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HERALD

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TWENTY-FIFTH ISSUE

Introduction

References to this issue in future issues will be cited using the figure and letters 25.GLJ. followed by the paragraph number.

Editorial Committee

The Deputy Bailiff (de V. G. Carey, Esq.), Advocate J. N. van Leuven, Advocate V. C. Ogier, Advocate C. M. Fooks, H.M. Greffier (K. H. Tough, Esq.).

Additional contributors to this edition

Advocate H. E. Roberts, Advocate C. Hookway, Advocate R. McMahon.

Presiding Judges

The initials of the judge who presided over each case digested in this issue, other than in the Court of Appeal, are given at the end of the text. Where the judge was sitting with Jurats this fact will be indicated; otherwise it may be assumed that the judge was sitting alone.

The presiding judges during the period relevant to this issue were: the Bailiff, Sir Graham Dorey (GMD); the Deputy Bailiff, de V.G. Carey (deVGC); and Lieutenant Bailiff and Assistant Magistrate, A.R.W. Hancox E.G.H., M.B.E. (ARWH).

Reporting of sensitive decisions

The Editorial Committee has considered the question of reporting decisions of a sensitive nature, whether relating to matrimonial and family matters, trusts or otherwise, where publication may lead to the identification of the parties or their children. Where it is deemed appropriate to limit the contents of reports, digests will identify the parties by letters and the word "RESTRICTED" will appear at the end of the report. Further particulars of the decision may be obtainable from H.M. Greffier but this will depend upon what directions the Court has given as to its dissemination.

Compiled from sources including all Orders in Council, Ordinances, Projets de Loi and subordinate legislation and selected cases and other relevant material which became available during the months January to June 1998. The original texts of legislation and judgments digested are available at the Greffe.

Whilst care has been taken in recording the material published herein no responsibility is accepted for the contents of this issue or its accuracy.

OBITUARY - PETER RENOUF COLLAS - 1916 TO 1998

Peter Renouf Collas was born in Guernsey in 1916 and educated at Elizabeth College. On leaving school he joined the chambers of the late Advocate Ridgeway before proceeding to Caen where he attained the degree of Bachelier en Droit in June 1938. He then studied in London, joining Grays Inn and becoming a Barrister at Law, before joining the Army in 1940. After service throughout the War during which he was commissioned to the Duke of Cornwall's Light Infantry, he returned to Guernsey and was called to the Guernsey Bar in January 1946. It was a busy time as several of the Advocates who had been in practice before the war had either died or retired and there were few new entrants to the Guernsey Bar at that time. Peter Collas soon established himself as one of the most able lawyers of his generation. Although he was usually to be found on one side or the other of the leading cases of the day the volume of contentious work before the Royal Court was not what it is today. Peter Collas always managed to go to the nub of the problem. He was the lawyer to whom other lawyers went for advice when they had a problem with which they were floundering and his advice was always given frankly but without a trace of conceit that he had been sometimes able to reason out a matter with a clarity that evaded others. He was joined as a partner by another able lawyer, Advocate Charles Frossard, who later moved into the service of the Crown.

It has to be conceded that there was an unworldly side to Peter Collas and he might have had a happier life relieved of certain of the lesser administrative tasks that Advocates have to undertake on occasion. It was the advocacy and legal analysis at which he excelled. Many clients benefited from the fact that sending out bills was not always high on his list of priorities!

He soon involved himself in the public life of the island becoming a Douzenier for St. Peter Port and then from 1948 until 1959 a Deputy for that parish. As the Bar began to expand in the 1970s and the 1980s he was generous in sharing his expertise and knowledge with others. Always prepared to volunteer his services, in 1968 he led the sub committee of the Bar which ironed out the problems of converting the drafting of conveyances from French into English and when the Law Journal started he volunteered his contributions.

It was matter of great satisfaction to him when, in 1983, his son Richard became an Advocate.

His intellect and his generosity of spirit will stand out as examples for his successors to emulate.

HEADINGS USED IN THIS ISSUE

GUERNSEY

ADVOCATES

Duty to client - conflict of interests - test to be applied - "relevant confidential information"

1. A, a partner in a firm of Advocates, had acted for the principal officers of a company ("RR") and also for the company itself for several years. He was subsequently appointed to the Board of H Limited, the Applicant company which had become the main group company. A dispute arose between RR and H Limited and H Limited applied for an injunction restraining A and his partners from acting for RR in arbitration proceedings, claiming that A was in possession of confidential information which precluded him from representing RR against H Limited. A, who had offered to resign from the Board of H Limited, resisted the application, arguing that there was no conflict because he was not in possession of relevant confidential information within the rules of professional conduct applying to the Guernsey Bar. HELD by the Deputy Bailiff, having considered Supasave Retail Limited v. Coward Chance [1991] 1 All ER 668 and Re a Firm of Solicitors [1992] 1 All ER 353, that the fact that A had helped advise clients of H Limited, drawn up settlements and done some debt collecting did not preclude him acting for RR. It was necessary to balance the possibility of information gained while A was acting for H Limited being used against that company, however unwittingly or innocently, with the public interest in not unnecessarily restraining parties from retaining the representative of their choice. On the facts, A had in his possession confidential information which was relevant to the areas of dispute. However, even if he had not been in possession of "relevant confidential information" it was difficult to see how, having been the principal legal adviser to the company and also having been one of its directors, he could now contemplate cross-examining his co-directors and other officers in litigation. The application would be granted. (deVGC).

[Havelet Holdings Limited v. Ozannes - Ordinary Court 12.3.98 (JPG/JMW)].

APPEALS

Appeal to Court of Appeal - appeal from Magistrate's Court in criminal case - power of Court of Appeal to hear appeal

2. A was convicted by the Magistrate's Court of disorderly conduct. His appeal against conviction and sentence was dismissed by the Royal Court and he applied for leave to appeal to the Court of Appeal, also asking for leave to call a witness. HELD by the Court of Appeal, the powers of the Court of Appeal to hear appeals from decisions of the Magistrate's Court under section 7 of the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 were restricted to appeals against conviction and, except where the Bailiff had granted a certificate that sufficient grounds of appeal existed, to appeals on a question of law alone. The Court was not satisfied that the matters to be raised by A were matters which were a question of law alone therefore leave to appeal against conviction and

sentence would be refused.

[Law Officers of the Crown v. Carter - Court of Appeal 16.3.98 (HMC/unrep)]. For full report of judgment of Court of Appeal, see paragraph 58.

Appeal to Court of Appeal - application for appeal to be struck out - Notice of Appeal disclosing no cause of action - failure to lodge security for costs - failure to comply with requirements to lodge documents - unrepresented appellant

3. See Smith v. Helmot, paragraph 33.

Appeal to Court of Appeal - civil case - application for leave to adduce fresh evidence

4. Prior to her appeal against a judgment of the Royal Court concerning a boundary dispute, A applied to the Court of Appeal for leave to adduce as evidence in that appeal a set of documents including correspondence, plans and photographs. The Court of Appeal HELD, following its decision in Kirk v. Blackwell (4.GLJ.65), and applying the principles set out in Halsbury's Laws of England (4th Edn.), Vol. 37, paragraph 693, that A had failed to meet the test set out therein. All except one of the documents were in existence before the date of the Royal Court trial and thus would have been available for use at the hearing: accordingly, she had not demonstrated that this evidence could not have been obtained with reasonable diligence. Further, the Court of Appeal was satisfied that the additional evidence would not have an important influence on the outcome of the case. The application would be refused.

[Smith v. Slawther - Court of Appeal 20.3.98 (unrep/PTRF)]. For full report of judgment of Court of Appeal, see paragraph 59.

BANKING, INSURANCE AND FINANCE INDUSTRIES

Insurance business

5. Order in Council: The Insurance Business (Amendment) (Guernsey and Alderney) Law, 1998. - See (*sub nom* Insurance Business (Amendment No. 2) (Guernsey and Alderney) Law, 1997) 24.GLJ.5.

Royal Sanction 18.3.98. Registered 7.4.98. (No. II of 1998). In force in two stages on 1st July, 1998 and 4th September, 1998: The Insurance Business (Amendment) (Guernsey and Alderney) Law, 1998 (Commencement) Ordinance 1998. (No. XIII of 1998).

Investment business

6. Ordinance: The Protection of Investors (Amendment) Ordinance, 1998. - Amends Schedules 1 and 2 to the Protection of Investors (Bailiwick of Guernsey) Law, 1987 as follows:

General securities and derivatives become controlled investments for the purposes of the Law. These include company shares and stock; debentures, bonds and other debt instruments of a company or public sector body (as defined); shares, units and limited partners' interests in closed-ended collective investment schemes; warrants; options; futures; contracts for differences; and rights or interests in any of the foregoing. Subject to the provisions of Schedule 2, carrying on a restricted activity in connection with any such investment accordingly constitutes controlled investment business.

Borrowing and lending are brought within the definition of "dealing" as a restricted activity when carried on in connection with a controlled investment. And custody as a restricted activity is re-defined to include the safeguarding for others of, or of the evidence of title to, general securities and derivatives.

The exclusion from the ambit of controlled investment business which previously applied to activities incidental to another profession or business is refined and clarified.

In force 1.7.98. (No. X of 1998).

7. Statutory Instrument: The Collective Investment Schemes (Qualifying Professional Investor Funds) (Class Q) Rules 1998. - Provide for the authorisation and regulation under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 of a new class of collective investment schemes known as Class Q Schemes. The holders of units in these schemes must, with very limited exceptions, be government, local or public authorities; trusts, companies or limited partnerships whose net assets exceed £2,000,000; or individuals whose "net worth" (excluding main residence and household goods) is £500,000 or more. Rules are prescribed as to, inter alia, marketing, dealing, management, custody, distribution and allocation of income, reports, meetings and information particulars; but the Financial Services Commission may exclude or modify the application of any provision as respects a particular Class Q Scheme if satisfied that compliance with it is not necessary in the interests of investors.

In force 2.3.98. (GSI No. 5 of 1998).

CHILDREN AND YOUNG PERSONS

Alderney - application and extension of legislation

8. Order in Council: The Children and Young Persons (Amendment) (Guernsey) Law, 1997. - See 24.GLJ.10.

Registered 19.1.98. (No. XXIX of 1997). In force on 24.6.98: The Children and Young Persons (Amendment) (Guernsey) Law, 1997 (Commencement) Ordinance, 1998 (No. XII of 1998).

COMPANIES

Financial assistance for purchase of own shares

9. Ordinance: The Companies (Financial Assistance for Acquisition of Own Shares) Ordinance, 1998. - Allows a company and any of its subsidiaries to give financial assistance for the purpose of enabling a person to acquire shares in the company. The company or, as the case may be, the subsidiary must be authorised to do so by its memorandum or articles and must be able, immediately after the financial assistance is given, to satisfy the solvency test.

A company and any of its subsidiaries may also, subject to the same conditions, give financial assistance for the purpose of reducing or discharging a liability incurred by a person who has acquired shares in the company.

Companies may by special resolution alter their memoranda so as to authorise the giving of financial assistance.

In favour of persons dealing with a company in good faith, no act of the company is invalidated by reason of a failure to comply with the Ordinance, and parties to transactions with companies are not bound to enquire as to whether the transaction is in accordance with the Ordinance. However, it remains the duty of a company's directors to observe any limitation on their powers imposed by or deriving from the Ordinance.

In force 25.2.98. (No. V of 1998).

Protected cell companies

10. Ordinance: The Protected Cell Companies (Amendment) Ordinance, 1998. - Amends the Protected Cell Companies Ordinance, 1997 (see 23.GLJ.22). Permits a protected cell company to hold cellular assets and non-cellular assets through a nominee or a company the shares of which are cellular or non-cellular assets, or to cause such assets to be to be collectively invested or collectively managed by an investment manager.

The Ordinance provides that cellular assets attributable to a cell of a protected cell company are only available to the creditors of the company who are creditors in respect of that cell, and that those assets are absolutely protected from the company's other creditors; and that where a liability is attributable to a particular cell of a protected cell company, the cellular assets attributable to that cell are primarily liable, the company's non-cellular assets are secondarily liable and the liability is not a liability of any cellular assets not attributable to that cell.

It limits creditors' rights by implying (except in so far as the same is expressly excluded in writing) into every transaction entered into by a protected cell company terms that no party shall seek to make liable any cellular assets of the company for a liability not attributable to that particular cell; that if a party succeeds in making liable any cellular assets for a liability not attributable to that cell, that party shall be

liable to repay the amount to the company; and that if a party succeeds in levying execution against any cellular assets for a liability not attributable to that cell, that party shall hold those assets or their proceeds on trust for the company. The sum is then to be applied by the company to compensate the cell affected.

Moreover, where cellular assets attributable to one cell of a protected cell company are used to settle a liability attributable to another cell, the company shall, so far as compensation cannot otherwise be obtained, transfer from the cellular assets to which the liability was attributable to the cell affected assets sufficient to restore the loss.

Protected cell companies may pay cellular dividends in respect of cell shares by reference to the assets, liabilities and profits of the cell in question. An application may also be made to the Court for an order authorising the company to reduce the cell share capital of a particular cell.

In the case of loss which is attributable to a particular cell of a protected cell company and which is caused by fraud, the loss is borne (with certain exceptions) by the company's non-cellular assets. A liability not attributable to a particular cell of a protected cell company is borne solely by the company's non-cellular assets.

The Royal Court has power to make declarations as to whether any right is in respect of a particular cell, whether any creditor is a creditor in respect of a particular cell, whether any liability is attributable to a particular cell and as to the amount to which any liability is limited.

