneschal gave the Appellant and her Advocate an indication that he would in due course find that the works then outstanding “*will be done*”. In those circumstances, I do not feel that he erred in refusing to undertake a site visit. This has not resulted in the Appellant not receiving a fair trial and I do not regard this decision as necessarily having been reached because he was inclining towards agreeing with everything being said on behalf of the Respondent.
99. The final procedural irregularity on which the Appellant relies relates to the refusal of the Seneschal to permit Chris Drillot to be called as a witness because he had been present throughout the proceedings. As Advocate Barnes accurately points out, sitting through other witnesses giving evidence does not automatically mean that a person cannot then also be called to give evidence. It was clearly open to the Seneschal to have permitted Mr Drillot to give evidence and then assessed for himself the appropriate weight to give to it. As such, the bare refusal to permit him to give evidence could amount to the Appellant not being afforded a fair hearing. However, I do not think that such a conclusion follows because of what then happened. Having been frustrated by the decision not to permit Mr Drillot to give evidence, Advocate Barnes suggested he would call a different person to give evidence on behalf of the Appellant who had not been present. Rather than accede to that request, which would, it seems, have necessitated adjourning, the Seneschal queried the purpose of someone coming along to say that the work required would be done. As I have already noted, the Seneschal stated: “*I am perfectly prepared to accept Ms Rogers’ statement that he is going to come and do the work. It seems good enough to me.*” As a consequence of that indication from the Seneschal, Advocate Barnes acknowledged that he did not need to call any further witnesses and proceeded to close the Appellant’s case.
100. When the sequence of events is placed into that context, I am satisfied that the Seneschal’s decision in respect of calling Mr Drillot as a witness does not mean that the Appellant did not get a fair trial. What Advocate Barnes really objects to is not the decision taken but the Seneschal’s failure thereafter to have proper regard to the finding that he indicated he would be making. That does not impact on whether, all other things being equal, the Appellant received a fair trial. Instead, it relates to the question of whether the Seneschal erred in not recognising that relief from forfeiture exists and how he should have applied that doctrine.
101. Having concluded that each of the complaints made by the Appellant about the fairness of the proceedings would, each being viewed in isolation, not result in the appeal being allowed, I have looked at them collectively as well. I have already commented about the apparent

desire, other than from Advocate Barnes, to complete this hearing on the day and how it might look as though certain issues were raised and dealt with without full consideration of the arguments that might have been developed. I have asked myself whether this is indication of a desire on the part of the Seneschal to reach a decision in favour of the Respondent without any delay. I am not persuaded that what happened supports that contention. I get the impression that the Seneschal, not being legally trained, may not have realised that he should have approached some of these procedural issues differently. Quite sensibly, he is keen to resolve matters without any unnecessary delay. Although he does not say so explicitly, he may well have found that the unpreparedness of Advocate Barnes was inexplicable and should not have been allowed to deflect the case from being dealt with on the day. He gave Advocate Barnes some time, but he also reached decisions without perhaps hearing argument on them in the structured type of way that a judge with a legal background would have expected. Had he heard fuller argument on them, it seems unlikely that the hearing would have concluded in the time available on 17 February 2017. The transcript at times reads a little bit too much like a free-for-all. I do not need to repeat in further detail how I feel that the Advocates did not entirely assist the Seneschal in relation to all the decisions he was called upon to take.

102. When considering these procedural issues from the perspective of a fair-minded and informed observer assessing whether the way they were dealt with raises a real possibility that the Seneschal was showing bias towards the Respondent, I think the first conclusion that would be reached is that the Seneschal did not decline to hear Advocate Barnes at any point. Each application made was dealt with pragmatically. The Seneschal gave brief reasons for each of his decisions. They are, of course, the type of case management decisions that fall within the range of discretionary decisions open to a trial judge and an appellate court will always give due deference to the trial judge in those circumstances. Accordingly, if the Seneschal had sought and been given a waiver from the parties that he should hear the case, none of these challenges to his procedural decision-making would have led to the appeal being allowed. However, the apparent bias that I have found that exists from the Seneschal having recently nominated the Respondent for the office of Conseiller is such that I think a fair-minded and informed observer would be troubled that some of these decisions may have been reached with a view to expediting the proceedings in a way that put the Appellant, albeit at least in part as a result of the inadequate preparation of Advocate Barnes, at some disadvantage. This is a further factor, therefore, that needs to be borne in mind when deciding how to resolve this appeal.

Stay of execution

103. The tenth ground of appeal was added very late in the day. The pleading of it appears to have been rushed and it does not really set out as precisely as it should what the Appellant's complaint is. This is because it introduces the outcome for which the Appellant would have argued if the eviction order had been made and then fell to be stayed. These are matters that were not raised before the Seneschal and they are matters that I cannot resolve on this appeal. The real complaint is that the Seneschal reached a decision about staying the execution of the eviction order he made without inviting the parties to address him on what stay might be appropriate and any conditions that might be attached to it. It is a complaint about process.
104. There is no explanation on the face of the Seneschal's judgment as to why he decided that a stay of execution of a little over six months was warranted. The closest there is to any reasoning comes in the final sentence: "*by ordering a stay in excess of six months there is time to make alternative arrangements or, better still, seek a mutually agreeable solution between the Parties*". Earlier in his judgment, the Seneschal had indicated that he had given consideration to the Stay of Evictions Laws. There is, therefore, an implication that he had in mind the matters set out in those Laws.

