Application to declare a service of Summons invalid and that the proceedings described in the Summons have neither been commenced nor are deemed to have been commenced

[2019]GRC008

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between **STEFAN BERND GOMOLL** **Applicant**

-v-

DOMINIQUE FABIENNE MERCEDES RUGGABER **Respondent**

Date of hearing: 4th February 2019

Judgment handed down: 5th March 2019

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant: **Advocate S H Davies**

Counsel for the Respondent: **Advocate N J Barnes**

Cases, Texts & Legislation referred to:

The Royal Court Civil Rules, 2007
Practice Direction No. 1 of 2008
The Trusts (Guernsey) Law, 2007
Abela v Baadarani [2013] 1 WLR 2043
Cecil v Byatt [2011] 1 WLR 3086
Cobra Business Ventures Limited v Green Field Capital Limited [2011-12] GLR Note 27 (9 July 2012)
Ordonnance relative aux Ajours at aux Causes mises devant la Cour Royale of 1934
R (Barclay) v Lord Chancellor (No 2) [2015] 1 AC 276
Dawes, *The Laws of Guernsey*
Ogier, *The Government and Law of Guernsey*, 2nd ed.
De l'Office du Sergent (Order in Council of 1849)
The Royal Court (Reform) (Guernsey) Law, 2008
The Court of Alderney Civil Rules, 2005
The Court of Alderney Civil (Amendment) Rules, 2015

The Royal Court Civil Rules, 1989
Rules of the Supreme Court / *Civil Procedure Rules*
The Royal Court (Signing of Summonses) Order, 2003
The Electronic Transactions (Guernsey) Law, 2000
The Electronic Transactions (Exemptions) Order, 2001
Olafsson v Gissurarson (No. 2) [2008] 1 WLR 2016
Elmes v Hygrade Food Products plc [2001] EWCA Civ 121
The Companies Act 2006
Tchenguiz v Hamedani [2015] GLR 154

Introduction

1. By an Application dated 12 December 2018, Stefan Gomoll, the Applicant, seeks:

   (a) a declaration that service of the Summons dated 21 November 2018 has not been validly effected on him; and

   (b) a declaration that the proceedings described in the Summons have neither been commenced nor are deemed to have been commenced.

   This Application is supported by the Applicant's Affidavit sworn on 30 December 2018.

2. At the conclusion of the hearing on 4 February 2019, I reserved judgment. I subsequently invited further written submissions on a point I considered could be relevant, which I received on 13 February 2019. This judgment now contains my reasons for dismissing the Application.

Background

3. From the Applicant's Affidavit evidence, it is apparent that Advocate Barnes prepared a Summons on behalf of Dominique Ruggaber, the Respondent. That Summons is dated 21 November 2018 (and I will refer to it as "the Guernsey Summons"). The address used in it for the Applicant is SG House in Sark, which is the address used by the Applicant for his professional activities. (The Applicant is an Advocate of the Royal Court of Guernsey, but the action against him is in his private, rather than his professional, capacity.) The Summons was made returnable in this Court on 30 November 2018, with the intention of tabling the Cause attached to it at 9.30 am that day. (In the pleading, the Respondent is the Plaintiff and the Applicant the Defendant.)

4. The Cause, settled by Advocate Barnes, seeks relief relating to an alleged trust of 5% of the shares in Penny Limited, an Isle of Man company. That company is said to own residential property in Germany, which cost in excess of €6 million to acquire and which produces a rental income of €250,000 per annum. Those shares in Penny Limited were said to have been gifted to the Respondent by the Applicant in 2010. They were held by a UK company, Domca Limited, of which the Respondent was the sole shareholder and director throughout its existence, although she pleads that the Applicant was responsible for and had control of the administration and good standing of Domca Limited and of its assets. Domca Limited was dissolved on 17 July 2012. The Respondent says it was not until 30 November 2012 that she found out the bank account of Domca Limited had been closed and she had not known previously that the company had been

dissolved. The Respondent has asked the Plaintiff to account to her for her interest in Penny Limited, but he has declined to do so.

5. This Summons was provided electronically to the Prévôt in Sark, who located the Applicant at a private address and served a copy of the Summons on him at around 9 am on 23 November 2018. The Applicant says in his Affidavit that there had been no letter before action and expresses surprise that the issues covered by the Cause had not previously been raised with him by the Respondent.

6. On 29 November 2018 at just after noon, the Applicant was served by the Prévôt with a Summons dated 27 November 2018 to appear at 2 pm on 19 December 2018 for the purpose of a similar Cause being tabled before the Court of the Seneschal of Sark ("the Sark Summons").

7. At 3.03 pm on 29 November 2018, the Applicant sent an e-mail to Advocate Barnes, attaching a copy of the Guernsey Summons. He referred to the problems Sark then had with its electricity supply, and the poor weather forecast for the following day, before making a request that the Applicant would not attend Court on 30 November 2018 but would come instead on 7 December 2018. The Applicant added that if there were still problems with the electricity situation in Sark, he would instruct a Guernsey Advocate to represent him on 7 December 2018. He further wrote "*Until then I fully reserve all and any rights*". Advocate Barnes replied just over one hour later agreeing to this request. Although it is not the precise way in which a Cause is signed over out of Court, I could treat this exchange as being its equivalent. In any event, it served to defer the tabling of the Cause by one week.

8. Advocate Barnes then informed the Greffe that he no longer intended to table the Cause in this matter on 30 November 2018. The Applicant was copied in to this e-mail. The Applicant spotted that the e-mail had apparently been sent by Advocate Barnes to the wrong person and so later that day sent it on to the person at the Greffe who he considered should have been the recipient, but received an automated out of office message. The Applicant then sent the message to a different person at the Greffe. Each time, Advocate Barnes was copied in. The Cause was not tabled at the Court's sitting on 30 November 2018.

9. Later during the morning of 30 November 2018, Advocate Barnes thanked the Applicant for correcting his error and explained that he had caused the Prévôt to serve another Summons returnable in the Sark Court "*just in case anyone said the Guernsey court didn't have jurisdiction.*" He asked the Applicant if they could agree to adjourn that matter sine die. He also offered the Applicant the chance to place the Cause before this Court *inscrite* by way of a Consent Order.