It is provided for the avoidance of doubt that a protected cell company does not require a cell transfer order to invest, and change investment of, cellular assets or otherwise to make payments or transfers from cellular assets in the ordinary course of the company's business.

Provision is made as to the distribution of surpluses of cellular assets attributable to any cell in relation to which a receivership order has been made and the business of which has been wound up and for the dissolution of a cell as to which a receivership order has been made.

Made 24.6.98. Deemed in force 1.2.97. (No. XV of 1998).

Purchase of own shares

11. Ordinance: The Companies (Purchase of Own Shares) Ordinance, 1998. - Provides that a company limited by shares or limited by guarantee and having a share capital may, subject to the provisions of the Ordinance, if so authorised by its articles, purchase its own shares (including any redeemable preference shares). A company may not however purchase its own shares if, as a result of the purchase, there would no longer be any other shareholder (apart from one holding redeemable preference shares).

The shares purchased must be fully paid. The company must have the consent of the member whose shares are to be purchased (unless the

memorandum or articles, the terms on which the shares were issued or the subscription agreement provide otherwise). With prescribed exceptions, shares may only be purchased out of distributable profits or out of the proceeds of a fresh issue of shares made for the purposes of the purchase, and any premium payable on purchase must be paid out of distributable profits.

Shares purchased under the Ordinance are treated as cancelled on purchase and the amount of the company's issued share capital is diminished accordingly by their nominal value. However, the purchase does not reduce the amount of the company's authorised share capital.

Except in the case of a market purchase, a purchase by a company of its own shares may only be made in pursuance of a contract authorised in advance by special resolution. In the case of a market purchase, the purchase must first be authorised by the company in general meeting or by the company's memorandum or articles.

Companies which purchase shares under the Ordinance must deliver to the Greffier a return in respect of the purchase.

Where shares of a company are purchased wholly out of the company's profits, the amount by which the company's issued share capital is diminished on cancellation of the shares must be transferred to the capital redemption reserve. Where shares are purchased out of the proceeds of a fresh issue and the proceeds are less than the nominal value of the shares purchased, the amount of the difference must be transferred to the capital redemption reserve.

Companies may also, subject to prescribed conditions (including approval by special resolution, publishing of notice in La Gazette Officielle and the hearing of objections by the Court) purchase their own shares out of capital, that is, otherwise than from their distributable profits or the proceeds of a fresh issue of shares.

A company which agrees to purchase any of its own shares is not liable in damages for any failure on its part to purchase the shares. However, on a winding up, but subject to prescribed conditions, the terms of the purchase may be enforced against the company.

In force 29.4.98. (No. VIII of 1998).

Shares - beneficial ownership - whether creditors had security interest - duty of directors to beneficial owners

12. The Appellants (AA) had entered into complex loan arrangements involving the transfer of their realty into the Respondent Company (R Ltd). The loans had been arranged through a firm of accountants who were also acting for AA. One of the creditors (C1) was a trust company owned and managed by the firm of accountants. A partner in the firm of accountants was the director of R Ltd and the shares in R Ltd were held by nominees of the firm of accountants. C1 was granted summary judgment in respect of its loan. On the instructions of C1, R Ltd commenced eviction proceedings against AA. An eviction order was granted against AA in the Royal Court.

Having obtained leave (see 24.GLJ.3), AA appealed to the Court of Appeal and sought a declaration that they were the beneficial owners of the shares in R Ltd. HELD by the Court of Appeal:

1. The eviction proceedings in the Royal Court had been "too summary", the first Appellant having represented himself and his wife and having been unable to make proper submissions whereby his argument had been understood by the court. In consequence, AA had not had a fair trial.

2. AA were the beneficial owners of the shares in R Ltd and had been treated as such by all parties at the time of the conveyance of their realty to R Ltd.

3. Neither C1 nor any other creditor had any security interest over the shares in R Ltd, there having been no formalities concluded under the customary law or the Security Interests (Guernsey) Law, 1993. The mere fact that the creditors had de facto control over R Ltd through its directors was insufficient to create a security interest. Further, there was no lien in favour of the creditors.

4. The directors of a company were required to act in accordance with the wishes of its shareholders. As AA were the beneficial owners of R Ltd, the directors were in breach of their duties to AA in bringing proceedings against AA without AA's consent to assist a third party creditor to whom the directors owed no duties.

5. In such circumstances the Court was entitled to look at the substance of the transaction rather than the form.

6. It was a matter of concern that there were conflicts of interest arising for the accountants and advocates involved in the transactions such that there was a doubt which would have to be investigated whether AA were ever truly given independent advice.

7. (Obiter) The informal security over AA's realty was unenforceable as being contrary to customary law.

Costs were awarded against C1.

[Gaudion & Gaudion v. Weardale Limited - Court of Appeal 4.2.98 (unrep/ PTRF)]. For full judgment of Court of Appeal, see paragraph 61.

CONSTITUTIONAL LAW

Elections

13. Order in Council: The Reform (Amendment) (Guernsey) Law, 1998. - See 24.GLJ.12.

Royal Sanction 22.4.98. Registered 26.5.98. In force 27.5.98. (No. III of 1998)

14. Ordinance: The By-election Ordinance, 1998. - Fixes dates for a Conseiller by-election and, contingently, a People's Deputy by-election.

In force 25.2.98. (No. III of 1998).

Public finances - commencement of Law

15. Ordinance: The States Audit Commission (Guernsey) Law, 1997 (Commencement) Ordinance, 1998. - Brings the States Audit Commission (Guernsey) Law, 1997 (see 24.GLJ.13) into force on 1.3.98.

In force 1.3.98. (No. IV of 1998).

States of Deliberation - replacement of Conseillers

16. Projet de Loi: The Reform (Replacement of Conseillers) (Guernsey) Law, 1998. - Provides for replacement of the Conseiller members of the States of Deliberation with an equal number of additional People's Deputies to be elected on the same basis as the existing 33 People's Deputies with effect from 1st May, 2000. Conseillers were formerly elected for a six year term of office and only persons who had at some time been members of the States of Deliberation for at least thirty months were eligible to be so elected. Before 1994 Conseillers were elected by the States of Election constituted in accordance with Article 4 of the Reform (Guernsey) Law, 1948. Beginning with the elections in 1994 they were elected by the popular vote of all those persons whose names were inscribed on the Register of Electors on an islandwide basis, and extended for this purpose to include the electorate of Alderney.

The People's Deputies are elected for a three year term of office by the persons whose names are inscribed on the section of the Electoral Roll relating to a particular Parish, the number of People's Deputies to be so elected in respect of each of the Parishes being determined under the Reform Law by Resolution of the States in accordance with the respective populations of the Parishes from time to time.

Given the increase in the number of People's Deputies to 45 it is estimated on current population figures that a fair distribution would require the election of no fewer than 12 Deputies in the most populous parish, that of St. Peter Port, whilst no other parish/electoral district would return more than 7 People's Deputies. It may well therefore be desirable to divide St. Peter Port into two electoral districts. It is also considered that at some time in the future there may be a case for the division or amalgamation of other parishes to form electoral districts with different boundaries from those of the parishes for the purpose of elections of People's Deputies. The Projet de Loi amends the Reform Law so as to confer that additional flexibility as respects the April 2000 General Election and thereafter.

Of the 12 Conseillers elected in 1994 the six who polled the fewest votes held office only until April 1997 and the six year term of office of the Conseillers elected in 1997 to replace these would not, apart from the present Projet, be due to expire until April 2003; the Projet accordingly declares for the avoidance of doubt that those six Conseillers, and any

person elected to fill a casual vacancy in the office of any one of them, are to cease to hold Office as conseillers at the end of April 2000, but that they may be elected to the office of People's Deputy at the General Election to be held during that month.

Approved by the States 28.5.98. Awaiting Royal Sanction.

17. Projet de Loi: The Replacement of Conseillers (Consequential Provisions) (Guernsey and Alderney) Law, 1998. - Repeals the Election of Conseillers (Participation of Alderney) (Guernsey and Alderney) Law, 1993 (see 15.GLJ.15) the provisions of which will cease to have any practical effect by virtue of the Reform (Replacement of Conseillers) (Guernsey) Law, 1998.

Approved by the States of Guernsey 28.5.98. Awaiting approval by the States of Alderney.

CONTRACTS

Conditional sale agreement - repossession of vehicle - duty of creditor in exercising power of sale - application for summary judgment - principles on which the Court acts

18. P, a finance company, terminated a conditional sale agreement relating to a car and brought proceedings against D for the balance of the loan less the sum of £300 which had been realised on the sale of the car. D filed defences and the matter was placed on the pleading list. P applied for summary judgment and D then filed an affidavit, annexed to which was an extract from Glass's Trade Catalogue, seeking to show that the vehicle had been sold at a price well below its proper value. P contended that, having failed to seek further and better particulars of the sum alleged to be due, D could not now seek to adduce such evidence and summary judgment should be granted. HELD by the Lieutenant Bailiff, in view of the effect of the grant of an application for summary judgment, namely that D would not have a full hearing of the evidence, it would be proper to consider the whole of the evidence that D had adduced, whether or not included in the pleadings, in order to decide whether he had any reasonable ground of defence to the claim. Following Cuckmere Brick Co. Ltd v. Mutual Finance Ltd. [1971] 2 All ER 633, a lender who repossesses a vehicle or other article on which money has been lent has a duty to act with good faith and without negligence in obtaining a fair price. However, there was no evidence to relate the prices in Glass's guide to the actual vehicle in this case, in particular no evidence as to its condition which would affect its value. Following European Asian Bank AG v. Punjab & Sind Bank (No. 2) [1983] 1 WLR 642, as applied in the case of The Monument Trust Company v. Gaudion (22.GLJ.45), the burden was on D to establish that he had an arguable defence and he had not done so. Accordingly the application would be granted. (ARWH).

[Lombard Finance (C.I.) Ltd. v. Brown - Ordinary Court 15.1.98 (NLP/unrep)].

CRIMINAL LAW AND PROCEDURE

Appeal to Court of Appeal - appeal from Magistrate's Court in criminal case - power of Court of Appeal to hear appeal

19. See Law Officers of the Crown v. Carter, paragraph 2.

Drug trafficking

20. Ordinance: The Drug Trafficking (Bailiwick of Guernsey) Law, 1988 (Specified Countries and Territories) (Amendment) Ordinance, 1998. - Amends the 1991 Ordinance by adding a number of countries to the list of specified countries in the Schedules thereto for the purpose of the enforcement in the Bailiwick of external confiscation orders.

In force 29.4.98. (No. VII of 1998).

False documents and domicile etc.

21. Projet de Loi: - The False Documents and Domicile, etc. (Bailiwick of Guernsey) Law, 1998. - Creates an offence of providing or procuring for another a document, address or personal identity which is "false" (e.g., because it is calculated to deceive, mislead or misrepresent). "Document" includes a passport or other statement indicating name, nationality, domicile, residence or address; "address" means any postal, telecommunication or electronic address.

Also creates an offence where a person, not being domiciled or resident in the Bailiwick, holds himself out as being so domiciled or resident. Aiding and abetting these offences is also an offence, and specific provision is made in relation to the issuing of advertisements for services constituting the above offences.

Approved by the States 25.3.98. Royal Sanction 19.5.98. Awaiting registration.

DIVORCE AND MATRIMONIAL CAUSES

Divorce - financial provision - lump sum - "big money" case - approach of the Court - additional provision for further education if required

22. Following the making of a final order in divorce proceedings against her husband on the ground of adultery, W applied for ancillary relief under Parts VII and VIII of the Matrimonial Causes (Guernsey) Law, 1939. The matter came before the Deputy Bailiff who, in a judgment dated 31st January, 1997, made a number of awards in favour of W, including a lump sum and a provision that a further sum be invested in a fund in the joint names for the future (university) education of the children of the marriage who were then aged 16 and 13 respectively with the proviso that if the fund was not required because the children did not go on to further education it would be returned to H. The Deputy Bailiff also added to his lump sum calculation a Besterman cushion (Re Besterman deceased [1984] Ch 458). In his judgment the Deputy Bailiff referred to English "big money"

cases including Duxbury v. Duxbury, [1992] 2 ALL ER 77, Gojkovic and Gojkovic [1990] 2 ALL ER 84 and Preston v. Preston [1982] Fam 17. H appealed to the Court of Appeal.

The Court of Appeal endorsed the approach that had been adopted in previous cases of appeals from the Matrimonial Causes Division and made particular reference to the previous Court of Appeal cases of Traisnel v. Traisnel (6.5.85) and Swaine v. Swaine (20.9.90). There was no fault in the reasoning of the Deputy Bailiff. The appeal would be dismissed.

[E v. E - Court of Appeal 20.3.98 (PTRF/ADL) (RESTRICTED)].

Divorce - financial provision - maintenance payable to children - effect of Order

23. An Order of the Royal Court pursuant to a divorce provided that D should make payments of maintenance to the children rather than to P, their mother, who had sole care and control. D opened bank accounts in his own name for the purpose of making payments which he contended would be used for their benefit. P sued D for arrears of maintenance. HELD, by the Assistant Magistrate, by adopting this procedure D had effectively prevented P from utilising the money which the Court ordered should be paid to the children for their maintenance and benefit because P did not have access to the accounts. D had not complied with the Order of the Royal Court and judgment would be given to P for the arrears. (ARWH).

[F v. F - Magistrate's Court 25.6.98 (unrep/unrep)].

