**Harnish v Elizabeth College**
Royal Court
5th June 2018

**JUDGMENT**
**25/2018**

Decision on a preliminary issue relating to the interpretation to be placed on a sub-clause of a Compromise Agreement

**IN THE ROYAL COURT OF GUERNSEY**

**(ORDINARY DIVISION)**

**Between**

**ROBERT HARNISH** **Applicant**

**-and-**

**ELIZABETH COLLEGE** **Respondent**

**Date of hearing: 29th March 2018**

**Judgment handed down: 5th June 2018**

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

**Counsel for the Applicant:** **Advocate J E Roland and Advocate S B Duerden**
**Counsel for the Respondent:** **Advocate M G A Dunster**

**Cases, Texts & Legislation referred to:**

The Statutes for the Government of Elizabeth College, Guernsey (1852)
The Employment Protection (Guernsey) Law, 1998
Parker, *A History of Elizabeth College Guernsey*
The Income Tax (Guernsey) Law, 1975
*Midland Resources Holding Limited v Prodefin Trading Limited* [2017] GLR 304
*Arnold v Britton* [2015] AC 1619
*Wood v Capita Insurance Services Ltd* [2017] AC 1173
*Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900
*States of Guernsey v Helyar* (unreported, 6 July 2001)
*Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896
The Employment Protection (Guernsey) (Amendment) Law, 2005
*Morton v Paint* (1996) 21.GLJ.61
*Les Banques Holdings Limited v Good* [2007-08] GLR Note 24 (24 June 2008)
*St Helier Parish v Manning* 1982 JJ 183

*CIN Properties Limited v Rawlins* [1995] 2 EGLR 130
*London Borough of Wandsworth v Ariwodo* (unreported, 21 December 1999)
Gray and Gray, *Civil rights, civil wrongs and quasi-public space* (1999) 4 EHRLR 46
*Anderson v United Kingdom* (Application No, 33689/96) [1998] EHRLR 218
*Cinnamond v British Airports Authority* [1980] 1 WLR 582
*State v Schmid* 423 A2d 615 (1980)
The Human Rights Act 1998
The Human Rights (Bailiwick of Guernsey) Law, 2000
*Porter v Commissioner of Police of the Metropolis* [1999] All ER (D) 1129
*R v East Berks HA, ex p Walsh* [1985] 1 QB 152

**Introduction**

1. By an Application dated 8 September 2017, the Reverend Dr Robert Harnish, the Applicant, who is a former teacher at Elizabeth College (and so, under the terms of the Statutes for the Government of Elizabeth College, Guernsey dating from 1852, as amended, strictly speaking a former Under Master), seeks orders that Elizabeth College (by which I understand him to mean formally the Board of Directors, which by virtue of Statute 27 has "*the general superintendence and management of the affairs of the College*") must comply with its obligations under clause 10.2 of a Compromise Agreement dated 5 April 2017 between the parties. Following representations from the Advocates for the parties, the Court directed that a preliminary issue could properly be tried relating to the interpretation to be placed on this particular sub-clause. At the conclusion of the hearing on 29 March 2018, I reserved judgment on that issue. This judgment sets out my reasons for finding that the Respondent's approach is the correct one, the consequences of which I will also explain.

**Background**

2. The Compromise Agreement was made pursuant to section 30A of the Employment Protection (Guernsey) Law, 1998, as amended, as a means of fully and finally settling what were listed in clause 11 as the "Specific Claims". The Applicant had been dismissed from his employment with the Respondent with effect from 12 January 2016 and had commenced proceedings for unfair dismissal by way of a complaint dated 7 April 2016. Clause 10.2 of that Compromise Agreement is one of the post-employment obligations of the parties. It provides:

> "*The Employer accepts and agrees that it will not prevent the Employee's ability to access the Employer's school premises and participate in any activities on such premises to the same extent and on the same terms as any other member of the public, including for the avoidance of doubt the Employee's ability to give individual fencing lessons for the Guernsey Fencing Academy if requested.*"

Within the Compromise Agreement, the Respondent is "the Employer" and the Applicant is "the Employee".

3. The evidence in support of the Application and the Respondent's evidence in opposition to the relief sought would have involved a significant number of individuals. However, because the primary relief sought by the Applicant is that there be compliance with clause 10.2, "*namely that [the Respondent] not prevent the Applicant's ability to access Elizabeth College's school premises and participate in any activities on such premises to the same extent and on the same terms as any other member of the public*", if, as the Respondent asserts, there is an entitlement to exclude a member of the public without having to explain the reason for doing so, there has been no breach of clause 10.2 by the Respondent informing

the Applicant that he is not entitled to enter upon any of the school premises. The fact that the Applicant has been informed, on a number of occasions and in a variety of ways, that he is not to enter the College's grounds is not in dispute and it is against that background that this self-contained legal issue has arisen for determination.