10. The Applicant responded on 5 December 2018, suggesting that pursuing him in respect of the same claim simultaneously in two courts was an abuse of process and so he invited Advocate Barnes to withdraw the Sark Summons. If not, the possibility of the Applicant applying to the Court of the Seneschal of Sark to have those proceedings struck out was raised. The Applicant further enquired as to whether the matter before this Court was to proceed that Friday and, again, he reserved any and all rights. The response the next morning from Advocate Barnes asked the Applicant if he was submitting to the jurisdiction of this Court, and indicated that if the Applicant did, the Sark proceedings would be withdrawn. Advocate Barnes further indicated that the Respondent intended to proceed with the tabling of the Cause the following day and that placing

it *inscrite* and providing an address for service could be achieved by way of a Consent Order. The Applicant's response was:

> "*If you withdraw the Sark Summons today I will confirm that I will not challenge the general jurisdiction of the Royal Court for all claims in the Bailiwick and will not argue that The Court of the Seneschal is forum conveniens.*"

The Applicant again added that "*all rights are fully reserved.*" Advocate Barnes replied straightaway:

> "*Thank you, on that basis I will not proceed with the Sark summons, I will not ask the Greffier to table it and you can treat it as having been withdrawn.*"

11. By a letter dated 6 December 2018, Advocate Davies on behalf of the Applicant wrote to Advocate Barnes setting out the Applicant's contentions that the proceedings had not been properly commenced. He highlighted rule 11 of the Royal Court Civil Rules, 2007, which requires the original Summons bearing the Advocate's signature to be served upon a defendant and pointed out that service effected in Sark would be service out of the jurisdiction of the Royal Court, for which the Court's leave is required. The letter invited Advocate Barnes to withdraw the Guernsey Summons and proceed instead to apply for leave to serve outside the jurisdiction.

12. The Cause was tabled in the Ordinary Court on 7 December 2018. Advocate Lyne appeared on behalf of the Applicant and gave an *élection de domicile* solely for the purpose of subsequently pursuing the current Application and expressly not accepting that service had validly been effected.

13. Once the Application was made, the parties agreed the procedural timetable that led to the hearing on 4 February 2019.

Summary of the parties' contentions

14. The Applicant's Skeleton Argument, prepared by Advocate Davies, first points out that Guernsey and Sark are separate jurisdictions. The 2007 Rules were made under two Laws that apply in Guernsey but not in Sark. Service was not effected in accordance with the 2007 Rules, which confer on Her Majesty's Sergeant a monopoly as regards effecting service under them or they require a Court order to be obtained for an alternative means of service. There has been no order of the Court, whether sought under rule 8 or rule 9(b). Rule 89 sets out when an action commences and none of the three options is applicable in the present case. On these bases, the Applicant has not properly been convened to this Court and there are currently no valid proceedings that he faces. Accordingly, the declarations sought should be made.

15. At the hearing, Advocate Davies elaborated on these submissions. He referred to the scheme of the 2007 Rules and the way in which proceedings were commenced through the involvement of Her Majesty's Sergeant, as an officer of the Court, or by the Court regulating how matters were to be dealt with. He referred in particular to there being a difference between giving notice to and effecting service on a person. In respect of someone outside the jurisdiction, rule 8 creates a threshold over which a prospective plaintiff has to pass. The test for service out engages a merits-based assessment. The premise of the Respondent's Cause is unsustainable and leave to serve a Summons out of the jurisdiction would not have been granted. If the Respondent's arguments were to be accepted, it would enable any prospective plaintiff to ignore the rules on

service, which would create uncertainty, especially by reference to rule 89, as to when a cause of action becomes prescribed. The language used by the Applicant when seeking agreement from Advocate Barnes to defer the tabling of the Cause was deliberately wide enough to encompass reserving the Applicant's right to challenge the validity of the method of service used. There were other inexcusable failures to comply with the 2007 Rules and Practice Direction No. 1 of 2008.

16. The Respondent's Skeleton Argument, prepared by Advocate Barnes, submits that proper service was effected because the Applicant's initial e-mail request asked for the tabling of the Cause to be delayed one week. The courts in Guernsey and Sark have concurrent jurisdiction, meaning that Sark is within the jurisdiction and so no leave to serve out of the jurisdiction was required. Accordingly, in the absence of provision in the 2007 Rules for how to effect service in Sark, the Respondent relied instead on the means of service set out in the procedures applicable before the Court of the Seneschal. He adds that the Respondent could have avoided issues relating to prescription by tabling the Cause on 30 November 2018 rather than acceding to the Applicant's request for a delay of one week. Rule 58 of the 2007 Rules enables the Court now to confirm that any non-compliance with a rule or practice direction does not invalidate any step in the proceedings and may make an order to remedy the defect.

17. At the hearing, Advocate Barnes also elaborated on these submissions. He repeated his contention that serving a Summons in Sark was not service out of the jurisdiction. Consequently, on behalf of the Respondent he chose to adopt a procedure that must be regarded as compliant with how to effect service in Sark. His second point is that the Applicant had accepted service, as shown by his request that the tabling of the Cause be deferred for one week. Because the Applicant had already accepted service, it followed that his general reservation of his rights could not now attach to the question of the validity of the service. Rule 89 needs to be interpreted to cover the reality of what happened, so these proceedings were commenced when the Guernsey Summons was provided to the Prévôt. However, if it is found that there has been an error of procedure, rule 58 enables that error to be remedied. To the extent that rule 8 is relevant, something that is justiciable in Sark is equally justiciable in Guernsey. He did not contend that the alleged trust is a Guernsey trust, as defined in the Trusts (Guernsey) Law, 2007, so that measure would not provide the jurisdictional gateway engaged in relation to this action.

