Representation application

[2019]GRC004

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between: **ROY SMITH** **Plaintiff**

and

CAREY OLSEN **Defendant**

Before: Sir Richard Collas, Bailiff

Hearing date: 17th December 2018

Judgment handed down: 6th February 2019

The Plaintiff represented himself assisted by Mr Howard Young (acting as the Plaintiff's McKenzie Friend)

Counsel for the Defendant: Advocate K M Le Cras

H M Procureur, M M E Pullum QC and the Bâtonnier, Advocate S Brehaut made submissions at the invitation of the Court

Cases, Texts and Materials referred to in Judgment:

The Royal Court (Adoption) (Guernsey and Alderney) Rules, 2006
The Magistrate's Court (Guernsey) Law, 2008, section 42(1)
Loi Ayant Rapport À L'Institution D'Un Magistrate en Police Correctionelle et pour le Recouvrement de Menues Dettes, 1925
The Legal Aid (Bailiwick of Guernsey) Law, 2003
The Law Officers of the Crown v Giroult [22.GLJ.28]
The Fishery Limits Act 1976 (Guernsey) Order 1989
Bar Ordinances
Ladbrokes PLC v Galaxy International Limited (Royal Court, unreported, 10 November 2007)
Delaney v Hunt (Court of the Seneschal, unreported, 19 September 2013)
The Legal Services Act, 2007
Practice Note (McKenzie Friends: Civil and Family Courts) [2010] 1 WLR 1881
Law Reform (Miscellaneous Provisions) (Scotland) Act 1990
Taylor Clark Leisure PLC v Commissioners for HM Revenue and Customs 2015 S.C. 595

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Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd 2011 S.C. 115
The Guernsey Bar (Bailiwick of Guernsey) Law, 2007
Terrien (1574 edition) Chapter VI of Book IX, page 350
Approbation des Lois, 1582
Remarques et Animadversions, sur L'Approbation des Lois et Coustumier de Normandie, Thomas Le Marchant
Ordonnance of 30 September 1588 at Tome 1 Recueil D'Ordonnances page 55
Morton v Paint [21.GLJ.61]
C (a minor) v DPP [1996] 1 AC 1 HL(E)
D (A Child) [2005] EWCA Civ 347
In the matter of Provident Investment Funds PCC Limited and Providence Investment Management International Limited (Royal Court, unreported, judgment 44/2017, 4 October 2017)

Introduction

1. By an Application dated 29 October 2018 ("the Representation Application"), Mr Smith ("the Plaintiff") has applied for the following Order:

> *"That in relation to the Defendant's application for Summary Judgment listed for hearing on 19 November 2018 that he be entitled, for the reasons set out in the attached witness statements, for the advocacy to be conducted by either:*
>
> *a. His McKenzie Friend, Mr Howard Young*
> *b. Mr Christopher Snell of New Square Chambers, London."*

Background

2. The Plaintiff was the tenant of L'Atlantique Hotel until he was evicted from the premises following a fire in 2012. Since that time he has been involved in extensive litigation resulting from the fire, the eviction and subsequent events. For the purposes of the present judgment, it is sufficient to say that in the substantive proceedings to which the Representation Application relates, the Plaintiff claims damages which he has quantified as a sum in the range £1,982,328.20 to £5,067,888.20 from Carey Olsen ("the Defendant") who were acting for him in proceedings involving the hotel premises at the time of the fire. The claim alleges that the Defendant negligently and/or in breach of contract failed to advise the Plaintiff on the options available to him at the time to avoid being evicted from the premises.

3. The Plaintiff's substantive claim is pleaded in a Re-Amended Cause dated 16 March 2018 in response to which, on 23 March 2018, the Defendant filed comprehensive defences which included an Exception de Fond alleging that the claim is time-barred by operation of the limitation of liability provisions contained in the Defendant's Terms of Business which set out the contractual terms governing the relationship between the parties.

4. On 24th July, 2018, the Defendant issued an Application for (i) an Order that the Exception de Fond be heard and determined as a preliminary issue; (ii) Summary Judgment against the Plaintiff pursuant to Rule 19 of the Royal Court Civil Rules, 2007 and (iii) costs.

5. On 5 September 2018, the Plaintiff filed a Replique denying that the claim is time barred, for the reasons set out in the Replique.

6. The Royal Court (McMahon DB) ordered that the Summary Judgment Application be heard first and that, subject to the outcome of that hearing, the Exception de Fond be heard as a preliminary issue prior to the substantive hearing of the claim.

7. The Summary Judgment Application was listed for hearing before me on 19 November but, prior to then, the Plaintiff issued the Representation Application. I gave directions for the filing of skeleton arguments and directed that HM Procureur and the Bâtonnier be advised of the Representation Application and invited to intervene if they so wished.

8. I directed that they be advised of the Representation Application because I was not aware of any instance in which an English barrister not qualified at the Guernsey Bar had been given rights of audience in a Bailiwick Court, although the Royal Court has on many occasions permitted a litigant in person to be supported by a McKenzie Friend on the same terms as such a person would be permitted to support a litigant in the Courts of England and Wales.