4. The principal evidence on this issue that has been placed before me is an Affidavit of Jeremy Bell-Connell sworn on 23 February 2018. The purpose of this Affidavit is explained by the deponent (at para. 2) as being to exhibit the fruits of the researches undertaken by the Applicant and his Advocates into "*the nature of the Respondent's nexus with the States of Guernsey*". It refers, in particular, to *A History of Elizabeth College Guernsey* by Bruce Parker, in which some uncertainty is expressed about the area of land originally granted for the establishment of the College and at whose expense the buildings were to be maintained, but it also exhibits the entries in the States of Guernsey Cadastre, which list Elizabeth College, c/o The Bursar as the owner of the main school buildings. Moreover, I do not understand that it is seriously contested on behalf of the Applicant that the Respondent is not the landowner and so entitled to act in that capacity. This Affidavit also exhibits extracts from the States of Guernsey's Accounts for 2016 as they were presented by the Policy & Resources Committee in Billet d'État No. XIII of 2017, which refer *inter alia* to the College benefiting from exempt status under section 40(k) of the Income Tax (Guernsey) Law, 1975, as amended, meaning that its income is not subject to tax, and also that a majority of the employees are members of the States of Guernsey Superannuation Scheme. Information is also exhibited relating to the way in which the States of Guernsey provides funding to the College (and how that might change) and how the College buildings and facilities are used for various community purposes, including being available for hire.

5. The Applicant himself swore a Third Affidavit on 13 February 2018. Although I have read this Affidavit, I do not consider that it sets out any material that assists me in determining the preliminary issue relating to the interpretation of clause 10.2 of the Compromise Agreement.

6. The Applicant was represented at the hearing by Advocate Roland, with the written submissions prepared by Advocate Duerden, who had also previously appeared. The Respondent has been represented throughout by Advocate Dunster. I am grateful to them for their helpful written and oral submissions.

**Contractual interpretation principles**

7. There is agreement between the Advocates about the approach this Court should take to the question of construction of the Compromise Agreement. In *Midland Resources Holding Limited v Prodefin Trading Limited* [2017] GLR 304, the Court of Appeal confirmed that the principles of construction set out by the higher courts in the United Kingdom are equally applicable in Guernsey (see para. 16). Two particular examples were cited in that judgment. The first was the summary given by Lord Neuberger PSC in para. 15 of *Arnold v Britton* [2015] AC 1619:

> "*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v)*

*commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*"

The second was the confirmation given by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 that *Arnold v Britton* had not involved any recalibration of what had previously been stated in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, with Lord Hodge JSC emphasising that the construction of a contract is a "*unitary exercise*" (para. 12):

> "*… once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*"

8. There is, therefore, no change in substance to the approach that had previously been taken by the Court of Appeal in *States of Guernsey v Helyar* (unreported, 6 July 2001), referring to *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896. The attraction of there being "*stability and continuity, particularly in contractual interpretation*" (see para. 15 in *Wood v Capita Insurance*) resonates as much in Guernsey as it did for the Supreme Court.

9. I also consider that the further guidance given by Lord Hodge at para. 13 in *Wood v Capita Insurance* is helpful:

> "*Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.*"

**The Compromise Agreement**

10. With those principles firmly in mind, I start with the background to the execution of the Compromise Agreement. Section 30A of the 1998 Law was inserted by section 11 of the Employment Protection (Guernsey) (Amendment) Law, 2005. A provision in an agreement that limits the operation of any provision of the 1998 Law or precludes a person from bringing proceedings under the Law before the Employment and Discrimination Tribunal is not void if the agreement to refrain from instituting or continuing any proceedings under the Law before

the Tribunal satisfies the provisions regulating compromise agreements (subsection (2)(d)). The conditions in subsection (3) are that the agreement is in writing, it relates to the particular proceedings, "*the employee has received advice from an independent adviser as to the terms and effect of the proposed agreement and in particular its effect on his ability to pursue his right before the Tribunal*" (para. (c)), the adviser is insured and the agreement identifies the adviser, and finally that "*the agreement states that the conditions regulating compromise agreements under this Law are satisfied*".

11. The Compromise Agreement includes, at Schedule 1, the Adviser's Certificate, signed by Advocate Roland. For the purposes of this judgment, I accept her submission that much of the Compromise Agreement is in standard form. The remedy available to the Applicant in respect of his complaint of unfair dismissal was a monetary award of six months' pay (see section 22 of the 1998 Law), which might also be reduced by the Tribunal if it considered it just and equitable to do so (see section 23). Had the complaint of unfair dismissal resulted in a Tribunal adjudication, there was no scope for it to have addressed anything other than this monetary award and costs. In particular, the Tribunal has no jurisdiction to make any order in relation to access to land or participation in activities thereon. That is the province of the Courts. Because it is open to the parties to a compromise agreement to resolve other matters that might otherwise be disputed between them, it follows that a compromise agreement is not confined to dealing with matters that can be resolved by the Tribunal. It is when this occurs that there might be something out of the ordinary included in a compromise agreement. The parties acknowledge that *inter alia* clause 10.2 is an example of something out of the ordinary.

12. Although the Compromise Agreement in this case is not as complex as the commercial agreements that occasionally fall to be construed by the Court, I regard it as a relevant factor that the Applicant had the benefit of legal advice. As para. 2 of Schedule 1 to the Compromise Agreement states, Advocate Roland confirmed that she had "*advised Robert Harnish … of the terms and the effect of the agreement between him and Elizabeth College to which this certificate is annexed*". It follows, therefore, that the Applicant was advised both about the standard terms and also anything out of the ordinary.