18. In advance of the hearing, I had drawn Counsel's attention to the Supreme Court's decision in *Abela v Baadarani* [2013] 1 WLR 2043 on the basis that it may have moved matters on from what was said in *Cecil v Byatt* [2011] 1 WLR 3086, to which I had referred in a case on which Advocate Davies relied, *Cobra Business Ventures Limited v Green Field Capital Limited* [2011-12] GLR Note 27 (9 July 2012). As a result, Advocate Davies submitted that there was little in that case to assist, referring to a number of passages in the judgment of Lord Clarke JSC, and Advocate Barnes referred to the short judgment given by Lord Sumption JSC about how previous cases referring to the exorbitant jurisdiction engaged in granting leave to serve out of the jurisdiction no longer offered a realistic approach to the question because of the way that modern commercial life now operates.

19. The measure in relation to which I invited further comments after the hearing is the *Ordonnance relative aux Ajours at aux Causes mises devant la Cour Royale*, which was made on 27 October 1934. In his written submissions, Advocate Davies offers a translation of the French language used in this Ordinance and then submits that it is inapplicable to the situation in the present case.

Advocate Barnes disagrees with the translation offered by Advocate Davies and suggests some different wording, from which he submits this measure supports his contentions that service through the Prévôt was the only appropriate manner of proceeding.

Discussion

20. This Application raises a number of issues about the operation of Guernsey's procedural rules which do not appear to have been the subject of previous decisions. Neither Advocate drew to my attention any domestic decision that provides a complete answer to any of the issues raised. I have proceeded on the usual basis that the Applicant has the burden of persuading me that the Court should make the declarations sought.

21. Part III of the 2007 Rules covers commencement of proceedings. Rule 10 requires that "*In every action a cause shall be tabled before the Court*" and specifies what a cause must contain. Rule 11 provides:

> "*(1) A plaintiff intending to table a cause shall give notice of the fact to the defendant by serving a summons upon him.*
>
> *(2) The summons–*
>
> *(a) shall be served not less than 2 clear days before the day of the tabling of the cause,*
>
> *(b) shall state the day and time appointed for the tabling of the cause,*
>
> *(c) shall contain, or have annexed to it, a copy of the cause, and*
>
> *(d) shall be signed by an Advocate.*"

22. Part II of the 2007 Rules covers service of documents. Rule 2 sets out how to effect service within the jurisdiction on an individual. Rule 3 sets out how to effect service within the jurisdiction on a body corporate or partnership. Rule 4 sets out how to effect service on the States of Guernsey. In each of these rules, it is the Sergeant who effects service and rule 5 sets out how the Sergeant will make a relation as to the mode of service effected. Rule 6 then sets out the consequences of the Sergeant's relation of service. Rule 92(1) provides that, unless the context other requires, "Sergeant" is defined as "*Her Majesty's Sergeant of the Royal Court or any of the Deputy or Assistant Sergeants*". Rule 7 makes provision for the Court, as it thinks just, to make an order for substituted or other service within the jurisdiction, "*whether by notice, by advertisement or otherwise*". Rule 8 provides that leave to effect service out of the jurisdiction can be given by the Court. The Court is not empowered to make such an order for leave "*unless satisfied (by affidavit or otherwise)*" that the matter is both properly justiciable and a proper one for service out of the jurisdiction. Rule 9 provides:

> "*The provisions of Rules 2 to 8–*
>
> *(a) are in addition to, and not in derogation from, the provisions of any enactment or rule of court relating to the service of documents,*
>
> *(b) do not apply where the Court orders service in some other manner.*"

23. It is apparent from the scheme of Part II of the 2007 Rules that there is a distinction made between service within the jurisdiction and service out of the jurisdiction. Accordingly, the first issue to address relates to the submission of Advocate Barnes that the consequence of there being concurrent jurisdiction in a civil matter like that being pursued by the Respondent is that service effected in Sark is service within the jurisdiction, and not something in respect of which rule 8 applies.

24. In my judgment, this submission is flawed because concurrent jurisdiction respects that there are and continue to be separate systems of law but enables the courts from the systems of law that have jurisdiction over the matter to exercise that jurisdiction at the same time interchangeably. Confirmation of the existence of concurrent jurisdiction between the Islands of Sark and Guernsey was given in ***R (Barclay) v Lord Chancellor (No 2)*** [2015] 1 AC 276, in which Lady Hale (at para. 20) stated:

> "*The chief judge of the island is the Seneschal, whose office of Seneschal was created by the Crown in 1675. He was originally appointed by the Seigneur with the approval of the Lieutenant Governor of Guernsey, the Sovereign's representative in the Bailiwick. The court of the Seneschal has unlimited jurisdiction in civil matters, but a more limited jurisdiction in criminal matters. There is an appeal from his court to the Royal Court of Guernsey, which also has concurrent first instance jurisdiction in civil matters and sole jurisdiction over more serious criminal matters. Appeals from the Royal Court lie to the Court of Appeal for Guernsey, and from that Court to the Judicial Committee of the Privy Council.*"

In my view, this means that someone who could litigate a matter in Sark before the Court of the Seneschal has a choice to commence proceedings instead in the Royal Court of Guernsey. Inevitably, if choosing to commence the proceedings in Guernsey, the plaintiff will forego one level of appeal that would otherwise be available if commencing the proceedings in Sark. If commencing the proceedings in Sark, the plaintiff has to comply with the procedural rules of the Court of the Seneschal. However, if commencing the proceedings in Guernsey, the plaintiff has to comply with the procedural rules of Guernsey, which are now principally contained in the 2007 Rules. Accordingly, "*concurrent*" means that either jurisdiction can entertain the claim in accordance with its respective procedural rules, not that the two jurisdictions somehow become a fused single jurisdiction.

25. It follows that, for the purpose of the 2007 Rules, effecting service on the Applicant in Sark must be regarded as service outside the jurisdiction of Guernsey and not within it. This is consistent with the summary provided on page 423 of Dawes, *The Laws of Guernsey*:

> "*Assuming that proceedings are to be brought it must be established whether there is a good address for service within the jurisdiction. The jurisdiction is, of course, restricted to the Island of Guernsey itself for hearings at first instance, save for those exceptional matters where the Royal Court has a Bailiwick-wide first instance jurisdiction. Leave is therefore usually required to serve a person resident in either Alderney or Sark.*"

It is common ground that no application for leave to serve the Guernsey Summons outside the jurisdiction has been made. It follows that service has not been effected in accordance with the scheme found on the face of the 2007 Rules because it has not involved Her Majesty's Sergeant.