The Hearing of the Representation Application

9. At the hearing I had before me two witness statements from the Plaintiff, dated 29 October and 3 December 2018, two witness statements from the prospective McKenzie Friend, Howard Gillespie Young (Mr Young") also dated 29 October and 3 December 2018 and an Affidavit by the Plaintiff sworn on 24 September in response to the Summary Judgment Application. Advocate Dunster, the partner of the Defendant firm who was acting for the Plaintiff at the time of the fire, swore an affidavit on 5 September in support of the Summary Judgment Application exhibiting a large number of documents including many items of correspondence. The Bâtonnier lodged an affidavit supporting her submissions in connection with the Representation Application. There was no oral evidence.

10. I had the benefit of written submissions in response to the Representation Application from the Defendant, from HM Procureur and from the Bâtonnier.

11. At the hearing, Advocate Karen Le Cras appeared for the Defendant. HM Procureur, Megan Pullum QC, appeared in person as did Advocate Sarah Brehaut, the Bâtonnier. The Plaintiff was unrepresented but was supported by Mr Young as his McKenzie Friend who did not on this occasion seek to address the Court in person but confined himself to the more conventional role of a McKenzie Friend supporting the litigant in person, advising him on the submissions from the Advocates and questions from the Court and advising him how he might respond thereto. That is a role Mr Young has fulfilled on a number of occasions on behalf of the Plaintiff in a number of hearings in the Royal Court and the Guernsey Court of Appeal to which I refer below.

The Plaintiff's Reasons for Making the Representation Application

12. The Plaintiff's reasons for seeking an Order of the Royal Court to appoint someone to conduct the advocacy on his behalf are set out in the witness statements filed in support of it. He submitted there were exceptional circumstances that justified such an order which he summarised at paragraph 14 of his second witness statement:

> *"14. I ask the Court to find that exceptional circumstances exist here. The reasons for that are as follows:*
>
> *i. It is simply not the case that I am deliberately choosing not to instruct a firm of Advocates on the island and seeking to bypass the Guernsey Bar in favour of my preference to have either a UK Barrister or Mr Young advocating on my behalf. As the Court will see, the vast majority of the firms have been excluded either by virtue of previous involvement with me or because this is not their area of expertise.*
>
> *ii. From a financial perspective, I have also been significantly hampered. It cannot be said that I am someone who has failed in the past to use what is*

available at the Guernsey Bar because I have instructed the majority of the larger firms on the island and have paid their fees. That is a further example of me not trying to bypass or opt out of the normal legal system. Even if there were an Advocate available for me to instruct, the cost of so doing is prohibitive for me; and again, I stress that it is through no fault of my own and is best demonstrated by the amount of fees that I have paid in the relatively recent past.

iii. *I did take the steps to try and instruct [an] Advocate upon the direct advice of Mr Young. I can only report that which I was told and that it would be difficult to find one Advocate to go against another Advocate, particularly on a complex and high value case like this which would inevitably carry publicity. I do not know if there is an "unwritten rule" to that effect and I do not ask the Court to find that there is but that is what I was told.*

iv. *This is a hugely important case for me and my only significant chance of recovering financial redress for what has happened to me. If the Defendant's application is successful, that is the end of my case and at present, I would be advocating against Advocate Le Cras who is one of the foremost Advocates on the island. That does not put me on an equal footing with the Defendant.*

v. *It is suggested that I am an articulate litigant in person. I accept that over the years I have become better able to understand the Court process but that is only against the background of Mr Young being able to explain it to me before and after Court. I find the live Court proceedings particularly difficult to follow, to understand what I am being asked and then how to formulate my reply. I agree with what Mr Young says in his statement to the effect that very often, he has suggested a formula of words to me and whilst I have thought that I have understood what he is assisting me with, I have then said something completely different to the Court. There have been a number of occasions where the Court has had to pause and ask for something to be repeated because my answer simply did not reflect the question which I had been asked. I fully accept that the Judges on the Island do what they can to assist litigants in person from my own personal experience but that does not necessarily mean that I am able to put forward my case on an equal footing with the skill that someone else could. I highlight that the documents that I submit to the court are ones that Mr Young has to explain in great deal to me, help me draft, go over any revisions and amendments and are simply not documents that I could create from fresh because I do not have the understanding and I do not have the expertise."*

The Response to those Circumstances

13. Advocates Le Cras and Brehaut both challenged the facts relied upon by the Plaintiff. In respect of sub-paragraph i, the conflict issue, they recognised that whilst a number of firms of Advocates were undeniably conflicted, there were other firms the Plaintiff had not mentioned who would be competent to conduct the matter on his behalf in that it is within the range of matters those firms deal with on a regular basis. On the second issue of his financial resources, they observed that the Plaintiff had declined an offer from the Bâtonnier to assist him in finding an Advocate, which is something that she and her predecessors have done on many previous occasions for other litigants. They were unable to say whether the Plaintiff would be eligible for legal aid if he were to apply.