13. Looking at the wording of clause 10.2, the style of the opening words ("*The Employer accepts and agrees …*") is similar to the opening words of clause 10.1, which then provides that the Applicant is to be bound after his employment with the Respondent had ended by "*his express and implied duties relating to Confidential Information*". Each sub-clause is a promise by the respective party to be bound in the terms that follow in relation to matters that continue post-employment. However, clause 10.2 continues with a negative rather than a positive obligation ("*it will not prevent the Employee's ability to access the Employer's school premises…*"). This does not involve a positive obligation to grant the Applicant entry to the school premises on whatever terms follow. Instead, I read it as a promise not to put in his way barriers to entry and participation that could not be applied to a member of the public. As will become clearer shortly, there may be a potential distinction between entry as a member of the public and entry as a parent of a pupil at the school.

14. An express example of the ability being referred to in the general wording is covered by the final words of clause 10. 2 ("*including for the avoidance of doubt the Employee's ability to give individual fencing lessons for the Guernsey Fencing Academy if requested*"). I understand that there has been no such request made to the Applicant by the Guernsey Fencing Academy, with the consequence that these words are not currently directly engaged. However, as part of the iterative process and the obligation to construe the Compromise Agreement as a whole, I have noted the terms of the Agreed Announcement set out in Schedule 3 (and to which clause 7.3 refers):

"*Elizabeth College has become aware that Rob Harnish is still being adversely affected by rumours stemming from his departure last year. We would like to clarify that the circumstances surrounding Rob's leaving were not due to any unlawful activity or safeguarding matter or unsatisfactory performance on his part.*

*Finally, the College is grateful for Rob's considerable efforts in founding the Guernsey Fencing Academy and we are pleased that he has offered to assist in the Academy's future activities at Elizabeth College.*"

This Announcement does not go so far as to indicate that the Applicant will be playing any part in the Academy's future activities, but rather records the Applicant's offer to do so. When read in conjunction with the final element of clause 10.2, I consider that it is apparent that the Guernsey Fencing Academy regulates whether or not the Applicant will be requested to give individual fencing lessons. If there were to be such a request, there is a promise by the Respondent that there will be access to the school premises for that purpose. The Applicant would be an invitee of the Academy. Absent such a request, of which there has been no evidence led by him, the Applicant remains in the position described in the Announcement, in that his offer to assist has not been taken up by the Academy.

15. The construction to be given to clause 10.2 turns, therefore, on what is meant by access to the school premises and participation in any activities on those premises "*to the same extent and on the same terms as any other member of the public*". The approach taken by the parties has been to consider whether the Respondent is able to assert an absolute right in the same manner as a private landowner to exclude someone from its premises or whether the entitlement to exclude the Applicant from its premises must be for a valid reason. If it were the latter, then the Application would have to proceed to trial but, if the former, it was accepted by Advocate Roland on behalf of the Applicant that it would mean that there has been no breach of clause 10.2 of the Compromise Agreement and the Application would necessarily fall to be dismissed on that basis. This is because the obligation in clause 10.2 is couched as a negative, so that if it is permissible for the Respondent to exclude any member of the public without explaining its reasoning, the steps it has taken in relation to the Applicant do not breach clause 10.2.

**Exclusion from land and trespass**

16. The first thing I should mention is that neither Advocate has referred to any Guernsey decision that settles the question of the entitlement of the Respondent, or someone in its position, to exclude persons from its premises. However, it is common ground that a person who is on another person's land without permission is a trespasser and that the tortious remedies that are available, usually by reference to English law principles, apply. Accordingly, it was agreed by both Advocates that any bare licence to enter upon another person's land, whether that licence is express or implied, can be withdrawn or terminated, after which the person on that land becomes a trespasser, often with almost immediate effect. As a consequence, if the Applicant is regarded as being in no better position than enjoying such a bare licence, and there is no additional obligation on the part of the Respondent to have good reason to withdraw or terminate that licence, the Respondent has not acted unlawfully and the relief sought by the Applicant necessarily fails.

17. On behalf of the Applicant, Advocate Roland recognises that she is inviting the Court to develop the position beyond that which has been established in English law. In order to do so, she has urged upon me that I should first adopt the principle that reasonable access is required to quasi-public spaces as forming part of Guernsey law, and then conclude that the Respondent's premises from which the Applicant is being excluded are quasi-public in nature and so there is no right to exclude anyone without advancing some reason for doing so.

Advocate Dunster opposes those submissions on the basis that these arguments were considered by the English Court of Appeal and rejected, which he suggests forms a solid foundation on which to reject them in Guernsey and, further, that the English Court of Appeal has addressed the issue of whether there are any special access arrangements relating to school premises, and the principles confirmed in the case in question can be applied to the present situation.

18. In *Morton v Paint* (1996) 21.GLJ.61, the Court of Appeal noted (at page 51C) that it was common ground that "*in relation to the law of torts it has been customary for the Guernsey courts to adopt English common law as it has been developed by the English court*". In *Les Banques Holdings Limited v Good* [2007-08] GLR Note 24 (24 June 2008), the analysis of the position in relation to trespass to land proceeded on the basis, as in Jersey (see *St Helier Parish v Manning* 1982 JJ 183), that the common law of England and Wales would be looked at for the elements to found an action in trespass. I am, therefore, similarly minded to regard the position in England and Wales as indicative of the starting point in Guernsey law. In reaching that conclusion, I have been open to the argument that it would, in appropriate circumstances, be possible to displace any of those aspects of the tort should there be a stronger argument for doing so.