Matrimonial causes - ouster orders - access applications - multiple applications - approach of the court - mediation

24. In a complex judgment covering many areas of matrimonial practice, the Court of Appeal issued the following guidelines:

Ouster orders

1. Except in an emergency, in matrimonial matters and especially those concerning children, both sides must be heard and notice of an application, however short, should be given wherever possible.

2. Ex parte orders should only be made for a short period until the matter could be heard inter partes.

3. Any order made should require the order to be reviewed inter partes at a fixed and early date.

4. The burden of proof is on the appellant to show that the order is justified and not on the respondent to show that it should be discharged.

5. In ex parte applications, the applicant must make full and frank disclosure.

Access

A child has a right of access to each parent and, save in the most exceptional circumstances, this must be considered of paramount importance.

Timetable

In cases where there are multiple applications, a timetable would be helpful. Applications concerning a refusal by one parent to allow access must be heard expeditiously.

Mediation

A mediator should be appointed in difficult cases.

[C v. C - Court of Appeal 3.6.98 (unrep/CMF)].

EMPLOYMENT

Contract of employment - construction - whether term to be implied - test to be applied

25. The contract of employment of A, an air traffic controller, included a condition that, should A's employment be terminated by the States for reasons of medical incapacity, he would be entitled to certain benefits, including a year's pay and a pension, subject to the restriction that if he was found alternative employment in the States on similar terms he would not be entitled to such benefits. A resigned from his position at a time when he had been suffering from eye problems. During his period of notice those problems led to the withdrawal of his Civil Aviation medical certificate and consequently to his immediately ceasing operational duties. A instituted proceedings against the States who had refused to grant him a pension on the grounds of incapacity and had refused to allow him to withdraw his letter of resignation. He argued that such refusal was a breach of an implied term of his contract of employment. The Deputy Bailiff upheld the States's Exception de Fonds that no term entitling A to the benefits claimed could be implied where he had voluntarily terminated his contract. HELD, on appeal to the Court of Appeal, applying Trollope & Colls Limited v. North West Metropolitan Regional Hospital Board (1973) 1 WLR p. 601-609 and Reigate v. Union Manufacturing Company (Ramsbottom) Limited (1918) 1 KB 593, at p. 605, the test was whether the term to be implied was necessary for the business efficacy of the contract. The Court's function was to interpret and apply the contract which the parties had made for themselves and only imply a term if it found that the parties must have intended the term to form part of the contract. The Deputy Bailiff's approach, that it was not in any way obvious or necessary to imply a term that A should be entitled to the benefits in the circumstances of the case, was correct. The appeal would be dismissed.

[Nash v. States of Guernsey - Court of Appeal 20.3.98 (AMM/HER)]. For full judgment of Court of Appeal, see paragraph 62.

Employment protection legislation

26. Projet de Loi: The Employment Protection (Guernsey) Law, 1998. - Part I provides for the giving by employers and employees of prescribed minimum periods of notice to terminate a contract of employment. Contracts of employment cannot exclude these rights. A failure by an employer or employee to give the notice required is deemed to be a breach of contract and actionable as such. Liquidators in a compulsory winding up may treat contracts of employment to which the company is a party as terminable without notice.

Part I also provides that an employee is entitled on being dismissed to be provided by his employer with a written statement of reasons for dismissal.

Part II confers on qualifying employees the right not to be unfairly dismissed. It is for the employer to show what was the reason for the dismissal and that it was a potentially fair reason (e.g., one relating to the capability or qualifications of the employee for performing his work). The determination of whether the dismissal was fair or unfair then depends on whether in the circumstances the employer acted reasonably in treating the reason as a sufficient reason for dismissal.

The dismissal of an employee is regarded as having been unfair if the reason for it was that the employee was or was not a member of an independent trade union (or certain other reasons connected with trade union activities); that the employee was pregnant (or some other reason connected with her pregnancy); that the employee had performed certain actions in connection with health and safety at work; or that the employee had complained of an infringement by the employer of specified statutory rights.

The qualifying period for an unfair dismissal claim is continuous employment for two years, except where the reason for dismissal is one of the automatically unfair ones specified above.

Part III deals with the complaints procedure and the adjudicators. An Adjudicators' Panel is established from whom a single adjudicator is appointed by the Board of Industry to hear a complaint against an employer of unfair dismissal or failure to provide a written statement of reasons for dismissal. A complaint has to be presented within one month of the effective date of termination of the employment (unless the Board allows further time). Where an adjudicator upholds a complaint of unfair dismissal he must make an award of compensation equal to three months' pay (unless he finds that the complainant unreasonably refused an offer of reinstatement). Compensation for failure to give reasons is half a month's pay. An appeal lies from a decision of an adjudicator on a question of law to the Royal Court. Awards are preferred debts for the purposes of section 1 of the Preferred Debts (Guernsey) Law, 1983.

Under Part IV of the Law (general provisions) the Board can issue codes of practice as to dismissal procedures. A failure by an employer to observe a code of practice does not of itself render him liable to proceedings but

the code is admissible in evidence and can be taken into account in determining whether an employer has acted reasonably.

Complaints under the Law of unfair dismissal or failure to provide a written statement of reasons for dismissal are expressly excluded from the application of the Industrial Disputes and Conditions of Employment (Guernsey) Law, 1993 (see 13.GLJ.24).

The Schedule to the Law sets out the adjudication procedure, including the procedure to be followed in hearings, the power of the Board of Industry to prescribe rules of procedure, the powers of adjudicators as to summoning witnesses, etc, and costs. In particular, the costs of legal representation are irrecoverable as between the parties.

Approved by the States 29.4.98. Awaiting Royal Sanction.

GAMBLING

27. Order in Council: The Gambling (Amendment) (Guernsey) law, 1997. - See 24.GLJ.28.

Registered and in force 19.1.98. (No. XXVII of 1997).

HEALTH AND MEDICINE

28. Ordinance: The Health Service (Physiotherapy Benefit) Ordinance, 1997. - Replaces the Health Service (Physiotherapy Benefit) Ordinance, 1995 (see 20.GLJ.32) so as to make continued provision for physiotherapy benefit under the Health Service (Benefit) (Guernsey) Law, 1990. Physiotherapy benefit means (subject to prescribed exceptions) physiotherapy requisite in the case of a person for the treatment of disease or otherwise by reason of his condition. The physiotherapy must be provided by an approved physiotherapist (i.e., one listed by the States Board of Health) pursuant to the provisions of the Physiotherapy Contract made between the States and the Guernsey Physiotherapy Group.

In force 1.1.98. (No. I of 1998).

HOUSING

Control of occupation - application for housing licence - appeal to Royal Court against refusal

29. A had first lived in Guernsey in 1972 when he was 19 (and thus still, at that date, a minor) and he had since that date lived in open market accommodation with his parents and, later, his wife and children. He appealed against the Housing Authority's refusal to grant him a licence on two grounds: firstly, that the decision of the Authority was ultra vires and/or unreasonable in that the Authority had wrongly concluded that A's entire residence in Guernsey had been in open market dwellings as an adult and, secondly, that the Authority's statement in its letter of refusal

that, where a person had been a long term resident in open market accommodation only, circumstances of residence were of prime importance and would generally override other factors such as strength of familial or like connections, was ultra vires. HELD, by the Bailiff, the fact that the Authority had missed a point of law and/or fact as to the date of A's majority made the decision a nullity which could be resubmitted to the Authority for a decision on the correct facts if A so chose but did not render the decision ultra vires or "Wednesbury" unreasonable. As regards the second ground of appeal, the Authority's statement was merely an expression of opinion and policy and was not ultra vires. The hearing would be adjourned to enable A, if he so chose, to pursue his appeal before the Jurats. (GMD).

[Lepp v. States Housing Authority - Ordinary Court 20.2.98 (StJAR/HER)].

Control of occupation - Housing Register

30. Order in Council: The Housing (Control of Occupation) (Amendment) (Guernsey) Law, 1998. - Repeals section 54(3) of the 1994 Law which restricted a qualified resident who had caused a property to be inscribed on Part B of the Housing Register (open market hotels) to occupation of an open market dwelling or the dwelling he was occupying at the time of the inscription.

Approved by the States 29.4.98. Royal Sanction 24.6.98. Awaiting registration.

31. Ordinance: The Housing (Control of Occupation) (Amendment of Housing Register) Ordinance, 1998. - Permits the Housing Authority to inscribe specified hotels in Part B of the Housing Register (open market hotels) if application is made in that behalf within three months.

In force 29.4.98. (No. VI of 1998).

PAROCHIAL MATTERS

Refuse rate

32. Ordinance: The Parochial Collection of Refuse (Saint Andrew) Ordinance, 1998. - Applies the Parochial Collection of Refuse (Guernsey) Law, 1958 to St. Andrew's as from 1st January, 1999.

In force 29.4.98. (No. IX of 1998).

PRACTICE AND PROCEDURE (CIVIL)

Appeal to Court of Appeal - application for appeal to be struck out - Notice of Appeal disclosing no cause of action - failure to lodge security for costs - failure to comply with requirements to lodge documents - unrepresented appellant

33. In proceedings concerning a boundary dispute A had given Notice of Appeal against a Royal Court judgment and R had successfully applied for security for costs (see 24.GLJ.45). R applied to the Court of Appeal to strike out the appeal on the grounds (a) that it disclosed no reasonable cause of action, was scandalous, frivolous or vexatious, or that it was otherwise an abuse of the process of the Court; (b) that the appeal be deemed abandoned because A had failed to lodge the documents required to be lodged pursuant to the Court of Appeal (Civil Division) (Guernsey) Rules, 1964, Rules 8 and 9; or (c) that A had failed to lodge security for costs in compliance with the Order of the Royal Court. HELD by the Court of Appeal, although the appeal could not be held to be scandalous, frivolous or vexatious, the grounds were difficult to comprehend and prima facie disclosed no basis for an appeal. However, as A was handling the appeal herself the appeal would not be struck out but A would be ordered to provide an amended Notice of Appeal to the satisfaction of the Court; to lodge the necessary documents within a specified period; and to lodge security for costs within 14 days of the judgment. Should A fail to comply with the requirements the appeal would be dismissed.

[Smith v. Helmot - Court of Appeal 20.3.98 (unrep/DGLeM)]. For full report of judgment of Court of Appeal, see paragraph 60.

Appeal to Court of Appeal - application for leave to adduce fresh evidence

34. See Smith v. Slawther, paragraph 4.

Cause of action - application to strike out - finding of fact by Court of Appeal - whether subsequent proceedings an abuse of process

35. In proceedings concerning the purchase of shares (see 24.GLJ.47), the Court of Appeal ordered not only that a mareva injunction concerning certain shares should be lifted but also that those shares should be released to a third party, Y, who, it was alleged, had provided the funds to pay for them and who required the shares as security for the loan. In subsequent proceedings in the Royal Court one of the parties, R, sought a declaration as to the ownership of the shares. This was opposed by A on the ground that the Court of Appeal had already adjudicated upon the issue. HELD, by the Deputy Bailiff, ordering the striking out of the proceedings, although the Court of Appeal had no more power to make a finding of fact in a case involving an appeal from a Bailiff sitting alone than the judge below had, in the circumstances of this case a finding of fact, that the source of the funds had been the third party, Y, did not appear to have been contested. This finding of fact could not properly be ignored by the Deputy Bailiff and allowed to be re-litigated before the

Royal Court. (deVGC).

[Matheson Securities (Channel Islands) Limited v. Hulme - Ordinary Court 17.3.98 (PTRF/MGF)].

Disclosure order - Norwich Pharmacal-type Order granted in Guernsey as a result of which Mareva orders were obtained elsewhere - whether Defendants entitled to copies of evidence on which Guernsey Order was granted

36. PP, a Russian company and its English subsidiary, had complaints against the former directors of the subsidiary involving fraud, unjust enrichment and other wrongdoings by them and certain companies with whom the directors were involved. Mareva proceedings in England initially failed for lack of evidence, but PP obtained certain new information and as a result of this applied in Guernsey for an order on the Norwich Pharmacal principles against the local branch of a bank ("the Bank") seeking information relating to the affairs of the defendants including the companies, Applicants in this matter. These applications were granted and the Court placed restrictions on the Bank preventing it from disclosing the existence of the order to any of its customers. Relying on information that had come to light as a result of the Bank's disclosures PP went back to the English Court and obtained fresh Mareva orders and a further Mareva order was obtained in Guernsey freezing certain assets which were in the hands of the Applicants. No steps were taken to set aside the fresh Mareva orders or challenge the validity of the information disclosed by the Bank as a result of the Guernsey disclosure order. The English proceedings were continuing and pleadings had been filed but were not closed. The Applicants applied for copies of evidence submitted in Guernsey to support the original disclosure order against the Bank. HELD, by the Deputy Bailiff, none of the Applicants had any *locus standi* to ask for details of material which PP had put before the Court in connection with the disclosure order against the Bank. If there had been a breach of confidence by the Bank then that was a matter for the Applicants to take up with the Bank as PP would have no information as to the relationship between the Applicants and the Bank. A further ground for refusal was that it was not clear from whom Counsel for the Applicants was getting his instructions as the Applicants were all companies, and in view of the allegations of fraud the Court would wish to enquire as to the identity of the recipients of any information. Finally it could be that documents relating to the applications might, if relevant, be discoverable in the substantive English proceedings. (deVGC).