14. In the Plaintiff's second witness statement, he reported a conversation over lunch with an unnamed Advocate from Trinity Chambers who had told him he would struggle to find an Advocate who was prepared to act against another Advocate as that would be in breach of an unwritten rule of the Bar. Mr Young reported the same conversation in his second witness statement. Advocates Le Cras and Brehaut both denied that there is such an unwritten rule. I can take judicial notice of the fact that proceedings are issued against Advocates and their firms from time to time, with another member of the Guernsey Bar acting for the claimants in those actions. My own experience when an Advocate at the Guernsey Bar in private practice for over twenty years prior to my appointment as Deputy Bailiff is that I was involved in litigation against Advocates, both as an Advocate acting either for the plaintiff or the defendant and also on occasion where my firm and/or I were the defendants in such claims. I am therefore able to refute unreservedly the suggestion that there is an unwritten rule that one Advocate will not act in proceedings against another Advocate. I am not saying that the Plaintiff has misstated what he was told; I merely say that it is factually wrong.

15. The importance of the proceedings asserted by the Plaintiff in paragraph iv is not disputed. However that, by itself, cannot amount to an exceptional circumstance justifying the Order requested.

16. In relation to his ability to conduct litigation on his own behalf, it was noted that there have been a number of court hearings in which the Plaintiff has appeared without an Advocate and has been able to conduct the case competently with the assistance of Mr Young as his McKenzie Friend. That has occurred both in the Royal Court and in the Guernsey Court of Appeal and has included occasions when, exceptionally, the court has invited Mr Young to address the court directly in order to deal, for example, with a submission on the law that the Plaintiff was struggling to present himself.

17. In short, the Defendant's submission was that even if the Court had the jurisdiction to extend rights of audience to a non-Guernsey qualified lawyer in exceptional circumstances, the Plaintiff had failed to establish that the circumstances of this case are exceptional.

The Law – Rights of Audience

18. I will consider first the question of whether the Royal Court has inherent jurisdiction to grant a right of audience to a person who is not a member of the Guernsey Bar. I will then turn to the matter of appointment of a McKenzie Friend.

19. It is common ground that there is no statutory power to grant rights of audience to someone who has not been admitted by the Royal Court as a member of the Guernsey Bar, save for certain limited exceptions, none of which apply in the present case. The exceptions cited to me include The Royal Court (Adoption) (Guernsey and Alderney) Rules, 2006 made pursuant to section 10 of the Adoption (Guernsey) Law, 1960, Rule 31:

> *"**31**. Where the Department is a respondent to an application for an adoption order, it may appear and be heard at proceedings under the Law by any member or servant of the Department authorised in that behalf."*

[References to the "Department" should now be read as referring to the Committee *for* Health and Social Care.]

20. The Magistrate's Court (Guernsey) Law, 2008, section 42(1) states:

> *"**42.** (1) For the avoidance of doubt, and without prejudice to the provisions of any rules under section 35 –*

(a) an officer of a States department authorised in that behalf by the Chief Officer of the department may represent the States in proceedings in the Magistrate's Court, and

(b) a person appointed to the Office of the Children's Convenor established by section 30 of the Children (Guernsey and Alderney) Law, 2008 or Deputy Children's Convenor may represent the Office in proceedings in the Magistrate's Court."

21. Both of those examples are very limited in terms of who is permitted to represent the body concerned. They do not permit a non-Guernsey qualified lawyer who is not an office holder in the department or the Office of the Children's Convenor to represent the department or Office in Court. In effect, they are little different from the position of an incorporated or unincorporated body which may be represented by a member, director or duly appointed employee of the body.

22. HM Procureur referred to Police officers who have been permitted to prosecute cases in the Magistrate's Court. They include some non-Guernsey qualified lawyers appointed as Special Constables. It is correct that Police officers prosecute cases in the Magistrate's Court. They have always done so. One of the reasons for establishing the Magistrate's Court was, in part, to enable them to do so and thereby to relieve HM Procureur of the necessity of attending to such cases (the resources and manpower of the Law Officer's Chambers were much more limited than they are now). Another reason was to reduce the workload of the Royal Court. That is clear from the Petition of the States seeking approval for the Projet de Loi entitled "Loi Ayant Rapport À L'Institution D'Un Magistrate en Police Correctionelle et pour le Recouvrement de Menues Dettes" which led to the establishment of a Magistrate's Court in 1925. It has always been the position that cases in the Magistrate's Court could be prosecuted by Police officers who were not qualified Advocates. Indeed the common name for the Magistrate's Court used to be the Police Court. It is only in recent times that the majority of prosecutions have been brought by qualified lawyers. Whilst they have prosecuted in the Magistrate's Court, police officers have never prosecuted in the Royal Court.

23. Another Order in Council that was not cited to me is The Legal Aid (Bailiwick of Guernsey) Law, 2003. Section 19 includes an Ordinance making power that would enable an "authorised lawyer", who is not a Guernsey Advocate to represent a legally aided person in a Guernsey Court. Such an Ordinance would only take effect if approved by Order of the Royal Court. The Section has not been brought into force and the power has not been exercised.

24. That may not be an exhaustive list of all the instances where someone who is not a Guernsey Advocate may appear in a Guernsey Court to represent someone other than himself. Each of those instances was established by Order in Council or pursuant to a power derived from an Order in Council. I explain later in this judgment why I regard that as significant.