19. As the Applicant's Skeleton Argument accepts, the position in England and Wales remains as set out in *CIN Properties Limited v Rawlins* [1995] 2 EGLR 130. That case concerned the Swansgate Shopping Centre in Wellingborough, Northamptonshire. Following the making of a compulsory purchase order, a building agreement was entered into in which the form of the lease eventually to be granted as set out in a schedule to that agreement included a covenant to allow full pedestrian access to the common part of the demised premises from 7 am to 11 pm daily. Such a term was included in the lease subsequently granted to the appellant. The appellant became concerned at the behaviour of a group of young men who frequented the shopping centre, which was regarded as causing a nuisance. Letters were sent to them revoking any licence they might have had to enter the shopping centre. However, the men continued to attend the centre, so an action seeking declarations and injunctions was commenced by the appellant. Within the respondents' pleading, it was contended that "*they and all other members of the public have a right to enter the centre and use the walkways, whether for visiting the centre or passing through it.*" Consequently, they contended that the licence was not revocable on a personal basis and could only be withdrawn for good cause. The Recorder at first instance concluded that the men were "*not to be considered as bare licensees whose rights can be revoked at will*". After considering the strength of the developments in other jurisdictions, to which I will return shortly, the Court of Appeal reversed that conclusion, holding instead that, subject to any issue about race discrimination (which has no application in the present case), the appellant lessee of the shopping centre had the right to determine any licence the respondents may have had to enter the centre. Thus, in English law, there was consideration, and rejection, of the principle of reasonable access to quasi-public spaces.

20. Before turning to the cases in which that principle has been developed, I will mention the other English law case on which Advocate Dunster principally relies. This is *London Borough of Wandsworth v Ariwodo* (unreported, 21 December 1999), which concerned a dispute about a parent's access to the primary school at which her son had been a pupil at the time in question. The Headmaster of the school wrote to the appellant because he considered he had reason to complain about her behaviour. He referred to this being the second instance of verbal abuse of staff and the warning already issued to the appellant that there might be a ban from school premises if her poor behaviour were repeated. Such a ban was imposed by his letter. However, the appellant continued to attend at the school premises. Several months later, a solicitor's letter was sent to her. The judge at first instance accepted the submissions on behalf of the respondent council that the appellant was a licensee at will and so the council,

as landowner, could withdraw that licence at any time. The English Court of Appeal identified as one of the issues it needed to resolve whether the council had the same freedom as a private landowner to terminate such a licence and, if so, what the limits were on it to terminate the appellant's licence.

21. In the judgment delivered by Buxton LJ, it was first noted (at para. 35) that "*The best guide to the terms of a licence that has to be implied from conduct is, plainly, what that conduct has been, and what the licensor has tacitly agreed to.*" Given the developments in the approach within the education regime to collaborative engagement with parents, that judgment continues (at para. 36) "*we think it now puts it too restrictively to see the parents' licence on no higher level than that of the milkman or postman, or of any casual enquirer at a public building who has a licence only to enter to state his business.*" The Court then articulated the issue for resolution in para. 41: "*The question that has to be asked is whether the act or omission which is in question in the particular case, and the grounds upon which it is challenged, have a sufficient public law element to attract public law principles.*" It then drew a distinction between parents and mere visitors (at para. 44):

> "*... the local authority has an obligation in public law to educate their children, and the children are in the school not casually, or as a matter of grace on the part of the education authority, but in performance of the duties of the authority and of the parent that have already been referred to. The parent has a correlative interest in seeing the duties of the authority properly performed. That does not give him the right to interfere with how the professional educators undertake their work, but it does give an interest in being informed about their work, with the possibility of formal representations about it; and generally makes him a more significant figure in the public activities of the school than is a mere visiting tradesman.*"

On this general issue, the conclusion (at para. 45) was: "*we are of opinion that whilst a school may exclude a text-book seller or milkman from its premises without any inhibition in public law, the same is not the case with the exclusion of a parent.*" Having concluded that there was some public law element engaged, and found that there is a stronger underpinning in public law for a parent to be on school premises than the interests of any citizen to use a recreation ground, being the example used in that judgment, the court concluded that this meant the individual concerned had to be afforded an opportunity to make representations against the decision being reached.

22. The most detailed exposition on the principle of access to quasi-public spaces to which Advocate Roland has helpfully referred is an article by Gray and Gray, *Civil rights, civil wrongs and quasi-public space* (1999) 4 EHRLR 46. The article amounts to a strong criticism of the Court of Appeal's decision in the *CIN Properties* case (*supra*) and the missed opportunity to develop the law of trespass beyond the position of permitting arbitrary exclusion. The article further explains that there was an application made to the European Commission of Human Rights following the Court of Appeal's decision (*Anderson v United Kingdom* (Application No, 33689/96) [1998] EHRLR 218), but the complaint was declared inadmissible.