105. Section 3 of the 1946 Law provides that:

"In considering the position of the parties and the circumstances of the case, with a view to deciding whether the Court should suspend execution of an eviction order, and if so, during what times and upon what terms such execution should be delayed, the Court shall take into account the following matters, inter alia:-

- (a) Whether any rent lawfully due from the tenant or sub-tenant has not been paid, or any other obligation of the tenancy has been broken or not performed.*
- (b) Whether there is suitable alternative accommodation available for the tenant or sub-tenant, or whether such accommodation be available when the judgment or order takes effect.*
- (c) Whether the tenant or sub-tenant or any person residing or lodging with him, or being his sub-tenant, has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers.*
- (d) Whether the condition of the premises has in the opinion of the Court deteriorated owing to the act, neglect or default of the tenant or sub-tenant or of any such person, and where such person is himself a lodger or sub-tenant of such tenant or sub-tenant, whether the Court is satisfied that such tenant or sub-tenant has not, before the making or giving of the order or judgment, taken such steps as he ought reasonably to take for the removal of such person.*
- (e) Whether the tenant or sub-tenant has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose.*
- (f) Whether the tenant or sub-tenant has given notice to quit, and in consequence the landlord has contracted to sell or let the house, or has taken other steps as a result of which he would, in the opinion of the Court, be seriously prejudiced if he could not obtain possession.*
- (g) Whether the premises consist of or include premises for the sale of intoxicating liquor and the tenant or sub-tenant has committed an offence as holder of the licence, or has not conducted the premises to the satisfaction of the Court.*
- (h) Whether the dwelling-house is so over-crowded as to be dangerous or injurious to the health of the inmates, and the Court is satisfied that the overcrowding could have been abated by the removal of any lodger or sub-tenant whom it would in all the circumstances of the case, including the question whether alternative accommodation is available for him, have been reasonable to remove, and the tenant or sub-tenant has not taken such steps as he ought reasonably to have taken for his removal."*

106. It is important first to remember that, unlike in Guernsey, there is no obligation on the Court of the Seneschal of Sark to take into account any of these matters because there is no legislative framework under which it must operate. However, in order to have some structure under which to operate, I certainly do not criticise the Seneschal for choosing to adopt for Sark the position in Guernsey. Indeed, that seems to me to be an entirely sensible approach. Not all of these paragraphs are engaged in the Appellant's case, but some of them clearly are. Advocate Barnes has referred to the Appellant having paid her rent for 2017 as required by her lease in advance, although I have noted that this was not led in evidence before the Seneschal and so I will make no further comment about the possible consequences of that. There was no evidence, nor any representations, about whether there is some other

accommodation to which the Appellant can go when the eviction order can be executed at the end of the stay.

107. Although Advocate Ferbrache initially submitted that, in the absence of any equivalent to the Stay of Evictions Laws in Sark, there is no power for the Seneschal to stay the effect of an eviction order, which is what he had indicated when putting on the record that the Respondent would desist from executing any eviction order for three months, he modified that position so as to acknowledge that the Court of the Seneschal of Sark must have the power to decide the terms on which it will make any order. Accordingly, there is now no opposition to the Seneschal having had the power to make an eviction order but to stay it as he saw fit. In my judgment, it is part of the jurisdiction of the Court of the Seneschal of Sark as the sole court of justice in Sark to be able to give judgment for re-entry to a landlord but then to decide when that eviction order will become operative. This is an aspect of the Court's inherent power to do justice as between the parties appearing before it.
108. Although he did not explicitly concede that the Seneschal erred in granting a stay of execution of the eviction order without having heard the parties' Advocates on that issue, Advocate Ferbrache has been realistic enough not to argue strenuously that what has happened was the appropriate process to follow. In doing so, I think he recognises that a judge should not reach a decision without at least affording the parties the opportunity to be heard. Indeed, had the Seneschal issued a judgment making an eviction order and, in the event of the length and terms of any stay not being agreed, re-convening the Court to hear argument about any possible stay, Advocate Ferbrache may well have been suggesting that any stay to be granted should have been on terms, whereas the Seneschal has imposed no conditions, and should have been as short as practical. It is not just the Appellant who has been denied the opportunity to make representations.
109. It is, of course, one of the fundamental principles of natural justice that a person should be given the opportunity to be heard before there is a determination made against them. It does not have to be an oral hearing, but decisions should not be reached in a vacuum of information. In my opinion, the Seneschal was plainly wrong to make the order he did, staying the execution of the eviction he order he had found followed from the Appellant's breach of clause 2(d) of her lease, without inviting the parties to make representations on that issue. Were this the only ground of appeal on which the Appellant succeeds, I would have simply remitted the case to the Seneschal for him to hear representations and then give his reasons for any decision on this question.
110. I did query with the Advocates why, when the judgment was handed down on 3 March 2017, they did not immediately draw attention to the Seneschal's failure to hear them on the issue of the length and terms of any stay. This would have been the most sensible way forward and it was, in my view, open to either or both of them to have raised that question before any Act of Court was issued. Somewhat surprisingly, I have been told that no Act of Court has been issued. Had this appeal failed, it would be difficult for the Respondent to make use of the services of the Prévôt if he does not have an Act of Court providing the authority for the Prévôt to take action. This demonstrates the importance of the parties ensuring that the proceedings before the Court of the Seneschal of Sark have concluded because, until that Court is *functus officio*, it would be possible to seek to make further representations on the issues that have been set out in the Seneschal's judgment. However, rather than deal with this issue by inviting the parties now to seek to be heard before the Seneschal on this question, I have included this aspect within this decision and now turn to the consequences of the decisions I have reached.