25. I was referred to a number of previous decisions in which courts in this Bailiwick have considered whether to grant rights of audience to a lawyer qualified in another jurisdiction but not as a Guernsey Advocate. On each occasion, the court concerned declined to permit a lawyer qualified in a jurisdiction other than Guernsey to address the court.

26. The Law Officers of the Crown v Giroult [22.GLJ.28] concerned a French fisherman who appeared in the Guernsey Magistrate's Court, in November 1996, charged with offences of fishing illegally within British Fishery Limits and with failure to comply with a British Sea Fishery officer contrary to provisions of the Fishery Limits Act 1976, as extended to the Bailiwick of Guernsey by the Fishery Limits Act 1976 (Guernsey) Order 1989. He was

represented by Advocate Jason Morgan who applied to the presiding Magistrate, JACW Gillett Esq, to permit a member of the French Bar to address the court. Advocate Morgan made a number of submissions including the right to legal representation as a fundamental human right (the case predated the enactment of domestic human rights legislation in Guernsey). He referred to a European Communities Directive which provides that a 'foreign' lawyer could address a court in conjunction with a lawyer who was entitled to appear in the jurisdiction. He said it was relevant that the legislation under which the defendant had been charged was an English Act of Parliament extended to Guernsey, the alleged offence was committed in British waters and the French lawyer was entitled to appear in a United Kingdom Court.

27. In his judgment, Mr Gillett held that the European Communities Directive had no effect in Guernsey. He recognised the human rights issue but accepted the submission of HM Procureur (ACK Day, QC) that it was the prerogative of each court to determine which persons may provide legal representation in it. He held that the relevant legislation in Guernsey is contained in the Bar Ordinances 1932 to 1996 which were binding on the Magistrate's Court. In the absence of any legislation conferring rights of audience on any other lawyers, he rejected the application for the lawyer to address the Court.

28. In Ladbrokes PLC v Galaxy International Limited (Royal Court, unreported, 10 November 2007), Lieutenant Bailiff Southwell QC was dealing with a different issue. Nevertheless, his judgment is probably the leading decision on the question of the extent to which external lawyers should be involved in Guernsey proceedings. It concerned a taxation hearing in which a claim had been submitted for recovery of the costs of external lawyers. He drew a distinction between the costs of an external lawyer giving expert evidence and an external lawyer assisting in the conduct of the Guernsey proceedings. At paragraphs 17 to 19 he held:

> *"17. The starting point must be with the public interest of Guernsey. In considering the public interest I have been assisted by and am grateful for the submissions of Mr Richardson and Mr Wessels, and also brief written submissions of the Batonnier, Advocate N J M Tostevin, on behalf of the Guernsey Bar Council.*
>
> *18. The Guernsey public interest lies, in my judgment, in the existence of a well-qualified, trained and experienced body of Advocates, capable themselves of handling the great majority of legal proceedings, both civil and criminal, effectively, efficiently, in a reasonable time and at a reasonable cost. The existence of such a body of Advocates is essential to all who live in Guernsey, or engage in business and other activities in Guernsey, or use Guernsey for the purposes of trusts, investments, insurances and the like. Such persons are entitled to expect that when legal assistance is needed such Advocates will be available in Guernsey to give this assistance. They are also entitled to expect that, if they are ordered to pay costs incurred in proceedings in Guernsey, such cost will not be unduly or unreasonably increased by costs relating to the use of external lawyers as well as Guernsey Advocates and their employees.*
>
> *19. In the majority of cases, both civil and criminal, the use of external lawyers will be unnecessary, and should not be allowed on taxation. The public interest lies, as indicated above, in developing, training and maintaining sufficient expertise among Guernsey Advocates to deal with the majority of cases. This is a point of no little importance. In a small jurisdiction such as Guernsey it would be easy for it to become customary to sub-contract the preparation of cases to external lawyers whether in England or elsewhere. If that were to happen it would weaken the Guernsey profession and damage the public interest which I have defined. The actual advocacy in the Courts of Guernsey could not be sub-contracted, since only*

Guernsey Advocates have the rights of audience in the Guernsey Courts. In my judgment it is vital that rights of audience remain only with Guernsey advocates. To extend rights of audience to external lawyers would be likely greatly to weaken the Guernsey profession, causing considerable damage to the public interest."

29. A later case, Delaney v Hunt, was heard by Lieutenant Seneschal Patrick Talbot QC in the Court of the Seneschal, Sark, in September 2013. In an unreported judgment dated 19 September 2013, Talbot LS considered an application by the plaintiff to withdraw proceedings in defamation issued by him and also the issue of costs in the action. After citing a passage from Southwell LB's judgment, he said (at paragraph 34):

    "34. Although, as the Defendant showed me, in the past there have apparently been a few occasions when lawyers from other jurisdictions, including England, may have been permitted to address this Court on behalf of a party to a criminal or civil case, I doubt whether modern practice in this Court supports such a thing happening today. For the reasons given by Southwell LB in ***Ladbroke*** *in the part of paragraphs 19 and 20 of his judgment highlighted by me above, and for the reasons mentioned by me in the previous paragraph, I am strongly of the view that the public interest of Sark makes it vital that only Guernsey Advocates should be entitled to exercise a right of audience before this Court."*

30. In England and Wales, the Legal Services Act, 2007 proscribes who may conduct a "reserved legal activity" which is defined as including the exercise of a right of audience and the conduct of litigation (section 12(1)). Such an activity may be carried on only by a person who is either authorised to do so or exempt in relation to that activity (section 13). Section 14 provides that it is an offence for any other person to carry on such activities.