23. The authors explain the rationale for the decision reached by the Court of Appeal in the following terms (at page 52), which I consider helpfully analyses the foundations of the traditional approach in English law:

> "*For English property lawyers the outcome in CIN Properties Ltd v. Rawlins merely confirmed a doctrine, once widely accepted in the common law tradition, that the landowner enjoys an absolute prerogative to determine – no matter how arbitrarily, selectively or capriciously – who may enter or remain on his or her land.*

*Accordingly, as a general principle, the landowner has an uncontrolled discretion to exclude any person from trespassing on private property. It is generally believed that this rule of peremptory exclusion makes no distinction between the kinds of land to which it may relate. In its strict conventional form the common law rule is as readily applicable to the domestic home as to vast tracts of privately owned territory in the Australian outback and quite clearly embodies an absolutist, as distinct from relativist, view of the nature of property in land.*

*This "arbitrary exclusion rule" rooted historically in the medieval action for trespass quare clausum fregit, has doubtless served a noble purpose in times past. It enabled Coke C.J. to declare in Semayne's Case that "the house of every one is to him as his castle and fortress". This recognition long provided an important pillar of the law of civil liberty and created a vital defence for the citizen from the intrusion of the state. In Entick v. Carrington in 1765 Lord Camden C.J. observed that "[b]y the laws of England every invasion of land, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence."*

*From these beginnings has emerged the common law dogma that "[t]he right to exclude strangers is an ordinary incident of ownership of land". Thus Justice Ritchie was able to refer in the Supreme Court of Canada to "the long-standing right of a citizen … to the control and enjoyment of his own property, including the right to determine who shall and who shall not be permitted to invade it". Under a 19th century English doctrine, enunciated in Wood v. Leadbitter and slavishly followed in more recent times in the United States, permissions to enter land came to be seen as revocable at the will of the landowner without prior notice and without any explanation. No doctrine of reasonableness or natural justice controls the selective grant of access to land. In the absence of some overriding statutory or common law constraint, the landowner simply enjoys an unchallengeable discretion to withhold or withdraw permission to enter. Except in extraordinary circumstances of humanitarian necessity or of compelling need to prevent or prosecute serious crime or effect hot pursuit, no excuse, however worthy, can prevent the uncontested intrusion into private property from ranking as an actionable trespass.*"

24. Bearing in mind the cases to which the English Court of Appeal referred in the *CIN Properties* case, the Gray article then argues for such a modern retreat from this traditional trespass doctrine to be endorsed in English law (and Advocate Roland adopts these arguments in respect of Guernsey law). At page 55, they put it thus:

> "*Whilst the strict enforcement of traditional trespassory concepts may make perfect sense within, say, the domestic curtilage, there is growing support today for the position that arbitrary and potentially capricious powers of exclusion can no longer comprise an inevitable incident of property in all kinds of land and that the unqualified assertion of such powers may in practice derogate from fundamental principles of human freedom and dignity. It so happens that the contemporary marketplace of the shopping mall or civic commercial centre has come to provide a significant testing-ground for this proposition. Is the absolute exclusionary prerogative of common law ownership to prevail undiminished and unqualified even in relation to such premises?*"

25. In the *CIN Properties* case, Balcombe LJ noted that certain obligations to permit entry on to land arise from statutory duties (eg, *Cinnamond v British Airports Authority* [1980] 1 WLR 582) and so did not assist (and, because there has been no suggestion that the Applicant benefits from any statutory obligations to which the Respondent is subject, that line of authority has not relevance to the present case), before continuing (at page 134):

"*... of more obvious relevance are two north American cases. In Uston v Resorts International Inc (1982) NJ 445 A2d 370, the Supreme Court of New Jersey laid down as a general proposition that when property owners open their premises – in that case a gaming casino – to the general public in pursuit of their own property interests, they have no right to exclude people unreasonably but, on the contrary, have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises. However that decision was based upon a previous decision of the same court in State v Schmid (1980) NJ 423 A2d 615, which clearly turned upon the constitutional freedoms of the First Amendment. The general proposition cited above has no application in English law.*

*The case of Harrison v Carswell (1975) 62 DLR (3d) 68, in the Supreme Court of Canada, concerned the right of an employee of a tenant in a shopping centre to picket her employer in the centre, against the wishes of the owner of the centre. The majority of the Supreme Court held that she had no such right and that the owner of the centre had sufficient control or possession of the common areas to enable it to invoke the remedy of trespass. However Laskin CJC in a strong dissenting judgment held that since a shopping centre was freely accessible to the public, the public did not enter under a revocable licence subject only to the owner's whim. He said [at p74] that the case involved a search for an appropriate legal framework for new social facts and:*

> *"If it was necessary to categorize the legal situation which, in my view, arises upon the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what that embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of the members of the public, doing violence to neither and recognizing the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based.""*

26. Having conducted a detailed analysis of developments elsewhere, particularly in the United States of America, the Gray article offers a definition of quasi-public land, recognising that "*there may in effect be a spectrum of differing intensities of exclusory power extending from the purely private zone through a group of quasi-public premises towards a category of genuinely public property*" (see page 90). Accordingly:

> "*"Quasi-public" property is private property which has been made the subject of an open invitation to the public and which therefore becomes "private property having an essential public character".*"