[Normaco Limited and RAO Norilsk Nickel v. Lundman and Others: In the matter of an application by Mazamet Limited and four others - Ordinary Court 12.5.98 (JPG/JJLM).]

Discovery of documents

37. Order of the Royal Court: The Royal Court (Discovery of Documents) Rules, 1998. - Empowers the Royal Court, on the application of a person who appears likely to be a party to subsequent proceedings in which a claim for personal injuries or death is likely to be made, to order discovery of documents against a person who appears likely to be a party to the proceedings. The Order also empowers the Royal Court, in any proceedings

in which a claim is made for personal injuries or death, to order discovery against a person who is not a party to the proceedings but who appears likely to have relevant documents. Production of documents under the Order is to be made to the applicant's legal advisers or any medical or other professional adviser.

Made 17.2.98. In force 1.3.98. (O.R.C. 1998 No. I).

Péremption d'instance - inaction for one year - date from which such period will run

38. On an application by DD that (inter alia) PP's action be declared périmée, the Bailiff HELD that although inaction of one year since the last Court Order on the part of a plaintiff will trigger peremption, in this case the last Court Order required action by both parties and in such a case it was not possible to determine from what point the one year period would run and therefore, although it would be open to DD to argue that the cause be struck out for want of prosecution under the Royal Court Civil Rules or under the Court's inherent jurisdiction, the action was not perempt. (GMD).

[Silver Falcon Enterprises Limited et al v. International Hellenic Operations Limited et al - Ordinary Court 24.4.98 (JPG/PTRF)].

Summary judgment - application for leave to defend - leave to defend subject to conditions - application to strike out counterclaim

39. A, a building company, commenced proceedings in the Royal Court against DD for monies due under a building contract. DD consented to judgment in respect of part of the sum alleged to be due (£7,419) but made a counterclaim based on A's alleged negligent workmanship. DD had also made similar allegations in a counterclaim to proceedings commenced by their architects to recover their professional fees which counterclaim had been dropped when the main action was settled. A applied to the Royal Court for summary judgment to recover the balance of £27,466 and argued, in the alternative, that should leave to defend be granted to DD such leave should be conditional upon payment into court of the whole sum claimed. Further, A applied for the counterclaim to be struck out on the ground that it was not a genuine counterclaim and an abuse of process. HELD by the Lieutenant Bailiff, summary judgment was only appropriate where the judge to whom the application was made did not consider that there was any reasonable ground of defence to the claim and it would not be appropriate in the present case. On the question whether a condition of payment in should be imposed, having considered the relevant cases Lloyds Banking Co v. Ogle [1876] 1 Ex D 262 and M.V. Yorke Motors v. Edwards [1982] 1 AER 1024, there was an element of suspicion in the conduct of DD regarding the course of payments made, the difficulty in making contact with them and the abandonment of the counterclaim against the architects and there should be a condition attached to leave to defend. However, it was important not to impose an onerous condition which would effectively remove the leave to defend. Leave would be granted subject to the payment into court of £4,000 within 21 days. Further, it was apparent that there were issues to be tried on DD's allegations regarding the quality of the

work and the application to strike out the counterclaim would be dismissed. (ARWH).

[R.G. Phillips & Son Limited v. Hill - Ordinary Court 2.6.98 (NLeP/CAT)].

Summary judgment - principles on which the Court acts

40. See Lombard Finance C.I. Limited v. Brown, paragraph 18.

Summary trial - eviction proceedings - whether defendant able to make proper representations

41. See Gaudion v Weardale Limited, paragraph 12.

PUBLIC HOLIDAYS

42. Ordinance: The Public Holidays (Boxing Day) Ordinance, 1998. - Provides that Saturday, 26th December, 1998 shall not be a public holiday but that Monday, 28th December, 1998 shall be a public holiday.

In force 24.6.98. (No. XIV of 1998).

REGISTRATION OF BIRTHS, DEATHS AND MARRIAGES

43. Order in Council: The Still-Birth (Definition) (Bailiwick of Guernsey) Law, 1998. - See 24.GLJ.50.

Royal Sanction 11.2.98. Registered and in force 3.3.98. (No. I of 1998).

ROAD TRAFFIC AND PUBLIC TRANSPORT

Driving licences

44. Ordinance: The Driving Licences (Guernsey) (Amendment) Ordinance, 1998. - Amends the Driving Licences (Guernsey) Ordinance, 1995 by enabling full licences to be granted to the holder of a valid pass certificate issued in Great Britain, Northern Ireland, the Isle of Man, Jersey, a Member State of the EC (provided that he has taken up normal residence in the Island) or any country with which the UK has a reciprocal arrangement. Amends some of the categories of vehicle and also limits the duration of licences for certain categories. Provides exemptions from the additional requirements that must be satisfied for certain categories of full licence. Makes other minor drafting changes.

Made 24.6.98. In force 24.6.98. (No. XI of 1998).

TOURISM

Boarding permits

45. Projet de Loi: The Tourist (Amendment) (Guernsey) Law, 1998. - Makes a number of amendments to the Tourist Laws, most notably in connection with the operation of the boarding permits and grading systems for tourist accommodation. The provision for reward of accommodation for short periods will require a boarding permit even if it is claimed that the accommodation is provided for only one person at a time. All boarding permits will have to be renewed with effect from 31st March each year. The matters to be considered when deciding whether to grant, refuse, suspend, revoke, attach conditions to, or vary any conditions of, a boarding permit are modified. A condition must be attached to every boarding permit prescribing the maximum number of persons for whom accommodation may be provided pursuant to it. The position as to the giving of notices and opportunities to make representations, and the time and manner in which an appeal may be instituted, are clarified; as is the power of the Board to appoint people other than States' employees as inspectors for the purposes of the Tourist Laws.

The Projet makes several changes to the system for classification and grading of tourist accommodation. It provides a statutory basis for the use of symbols and insignia (such as the present system under which a number of "crowns" are awarded to graded establishments); gives statutory entitlement to the Board to appose a plaque to the exterior of any graded tourist accommodation; and modernises the list of matters to be taken into account in considering the grading and description of premises.

The Projet expands the existing offences concerning false representations about boarding permits so as to include signs and advertisements etc. which by way of business describe premises as hotels, guest houses or self-catering accommodation when there is no boarding permit in force for those premises; it also expands the present offence of "wilfully obstructing", so as to include failing without reasonable excuse to provide information reasonably required by the Board about the operation of tourist premises.

The Projet replaces the provisions of the 1948 Law under which fees have been set by Resolution thereafter embodied in an Ordinance of the States, with a power conferred on the Board to set fees by Order, but any such Order will have to be laid before the States and will be susceptible to annulment.

Finally, the Projet repeals the section of the 1948 Law which had enshrined the functions of the Tourist Board in statutory form, and replaces it so that, in common with most States Committees, the Board's mandate can - subject of course to discharging their duties under the Tourist Laws themselves - be set by Resolution of the States.

Approved by the States 29.4.98. Awaiting Royal Sanction.

TRUSTS

Applications under the Trusts (Guernsey) Law, 1989 - application by local trust company for permission to charge remuneration - procedure on such applications and generally

46. A, a trust company incorporated in Guernsey, applied to the Royal Court for an order under section 63 of the Trusts (Guernsey) Law, 1989 enabling it to charge remuneration in respect of the discharge of its duties as trustee of a settlement which was governed by English Law. Under English Law only a trust corporation, as defined, or a professional person acting as a trustee could charge fees. Having been satisfied, on the basis of affidavit evidence from Chancery Counsel, that under English Law the applicant was entitled to resettle the trust funds in the way proposed in the application, and also that such resettlement was in the interests of the affected beneficiaries and their minor children, the Court went on to consider the application. The Deputy Bailiff, sitting with Jurats, HELD that, as the evidence showed that the alternative course of the beneficiaries' paying the fees personally or out of the trust fund might have fiscal disadvantages, and as the beneficiaries had developed a good relationship with A which would almost certainly have qualified as a trust corporation had it been established in England, the application would be granted. The Court also went on to give guidance as to the way in which applications under the 1989 Law should be dealt with:-

(1) On the question whether applications should be considered by the Bailiff sitting alone or with the Jurats, the majority of such applications would not be limited to law and procedure and thus would more appropriately be dealt with by the Bailiff retiring with the Jurats to decide on the appropriate order.

(2) Although many such applications were unopposed the Court must consider them all on their merits.

(3) It was necessary that the Court recorded its conclusions so that a body of case law could be built up.

(4) As trusts involve the private affairs of individuals, some of whom may be minors, the Court should sit in Chambers and hand down its judgment in Chambers, and any publication made in such a way that the beneficiaries could not be identified.

(5) Where such an application was contested there would be a need for greater formality but the procedure in each case would depend on the circumstances, e.g. directions of law might need to be given in Open Court and issues of fact might need to be considered by the Jurats alone after a summing up by the Bailiff. (deVGC with Jurats).

[In re Kleinwort Benson (Guernsey) Trustee Limited's Application; In re Mr and Mrs W's 1966 Settlement - Ordinary Court 12.3.98 (JNvL/PAA)].

Breach of trust - insolvent trust company - joinder of directors as co-defendants - section 70 of the Trusts (Guernsey) Law, 1989 - whether plaintiff could proceed against directors as guarantors before liability of company was established - whether fiduciary duty owed by directors to plaintiff - whether cause of action in negligence

47. P brought proceedings against D1, a trust company which was known to be insolvent, for breach of trust. The company's three directors were joined as co-defendants on the grounds (a) that under section 70 of the 1989 Law they were deemed to be guarantors of the company in respect of any damages and costs awarded by the Court against the company as trustee; (b) that they were in breach of their fiduciary duty to P; and (c) that they were negligent in that they failed to ensure that sufficient controls were in place. D3 and D4 each filed Exceptions de Fonds alleging that no cause of action was disclosed against them, arguing that no action could be taken against them under section 70 of the 1989 Law until the Court had made a finding against the trustee and that they did not owe a fiduciary duty to P. D4 also argued that there was no cause of action against him in negligence because there was no allegation that he had done or omitted to do anything in connection with P's affairs. HELD by the Deputy Bailiff, dismissing the first Exception, it could be harsh and cause unnecessary delay to interpret section 70 of the Law as barring injured beneficiaries from suing directors of corporate trustees until they had exhausted their remedy against the trustee although there might be circumstances where the Court might properly stay proceedings brought against a director pending resolution of the action against the trustee, for example where there was no suggestion that the trustee might not be able to meet any judgment awarded against it. In relation to the fiduciary duty of directors of a company, following Bath v Standard Land Co. Ltd [1911] 1 Ch 618 generally a director has no fiduciary duty other than to the company of which he is a director: special duties were imposed on directors of trust companies by section 70 and no further fiduciary duties should be imposed by the Court. Accordingly, the second Exception would be upheld. On the question whether there was a cause of action against D4 in negligence, it could not be said that such a cause of action in circumstances where he did nothing either to encourage or prevent the acts of which P complained was not in any circumstances maintainable and that Exception would be dismissed. (deVGC).

[Cross v. Benitrust International (C.I.) Ltd et al - Ordinary Court 6.4.98 (StJAR/NJB)].

WILLS, SUCCESSION AND ADMINISTRATION OF ESTATES

Succession - wrongful act of beneficiary on intestacy leading to death - whether beneficiary barred from succession

48. In a case where a widow had been convicted in Spain of causing the death of her husband in circumstances which, had the offence been committed in Guernsey, would have resulted in a conviction of voluntary manslaughter, the Bailiff HELD that, under Norman customary law, the widow was "indigne" to succeed in her late husband's estate and payments which would otherwise have been made to her under two investment bonds as the survivor of the

two insured lives fell to be distributed excluding the widow. The investment bonds should be dealt with as insurance products which constituted a settlement under section 12 of the Married Women's Property Law, 1928, which settlement had been terminated by the death of the husband as a result of the wrongful act. (GMD).

[In re Estate Poole - Ordinary Court 3.2.98 (StJAR/JMW)].

GUERNSEY STATUTORY INSTRUMENTS

49. The following Statutory Instruments were made during the period covered by this issue. Except where otherwise indicated they have not been digested in detail. A reference copy of each is held at the Greffe and copies may be obtained from the relevant Committee.

Title	Date Made	Coming into force	No.
The Income Tax (Pensions) (Contribution Limits and Tax-free Lump Sums) Regulations, 1998	8. 1.98	1. 1.98	1.
The Parking Places (Amendment) Order, 1998	19.12.97	2. 1.98	2.
The Health Service (Payment of Authorised Appliance Suppliers) (Amendment) Regulations, 1998	29. 1 98	1. 1 98	3.
The Health Service (Payment of Authorised Suppliers) (Amendment) Regulations, 1998	29. 1.98	1. 1.98	4.
The Collective Investment Schemes (Qualifying Professional Investor Funds) (Class Q) Rules 1998 (see paragraph 7)	3. 2.98	2. 3.98	5.
The Post Office (Inland Post) (Amendment) Order, 1998	19. 2.98	1. 4 98	6.
The Post Office (Overseas Letter Post) (Amendment) Order, 1998	19. 2.98	1. 4.98	7.
The Post Office (Overseas Parcel Post (Amendment) Order, 1998	19. 2.98	1. 4.98	8.
The Teachers' Superannuation (Amendment) (Guernsey) Regulations, 1998	26. 3.98	1.10.96	9.
The Protected Cell Companies (Fees for Insurers) Regulations, 1998	1. 4 98	1. 4 98	10.
The Rent Control (Variation) Order, 1998	20. 5 98	1. 7 98	11.
The Prohibited and One-Way Streets (Amendment) (No.1) Order, 1998	17. 5.98	1. 6 98	12.
The Parking Places (Amendment) Order, 1998	22. 5.98	1. 6.98	13.
The Parking Places (Amendment) (No 2) Order, 1998	8. 6.98	14. 6 98	14.
The Teachers' Superannuation (Amendment) (No.2) (Guernsey) Regulations, 1998	16. 6.98	1. 4.98	15.
The Agricultural Census Order, 1998	19. 6.98	30. 6.98	16.