31. Practice Note (McKenzie Friends: Civil and Family Courts) [2010] 1 WLR 1881 ("the Practice Note") issued by Lord Neuberger of Abbotsbury MR and Sir Nicholas Wall P provides detailed guidance on the role of a McKenzie Friend to assist a litigant in person. To date, the Courts in Guernsey have had regard to the provisions of the Practice Note even though it is not binding on us. Paragraphs 2, 3 and 4 are helpful in setting out the general position:

    "The right to reasonable assistance

    2. Litigants have the right to have reasonable assistance from a lay person, sometimes called a McKenzie friend ("MF"). Litigants assisted by MFs remain litigants in person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation.

    What McKenzie friends may do

    3. MFs may: (i) provide oral support for litigants; (ii) take notes; (iii) help with case papers; (iii) quietly give advice on any aspect of the conduct of the case.

    What McKenzie friends may not do

    4. MFs may not: (i) act as the litigant's agent in relation to the proceedings; (ii) manage litigants' cases outside court, for example by signing court documents; or (iii) address the court, make oral submissions or examine witnesses."

32. Paragraphs 5 to 17, headed *"Exercising the right to reasonable assistance"*, are also helpful but there is no need to quote them in full in this judgment. Paragraphs 18 to 26 explain the *"Rights of audience and rights to conduct litigation".*

"Rights of audience and rights to conduct litigation

18. *MFs do not have a right of audience or a right to conduct litigation. It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or, in the case of an otherwise unqualified or unauthorised individual (ie, a lay individual including a MF), the court grants such rights on a case-by-case basis: Legal Services Act 2007, sections 12-19 and Schedule 3.*

19. *Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.*

20. *Any application for a right of audience or a right to conduct litigation to be granted to any lay person should therefore be considered very carefully.* ***The court should only be prepared to grant such rights where there is good reason to do so taking into account all the circumstances of the case, which are likely to vary greatly.*** (Emphasis added.) *Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.*

21. *Examples of the type of special circumstances which have been held to justify the grant of a right of audience to a lay person, including a MF, are: (i) that person is a close relative of the litigant; (ii) health problems preclude the litigant from addressing the court, or conduct in litigation, and the litigant cannot afford to pay for a qualified legal representative; (iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings.*

22. *It is for the litigant to persuade the court that the circumstances of the case are such that it is in the interests of justice for the court to grant a lay person a right of audience or a right to conduct litigation.*

23. *The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional MFs or who seek to exercise such rights on a regular basis, whether for reward or not, will however only be granted in <u>exceptional circumstances</u>. To do otherwise would tend to subvert the will of Parliament.*

24. *If a litigant wants a lay person to be granted a right of audience, an application must be made at the start of the hearing. If a right to conduct litigation is sought such an application must be made at the earliest possible time and must be made, in any event, before the lay person does anything which amounts to the conduct of litigation. It is for litigants to persuade the court, on a case-by-case basis, that the grant of such rights is justified.*

25. *Rights of audience and the right to conduct litigation are separate rights. The grant of one right to a lay person does not mean that a grant of the other right has been made. If both rights are sought their grant must be applied for individually and justified separately.*

26. Having granted either a right of audience or a right to conduct litigation, the court has the power to remove either right. The grant of such rights in one set of proceedings cannot be relied on as a precedent supporting their grant in future proceedings."

33. I have highlighted part of paragraph 20 as it is relevant to the Application before me and I return to it later.

34. I make no comment on paragraphs 27 to 30 entitled "*Remuneration*". As for paragraph 31, "*Personal support units and Citizens' Advice Bureaux*", I would merely add that the Guernsey CAB provides such assistance and support as it can to litigants. As Patron thereof, I have frequently thanked and complimented them on the advice they provide voluntarily.

35. During the hearing, there was discussion concerning the position in Scotland. Subsequently, Advocate Le Cras forwarded further information which suggests that although the position in that jurisdiction has evolved in a different way, the result is much the same. In an email to the Court copied to all parties, Advocate Le Cras submitted:

"To assist the Court, we have looked into the Scottish position, which is not entirely straightforward given the different ways in which the rights of audience for Scottish advocates and solicitors have developed. In summary, the outcome of our research is as follows:

Until 1990, it appears that advocates had the exclusive right of audience (see attached 1993 article "Rights of Audience - A Scottish Perspective" by The Right Hon. Lord Rodger of Earlsferry).