In a sense, this approach reflects that taken in *State v Schmid* 423 A2d 615 (1980) in which it was held that, at a certain point on this sliding scale, "*the private property is sufficiently devoted to public use to impose constitutional obligations on the private entity, assuming that the proposed use is not significantly discordant with normal uses ... If the obligation attaches, a court should then examine the reasonableness of the property owner's regulations limiting access to the property.*"

27. Through applying such a test, the Gray article further notes that this reasonable access rule would not authorise members of the public to invade the property or privacy rights of an individual homeowner, or of a modest retail establishment, or an office, workplace or

adjoining parking area not normally open to the public. They continue (at the foot of page 92, but omitting any citation of the wealth of authority to which reference is made):

> "*There is equally no right to insist upon automatic access to a bank, a theatre, or a church (unless perhaps one is a parishioner). Predictably, the category of quasi-public places does not include a nuclear installation or such locations as archdiocesan offices, internal government offices, air traffic control towers, prison cells or judges' chambers.*
>
> *Conversely common law courts have had little hesitation in attributing quasi-public status to locations such as a community library, a university campus, a ski resort, a racecourse held on a trust for the public, a casino, a gasoline service station, and the privately owned environs of a baseball stadium, where it has been clear that such places were the subject of an open invitation to public use. Similarly a police station is a location where public policy requires that persons should have "unfettered access" for the purpose of lawful enquiry or business. Quasi-public quality also attaches to an airport, bus or railway terminal. In The Queen in Right of Canada v. Committee for the Commonwealth of Canada, for instance, the Supreme Court of Canada ruled that access could not be arbitrarily denied in respect of a government-owned airport terminal concourse. The Court took the view that an airport terminal bore the earmarks of a "public arena" and was "in many ways a thoroughfare" or "contemporary crossroads", or a "modern equivalent of the streets and by-ways of the past". Such property, being "quasi-fiduciary", was owned for the benefit of the citizen and could not therefore be closed off from reasonable public access.*
>
> *Whilst the degree of dedication to general public use thus ranks as a strongly decisive factor in attributing quasi-public status to land, additional criteria may, in certain cases, intensify the quasi-public aspect of the premises in question. Partly pursuant to the constitutional "state action" doctrine, American courts have been ready to acknowledge, for instance, that nominally private enterprises may "bear such a close relationship with governmental entities or public monies" that they become "affected with a public interest." In these circumstances the public entity can be said to have "so far insinuated itself into a position of interdependence with [the private enterprise] that it must be recognized as a joint participant" in the activity under challenge. In the result the private entity cannot be allowed, by disavowing the intrinsic component of "public interest" to act in an arbitrary or unreasonably discriminatory way towards the public in whose name this close nexus exists. In such circumstances civil freedoms cannot be violated on the supposition that the location of their attempted exercise is an exclusively private zone.*"

28. As the authors note in their conclusion (at page 102) advocating adopting a new approach, "*the legal developments described in this article represent the road not taken by the English Court of Appeal in CIN Properties Ltd v Rawlins. It remains to be seen whether the statutory accommodation of the ECHR will rectify this omission.*" Neither Advocate has pointed to any departure in England and Wales from the position established in the *CIN Properties* case. It seems, therefore, that the Human Rights Act 1998 has not had the impact that the authors may have envisaged. Equally, this rather implies that the Human Rights (Bailiwick of Guernsey) Law, 2000 does not afford any additional solution.

29. The English Court of Appeal has itself also had the opportunity to consider the approach articulated in the Gray article. This occurred in *Porter v Commissioner of Police of the Metropolis* [1999] All ER (D) 1129. That case involved a London Electricity Board showroom, from which the appellant, having attended to raise her concerns about matters relating to the connection of a supply at her new home, was asked to leave. When she

refused, the police attended, a struggle ensued and she was arrested for breach of the peace and removed. The issue for the Court of Appeal was not whether the police were acting in execution of their duty, but rather whether they were acting lawfully when they physically seized the appellant, when they were acting to assist the landowner exercise its right to eject her. In the judgment given by Judge LJ, the general position was described as follows:

> "*Permission to enter their premises is nowadays given by owners of shopping malls, shops and stores, showrooms and offices to the public as a whole, and they are usually at some pains to make their premises attractive and inviting to potential as well as actual customers. Nevertheless the owner of shop premises remains entitled to revoke the permission of any customer to enter or remain on the premises. When this right is exercised, and the customer has been requested to leave, his continued presence after a reasonable time amounts to trespass, and the owner of the shop is in his turn permitted to take reasonable steps to end the trespass by ejecting or arranging for the removal of the trespasser.*"

Having referred to the thesis espoused in what His Lordship described as "*an interesting article*", Judge LJ remarked that the argument had been "*decisively rejected*" in the *CIN Properties* case and then commented:

> "*Whether this area of the law is susceptible to significant modification by incremental development of the common law, or whether the relevant principles are now so well established that legislation would be required for the purpose, even in its fully developed form the thesis would have no application to this case. This showroom was provided for the convenience of customers who were invited there to do their business with the LEB. It was no different from any other shop or office to which the public has access, and no special licence to enter and remain was sought by the customers or given by the LEB, and none was created, or can be implied, from the relevant legislation.*"