UNITED KINGDOM STATUTORY INSTRUMENTS

50. The following is a list of Statutory Instruments made in the United Kingdom which are specifically applicable to Guernsey and which were registered here during the period covered by this issue. Unless otherwise indicated they are not digested in detail elsewhere in the Journal.

	S.I. Number
The Antarctic (Guernsey) Regulations, 1997	2966
The Deep Sea Mining (Temporary Provisions) Act 1981 (Guernsey) Order, 1997	2978
The Aviation Security (Guernsey) Order, 1997	2989
The Merchant Shipping (Oil Pollution and General Provisions) (Guernsey) Order, 1998	260
The Federal Republic of Yugoslavia (United Nations Sanctions) (Channel Islands) Order, 1998	1072
The United Nations Personnel (Guernsey) Order, 1998	1075
The Asylum and Immigration Act 1996 (Guernsey) Order, 1998	1264
The United Nations Arms Embargoes (Channel Islands) (Amendment) (Sierra Leone) Order 1998	1507

ALDERNEY

CHILDREN AND YOUNG PERSONS

Application of legislation

51. Order in Council: The Children and Young Persons (Amendment) (Guernsey) Law, 1997. - See paragraph 8.

CONSTITUTIONAL LAW

52. Order in Council: The Government of Alderney (Amendment) Law, 1998. - See 24.GLJ.64.

Royal Sanction 22.4.98. Registered and in force 26.5.98. (No. IV of 1998).

CRIMINAL LAW AND PROCEDURE

Money laundering

53. Projet de Loi: The Money Laundering (Disclosure of Information) (Alderney) Law, 1998. - Provides that no obligation of secrecy or other restriction on the disclosure of information, whether arising by statute, contract or otherwise, is contravened by reason of the disclosure to a specified officer of any reasonable suspicion that any money or other property is, or is derived from or represents, the proceeds of criminal activity.

Approved by the States 6.5.98. Awaiting Royal Sanction.

HEALTH AND MEDICINE

54. Ordinance: The Alderney (Application of Legislation) (Health Service) (Benefit) (Amendment) Ordinance, 1997. - Applies the Health Service (Physiotherapy Benefit) Ordinance, 1997 (see paragraph 28) to Alderney.

In force 1.1.98. (No. II of 1998).

HOUSING

55. Ordinance: The Housing (Exemptions) (Alderney) Ordinance, 1998. - Exempts Alderney Stores and Bunkering Company (1978) Limited from the provisions of the Housing (Control of Occupation and Development) (Alderney) Law, 1994 thus enabling the Building and Development Control Committee to grant development permission for the construction by that company of the housing development specified in the Ordinance.

Ordinance of the States of Alderney of 1.4.98.

ROAD TRAFFIC

56. Ordinance: The Speed Trials (Alderney) Ordinance, 1998. - Closes Tourgis Hill and the Whitegates/Mannez Lighthouse road to public traffic, and disapplies certain road traffic rules (such as speed limits), for the purposes of the September speed trials.

Ordinance of the States of Alderney of 6.5.98.

SARK

FISHING

57. Ordinance: The Scallops (Sark) Ordinance, 1998. - Establishes a close season from the 20th October to the 20th March (inclusive) during which a person cannot possess, buy, sell or offer for sale any scallops (other than preserved ones). Outside the close season, a person cannot take any scallop except under a licence of the Sark Sea Fisheries Committee.

Ordinance of the Chief Pleas of 21.1.98. In force 1.3.98.

58. [CRIMINAL DIVISION - APPEAL NO. 223]

1998 MARCH 16

THE LAW OFFICERS OF THE CROWN
V.
RICHARD MARK CARTER

Before: CALCUTT, LORD CARLISLE AND CLARKE JJ.A

Appeal to Court of Appeal - appeal from Magistrate's Court in criminal case - power of Court of Appeal to hear appeal

See paragraph 2.

The Applicant, in person
G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown

LORD CARLISLE, J.A.: This is an application for leave to appeal to the Court of Appeal by Richard Mark Carter, from his conviction and sentence imposed upon him in the Magistrate's Court on 8th August 1997, for the offence of disorderly conduct, where he was convicted and sentenced to 2 months imprisonment, to be suspended for 12 months. Further, he makes application to this Court to call a witness.

The facts are that Mr. Carter appeared before the Assistant Magistrate, first of all on 4th, and thereafter on 8th August, on a charge that he, at about 12.15 a.m. on 3rd August 1997, in a certain public place, namely, North Plantation, St. Peter Port, behaved in a disorderly manner, contrary to Section 1(c)(2) of the Summary Offences (Bailiwick of Guernsey) Law 1982, as amended. As I say, the Applicant pleaded not guilty to that charge.

The allegations were that at 11.45 p.m. on 2nd August 1997, he had been seen by a policeman on North Plantation arguing with a doorman at Les Folies d'Amour Nightclub. According to the officer he was shouting and swearing. He was asked to leave the area...

APPLICANT: And did so peacefully.

LORD CARLISLE: ... at the first stage he refused to do so - this was the officer's evidence- and then, as he says, went peacefully.

Thirty minutes later, at 12.15 a.m. on 3rd August, the officer's evidence was that he was seen again by that officer. He was then bleeding heavily from the mouth. According to the officer he was shouting and swearing at passers-by, and spitting blood over passers-by.

The officer arrested him and charged him with disorderly conduct. The Applicant, Mr. Carter, denied the charge, he said that after he had left the area of North Plantation he had been assaulted, struck in the face, and had considerable damage done to his face, and he denied that he was shouting and swearing at passers-by, although he said he may have been shouting at Christine

A Gill, who he said, had organised the assault upon him. The Deputy Magistrate, having heard the evidence, convicted Mr. Carter and, as I say, ordered him to be sentenced to 2 months imprisonment suspended for 12 months.

On 3rd November 1997, Mr. Carter appealed against that conviction before the Bailiff in the Royal Court. The appeal against conviction was dismissed, and on 18th November, an appeal which it had been understood had been tendered in the notice of appeal against sentence, but which Mr. Carter has told this Court
B he never intended to pursue in any event, was also disposed of.

On 5th December 1997, Mr. Carter gave notice of application to appeal to this Court against both conviction and sentence, and the grounds of his application were that the decision of the Magistrate's Court could not be supported, having regard to the evidence. The Appellant did not have an adequate opportunity to present his case. He also asked for leave to call Christine Gill as a witness, and on 9th December, it having been drawn to his attention by the Greffier that
C his original notice of appeal was out of time, he applied for an extension of time to appeal to this Court.

The powers of this Court to hear appeals from decisions of the Magistrate's Court are limited and are laid down by statute. They are to be found in Section 7 of the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988, which states as follows:-

D "7(1) A person whose appeal is dismissed by the Royal Court ... may appeal to the Court of Appeal against that conviction...

PROVIDED that no such appeal may be brought without the leave of the Court of Appeal..."

which is what this application is about, and:-

"(2) The appeal may be-

E

(a) on any ground which involves a question of law alone; or

(b) pursuant to a certificate granted by the Bailiff that sufficient grounds of appeal exist in the case."

No such certificate has been granted by the Bailiff in this case and therefore, the only basis on which Mr. Carter is able to apply for leave to appeal to this
F Court is if he can show that the basis of his appeal is on a ground which involves a question of law alone.

Mr. Carter, in this Court, in representing himself, explained to this Court that his wish to appeal was on the basis that the Assistant Magistrate had been misled into coming to the view that Mr. Carter was guilty of the offence with which he was charged, because he had accepted the evidence of the police constable which, he said, was based on two lies, and also on a misunderstanding, and further and specifically, he said because this Magistrate
G had accepted the evidence of the police officer that he was spitting blood at the time when he was not.

As I say, those are the matters which Mr. Carter says that he wishes to raise in this Court.

Before he is able to appeal to this Court, this Court has to be satisfied that they are matters which are a question of law alone.

Having listened to Mr. Carter's application, it is the view of this Court that the matters which he wishes to raise by appeal are matters of fact rather than matters of law and, therefore, this Court has no power to hear any appeal, the conviction having been in the Magistrate's Court and, therefore, this application for leave to appeal is refused.

I should add by way of completeness that, in fact, Mr. Carter did, in his notice, apply also for leave to appeal against sentence. This Court has no power to intervene in the question of sentence in cases where the original conviction was before the Magistrate's Court, therefore application for leave to appeal against sentence is also dismissed.

Finally, the issue as to whether or not Mr. Carter wishes to call a witness. That application would only become relevant if, in fact, the Court found that it was a matter of law on which Mr. Carter wished to appeal, and that witness would therefore have to be relevant to that matter of law.

As I say, the Court are not satisfied that it is a matter of law rather than fact on which Mr. Carter wishes to appeal and therefore Mr. Carter, I'm afraid we have no alternative but to refuse your application to appeal. Thank you Mr. Carter.

Application for leave to appeal dismissed

59. [CIVIL DIVISION - APPEAL NO. 220]

1998 MARCH 20

KATHLEEN EDNA SMITH **Appellant**
V.
GORDON LAWSON SLAWTHER **Respondent**

Before: CALCUTT, LORD CARLISLE and CLARKE, JJ.A.

Appeal to Court of Appeal - application for leave to adduce fresh evidence

See paragraph 4.

The Appellant in person.
P.T.R. Ferbrache, for the Respondents.

CLARKE, J.A.: This appeal which is from the judgment given by the Royal Court on 29th September 1995, was set down to be heard by this Court in the course of its present sitting. The case involves the long running boundary dispute

between the parties. Because of the pressure of other business it became clear that the Court would be unable to do proper justice to the merits of the appeal in the time available. The merits of the appeal will therefore have to be determined at a future sitting of this Court.

The Court did however consider an application by the Appellant that she be allowed to lodge and adduce as evidence a set of documents which included correspondence, additional plans and photographs. Having considered carefully the content of these documents, it is clear that with one exception, they were all, or should have been, available to the Appellant and/or her advisors prior to the hearing in the Royal Court. The Appellant stressed to us that these documents were very important for the proper presentation of her case, in that they would demonstrate that evidence given at the hearing before the Royal Court was untrue.

Advocate Ferbrache, on behalf of the Respondent, resisted the Appellant's application in respect of these documents. He pointed out that, as I have previously noted, having regard to the dates of the documents, they all, with one exception, had been in existence prior to the hearing in the Royal Court. The one exception was a letter dated 18th September 1995, from the Law Officers of the Island, addressed to the Appellant, which appeared to deal with a request by the Appellant that disciplinary proceedings be initiated against Advocate Ferbrache. That document would appear to have no relevance to the issue between the parties to the present case.

The only reason the Appellant gave us for the other documents not being made part of her evidence in the hearing before the Royal Court was that Mr. Palmer, the advocate who represented her at that hearing, had decided not to use them. She also appeared however to suggest that Mr. Ferbrache had in some way not allowed these documents to be admitted.

The Appellant's grounds of appeal were initially set out in her letter of 26th March 1996, addressed to the Court. This was followed by a revised Notice of Appeal, dated 11th September 1996, in which she sought leave:-

> "To adduce fresh evidence at the hearing of this appeal, namely, a working drawing prepared for the Respondent by Building and Design Consultants Limited, drawing number 86029/1A."

By a judgment of 3rd December 1996, the learned Bailiff, sitting as a single judge of this Court, ordered the Appellant to file an affidavit in support of her application to adduce that further evidence. The Appellant lodged no such affidavit. The Appellant subsequently lodged a further revised Notice of Appeal, dated 3rd October 1997, which is the one which is presently before this Court. It removed the application to adduce further evidence.

Against that background Advocate Ferbrache drew our attention to the provisions of Rule 12(2) of the Court of Appeal (Civil Division)(Guernsey) Rules, 1964. Reading short that rule provides that:-

> "The Court shall have full discretionary power to receive further evidence upon questions of fact either by oral examination in Court, by affidavit, or by deposition, provided that in the case of an appeal from a judgment after trial, or hearing of any cause or matter upon the merits, no such

> further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

The proviso in Rule 12(2) applies in the present case. In its decision of 31st October 1986, in the case of Maurice John Kirk v. Nicholas John Blackwell, this Court noted that the power conferred in Rule 12(2) was stated in similar terms to the power of the Court of Appeal in England, and that the rule upon which the Court of Appeal in England proceeded in applications to admit further evidence was stated in Halsbury's Laws of England 4, vol. 37, para 693, as follows:-

> "The Court of Appeal has power to receive further evidence on questions of fact. Before further evidence will be admitted, (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) the evidence must be apparently credible, although it need not be incontrovertible."

The Court held that the Section 12(2) power should be exercised in accordance with the same principles.

Having regard to the Court's decision in that case, I am satisfied that the Appellant has failed to meet the test set out in the paragraph quoted from Halsbury. With the one exception noted, all of the documents were in existence before the date of the trial before the Royal Court, and were, or ought to have been, available to the Appellant or her representatives at that time. She has accordingly not demonstrated that this evidence could not have been obtained with reasonable diligence for use at the hearing. In addition, having regard to the content of the letter of 18th September 1995, from the Law Officers, I am satisfied that it is clear that it would not have an important influence on the result of the case.