26. The role played by Her Majesty's Sergeant is one of such long-standing that, as Advocate Davies put it, any departure from it would seriously undermine the certainty that complying with these service rules gives to all involved with litigation. A general description of this aspect of the Sergeant's functions is contained at page 134 of Ogier, *The Government and Law of Guernsey*, 2nd ed.:

> "*The particular responsibilities of the office of HM Sergeant include attending Court sessions, keeping order, and serving summonses and other legal notices (although before the coming into force of an Order in Council of 6 October 1849 other sergeants, holding manorial office, sometimes served the same in respect of certain matters, and it remains the case that in respect of many offences, the Police will issue a summons, often by post.)*"

27. It is that 1849 Order in Council *De l'Office du Sergent* which forms the basis, I imagine, of the submission made by Advocate Davies that the Sergeant has a monopoly on effecting service within the jurisdiction. It provides:

> "*1. Qu'à l'avenir le Sergent de la Reine, vertu de son office, aura le droit de faire ou de servir dans toute l'étendue de cette île, tous ajours, namiements, exploits et autres pièces et procédures juridiques quelconques, qui d'après loi et coutume doivent être présentement faits ou servis par un Sergent, et que tout ajour, namiement, exploit, pièce ou procédure juridque ainsi fait ou servi sera bon et valable tant en cour que dehors.*
>
> *2. Que ledit Sergent de la Reine sera à l'avenir tenu et obligé de faire ou de servir par lui-même ou par son Député ou Assistant, tous ajours, namiements, exploits et autres pièces ou procédures juridiques quelconques, qui seront livrés, soit à son bureau ou à son domicile, sur les mêmes peines ou amendes auxquelles les Sergents sont présentement tenus.*
>
> *3. Qu'il sera loisible au Sergent de la Reine de faire sermenter des Assistants Sergents pour les paroisses des champs de cette île.*"

Accordingly, this measure provides the foundation for the provisions now found in rules 2 to 4 of the 2007 Rules conferring the function of formal service on Her Majesty's Sergeant. (Section 21 of the Royal Court (Reform) (Guernsey) Law, 2008 makes provision for the reciprocal performance of those functions by Her Majesty's Sheriff and her Deputies.)

28. I was surprised that neither Advocate had familiarised themselves with the rules for service operating elsewhere in the Bailiwick, if only to see whether there was any support for their arguments that service had been validly effected or that it had not. Had they done so, they would have discovered that what Advocate Barnes had done in this case came closer to what is permitted by the Court of Alderney Civil Rules, 2005, as amended, but still not fully compliant. By an amendment made by the Court of Alderney Civil (Amendment) Rules, 2015, rule 1(3) of the 2005 Rules now provides:

> "*Service of a document may be effected on an individual in Sark by being transmitted by the Greffier to the Prévôt for service –*
>
> *(a) in accordance with the rules of service from time to time in force in Sark, or*

(b) if no such rules of service are in force, in the same manner as for service in Alderney in accordance with the rules set out in paragraph (1)."

Rule 4(3), as inserted, makes provision for the Greffier in Alderney to replicate the mode of service given by the Prévôt in respect of a document served in accordance with rule 1(3). This comparatively new arrangement for service on an individual in Sark in relation to proceedings to be commenced before the Court of Alderney develops what was already in place in relation to service of proceedings before that Court on an individual in Guernsey as set out in rule 1(2). The document is provided to the Greffier who then transmits it to Her Majesty's Sergeant for service in accordance with rule 2 of the 2007 Rules.

29. Alderney had, therefore, the foresight to make express provision for service outside of Alderney but within the Bailiwick on an individual. I recognise, however, that even if there were like provision in the 2007 Rules, what Advocate Barnes caused to be done would not be compliant. However, it seems there is an obvious gap in Guernsey's Rules and, if there had been like provision, I expect that Advocate Barnes on behalf of the Respondent would have taken steps to comply with it. By doing so, the Summons for service on the Applicant as an individual in Sark would have been handed to Her Majesty's Sergeant, thereby also confirming the date of the commencement of the proceedings for the purpose of rule 89, who would then have transmitted it to the Prévôt. In this way, the Application with which I am dealing could not have been made. However, the 2007 Rules do not make this provision and the method of service used would still not have complied fully with it.

30. Returning to the position in Guernsey. it was only by virtue of the predecessor to the 2007 Rules, the Royal Court Civil Rules, 1989, that various strands of procedure before this Court found elsewhere, or rooted in the customary law, were gathered together in a single set of composite, but still not exhaustive, rules. Those rules were, and the 2007 Rules are still, less compendious than the old *Rules of the Supreme Court* and the current *Civil Procedure Rules* that govern matters in England and Wales. The repeals effected by rule 57 of and the Schedule to the 1989 Rules offer some examples of older Ordinances made by the Court (at times when these Ordinances were what would now be achieved by Orders of the Court), each often termed a "*Style de Procéder*". The rules found in Part I of the 1989 Rules have been carried forward into the rules contained in Part II of the 2007 Rules to which I have already referred. I accept the submission of Advocate Barnes that this was largely codification of the previous procedural rules relating to service.