**Discussion**

30. Both Advocates have accepted that construing clause 10.2 of the Compromise Agreement involves determining whether the Applicant can establish that the Respondent is not permitted to exclude him from its school premises without first having to give some reason. In effect, the general principles of construction to which I have referred lead to this narrow issue. If the Respondent is correct that it can exclude a member of the public, however arbitrary, selective or capricious such a decision may seem, it follows that the Application falls to be dismissed. If it cannot lawfully do that, it follows that the Application will have to proceed to trial so that consideration can be given as to whether the Respondent has a valid reason for excluding the Applicant. Further, Advocate Roland accepts that adopting the approach established in English law in the *CIN Properties* case *(supra)* would result in the so-called arbitrary exclusion rule applying in Guernsey law, subject only to consideration of whether any public law element is engaged requiring a rational explanation for the decision taken. In that respect, the Applicant aims to address the consequences of the *Ariwodo* case (*supra*) by distinguishing it on its facts. Advocate Roland suggests that the present Application has nothing to do with a parent's access to school premises during school hours, but instead relates to the position of the way the premises are operated outside of school hours and the basis on which members of the public are admitted for non-school-related activities.

31. Whilst I appreciate that this Court is not bound to adopt the same approach as has been taken in English law, in my judgment, it is appropriate to do so here. Moreover, even if, contrary to that view, I had been minded to adopt a more liberal approach and endorse the arguments

developed in the Gray article, I would not have been minded to find that the Elizabeth College premises amount to a quasi-public space for these purposes.

32. The primary reason for reaching my conclusion is that the Court of Appeal in ***Morton v Paint*** (*supra*) endorsed an approach to the law of torts in this jurisdiction that pays regard to developments in the common law in England and Wales. Given the passage of time since the ***CIN Properties*** and ***Porter*** cases, and the coming into force in the United Kingdom of the Human Rights Act 1998, I consider that there has been ample opportunity for the effect of those decisions to have been re-visited and, if appropriate, developed in such a way that the doctrine of reasonable access to quasi-public space operating in other common law jurisdictions would by now have been recognised in English common law if it were appropriate for the common law to be developed in that way. The fact that this has not happened in the last 15 to 20 years in a jurisdiction where there are, for example, large shopping centres that have the hallmarks of areas equivalent to streets rather suggests that there is still good reason why English law remains as it is. As a result, although it would be possible for Guernsey to adopt a different approach, I am not persuaded that this is the case in which to develop the common law position in such a way that it diverges from the English law position. To do so would, in my view, run contrary to the position endorsed by the Court of Appeal.

33. The foundation of the new approach that is explained in detail in the Gray article includes cases that formed part of the argument before the English Court of Appeal in the ***CIN Properties*** case. The Court of Appeal, therefore, did not reach its decision without the benefit of considering the type of approach that the article's authors then urge. Indeed, the very same arguments that have been advanced by Advocate Roland on this preliminary issue have been raised before the English Court of Appeal and rejected in the ***Porter*** case. I regard that decision as being significant because it means that I am not being invited to consider those arguments as if they were being made for the first time.

34. I am also not persuaded that there is any public law element in the present case to which the position set out in the ***Ariwodo*** case could attach. The basis on which the Applicant claims to be entitled to attend on the Respondent's school premises is put no higher in clause 10.2 of the Compromise Agreement than that of "*any other member of the public*". That description resonates with the arguments of the respondents in the ***CIN Properties*** case, to which I have previously referred. As Advocate Roland acknowledged, clause 10.2 appears in a private law arrangement between the parties, and there is no veneer of public law just because, in some instances, the Respondent would inevitably be regarded as a public authority, eg, for the purposes of the Human Rights (Bailiwick of Guernsey) Law, 2000 and its decisions potentially amenable to review by the Court. (At the end of para. 42 of the ***Ariwodo*** case, referring to ***R v East Berks HA, ex p Walsh*** [1985] 1 QB 152, it was confirmed that, "*in the case of employment by a public body, that legal status of the employer does not per se inject any element of public law*" and I consider that the same principle is applicable to the relationship of the parties when the Applicant was employed, which also translates into the position post-employment under the terms of the Compromise Agreement.) Accordingly, the Applicant should not, in my view, be afforded any status as a "*privileged visitor*" (although if there were evidence that he had been requested to give individual fencing lessons for the Guernsey Fencing Academy, subject to deciding what the consequence of using "*including*" in clause 10.2 is, I think it would be arguable that he could be viewed differently). The parent of a pupil may be such a "*privileged visitor*", leading to public law considerations extending to the need to afford an opportunity to make representations being engaged, but that is not the position in which the Applicant finds himself. Although it is not an entirely accurate description, for the purposes of being entitled to revoke the licence that the Applicant otherwise had to enter the Respondent's premises, he can be treated in the same fashion as a

textbook seller or milkman. In other words, his licence was revocable without notice and without the need for any explanation.

35. In saying this, I am conscious that Advocate Roland has suggested that the Respondent has executed the Compromise Agreement without intending to give effect to clause 10.2. Putting to one side whether this amounts to an allegation of bad faith, I do not think that the position is as Advocate Roland suggests it is. As I have indicated, I do not find that the Respondent has breached clause 10.2 because the Respondent can exclude any "ordinary" member of the public without having to give any reason. In effect, my conclusion means that the Applicant appears to have made a bad bargain. From the way his case has been put, I suspect that he thought he was extracting a promise from the Respondent to his advantage, whereas I have found, subject to the qualification to which I have referred about what the final words of the sub-clause mean (and which I do not have to resolve on this Application), that the way to construe that promise means that it can be no more advantageous than exists as a matter of common law principle in Guernsey about what a landowner (or possessor) can do in respect of someone whose licence to enter is terminated. However, his subjective intention when making the bargain is not a factor that gets taken into account when interpreting the Compromise Agreement.