I accordingly see no basis for granting the application and consider that it falls to be refused. The appeal itself should be adjourned to a future sitting of this Court. I should just add that prior to convening to give our judgment, the Appellant tendered some documents - some further documents - to the Greffier. We have had no time to consider carefully the contents of these documents, far less did we have an opportunity to hear submissions regarding them, accordingly any application in respect of those documents will require to be made, if so advised by the Appellant, to this Court on some future occasion.

SIR DAVID CALCUTT: I agree.

LORD CARLISLE: I agree and have nothing to add.

Application to admit further evidence refused; appeal adjourned.

60. [CIVIL DIVISION - APPEAL NO. 237]

1998 MARCH 20

KATHLEEN EDNA SMITH Appellant
V.
VINCENT ROGER HELMOT and SONIA HELMOT Respondents

Before: CLARKE, CALCUTT and LORD CARLISLE, JJ.A.

Appeal to Court of Appeal - application for appeal to be struck out - Notice of Appeal disclosing no cause of action - failure to lodge security for costs - failure to comply with requirements to lodge documents - unrepresented appellant

See paragraph 33.

The Appellant in person.
D.G. Le Marquand, for the Respondents.

CLARKE, J.A.: This is an application by the Respondents to strike out the Appellant's appeal.

The appeal relates to a boundary dispute between the parties in respect of which the Royal Court issued a judgment on 30th April 1997, which included an award of costs against the Appellant on a full indemnity basis.

This is not the only dispute in which the Applicant is presently involved with regard to boundaries of her property. One of these other disputes at the instance of the Appellant against Mr. G.L. Slawther, is the subject of an appeal presently pending before this Court.

In the present case the Appellant's Notice of Appeal was lodged with the Court on 12th May 1997. The Appellant's case was set down on 19th May 1997, and on 23rd July 1997, this Court heard two applications from the parties. The first was an application by the Appellant to stay the declaration of the Royal Court, pending the hearing of the appeal. The second was an application by the Respondents for security for costs of the appeal. This Court refused the application for a stay in the light of various assurances given on behalf of the Respondents.

So far as the application for security for costs was concerned, the Court made an order for security for costs in the sum of £2,500. It also stayed the enforcement of the order for indemnity costs made in the Royal Court pending the hearing of the appeal, or until 30th December 1997, if the appeal had not been heard by that date.

The Respondent's application to us to have the appeal struck out proceeded on a number of grounds. The first was that the appeal should be struck out under the inherent jurisdiction of the Court because it discloses no reasonable cause of action, it is scandalous, frivolous or vexatious, and it is otherwise an abuse of the powers of the Court.

I approach this case having very much in mind that the Appellant is handling this appeal on her own behalf, and is clearly not familiar, or over-familiar, with the detailed requirements of the Rules of Procedure. I am not satisfied that the appeal can be held to be scandalous, frivolous or vexatious, but I do accept that as matters stand the grounds of appeal as stated are difficult to comprehend and prima facie disclose no proper basis for attacking the judgment of the Court below. A

The Respondents also seek to have the appeal struck out under reference to the provisions of Rules 8 and 9 of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964. By Rule 8, an Appellant is required before the expiration of four months after the day on which the appeal was set down to lodge with the Registrar four copies of a number of different documents; those include:- B

"(a) the Notice of Appeal;

(b) the judgment, order, decree or award under appeal; C

(c) the pleadings, if any, in the proceedings in the Court below;

(d) the official transcript, if any;

(e) such affidavits or depositions, if any, as are relevant to the matters in controversy on the appeal;

(f) such exhibits or parts of exhibits (including correspondence) as are relevant to the matters in controversy on the appeal;" D

Finally, four copies have to be lodged of a statement setting out the contentions to be urged and the authorities to be cited by the Appellant in support of his appeal, and that statement is said thereafter in the Rule to be referred to as "The Appellant's Case."

By Rule 9, provision is made in respect of failure on the part of the Appellant to lodge with the Registrar all such documents and exhibits as are required under Rule 8(1) within the time limit prescribed or such time as may have been extended under Rule 17, in terms that in the event of such failure the Appellant shall be deemed to have abandoned his appeal. E

It is true that the Appellant has not complied with the requirements of Rule 8, in that she has failed to lodge any of the prescribed documents within the prescribed time limit. F

She explained to us that this was largely due to the fact that she was concentrating her efforts on preparing for the appeal in the case which she has against Mr. Slawther. It also arose, she claimed, because she was unaware of the strict time limits imposed by the Rule. Nevertheless, she has paid for the whole cost of the transcript of the proceedings of the Royal Court, and the Greffier informed us that the final pages of that transcript should be available for the Appellant in approximately two weeks' time. G

By Rule 17(1) of the Court of Appeal Rules:-

A "17. (1) The Court or a judge thereof may, on such terms as the Court or judge thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any order or direction, to do any act and may extend any such period although the application for extension is not made until after the expiration of that period."

I understood that in effect the Appellant was seeking from us an extension of
B time to comply with the requirements of Rule 8.

Lastly, the Respondent sought to have the appeal struck out because of the Appellant's failure to lodge security for costs to the extent of £2,500 in compliance with the order of this Court of 23rd July 1997. I observe that no specific time limit was prescribed in that order for lodging of security. The Appellant informed the Court that if we were now to order her to lodge the security she would do so.

C Counsel for the Respondents impressed upon us the prejudice which the Respondents were suffering as a result of the delay in the prosecution of this appeal and having the dispute finally resolved. The Respondents wish to develop and cultivate their land further, which they are inhibited from doing while its boundaries are the subject of an unresolved dispute.

I clearly understand the concerns of the Respondents, that the appeal should be prosecuted with all due diligence, and I am not prepared to accept as a
D satisfactory excuse for not doing so, the fact that, as she put it, the Appellant has been concentrating all her efforts on the Slawther appeal. The Respondents must not be prejudiced further simply because the Appellant is involved in another litigation. On the other hand, I consider that it would be unreasonably harsh to strike out the appeal at this stage, particularly having regard to the fact that the Appellant has incurred considerable expense in obtaining the official transcript. I would be prepared to grant an extension of time under Rule 17.

E Nevertheless, it is clear in my view that some strict timetable must now be imposed on this affair. I also consider that it is essential that the Respondents are given some adequate notice of what the metes and bounds of the grounds for appeal truly are. Accordingly, I have reached the conclusion that the proper course to adopt is as follows: The Appellant should be ordered to lodge security for costs to the extent of £2,500 within 14 days of today's judgment. She must also provide an amended Notice of Appeal which clearly sets
F out, to the satisfaction of the Court, the grounds upon which she relies, which the current notice clearly does not. She must furthermore lodge within 14 days of receiving the last pages of the official transcript, all the documents she is required to lodge in terms of Rule 8.

If the Appellant fails to comply with any of the foregoing orders, the appeal

G

shall be dismissed. In the meantime, the application to strike out is stayed. A

SIR DAVID CALCUTT: I agree.

LORD CARLISLE: I agree.

Appellant ordered to lodge security for costs, an amended Notice of Appeal and all documents required pursuant to Rule 8; application to strike out appeal stayed. B

61. [CIVIL DIVISION - APPEAL NO. 241]

1998 FEBRUARY 4

C

HERBERT FREDERICK GAUDION
and **Applicants**
RUBY ADA GAUDION
v.
WEARDALE LIMITED **Respondent**

Before: GLOSTER, SOUTHWELL and SMITH, JJ.A. D

Eviction proceedings - summary trial - whether defendant able to make proper representations

Shares - beneficial ownership - whether creditors had security interest - duty of directors to beneficial owners

See paragraph 12. E

H.F. Gaudion for the Applicants.
P.T.R. Ferbrache, for the Respondent.
H.E. Roberts, for H.M. Procureur as amicus curiae.

SOUTHWELL, J.A.: Mr. Herbert Frederick Gaudion and his wife Mrs. Ruby Ada Gaudion are the appellants in this appeal. I will refer to them as "the Gaudions". They have lived at La Cache Farm, Rue de la Cache, Vale in Guernsey for many years. They appeal with leave of this Court against an order of the Royal Court made by the Bailiff on 28 January 1997 ordering the eviction of the Gaudions from La Cache Farm, execution of the eviction order being stayed for a period of six months, and the stay having been extended pending the determination by this Court of the Gaudions' appeal. F

The Gaudions have been advised for many years by the firm of chartered accountants, Ernst & Young, and predecessors of that firm. The two partners principally involved have been Mr. Stephen Harlow and Mr. C.F.L. Legge. G

By 1992 the Gaudions had reached a position in which they were substantially indebted. They owned a number of parcels of realty including La Cache Farm.

A Their realty was subject to charges in favour of the States of Guernsey for about £38,000, and of the Royal Bank of Scotland for about £270,000. They wished to obtain further loan finance with a view to continuing certain developments under way on their land at Les Barras. Advised by Mr. Harlow of Ernst & Young and Advocate John Loveridge they borrowed £230,000 from a Mr. Michael Edward Neuman of Devon, England, on the terms of a Bond, giving security in the manner usual in Guernsey over their realty, which was registered in the Livre des Hypotheques, Actes de Cour et Obligations on 15 B December 1992. Under the terms of the Bond the Gaudions covenanted (*inter alia*) to repay to Mr. Neuman the sum of £256,000, on or before 15 March 1993, or at Mr. Neuman's election the equivalent in US dollars of that sum at the agreed exchange rate of US$1.55 to £1 sterling. The rate of interest charged under the terms of the Bond was substantial and has been calculated in the affidavit evidence before us as being at as high a rate as 90% per annum.

The Gaudions did not repay the sum due under the Bond to Mr. Neuman timeously. Mr. Neuman started proceedings against them. On 22 April 1993 the Bailiff in C the Royal Court, having heard Counsel for Mr. Neuman and Mr. H.F. Gaudion in person, gave judgment for US$410,750 with costs and interest at 18% from 15 March 1993, with power to levy execution on the real property of the Gaudions (a preliminary vesting order).

It appears that neither Ernst & Young nor the Advocate then advising the Gaudions drew to their attention the power of the Royal Court under the Ordonnance donnant pouvoir á la Court de réduire les intérêts excessifs (the D Ordonnance as to Interest) to reduce the interest payable to Mr. Neuman (if the circumstances contemplated in the Ordonnance existed, as *prima facie* they did) to a rate not less than 10% per annum. Having regard to the high rate charged by Mr. Neuman, it seems not improbable that the Royal Court would have exercised that power if application had been made to that end.

On 13 May 1993 the Royal Court having heard Counsel for both parties (Advocate Loveridge for the Gaudions) made an order in favour of Mr. Neuman for the E eviction of the Gaudions from their realty, execution of the order to be stayed for 6 months (which was the maximum period of stay permitted under Article 1 of the Stay of Evictions (Amendment) Law 1954).

On 3 June 1993 the Royal Court postponed the making of an interim vesting order and ordered that judicial interest be paid at 18% p.a. from that day on the amount of US$420,810.56 found due pursuant to the preliminary vesting order.

F In November 1993 fresh transactions were entered into by the Gaudions, advised by Ernst & Young and by Advocate Dadd (in place of Advocate Loveridge). It appears that Mr. Harlow advised the Gaudions to seek the services of Advocate Dadd. Ernst & Young by Mr. Harlow had found another lender for whom they acted (as well as for the Gaudions) and who was prepared to lend money to the Gaudions through a Liberian company, Sigmet Inc. This Court has not been told the identity of the person behind Sigmet Inc. Sigmet was apparently formed by Hamilton Brothers Limited (Hamilton), a Jersey trust and company administration company with connections with Ernst & Young.

G

On the advice of Ernst & Young and Mr. Dadd, the loan arrangements were structured, unusually, in this way:

(1) A company called Weardale Limited (Weardale), the plaintiff in the present action, was formed or used as an existing shelf company by Ernst & Young.

(2) A loan agreement dated 18th November 1993 (the Sigmet Loan Agreement) was entered into between Sigmet and the Gaudions. Sigmet agreed to make an unsecured loan of £345,000 for a fixed period until 10 November 1994. The Gaudions were to pay interest at the fixed rate of 50% until repayment. By clause 9 the Gaudions acknowledged the fairness of the interest rate and irrevocably affirmed that they would not challenge the terms of the loan.

Whether such an acknowledgement would be held to be binding on the borrowers in circumstances such as those of the Gaudions, preventing them from relying on the Ordonnance as to Interest, is doubtful.

(3) A second agreement (the Sigmet Composite Agreement) dated 18 November 1993 was made between the Gaudions, Weardale and Sigmet. By this agreement

(a) the Gaudions undertook to convey to Weardale all their realty for £5,000 (clause 1);

(b) the Gaudions instructed Sigmet to pay off the Neuman loan, and to pay £20,000 to Weardale "in respect of its own charges professional fees and disbursements" (clause 3);

(c) Weardale was to try to obtain long term finance for the Gaudions to repay the Sigmet Loan and the secured creditors of the Gaudions (clause 4);

(d) if Weardale could not secure long-term finance for the Gaudions, then from 10 November 1994 Weardale were to be at liberty to sell immediately all or parts of the realty and to apply the proceeds in paying off the Sigmet loan and the secured creditors of the Gaudions (clause 5), with any balance to be paid to the Gaudions (clause 6), and any remaining realty to be reconveyed to the Gaudions (clause 7);

(e) if the Gaudions themselves paid off their creditors, the realty was to be reconveyed to them by Weardale (clause 8);

(f) until 10 November 1994 the Gaudions were given a "droit d'habitation" in respect of the realty (clause 9), but if Weardale implemented their power of sale under clause 5, then Weardale could require the Gaudions to give vacant possession of or part of their realty (clause 11).