31. In relation to the commencement of actions, rule 56 in the 1989 Rules has been incorporated as the substance of rule 89(1) in the 2007 Rules. The other elements of rule 89 were new when the 2007 Rules were made. Rule 89 provides:

> "*(1) Subject to subsections (2) and (3), for the purposes of these Rules, an action commences when the summons is handed by the plaintiff to the Sergeant.*
>
> *(2) Where the Court makes an order for substituted service within the jurisdiction pursuant to Rule 7, or for leave to effect service out of the jurisdiction pursuant to Rule 8, the action shall be deemed to have commenced when the application for such order is lodged at the Greffe.*

> *(3) Where a party's Advocate has agreed to accept service of proceedings on that party's behalf, the action shall be deemed to have commenced when the summons is handed to, or delivered to the place of business of, that Advocate.*"

I do not read this rule as setting out the only ways in which proceedings can be commenced. The use in paragraph (1) of the words "*for the purposes of these Rules*" cannot be as restrictive as Advocate Davies suggests it is. Rule 9(a) clarifies that the rules on service in Part II "*are in addition to, and not in derogation from, the provisions of any enactment or rule of court relating to the service of documents*". It follows, therefore, that any such other method of service found outside the 2007 Rules could result in proceedings being commenced. In my view, this means that rule 89 supplements the methods of service expressly set out in Part II, but adds in paragraph (3) a deeming provision to cover the position where service through an Advocate has been agreed. The benefit of rule 89 is that it affords certainty of the date when proceedings have been commenced in these instances, which may be relevant to whether or not a prescription defence exists. In other cases, there may be less certainty, but that in itself is not a reason for construing rule 90 as limiting the ways in which service can be effected, especially if this is as a result of a procedural measure still operating. In such other cases, if there is a dispute as to when proceedings commenced, it will be resolved by a decision of the Court based on the evidence adduced and arguments deployed.

32. It was as a result of reviewing other provisions in the 2007 Rules relating to the signing of summonses that I noted the reference in rule 90(1)(b) to the 1934 Ordinance. Rule 90 relates to a litigant seeking leave to serve a summons (or some other document referred to in paragraph (4)) without it being signed by an Advocate. Paragraph (1) provides that it is not formally invalid by reason only that it is not signed by an Advocate, notwithstanding the provisions of the 2007 Rules themselves, the 1934 Ordinance or any other rule of statutory or customary law imposing formal requirements as to the signing of summonses, provided that the conditions in paragraph (2) are satisfied. The detail of rule 90 is not relevant to this Application, but it led me to look at the 1934 Ordinance, because it appeared that the submission of Advocate Davies that the 2007 Rules comprise a complete procedural code for proceedings before this Court must be incorrect. I further noted that what is now rule 90 had been introduced by way of an addition to the 1989 Rules by the making of the Royal Court (Signing of Summonses) Order, 2003 (which was one of the measures repealed by rule 91 of the 2007 Rules). The implication from the reference to it was that the 1934 Ordinance has not been repealed (and the list of measures repealed by the 1989 Rules does not include any reference to the 1934 Ordinance) and Advocate Davies' researches confirm that to be his view as well. Hence the reason why I invited further submissions on its terms.

33. Although it is only really section 3 that has relevance, I will set out the 1934 Ordinance in full to place it into context:

> "*1. Toutes causes destinées à être mises devant la Cour, et tous ajours y ayant rapport, seront sur papier du forme et grandeur uniforme suivant aux échantillons approuvés par la Cour et déposés au Greffe.*
>
> *2. Nul ajour, signification ou autre semonce judiciaire émis en cette Ile ne sera valable à moins qu'il ne soit signé au pied par l'Avocat l'émettant ou par un Avocat signant pour lui et, si tel ajour, signification ou autre semonce judiciaire est destiné à*

être servi en cette Ile, à moins qu'il ne soit estampillé ou signé à l'endos et servi par le Sergent du Roi ou son Député.

3. Nulle cause qui est complémentaire à un ajour, signification ou semonce ne sera mise devant la Cour à moins que telle cause ne soit signé ou éstampillé par l'Officier competent qui aura servi l'ajour, signification ou semonce y relative, savoir, par le Sergent du Roi ou son Député en ce qui concerne les ajours, significations et semonces servis dans cette Ile; par le Sergent de l'Ile d'Auregny ou autre officier competent en ce qui concerne les ajours, significations et semonces servis dans l'Ile d'Auregny; et par le Prévôt de l'Ile de Sercq; et ce comme relation qu'un ajour, signification ou semonce à tout défendeur désigné dans la dite cause a été servi par tel Officier competent."

34. The translation offered by Advocate Davies is:

"*1. All Causes intended to be put before the Court and all amendments related to them shall be written on paper in the shape and size conforming with the templates approved by the Court and filed with the Greffe.*

2. No cause, summons or other legal application issued in this Island shall be valid unless it is signed at the bottom by the Advocate who drafted it or by another Advocate signing on his behalf and, if such cause, summons or other legal application is to be served on this Island, unless it was also stamped or signed on the back and served by the King's Sergeant or his Deputy.

3. No document amending a cause, summons or other legal application must be put before the Court unless such document was signed or stamped by the competent Officer who served the initial cause, summons or other application to which it relates meaning: By the King's Sergeant or his Deputy concerning a cause, summons or other legal application served in this Island, by the Sergeant of the Island of Alderney or another competent officer concerning a cause, summons or other legal application served in the Island of Alderney; and by the Prévôt of the Island of Sark; and that is provided that the cause, summons or application was served on all defendants named in the above mentioned cause by such competent Officer."

The alternative version offered by Advocate Barnes, achieved by him making some manuscript changes to the text from Advocate Davies' further written submissions, first takes issue with the reference in section 1 to "*amendments*", because in his view "*ajours*" translates as "*summonses*". Advocate Barnes suggests that the opening words in section 2 should read "*No summons, notice or other judicial summons*", which would then also feature when the words are repeated. (There has been no explanation from Advocate Davies as to why "*ajour*" attracts a different meaning in section 2 from that attributed to it in section 1.) In respect of section 3, Advocate Barnes suggests it should read:

"*No document served with a summons, notice or other judicial summons must be put before the Court unless such document was signed or stamped by the competent Officer who served the initial summons, notice or other judicial summons to which it relates meaning: By the King's Sergeant or his Deputy concerning a summons, notice or other judicial summons served in this Island, by the Sergeant of the Island of*

Alderney or another competent officer concerning a summons, notice or other judicial summons served in the Island of Alderney; and by the Prévôt of the Island of Sark; and that is by report/record that the cause, summons or application was served on each defendant named in the above mentioned cause by such competent Officer."