*1. The position changed with the introduction of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (the **Law Reform Act**). Under Part II of that Act, in the sub-part headed "Rights of audience" (section 24 to 30), a couple of significant and relevant changes were made. First, section 24 inserted a new section 25A into the Solicitors (Scotland) Act 1980 (the **Solicitors Act**) which effectively gave Scottish solicitors a right of audience before the Scottish courts. Second, section 27 permitted other persons (with the requisite permission granted by the Lord President and Secretary of State) to have a right of audience. A copy of the relevant provisions of the Law Reform Act and the Solicitors Act are attached.*

2. It is noted that the definition of "rights of audience" in section 27(8) of the Law Reform Act is "any such right exercised by an advocate". This appears to confirm the position referred to in paragraph 1 above.

3. Section 27(3)(a) of the Law Reform Act also recognised the Scottish courts' power to grant a person a right of audience, who otherwise would not have such a right.

4. As for offences, section 27(7) of the Law Reform Act provides that it is an offence for a person to wilfully and falsely pretend to have a right to conduct litigation or right of audience.

5. Further, section 23(1) of the Solicitors Act makes it an offence for a person to practice as a solicitor (or hold himself out as one) without holding a practicing certificate, and section 31 provides that an unqualified person is guilty of an offence if they pretend to be or hold themselves out as a solicitor. Given the insertion of section 25A into the Solicitors Act, which gave solicitors a right of

audience, we submit that the offences in section 23(1) and 31 are in effect the same as that under section 14 of the Legal Service Act.

6. We have also found two further Scottish cases which relate to the question of whether the Scottish courts have inherent power to grant a right of audience to persons not otherwise qualified in Scotland. The first is the decision of the Court of Session in Taylor Clark Leisure PLC v Commissioners for HM Revenue and Customs 2015 S.C. 595. The second is the earlier decision of the same court in Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd 2011 S.C. 115."

36. In my view, it is significant that the situation in Scotland has been achieved through primary legislation. As I have said, there is no legislation in Guernsey that would expressly permit the Royal Court to allow a non-Guernsey qualified lawyer to have rights of audience.

37. The Guernsey Bar (Bailiwick of Guernsey) Law, 2007 had two main purposes. It incorporated the Guernsey Bar as a body corporate and it reformed the disciplinary procedures applicable to members of the Bar. It made no mention of rights of audience. The Bar Ordinances deal principally with the qualifications required to be satisfied before a person may be admitted as an Advocate of the Royal Court.

38. HM Procureur submitted that in the absence of a statutory provision prohibiting non-Advocates from having rights of audience, the Royal Court might have inherent jurisdiction to grant rights of audience either to a McKenzie Friend and/or to a non-Advocate. In her oral submissions, she was careful to state she was not claiming that there is the inherent jurisdiction to do so.

39. In preparing my judgment, I have considered the customary law position as set out in our ancient Commentaires. Terrien (1574 edition) wrote, at Chapter VI of Book IX, page 350:

> *"Est ordonné par la Court que desormais aucun ne soit recue à patrociner en Court laye devant les Baillis, Vicontes & autres Juges du pays de Normandie, pour postuler, & y faire & exercer office d'Avocat ou conseiller publique, se premierement il n'est trouvé suffisant expert & habile, & ait fait serment en assise. Et que s'efforcera de faire le contraire, en soit debouté, et puny d'amende selon l'exigence du cas. Et defend la Court aux dits Juges, sur peine d'amende, qu'à faire ce que dit est, aucun contre la teneur de cette presente ordonnance ils ne reçoyvent"*

My translation:

> *"It is ordered by the Court that henceforth no one will be permitted to argue in lay Court before Bailiffs, Viscounts and other Judges of the land of Normandy, to postulate, and there to exercise the profession of Advocate or public counsellor, if he has not first been found sufficiently expert and competent and has taken an oath before a sitting of a court. And whoever attempts to do otherwise, will be refused, and punished with a fine as the case may require. And the Court forbids the said Judges, on pain of a fine, to admit any person contrary to the tenor of this present ordinance to do what is said above."*

(Terrien explained that Advocates were formerly called counsellors but following the creation of the Court in Parliament that title was taken away from them and they were known only as Advocates. The French word "laye" which I have translated as "lay" means non-ecclesiastical.)

40. Chapter IV of Book IX of Terrien was approved in the Approbation des Lois. *"Nous usons du texte de la coustume du sixiesme chapitre, du serment des Avocats"*. In "Remarques et Animadversions, sur L'Approbation des Lois et Coustumier de Normandie", Thomas Le Marchant added some Remarks but did not disagree with the Approbation.

41. It is not surprising that the Courts of Ancient Normandy required those who were appearing as Advocates to be learned in the laws of Normandy and to uphold certain standards of honesty and propriety. The Normans were very proud of their system of customary law and it seems inconceivable that the Normans would have permitted a lawyer from elsewhere to exercise rights of audience in their Courts.

42. The passage from Terrien and the Approbation together with Le Marchant's Remarks tell us the customary law position at the respective times when they were written. Terrien's writing leaves no scope for suggesting that the Court had inherent jurisdiction to permit someone who had not been found to be "sufficiently expert and competent" in the law and who had not taken an oath before the court to "postulate" which I interpret as meaning to "present a case before the court".

43. If the Court lacked the inherent jurisdiction to do so at that time, it cannot now claim to have acquired the inherent jurisdiction to do so simply because it might now be convenient.