(4) Mr. Harlow, in return for being paid by Sigmet a "Guarantee Fee of £1,500", guaranteed repayment of the Sigmet Loan up to £50,000.

The Gaudions contend that the guarantee was given by Mr. Harlow without their knowledge or consent. If they are right then serious questions arise as to Mr.

A Harlow's conduct in receiving the guarantee fee and allowing his personal interest to conflict with his duty to the Gaudions as his clients.

The nature of the whole transaction is very unclear. The conveyance of the Gaudions' realty to Weardale was at a gross undervalue. It therefore might be assumed that the intention was for the shares in Weardale to be held by the Gaudions or by nominees in trust for the Gaudions. Indeed as recently as 30 June 1997 Mr. Harlow wrote to the Institute of Chartered Accountants (the ICA) B stating that "Weardale was and is owned beneficially by Mr. and Mrs. Gaudion" and that declarations of trust should have been completed in favour of the Gaudions, but by mistake were not completed. The directors of Weardale in 1993 appear to have been Mr. Harlow and two other partners or employees of Ernst & Young, and also Advocate Dadd. Since all these persons were acting for the Gaudions in the transaction, it may be assumed that they would be required to act in accordance with the Gaudions' instructions. The shareholders of Weardale from 1993 were companies connected with Ernst & Young. For the purposes of feudal dues and document duty, HM Comptroller was persuaded not to C impose *ad valorem* charges on the ground that there was to be no change of beneficial ownership. By letter dated 27 June 1996 to HM Comptroller, Advocate Dadd stated that the two Weardale shares were issued to nominees of Ernst & Young, "the beneficial owner was and is [Mr.] Gaudion".

If that is correct, then it appears that Sigmet truly made an unsecured loan. Sigmet had no security over the shares of Weardale. Sigmet had no security over the realty. Weardale had to be conducted in accordance with the Gaudions' D instructions. If the Gaudions did not instruct Weardale to sell all or part of the realty, there would be no sale, unless Sigmet could enforce against Weardale any requirement to sell (if any) under clause 5 of the Sigmet Composite Agreement. But such clause 5 merely gave Weardale the "liberty" to sell: it did not contain any undertaking by Weardale to Sigmet to sell the realty. In my judgment that is the correct analysis of the Sigmet transaction.

The Gaudions were unable to find other sources of money to repay the Sigmet E Loan. So they had either to go into default or to take other steps to avoid default.

The Gaudions complain that Ernst & Young and Advocate Dadd did not advise them as to whether they should seek to sell all or part of the realty in 1994, and that these professional advisers apparently failed to advise the Gaudions of the possibility that they might obtain a reduction of the interest charged by Sigmet pursuant to the Ordonnance as to Interest. These are matters which F arise as part of the relationship between the Gaudions and their then advisers, and this Court could not express any concluded view as to whether these complaints are or are not well-founded.

I now turn to the transaction with which this Court is directly concerned on this appeal.

Mr. Harlow in 1994 found another client of Ernst & Young, Mr. Erb, who might be willing to lend moneys to the Gaudions to pay off all their major debts, those G to Sigmet and their secured creditors. Once again Ernst & Young and Advocate Dadd appear to have acted for all parties, without regard to the obvious conflicts of interest and duty. By fax message dated 17 October 1994 Mr. Harlow appears to have informed Mr. Erb of the background. He stated that his

client (the Gaudions) was seeking to raise £800,000. The "security" was "a portfolio of Guernsey property which was valued on a forced sale basis within the last 12 months at £1.1 million. A copy of the valuation is available if required". The "risk", Mr. Harlow stated,

> "is that the property does not realise its forced sale valuation. Whilst this risk should not be discounted enquiries have been made on certain of the properties at substantially above the aforementioned valuation."

(I should observe here that there is evidence before this Court that the value of the realty was less than £1.1 million.)

Mr. Harlow also referred to the fact that

> "I have an involvement on both sides of this transaction."

Mr. Harlow wrote again to Mr. Erb on 11 November 1994 giving his view (in my judgment, not an entirely correct view, for reasons I have already indicated) as to the structure of the Sigmet transaction. Mr. Erb agreed to proceed, and what I will call "the Erb transaction" was put into effect.

Mr. Erb did not appear as a party to the Erb transaction. His moneys were made available through Monument Trust Company Limited (Monument), an Ernst & Young company, and the holder of one of the two shares of Weardale as nominee for the Gaudions. So one has the rather extraordinary feature of the transaction that Monument was acting simultaneously as nominee for Mr. Erb and as nominee for the Gaudions. In both capacities it was acting, as Mr. Harlow informed the ICA, as nominee for Ernst & Young, who were acting for all the parties involved, as was Advocate Dadd. It is a matter for concern that Ernst & Young and Advocate Dadd, by reason of their conflicts of duties, may not have been in a position to seek to obtain the best terms practicable for the Gaudions. That is a concern which in my judgment requires to be investigated without delay by the relevant regulatory authorities, in the case of the ICA with a greater degree of competence and effectiveness than appears to be shown by the correspondence from the ICA placed before this Court. In my judgment it will be incumbent on these regulatory authorities to consider how the Gaudions' need for protection by independent advice (in view of their ages, their physical infirmities and their financial position) could have been met by professional advisers who seem to have had conflicts of duty and interest and who do not appear to have been independent.

As part of the Erb transaction, a loan agreement dated 22 December 1994 (the Erb Loan Agreement) was entered into by Monument and the Gaudions, pursuant to which

> (a) Monument agreed to lend £800,000 for the repayment to Sigmet of £19,911.98 and to the Royal Bank of Scotland of £272,700, plus associated costs (clause 1).
>
> (b) The loan was to be made available on 22 December or other agreed date (clause 2).
>
> (c) The loan was to be for a fixed period until 16 December 1995 (clause 3).

(d) The Gaudions were to pay Monument compound interest at 16.5% above the base lending rate of the Royal Bank of Scotland with a minimum aggregate payment of interest of £90,000, interest being calculated and capitalised three monthly (clause 5).

(e) By clause 4, "the loan shall be secured to the extent provided for under the terms of" the agreement of the same date which I will refer to shortly and will call "the Erb Novation Agreement". To what extent (if at all) security was given to Monument for Mr. Erb by that agreement is an issue which this Court has to determine.

(f) Monument was to receive from Weardale or the Gaudions a fee equal to 30% of the proceeds of sale of any realty sold pursuant to clauses 12 or 3 of the Erb Novation Agreement or at any time thereafter but only after all amounts due under the Erb Loan Agreement had been met in full (clause 6).

(g) Events of Default were specified in usual terms in clause 8, and pursuant to clause 9, on an Event of Default Monument could declare the loan due and payable on demand.

(h) The Gaudions undertook to use their best endeavours to procure the sale of the realty owned by Weardale at the earliest available opportunity, and to take all steps necessary to facilitate such sale prior to the expiry of the period for repayment of the loan for the best price reasonably attainable (clause 12).

(i) The Gaudions acknowledged that the interest and arrangement fee were at a rate which was accepted by them as fair and reasonable, and irrevocably affirmed that they would not challenge the terms of the Erb Agreements (clause 13),

The parties to the Erb Novation Agreement also dated 22 December 1994, were the Gaudions, Weardale, Monument, Sigmet and Mr. Harlow. As regards the Sigmet loan, Sigmet discharged the Gaudions from their obligations under the Sigmet Agreements and released Mr. Harlow from his guarantee. As regards the Erb loan, the terms of the Erb Novation Agreement included the following:

(i) The Erb loan of £800,000 was confirmed (clause 1) and the Gaudions by clause 2 instructed Monument to pay from the loan to

	£
Royal Bank of Scotland (Guernsey) Ltd	273,700.00
Sigmet	519,911.98
Monument	6,388.02
Ferbrache & Co. Advocates (the firm of Advocate Dadd)	1,000.00
	£800,000.00

(ii) If the Erb loan was not repaid by 16 December 1995 (or earlier if there was an Event of Default) Weardale "shall be at liberty" (a) to sell all or any parts of the realty as Weardale should "in its absolute discretion see fit", and (b) to apply proceeds of sale in settlement of the Erb loan (clause 3). A

Advocate Peter Ferbrache (who appeared for Weardale before this Court) argued that, though what was given to Weardale was a "liberty", it had to be exercised reasonably. Weardale must ultimately sell, and Monument could by legal proceedings compel Weardale to sell and to apply the sale proceeds in repayment of the Erb loan. In my judgment the words of clause 3 cannot be given this interpretation. Weardale is given a "liberty" to sell; Weardale did not give any undertaking to exercise this power. Mr. Peter Ferbrache used in aid of his argument the Gaudions' undertaking in clause 12 of the Erb Loan Agreement to use their best endeavours to procure the sale of the realty by Weardale. But in my judgment both clauses mean what they state. The Gaudions are obliged vis à vis Monument to use their best endeavours, but Weardale owe no such obligation to Monument, having no more than a "liberty" to sell. That Weardale owes no such obligation to Monument is confirmed by the opening words of clause 4: "In the event that [Weardale] exercises its right to sell all or any of the Realty..." B C

(iii) If Weardale does exercise its right to sell, it is to pay any balance remaining after repayment of the Erb loan to the Gaudions (clause 4) and to reconvey any of the realty remaining in its ownership to the Gaudions (clause 5). D

(iv) Until 16 December 1995 the Gaudions were granted by Weardale a "droit d'habitation" in respect of the realty (clause 7).

(v) The Gaudions undertook to Weardale that if Weardale decided to sell under clause 3, or if the Gaudions were in default under clause 8 of the Erb Loan Agreement, they would with immediate effect cease their occupation of the whole of the realty or such lesser part as Weardale might in its absolute discretion require (clause 9). E

I will return later in this judgment to consider the arguments addressed to this Court as to the effect of the Erb Agreements. First, I must deal with the further history of this matter.

The two shares of Weardale remained held by Monument and another Ernst & Young company, Consulting and Secretarial Services Limited ("CSSL"). As I have already stated, these shares were, and in my judgment still are, held as nominees of and in trust for the Gaudions. It appears that draft declarations of trust were intended to be signed by Monument and CSSL in favour of the Gaudions (probably at the time when the conveyance of the realty to Weardale was made in November 1993). That no such written declaration of trust was executed does not in my judgment alter the position. It is clear that it was the intention of all the parties that the shares should be held in trust for the Gaudions. In this connection I note that the letter from Advocate Dadd to HM Comptroller of 27 June 1996 (which I have already mentioned) was sent at a time when Advocate Dadd was acting for all the parties to the Sigmet and Erb Agreements. F G

A In January 1995 Mr. T.S. Howarth became a director of Weardale and Mr. Henning resigned (the relevant letters were misdated "1993"). Mr. Howarth was a director of Hamilton and as a solicitor acted and acts on behalf of Mr. Erb. Some of the difficulties which have arisen in this matter have resulted from Mr. Howarth's failure to keep separate his duties owed to Mr. Erb, and his duties owed to Weardale and through Weardale to the Gaudions.

It is alleged by Mr. Howarth, in paragraph 13 of an affidavit sworn on 19 March
B 1996, that Ernst & Young undertook to him on behalf of Mr. Erb that the shares in Weardale would be held to the order of Mr. Erb pending repayment of the loan. There is no written evidence to support this, and there is no evidence before this Court that Ernst & Young had any authority from the Gaudions to give any such undertaking.

In September and October 1995 three parts of the realty were sold by Weardale for £110,000, £8,000 and £8,850 respectively (I understand with the specific
C consent of the Gaudions), and the net proceeds of sale went to discharge in part the Erb Loan. The Erb Loan was not otherwise discharged by the due date of 16 December 1995.

In January 1996 Mr. Harlow and Advocate Dadd resigned as directors of Weardale, no doubt in recognition of the conflicts of duty and interest involved in their acting for all the parties. But another partner in Ernst & Young, Mr. C.F.L. Legge, became a director of Weardale in January 1996. It is not clear how Mr. Legge, as a partner of Ernst & Young, which as a firm was continuing to act for
D all the parties, could have expected to avoid the conflicts of duty and interest, which were, I consider, unavoidable. At all events from January 1996 onwards the only directors of Weardale have been Mr. Howarth and Mr. Legge.

In February 1996 Monument commenced an action in the Royal Court against the Gaudions to recover the balance of the Erb Loan in the sum of £707,504.82 plus interest and costs. Monument's pleading indicated that before 16 December 1995 a total of £273,897 had been repaid. So the total claimed in respect of the
E Erb Loan for just under one year was £981,401.82 in excess of the Erb Loan of £800,000.

Monument applied for summary judgment for principal amounting to £526,103. The application was refused by the Bailiff in his Judgment of 10 June 1996. On appeal the Court of Appeal on 18 October 1996 gave judgment for Monument in the sum claimed. This judgment has been enforced by execution against the person of the Gaudions (subject to one matter to which I will return), But little
F return was achieved by this execution. H.M. Sheriff's report of 8 November recorded confirmation by the Gaudions that "they were not the beneficial owners of any shares in any company". That was inconsistent with what Mr. Gaudion stated in his letter to Mr. Erb of 11 June 1997.