Disposal of appeal

111. For the reasons I have given, the appeal is allowed. There are three bases on which this follows. The first is that the Seneschal did not apply the equitable principles of relief from

forfeiture, as viewed through the need to avoid reaching a disproportionate outcome, to the Appellant's situation, when I consider he should have done so. The second is that the Seneschal should, once he decided not to recuse himself, have drawn the attention of the parties to him having proposed the Respondent for the office of Conseiller and then dealt with any application to recuse him or invite the parties to waive any objection that would otherwise have been available to them. Finally, having decided to make an eviction order, although there is a large element of overlap with the considerations as to whether relief from forfeiture was available, the Seneschal erred by staying that order without inviting further comment from the parties' Advocates.

112. In the event that I were minded to allow the appeal, Advocate Ferbrache has urged me to remit the matter to the Court of the Seneschal of Sark on the limited basis of giving further consideration to the question of the length of the stay of execution and any conditions to be attached, possibly also offering some guidance as to the approach to be followed. This is on the basis that the Seneschal's findings of fact should not be interfered with, meaning that I can conclude that, even if the Seneschal did not apply the appropriate test for relief from forfeiture, the same outcome would follow because the Appellant had been wilful in breaching her lease. Advocate Barnes suggests that allowing the appeal necessarily leads to the Seneschal's whole decision being set aside and the case being re-heard in its entirety.
113. I find myself unable to accede to Advocate Ferbrache's suggestion. In any event, it was, I think, made on the basis that I would not agree with the Appellant's fourth ground of appeal relating to apparent bias. Although much of what took place could well have occurred before any judge, I am satisfied that the ultimate decision of the Seneschal is sufficiently affected by his decision to hear the case without raising the fact that he had proposed the Respondent for the office of Conseiller to mean that a new trial before a differently constituted Court is the only option.
114. I am reluctant to add anything further about the process that should be adopted at such a hearing. Quite what is relevant and what is not will be for whoever hears this action to decide. As I have already indicated, the precise ambits of considering whether it is appropriate to give relief from forfeiture will be for further argument, although it is inevitable that the nature of the breaches of the lease and the opportunities already given to rectify them will be live issues. The case presented by the Respondent landlord is always likely to result in there being breaches found because, putting the Appellant tenant's case at its highest, some repairs had not been completed. In those circumstances, a very careful analysis will be necessary to decide whether this properly results in the Appellant being given a last opportunity to avoid the usual contractual consequences of those breaches or whether the proper and proportionate response to what has happened is to make an eviction order but then to consider how generous to be in terms of any stay of execution of it. In fairness to the Seneschal, although I have decided that his decision must be set aside principally because of his failure to give the parties the opportunity to address him on whether he should hear the case, his overall approach seems to me to have endeavoured to balance the parties' respective situations, although I incline to the view that he placed more weight than perhaps he should have on the Appellant's dealings with her former landlord, Antony Hurden. A different judge may also have reached different conclusions about the work that was said to be required to be done and how serious each item was, both individually and collectively. In the event that an eviction order is the correct outcome, the question of what length of stay to grant, if any, will depend on a fuller consideration of all the circumstances of the case than is apparent from the face of the Seneschal's judgment. I would be surprised if this were a case that could be completed in one day with a start at noon.
115. The outcome of this appeal is that the eviction order, including the stay to the end of this month, made by the Seneschal is set aside.

Costs

116. I will hear whatever submissions the parties wish to make on the question of the costs of this appeal in due course, and so formally reserve the question of costs. I have noted that the Seneschal chose to make no order as to costs. If the parties are unable to agree what the costs order for these proceedings should be, then I invite them to identify a suitable Interlocutory Court at which the question of costs can be heard or, if they prefer, I will deal with any costs application to be made on the papers. Any such application, accompanied by all the materials on which the party making it wishes to rely, should be filed and served within 14 days of this judgment being handed down. The party against whom any order is sought will then have seven days in which to respond, with any reply being seven days thereafter.