44. In my judgment, the customary provisions regarding rights of audience in the courts of the Bailiwick as set out in Chapter IV of Book IX of Terrien and confirmed in the Approbation remain in force. An example of their continued application is that the Articles read by HM Greffier to an *aspirant* Advocate prior to taking the oath attaching to the office of Advocate before the Royal Court on admission to the Guernsey Bar are drawn from Chapter IV of Book IX of Terrien. The customary law can of course be amended by primary legislation as has happened in the instances cited in paragraphs 19, 20 and 23 above. Through the Bar Ordinances the Royal Court and, more recently, the States have specified what qualifications are required to be met before admission to the Guernsey Bar but those Ordinances have not, and could not, grant rights of audience to someone who is not qualified locally.

45. Following circulation of the judgment in draft pursuant to Practice Direction No. 1 of 2012, HM Procureur has drawn my attention to an Ordonnance of the Royal Court made on 30 September 1588 describing it as supporting the evolution of the customary law noted in the preceding paragraphs. The Ordonnance reported at Tome 1 Recueil D'Ordonnances page 55 states:

> "*Item, est ordonné par Justice que null ne postulera en Court sinon par la bouche ou permission d'un Advocat, et que les Officiers de la Majesté ne seront admis en temps advenir pour etre Attournez ou Advocats à playdoyer les causes d'aucune personne particulière: toutesfoys pourront, quands aucunes causes auront été meues ou debatues entre deux parties par devant Justice, remontrer ce qu'ils verront estre de droict, principallement en ce qui concernera l'interest de sa Majesté."*

The passage may be translated as:

> "Similarly, it is ordered by the court that no-one will postulate in court except through the mouth of or with the permission of an Advocate, and that the Crown Officers will not be permitted in future to act as Attorney or Advocate to plead cases of any private persons: however, they can, when any cases between two parties have been moved or are being proceeded against before the court, point out what they see as a matter of law, principally in what concerns the interests of Her Majesty. "

46. Rather than an evolution of the customary law position, I see the 1588 Ordonnance as confirmation of the customary law position set out in Terrien and confirmed in the Approbation which had been registered only a few years earlier. There is no explanation as to why it was considered necessary to state that the Law Officers of the Crown could not act on behalf of private persons but one can speculate that they had hitherto been doing so and the Court wanted the practice to discontinue.

47. HM Procureur also drew attention to section 12(1) of the Court of Appeal (Guernsey) Law, 1961 which provides that only members of the Guernsey Bar have the right to practise in the Court of Appeal. Again, I see that as confirmation of the customary law position but extending it to a new, superior court which had not previously existed.

48. I recognise that it is a feature of the customary law that it changes over time as the custom and practices of the Bailiwick change. However, there are restrictions. The propriety of judicial law-making was considered by the Guernsey Court of Appeal in Morton v Paint [21.GLJ.61] where the Court cited with approval the speech of Lord Lowry in C (a minor) v DPP [1996] 1 AC 1 HL(E) and the "aids to navigation across an uncertainly charted sea" as he described them:

> *"(1) If the solution is doubtful, the judges should beware of imposing their own remedy.*
> *(2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched.*
> *(3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems.*
> *(4) Fundamental legal doctrines should not be lightly set aside.*
> *(5) Judges should not make a change unless they can achieve finality and certainty."*

49. I consider that all those aids point away from adopting the inherent jurisdiction to permit someone who is not an Advocate of the Royal Court to conduct a case in this Court on behalf of a client. (1) The solution would be doubtful because it would be difficult to decide in what circumstances the jurisdiction would be exercised and also in whose favour it would be exercised, that is to say, what qualifications, if any, the person would have to possess. (2) It is not strictly the case that the States has rejected opportunities to clear up a known difficulty. However, the States has legislated, by Ordinance, to lay down the qualifications required of an Advocate. (3) It may not strictly be a matter of disputed social policy but in Ladbroke, Southwell LB identified clearly the public policy reasons for retaining Guernsey qualifications, the benefits thereof and the disadvantages if that were to be changed. (4) A provision of the customary law that has stood for more than four centuries is close to being described as a fundamental legal doctrine. (5) The change would not achieve finality and certainty because there would be uncertainty as to the limits of the jurisdiction.

50. In conclusion and subject to what I say below about McKenzie Friends, the Royal Court does not have any inherent jurisdiction to enable a person who has not been admitted as an Advocate to exercise rights of audience in any court of the Bailiwick and nor does it have the power to bestow upon itself the inherent jurisdiction to do so.

McKenzie Friend

51. I turn now to the second issue in paragraph (a) of the Representation Application, whether to permit the Plaintiff's McKenzie Friend, Mr Young to conduct the advocacy on his behalf.

52. I said above that the Courts of the Bailiwicks recognise McKenzie Friends and to date have been guided by the practice of the English Courts, in particular Lord Neuberger's Practice Direction quoted above. None of the counsel appearing before me objected to the principles therein and I see no reason why I should not apply them in this case. Three issues were raised: the suitability of Mr Young as a McKenzie Friend; whether he be permitted to conduct the advocacy; and his remuneration.