36. Even if I am wrong to conclude that the correct approach is to follow English common law relating to the access to land of others which members of the public generally enjoy, I would not have found that the Respondent's school premises are quasi-public spaces for the purposes of the test given in the Gray article. Elizabeth College cannot, in my view, be equated to a gaming casino (as in the ***Uston*** case) or to a shopping centre, where the privately-owned areas, eg, the thoroughfares over which members of the public pass to reach the shops and other amenities within the centre, can be treated almost as if they were roads in a town, or to any of the other examples offered. Its primary use is as an educational establishment. It is not, therefore, a location to which those responsible for it have given an "*open invitation to the public*". There is, for instance, no entitlement at any time of the day for a member of the public to pass from one side of the main school site to the other as a means of avoiding having to walk around the perimeter. As Advocate Roland accepted during argument, if the Respondent decided to shut the gates and only permit through them those to whom it wished to afford access, it would be entitled to adopt such a stance. This is tantamount to acknowledging that the Respondent has the same rights in respect of its land as does the owner of a private residence. That is the legal position, although what reaction it would provoke from those having business on the site, and more widely how the community would then perceive the stance being taken by the Respondent, are different issues about which I do not need to form any view to resolve this preliminary issue. In relation to the sliding scale that appears to operate elsewhere, I would, if I had to, conclude that the Respondent's premises are not sufficiently far along it to demonstrate that its private property is generally sufficiently devoted to public use to convert it into a quasi-public space.

37. I have also considered the way in which the Applicant highlights, principally through the Affidavit of Mr Bell-Connell, the way in which the Respondent is funded and the manner in which it affords access to its premises by way of assistance to the community. In relation to funding, the evidence shows that the States of Guernsey have been paying a little over £2 million per annum to the Respondent, part of which is the general, or "block", grant, and the larger part of which relates to the fees payable in respect of those pupils who have been awarded special places through the 11-plus examinations. The total income of the Respondent, as shown in the States of Guernsey Accounts, is in excess of £6 million annually. Accordingly, the percentage contribution of funding by the States is well below 40%. I am not, therefore, persuaded that there is such a close funding link that the Respondent can properly be characterised as a "*publicly funded private actor*" in the manner suggested by the thesis in the Gray article. The examples given of when people have access to the

Respondent's premises indicates that, on many occasions, they result from the Respondent entering into commercial arrangements under which external bodies rent space for time-limited periods when that is compatible with the operation of a school. On other occasions, because the College grounds are a convenient space in Town, the Respondent permits access to its premises as part of its desire to assist the community. In my view, none of this results in the Respondent's premises becoming quasi-public spaces in the same manner as would be the case if it opened its doors generally like a shopping centre does and the other examples given seemingly do. Any invitations extended appear to me to be more specific rather than of such a similarly general nature. Accordingly, I am satisfied that it is appropriate to regard the Respondent's entitlement to regulate access to, and activities on, its premises as if it were treated in the same way as a private body.

**Conclusion**

38. For the reasons I have given, I find that it was permissible for the Respondent to revoke any licence that the Applicant might otherwise have had to access its premises and participate in activities in any of those locations. (The only qualification I have mentioned is what the position would be if the Guernsey Fencing Academy were to request the Applicant to give individual fencing lessons for it, but that aspect does not arise on this preliminary issue, so my conclusion is of general application as between the parties.) This is because the Respondent is entitled, as a matter of domestic law, to revoke that licence without notice and without offering any explanation. Such a decision could be reached in relation to any member of the public, so the Respondent has not prevented the Applicant from accessing the school premises in any manner differently to how it could choose to treat someone else. The consequence is that the Application is dismissed.

39. On behalf of the Respondent, Advocate Dunster also seeks the type of injunctive relief against the Applicant that has been raised by way of cross-application. I do not consider that it is appropriate for me, on the basis of this ruling on the preliminary issue, to grant that relief. There has been no suggestion that the Applicant has sought to gain entry on to the Respondent's premises once he made his Application. He has, therefore, as I understand was the position between his dismissal and the Compromise Agreement, respected his exclusion for those periods. In my view, both parties now have the benefit of this judgment, meaning that, were the Applicant to trespass on the Respondent's premises, once he has been given a reasonable opportunity to leave, he can then be ejected. Such a trespass would lay the foundation for the Respondent seeking injunctive relief. In my opinion, the Applicant should now be given the opportunity to respect the decision made against him rather than find himself subject to an injunction and all the consequences of such an order. In short, I take the view that the terms of this judgment should suffice and that it is currently unnecessary to enforce its terms with the type of order sought, so I will not exercise the Court’s discretion to make such an order at this time.

40. Given the outcome, I invite the parties to agree the appropriate costs order, which I imagine will follow the event. However, if there is no agreement, any costs application can be pursued by listing the matter before the Interlocutory Court.