35. I am persuaded that Advocate Barnes offers a more accurate translation than that of Advocate Davies, with the consequence that Advocate Davies' submission that section 3 does not concern the initial or originating summons because it explicitly refers to documents amending or supplementary to a cause being served by the same competent officer who served the initial Summons is based on a misreading of the wording. I do not, however, think that Advocate Barnes has made all the changes from the translation offered by Advocate Davies that potentially need to be made in order to construe the whole of the enactment.

36. The first thing to note is that the reference contained in rule 90 of the 2007 Rules relates to the requirement in section 2 for the document convening the party or parties to the Court to be signed by an Advocate. In many instances, this will be a summons. However, what then matters, in my opinion, is that it appears to be the case that the other provisions in the 1934 Ordinance continue to be operative because they have not been repealed, save possibly to the extent that any of them can be said to have been impliedly repealed by being replaced with something more modern. I do not find that the references to the other competent officers in section 3 have been impliedly repealed. The marginal notes are not, of course, matters that affect the meaning of the provisions themselves but the scheme of them shows that section 3 is not related to amendment to documents that have already formed the basis of the proceedings commenced in accordance with sections 1 and 2. Section 1 is headed "*Causes et ajours*"; section 2 is headed "*Signature et service*"; and section 3 is headed "*Causes complémentaires*". The use of "*complémentaires*" in that section means that the Cause must be additional, supplementary or further to something and the text of section 3 demonstrates that it is to "*un ajour, signification or semonce*".

37. I am satisfied that the word "*ajour*" is used throughout the Ordinance to mean a summons. Accordingly, when Advocate Davies translates the plural version of that word as "*amendments*" in section 1 that is giving it the wrong meaning. I regard section 1 as making provision for the use of standardised paper for use in respect of Causes to be tabled before the Court and any summonses related thereto. Section 2 makes provision for the summonses, significations or other forms of notice of proceedings (and I have found "*semonce judiciare*" difficult to translate on the basis that "*semoncer"* can mean "*to reprimand*" and so it could extend to any form of warning that proceedings have been commenced, possibly even covering a petition, which is included in rule 91(4) in the 2007 Rules where the general words are "*other document to be served by Her Majesty's Sergeant*") to be signed by the Advocate (hence the reference to the 1934 Ordinance in rule 90 and the 2003 Order it replaced). Section 2 also deals with service <u>if</u> the summons, signification or other form of notice is to be served in Guernsey. I have highlighted the inclusion of if (the translation of "*si*") because I think its use means that some other form of service is envisaged if that service is not going to be effected in the Island of Guernsey. In my judgment, this is then partially covered in section 3.

38. Contrary to the submissions of Advocate Davies, I am satisfied that section 3 of the 1934 Ordinance makes provision for service by the competent officers who operate in the other jurisdictions of the Bailiwick of Guernsey. Today, rule 11(2) of the 2007 Rules provides that the summons to be served "*shall contain, or have annexed to it, a copy of the cause*". This shows

that the Cause to be tabled can be a separate document, annexed to the summons to be served, or it can be set out in the body of the summons itself. In my opinion, this is exactly the same substance as in section 3 of the 1934 Ordinance, which covers the certificate of service given by the officer serving the summons, signification or other form of notice where the Cause is supplementary, additional or further to that summons, etc. In other words, it covers the proof that the person to be convened to the Court has been served. But more importantly, it refers expressly to service in the Island of Alderney in respect of proceedings to be commenced before this Court. Although it does not descend into the same level of detail in respect of service in Sark, because no reference is made explicitly to that, I am satisfied that the only proper way to read the reference in section 3 to "*et par le Prévôt de l'Ile de Sercq*" must be as if it also added that this is where service is to be effected in the Island of Sark. Accordingly, in my judgment, it was not impermissible for the summons to be served on the Applicant in Sark to be transmitted on behalf of the Respondent directly to the Prévôt.

39. In a case such as this, where the defendant who is to be convened to this Court to answer to the tabling of a Cause lives in Sark, I take the view that the plaintiff has a choice. The first choice would be to comply with rule 8 of the 2007 Rules and seek leave to serve outside the jurisdiction of Guernsey. The second choice is to rely upon the 1934 Ordinance, which enables service to be effected in accordance with its terms through the Prévôt. I have noted that rule 9(a) of the 2007 Rules expressly provides that rules 2 to 8 "*are in addition to, and not in derogation from, the provisions of any enactment or rule of court relating to the service of documents*". For the reasons I have given, section 3 of the 1934 Ordinance remains in force and is an enactment (albeit effectively an older style rule of this Court) about service being effected in all the Islands of the Bailiwick by the competent officer in each jurisdiction. Consequently, using the Prévôt in Sark to serve a summons to attend this Court on a Friday morning to see a plaintiff table a cause is not in itself procedurally flawed.

40. As an aside, I think that the approach taken by the Court of Alderney is the preferable one. It would be better, especially in the light of rule 89, to which I will return in due course, if the process in Guernsey involved handing the summons (or other document for service) to the Sergeant, who would then be enabled to transmit the original summons, etc to her counterpart in Sark (or Alderney). To that extent, I agree with Advocate Davies that it would be better if there were involvement of an officer of this Court from the outset. However, my preference for clarity does not displace the finding I am compelled to make in respect of the current availability of what is set out in the 1934 Ordinance. It is simply a matter that could, in my view, sensibly be addressed when the Court reviews the 2007 Rules.

41. The availability of the 1934 Ordinance process, however, is not a complete answer to the Application. This is because there have been other failures to comply with the 2007 Rules and Practice Direction No. 1 of 2008, notably that what was served was not an original summons but a printout from an electronic copy, so it did not have the Advocate's original signature on it, and the summons did not contain all the information expected warning about non-attendance, as set out in paragraphs 1.4 and 3 of the Practice Direction. Advocate Barnes has not sought to argue that these omissions are misplaced, but instead relies on the terms of rule 58, which provides:

> "*Where there has been an error of procedure such as a failure to comply with a rule or practice direction –*

(a) the error does not invalidate any step taken in the proceedings unless the Court so orders, and

(b) the Court may make an order to remedy the error."

Advocate Barnes submits that the step already taken in the proceedings has been the tabling of the Cause, which is not invalidated by any errors preceding that step in relation to how the Applicant has been convened.