53. Mr Young was struck off the Roll of Solicitors by the Solicitors Disciplinary Tribunal for the reasons given in a Judgment dated 22nd April 2013. Mr Young has made no secret of the fact that he has been struck off. The Plaintiff was aware and the Royal Court and Court of Appeal were aware of that fact on the occasions when he has been permitted to act as McKenzie Friend on behalf of the Plaintiff.

54. Advocate Le Cras submitted that Mr Young had played down the seriousness of the allegations that led to him being struck off, referring to them as regulatory issues when in fact they included an allegation of dishonesty that was found proven by the Disciplinary Tribunal. Both she and the Bâtonnier invited me to follow the decision of the Court of Appeal of England and Wales (Thorpe LJ and Hooper LJ) in D (A Child) [2005] EWCA Civ 347. In that case, the applicant sought rights of audience for her partner who had been struck off by the Solicitors Disciplinary Tribunal. The application was refused. In a short judgment, Thorpe LJ said:

> *"I do not think there can be much doubt [that he would be able to put the case better than his partner can] because he is an experienced lawyer and one who had advocacy skills as well. But the circumstances in which he finds himself professionally militates strongly against the application. I am in no doubt at all that, as a matter of principle and as a matter of fairness, the application should be refused."*

55. That decision is one that, inevitably, was decided on the facts and circumstances of the case which are not fully disclosed in the judgment. Their Lordships said they were following guidance issued from the President's Office as to the role of a McKenzie Friend, specifically written for judges of the Family Division. That guidance preceded the Practice Note of 2010 quoted above to which I have said I will have regard. The only issue of general application which I derive from the decision is that the circumstances that led to the former solicitor being struck off are a factor to be considered.

56. Thus, in the present Application, the findings of the Solicitors Disciplinary Tribunal that led to the disqualification of Mr Young are to be considered and weighed in the balance. The manner in which he has conducted himself subsequently, including the way in which he has discharged acting as a McKenzie Friend, both for the Plaintiff and others, is also a factor. He has disclosed the fact of his disqualification. I, and my fellow judges, have seen how he has conducted himself when appearing with the Plaintiff in different courts at different times. In his witness statements, Mr Young has referred to other proceedings in which he has been commended by different courts for the assistance he has provided to litigants who otherwise would have had no representation. A significant fact is that he has been assisting the Plaintiff for some time so he is familiar with the substantive claim against Carey Olsen and the surrounding circumstances. The Plaintiff has full confidence in him and I have no reason to believe that it would be easy for him, at this stage, to find someone else, failing which the Plaintiff would have to present his own case which he would struggle to do satisfactorily.

57. In conclusion, I am satisfied that both the Plaintiff and the Court will be assisted if the Plaintiff has the assistance of Mr Young as his McKenzie Friend.

58. However I am not persuaded that there are exceptional circumstances that would justify granting Mr Young a right of audience or the right to conduct the present litigation on behalf of the Plaintiff. The Representation Application relates specifically to the Defendant's application for summary judgment. I have directed both parties to produce written submissions in advance of the hearing. I anticipate that the issues will be identified in those submissions and will greatly assist the presentation of the case at the subsequent oral hearing. I do not presently envisage that the Plaintiff would be unable to conduct the hearing with Mr Young alongside him assisting him in the more conventional role of a McKenzie Friend. If there is a need for him to address me on a point of law where I am of the opinion that he is unable to do so adequately, I reserve the right to grant permission to Mr Young to address me directly on such an issue. If I do, permission will be limited to one or more specific aspects of the matter and will not amount to a general right of audience. The Plaintiff and Mr Young have had previous experience of instances where the Royal Court has given similar limited permissions, such as at the eviction hearing in the Royal Court before Judge of the Royal Court Finch and three Jurats on 13 August 2012.

59. Regarding remuneration, Mr Young confirmed in his second witness statement that the plaintiff is not in a position to pay his company a monthly consultancy fee. I am uncertain as to what remuneration, if any, Mr Young might be receiving. He is a professional McKenzie Friend (the existence of such persons is recognised in the 2010 Practice Note). What would not be permitted would be if he were to be acting under an agreement that would infringe the Guernsey law of champerty – an issue that was carefully considered by Her Honour Hazel Marshall QC, Lieutenant Bailiff In the matter of Provident Investment Funds PCC Limited and Providence Investment Management International Limited (Royal Court, unreported, judgment 44/2017, 4 October 2017).

Conclusion

60. In conclusion, the well-established customary law prohibits anyone from presenting a case on behalf of another unless they have first been found to be competent in the laws of the Bailiwick and have taken an oath before the Royal Court. In my judgment, the custom and practice of the courts of the Bailiwick are so well settled that there is no scope for the Royal Court now to declare that it has inherent jurisdiction to do otherwise. If it were to do so, the circumstances in which it might permit someone who is not a qualified Advocate to appear are unclear and uncertain. Notwithstanding all of that, the circumstances in this present matter are not sufficiently exceptional to invoke the inherent jurisdiction even if the Royal Court had such jurisdiction.

61. However, I am content for Mr Howard Young to continue to act as the Plaintiff's McKenzie Friend on the terms identified in the Practice Note and as he has done to date.

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