42. I have reminded myself that the Electronic Transactions (Guernsey) Law, 2000 does not assist the Respondent because of the terms of article 1(i) of the Electronic Transactions (Exemptions) Order, 2001. Court process is one of those areas where what is otherwise the widespread permissive use of electronic means does not extend. In those circumstances, a party being convened to the Court can, unless agreeing otherwise, expect to be served with an original document rather than the type of copy used in this case. Similarly, the safeguard provided by the Practice Direction requiring *inter alia* a warning about the consequences of failing to attend in response to being summonsed to the Court is an important feature of the process. Without it, if judgment in default of appearance were sought and obtained, the prospects of overturning that judgment through a requête civile would potentially rise. I am, therefore, satisfied that the approach taken by Advocate Barnes on behalf of the Respondent has been erroneous and so I have to decide whether or not to make the order sought by the Applicant or overlook those errors and, if necessary, remedy them.

43. In my judgment, this is an appropriate case in which to invoke rule 58. In the absence of any domestic authority, I have drawn some guidance about the approach to take from *Abela v Baadarani* (*supra*), in which it was noted (at para. 36) that "*The mere fact that the defendant learned of the existence and content of the claim form cannot, without more ado, constitute a good reason to make an order under rule 6.15(2).*" Rule 6.15 in the *Civil Procedure Rules* provides:

> "*(1) Where it appears to the court that there is good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.*
>
> *(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.*"

This shows that the issues dealt with by this rule are confined to service and not as broad as rule 58 of the 2007 Rules. In effect, it enables an after-the-event validation of something that could have been sought prospectively through demonstrating a good reason to proceed in the manner suggested. It involves what is essentially a factual evaluation. Within the context of the 2007 Rules, it would entail considering why the steps provided for within those Rules were not taken. In doing so, regard can, in my view, properly be had to the reason why service, as distinct from merely some form of notification, needs to be effected.

44. On that issue, Lord Clarke referred to what he had said in *Olafsson v Gissurarson (No. 2)* [2008] 1 WLR 2016 (at para. 55):

> "*… the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case: see eg* Barclays Bank of Swaziland Ltd v Hahn *[1989] 1 WLR 506, 509 per Lord Brightman, and the definition of 'service' in the glossary to the CPR, which describes it as 'steps required to bring documents used in court proceedings to a person's attention …*"".

He also referred to what Lewison J (as he then was) had stated at first instance about service issues not being "*about playing technical games*". Further, the introduction of rule 6.15(2) was designed to remedy the gap identified in *Elmes v Hygrade Food Products plc* [2001] EWCA Civ 121 where the consequences of validating a non-compliant form of service would avoid the defendant escaping from the consequences of a limitation period.

45. With such guidance in mind, the starting point for reliance on rule 58 is, of course, to recognise that it should not be necessary in a case such as this. As an officer of the Court, Advocate Barnes should have known that the Prévôt should have been asked to serve an original summons and not a printout from the electronic version sent to him. Indeed, even before reaching that stage, one wonders why Advocate Barnes did not inquire of the Applicant if the Applicant would be prepared to dispense with formal service or wished to nominate an Advocate to accept service on his behalf. In either case, there would have been a mechanism for the Respondent to ensure, so far as possible, that the required commencing of the proceedings took place within the six years from the date she appears to regard as being when prescription began to run, ie, by the end of November 2018. However, I take the view that the document itself shows that it does indeed bear the signature of an Advocate and that this was something that the Applicant knew. In those circumstances, I am satisfied that the fact that a copy document was what was served does not mean that the tabling of the Cause associated with that service document was invalid and so, in accordance with rule 58(a), I am not minded to order that the tabling of the Cause was invalid as a consequence of this error.

46. Similarly, the absence from the summons of the example warning set out in para. 3 of the Practice Direction does not, in my view, invalidate the step that has been taken of tabling the Cause. In relation to most matters, I would treat the Applicant in the same way as a non-lawyer litigant in person. However, I think I can properly recognise that there are certain aspects of how this Court operates that the Applicant, as an Advocate, must be taken to know. One of those things is the consequence of not attending at the sitting of the Court at which a Cause will be tabled, as well as the other matters set out in para. 3 of the Practice Direction. In my opinion, it is impossible to ignore the fact that these consequences must be known to the Applicant and so the failure to comply with the Practice Direction does not have the consequences that it potentially would if the recipient of the summons had no prior knowledge of these matters. Accordingly, whilst the form of the summons served did not comply with these requirements, that error of procedure is one that I do not find invalidates the step of tabling the Cause.

47. I also think I can take into account what the Applicant did as a result of being served with summonses convening him first to this Court and then to the Court of the Seneschal of Sark in respect of what is the same matter. He contacted Advocate Barnes and sought his agreement to defer tabling the Cause before this Court by one week. He did not mention receipt of the Sark Summons. However by the following week, before the Cause related to the Guernsey Summons was tabled, the Applicant persuaded Advocate Barnes not to pursue the Sark Summons. If the end of November 2018 has any relevance in this matter, the Applicant had achieved a situation in

which the Guernsey Summons, which he now challenges, was the only action he faced and the Sark Summons, served before the relevant date, had been withdrawn.

48. The first thing to consider, therefore, is whether what I have indicated I could treat as an agreement outside of Court to defer the tabling of the Cause in relation to the Guernsey Summons is, as Advocate Barnes argues, a procedural step that now precludes the Applicant from challenging the validity of the service effected on him. I am not persuaded that I can properly reach that conclusion. The e-mail sent by the Applicant was carefully crafted to include "*Until then I fully reserve all and any rights*". Whilst I understand why Advocate Barnes chooses to read this as not including any reference to challenging the manner of service, I am prepared to give it the broader meaning for which Advocate Davies argued. In other words, the Applicant, albeit not explicitly stating as much, was leaving open the possibility of raising any procedural argument available to him. By way of comparison, had there been an application for leave to serve out of the jurisdiction, followed by service of the summons, it is quite feasible that the Advocate instructed by the defendant would liaise with the plaintiff's Advocate with a view to signing over the Cause for a while, but it would still be open to the defendant at the first tabling of the Cause to apply to set aside the order giving leave to serve out of the jurisdiction. I regard the position here as broadly analogous. However, I do find that the initial response of the Applicant shows quite clearly that he knew he had been convened to this Court for 30 November 2018 and that it was incumbent upon him to attend, whether in person or through Counsel, hence his enquiry of Advocate Barnes. In my view, that is something that I can take into account when deciding whether or not rule 58 assists the Respondent. I also take into account that the Applicant persuaded Advocate Barnes that the Respondent did not need to wait and see what would happen in relation to the Guernsey Summons before withdrawing the proceedings based on the Sark Summons. It strikes me that this should be treated as if the Guernsey proceedings were capable of being pursued otherwise the Respondent would have been persuaded to abandon the proceedings in Sark and lose the advantage of knowing that they had been commenced before the end of November 2018. I do not think that would be a just overall outcome.

49. In summary, therefore, despite the errors of procedure into which Advocate Barnes, on behalf of the Respondent, fell, I do not find them to be the types of error of procedure that mean the next step in the procedure, which was the tabling of the Cause, is invalidated. This is, of course, predicated on the procedure in the 1934 Ordinance operating so that service through the Prévôt without any involvement of an officer of this Court is permissible. However, on the basis that it continues to operate in the manner I have indicated, the other errors are minor and, in my view, capable of being overlooked in the present case.

Outcome

50. For the reasons I have given, I have concluded that the manner of service adopted on behalf of the Respondent by Advocate Barnes was available under the terms of the 1934 Ordinance. The other shortcomings with how the Applicant was convened to this Court for the return date of 30 November 2018 are, in my judgment, not so significant that I should exercise the power in rule 58(a) to order that this invalidates the proceedings that have been commenced by the Guernsey Summons. Instead, to the extent necessary in this particular case, I will declare that providing a copy summons rather than original document was permissible and to treat the Guernsey Summons as if it complied with Practice Direction No. 1, and especially paragraphs 1.4 and 3. The Application for declarations is, therefore, dismissed. Because the Cause in the action

between the parties was tabled on 7 December 2018 and then adjourned pending resolution of this Application, I will direct that it be re-tabled on 15 March 2019 for the purpose of the Applicant as Defendant indicating whether it is to be defended.

Other matters

51. Although it is not strictly necessary for me to do so, I will briefly set out the position as it would be if the 1934 Ordinance did not assist the Respondent. In those circumstances, I would have found that an application for leave to serve out of the jurisdiction pursuant to rule 8 of the 2007 Rules would have been needed. I would also have found that this was the type of procedural error that could not be overlooked under rule 58 and so the proceedings between the parties would not have commenced in Guernsey under the Guernsey Summons and the Application would then have been granted.

52. It is always difficult to say whether an application that has not been made would or would not have been successful. The main reason is that one cannot tell what materials would have been provided to support the application, but in light of the terms of the Respondent's Cause, it seems to be more likely than not that an application for leave to serve out of the jurisdiction would have been refused. If so, this would have had an impact on whether or not rule 58 could be prayed in aid.

53. The relief sought in the Respondent's action pursues the Applicant in respect of an alleged trust of a shareholding in Penny Limited. Advocate Barnes clarified that he did not suggest that this was a trust the proper law of which is Guernsey law. He appeared to be unwilling to indicate what the proper law of the alleged trust is, but suggested that the cause of action arises in Sark because that is the jurisdiction in which the parties reside and so, under the concurrent jurisdiction, it can be commenced in Guernsey at the Respondent's election. The problem that arises from the face of the pleading is that the shares were held by Domca Limited, which was dissolved in 2012. If those shares were still held by Domca Limited at the time of dissolution, and there is nothing pleaded suggesting anything different, it appears that the assets of Domca Limited will probably be deemed to be *bona vacantia* (and this appears to be the consequence as set out in Part 31 of the Companies Act 2006). If so, the basis on which there can be a trust in respect of those shares, which are not in the hands of the Applicant, becomes harder to divine. As such, the Respondent may have struggled to persuade this Court that the test for leave to serve out of the jurisdiction, as confirmed by the Court of Appeal in *Tchenguiz v Hamedani* [2015] GLR 154, could be satisfied, whether on the limb of there being a serious issue to be tried on the merits, by reference to the type of "gateway" found in other jurisdictions, or whether Guernsey is in the circumstances of this dispute clearly and distinctly the appropriate forum. (Whether or not there is any prescription defence available to the Applicant would not have troubled this Court, though, on the basis that it falls to a defendant to raise such a defence rather than it being a hurdle to surmount on an application for leave to serve out of the jurisdiction, although the greater the likelihood of such a defence being raised and being raised successfully, recognising that *empêchement* may also be raised in response, the more likely it is that the Court might choose not to exercise its discretion to grant the leave sought.)

54. In that situation, had I needed to address my mind to whether there had been a procedural failure in omitting to seek leave to serve out of the jurisdiction that could be remedied through rule 58(b) by granting a form of retrospective leave, I would not have been minded to do so. In my view, it

would amount to such a significant error of procedure that it could only properly be dealt with through a fully articulated application for leave to serve out. As a result, I would have found that the Application succeeded. However, I would also have commented adversely about what happened in relation to the Sark Summons. The Sark Summons could have led to the tabling as of right of the cause associated with it at the return date (or on a later date through agreement). The agreement made on behalf of the Respondent by Advocate Barnes not to pursue the alternative proceedings in Sark could be viewed, in those circumstances, as being vitiated by mistake. I would have been inclined to comment that the Respondent might then wish to attempt to restore the proceedings originally commenced by the Sark Summons before the Court of the Seneschal of Sark and deal with anything flowing therefrom by inviting that Court to acknowledge that the proceedings were capable of being progressed as if the Applicant had been convened for the first time by the Sark Summons. To the extent that the end of November 2018 is a key date in relation to prescription, I would have been minded to make it clear that, subject to any further arguments raised in due course, I regarded what Advocate Barnes had done as in principle commencing proceedings in Guernsey or in Sark on the Respondent's behalf before the end of that month.