Meanwhile Weardale had commenced eviction proceedings against the Gaudions in the Royal Court on 13 February 1996. These proceedings were adjourned for four
G months to enable the Gaudions to file defences. On 24 June 1996 the Bailiff (having refused to grant summary judgment in the Monument action) directed that the two actions should be heard together.

Following the Court of Appeal's grant of summary judgment in the Monument action, on 21 January 1997 the Bailiff ordered that the two actions should be heard separately. A

On 28 January 1997 in the Royal Court the Bailiff and three Jurats heard the trial of the Weardale action for eviction. Such a trial is to be heard "summarily". Advocate Peter Ferbrache appeared for Weardale and Mr. Gaudion appeared in person for himself and his wife. When Mr. Gaudion's turn came to address the Court, he was unable to formulate any considered submissions. The Bailiff seems to have thought that Mr. Gaudion was alleging that he had been defrauded. It seems to me, reading the transcript, that what Mr. Gaudion was saying was that Weardale is the Gaudions' company, and if it were not, then the States would have defrauded by reason of Advocate Dadd's representation to HM Comptroller in June 1996 that the beneficial owner of the shares of Weardale was Mr. Gaudion. B

The Bailiff seems not to have had the benefit (which this Court has had) of detailed written submissions on behalf of the Gaudions. As a result the misunderstanding remained, and became the worse as Mr. Gaudion tried to explain himself. Mr. Gaudion was, not surprisingly, rather slow in speaking, and was still addressing the Court when the Bailiff began his summing up to the Jurats. So Mr. Gaudion was not able to complete what he wished to say. The hearing at this stage can be seen, with hindsight, to have become too muddled. Unfortunately counsel for Weardale was perhaps unable to, and at any rate did not, assist in sorting out for the Court's benefit what points Mr. Gaudion wished to and could properly make in his defence. In the light of the Court of Appeal's judgment (referred to hereafter) on the application to extend time for appealing, and of the much fuller consideration before us, it is plain that the hearing below was too "summary", and that the Gaudions did not, in my judgment, have a fair trial. For this reason alone I would allow the appeal and set aside the judgment of the Royal Court. However, it is necessary also to consider in detail the other submissions placed before this Court. C D

The Royal Court on 28 January 1997 ordered the eviction of Mr. and Mrs. Gaudion from La Cache Farm, execution of that order being stayed for six months. E

The Gaudions had to seek an extension of time to serve notice of appeal from the Court of Appeal. On 23 July 1997 by a Judgment delivered by Miss E. Gloster QC the Court of Appeal extended time for service of the notice of appeal subject to certain conditions, invited HM Procureur to attend the hearing of the appeal by counsel as *amicus curiae*, and stayed execution of the eviction order until after the hearing of the appeal. In the course of the Court's judgment it considered a number of potential defences which the Gaudions might raise on the hearing of the appeal. F

On the hearing of the appeal Mr. Gaudion appeared in person for the Gaudions, Advocate Peter Ferbrache for Weardale, and Advocate Roberts for HM Procureur as *amicus curiae*. Mr. Gaudion was unable to assist the Court orally, but he had served a full written submission prepared for him by Carey Langlois. It was unfortunate that Carey Langlois were unwilling to appear on the Gaudions' behalf because of their concern not to be seen to appear against Ernst & Young. I am indebted to them for their written submissions, to Mr. Peter Ferbrache for his persistent advocacy in the face of hostile bowling from the Court, and to Mr. Roberts as *amicus*. G

A The Gaudions in this appeal ask that the eviction order of 28 January 1997 be quashed, and that this Court declare that the Gaudions are the beneficial owners of the shares of Weardale.

The grounds of appeal set out at pages 12 & foll. of the Gaudions' written submissions have to be considered in turn. For convenience I consider them in a slightly different order.

B The first question is whether the Gaudions are the beneficial owners of the shares of Weardale. As I have already mentioned, at the time of the conveyance of the realty to Weardale the Gaudions were treated as the beneficial owners of the shares. After the Erb Agreements had been entered into, Advocate Dadd acting for the parties to the Erb Novation Agreement represented to HM Comptroller in July 1996 that the Gaudions were then (i.e. seven months after the Gaudions had defaulted on the Erb loan) the beneficial owners of the shares so as to avoid payment of *ad valorem* dues and duties. None of the parties can now be heard to contend to the contrary. In any event it seems to me clear
C that throughout Monument and CSSL have held the shares in trust for the Gaudions.

The second question is whether Mr. Erb or Monument has any security interest over the Weardale shares. There is no provision in either of the Erb Agreements giving any such security interest.

The only contention that such a security exists is Mr. Howarth's contention (in
D paragraph 13 of his affidavit of 19 March 1996) that in December 1994 Ernst & Young orally

> "undertook to me on behalf of my Client [Mr. Erb] that the shares in Weardale would be held to the order of my Client pending repayment of the Loan..."

There is no other evidence to support this contention. The documents emanating
E from Ernst & Young do not support it. There is no suggestion or evidence that the Gaudions were asked for or gave the consent which they would have to have given. There were none of the formalities required under Guernsey customary law (such as the giving of possession of the subject matter of the security), or under the Security Interests (Guernsey) Law 1993 ("the 1993 Law"): see articles 1(2) and (3) and 2(1). I have no doubt that no effective security interest was ever created over the Weardale shares in favour of Monument or Mr. Erb.

F Moreover the arrangements under which it could be said that Monument or Mr. Erb had *de facto* control of Weardale, because of the fact that Mr. Legge and Mr. Howarth remained directors of Weardale, cannot take effect as any type of security interest. In the absence of the creation of a formal security interest over the shares in Weardale in accordance with the 1993 Law, no such arrangement could confer a right on Monument or Mr. Erb to control Weardale, through control of its directors, until the Monument loan was repaid. Any such arrangement would be in breach of the principle of the Ancienne Coutume de
G Normandie as noted in Terrien, Book VIII, Chapter 1;

> "meuble n'a point de suite en Normandie... et est entendu que meubles n'a point de suite par hypotheque"

as enshrined in the Ordinance concerning "Hypotheques etc" passed at the Chief Pleas after Easter 1636 (Recueil d' Ordonnances, Tome 1, page 174).

Mr. Ferbrache argued that Monument (or perhaps Mr. Erb) had a lien over the Weardale shares. A lien is essentially a security which is possessory in nature. Mr. Erb had possession of neither of the two shares. Monument was the registered holder of only one share, but it held this share, as I have already indicated, as nominee and in trust for the Gaudions. The share held by CSSL was also held as nominee and in trust for the Gaudions. That finding is inconsistent with there being a lien in Monument's favour of the share certificates. Even if there had been any such lien, it would not follow that this would entitle Monument to effect the sale of the realty vested in Weardale with a view to discharging the Gaudions' debt to Monument.

The third question arises in this way. Presumably the bringing of proceedings by Weardale against the Gaudions was purportedly authorised by the directors of Weardale. The directors of Weardale are seeking to enforce clause 9 of the Erb Novation Agreement, by which the Gaudions undertook **to Weardale** (*inter alia*) that if they defaulted on repayment of the Erb Loan they would "with immediate effect cease their occupation of the whole of the Realty or such lesser part thereof as [Weardale] may in its absolute discretion require". Mr. Peter Ferbrache's submission, on behalf of Weardale, is that the Directors of Weardale are entitled on behalf and in the name of Weardale to enforce this contractual obligation against the Gaudions. The question is whether there is any limitation on the powers of the directors of Weardale such as a requirement to obtain authority from the Gaudions before commencing such proceedings against the Gaudions. Mr. Ferbrache's submission is that any such limitation would render clauses such as clause 9 of the Erb Novation Agreement unworkable, because the Gaudions could not be expected to authorise proceedings against themselves. Furthermore, the Gaudions have not required the registered shareholders to hold a general meeting of Weardale at which a resolution removing the present directors and withdrawing the present action could be passed.

In my judgment this Court, in the particular circumstances of this case, is entitled to look to the substance of the Erb transaction. Weardale as a company remained under the control of the Gaudions as the beneficial owners of the shares throughout. Mr. Erb and/or Monument did not arrange for control to be transferred to them pending repayment of the loan as part of the written agreements. I have already dealt with the oral arrangement contended for by Mr. Howarth. Given that control of Weardale has remained throughout with the Gaudions, it would be superfluous to require the Gaudions to require Monument and CSSL to call a general meeting of Weardale with a view to bringing the present action to an end. Monument (for which throughout Mr. Peter Ferbrache declared himself to be acting as the party controlling *de facto* the actions of Weardale) might refuse, leading to further legal proceedings. In my judgment the reality of the position here is that the directors of Weardale are acting in a manner which they know to be contrary to the wishes and interests of the beneficial owners of Weardale's shares, the Gaudions. The latter have made it clear from the start of the eviction proceedings that they object to the course being taken by the Weardale directors. In circumstances where there is no contractual obligation owed by Weardale to Monument to realise the reality or apply the proceeds of sale in discharge of the Gaudions' debt to Monument, the directors are acting in breach of their duties as such, in disregarding the

A interests of their shareholders, and acting in the interests of a third party, Monument, to whom the directors owe no duties in their capacity as such. In my judgment, the Court cannot, in the circumstances of this case, give effect to the actions of the directors, simply on the basis that no formal steps have to date been taken by the Gaudions to regain control of their company, by giving the appropriate directions to the nominee shareholders to pass the requisite shareholders' resolutions to remove the directors and discontinue the eviction action. If the Court were to do so, it would, in effect, be endorsing acts
B which it knew constituted breaches of duty on the part of the directors, and, in addition, giving effect to an informal security arrangement - *de facto* control by Monument of Weardale to secure payment of its debt owed by the Gaudions - which is not an arrangement recognised as valid by the law. Accordingly, in my judgment, in the absence of the Gaudions' authority this action cannot succeed. Right at the beginning of Mr. Ferbrache's address to this Court, I asked him what authority he had as an Advocate to launch the present action in the name of Weardale. He answered the question in the way I
C have already indicated. But this question is the essential question to be determined on this appeal, and in my judgment, in the particular circumstances of this case, Weardale could not pursue this action without first obtaining the authority of the Gaudions.

Even if this were not as clear as I consider it to be, I would not uphold the judgment of the Royal Court. I would set aside the order of the Royal Court, and adjourn this appeal so as to give the Gaudions the opportunity to require a general meeting of Weardale to be called for the purposes I have indicated.

D

The final question raised on the Gaudions' behalf is whether the Erb Novation Agreement is void as being contrary to public policy. Four grounds are put forward in support of this submission which I will consider in turn.

The first ground is that "the mechanism of transfer of the Gaudions' Realty into Weardale was deliberately constituted as a method by which the safeguards and protection provided under Guernsey law through the system of Saisie could
E be circumvented".

This is a matter on which the Bailiff had expressed concerns when he refused to give summary judgment in favour of Monument on 24 June 1996. His concerns arose through his understanding that

(i) the realty was transferred to a company, Weardale, controlled by the Gaudions, so that *ad valorem* dues and duties could be legitimately avoided
F because beneficial ownership of the realty could be said not to have changed;

(ii) *de facto* control of Weardale was given to Monument to secure the loan without any of the appropriate formalities;

(iii) on default in repayment of the loan, Monument through Weardale would take control of the realty and deal with it as Monument might choose;

G

(iv) because Monument in those circumstances would be free to deal with the realty as it chose, the fundamental protections of the Saisie procedure would have been bypassed.

The Court of Appeal in its judgment ordering payment of the principal lent by Monument did not find it necessary to consider any questions of public policy because, in that Court's view, Monument was entitled in any event to recover the principal of its loan.

The normal procedure for giving security over realty in Guernsey is this. The lender advances money to the borrower on the terms of a written agreement, and takes security by means of a bond on the borrower's realty which is registered in the Court in accordance with Guernsey customary law and the Ordonnances as to hypothéques of 1631 and 1636.

If the borrower defaults in repayment of the loan, the appropriate course is for Saisie proceedings to be commenced, under the Saisie Procedure (Simplification) (Bailiwick of Guernsey) Order 1952") ("the Saisie order 1952"). The first stage in the procedure involves the lender obtaining a preliminary vesting order, constituting a judgment against the borrower with power to levy execution against the borrower's realty. If this step is taken first, the lender is barred from resorting to the borrower's personal property. The borrower may be evicted from his realty, and the lender may let it. However, it is open to the lender to go against the borrower's personal property first (as Monument has done).

Next, the lender requires the borrower to appear before a Commissioner for the Royal Court, and presents an account of the lender's claim. Following submissions by both parties, the Commissioner produces a report declaring the amount payable by the borrower.

The lender as the creditor then issues a summons against the borrower/debtor requiring him to pay that amount, and notifying him that in default of payment the creditor will apply to the Royal Court for an interim vesting order.

The effect of an interim vesting order is to vest the debtor's realty in the creditor as trustee for all claimants against the debtor's realty. If the creditor sells the property at a price which exceeds the amount of the debt, the surplus belongs to the creditor, not to the debtor.

This is a relic of ancient Guernsey customary law, which in my judgment would well bear reconsideration by the relevant authorities. They may consider that at the end of this 20th century it would be appropriate for any surplus to go to the impoverished debtor, rather than as a windfall to the relevant creditor.

However, to reduce the risk of this potential injustice to the debtor, under section 2(5) of the Saisie Order 1952 the Royal Court may, if the circumstances relied on by the debtor appear to render it just to do so, postpone the making or the operation of an interim vesting order on such conditions, if any, as the Court sees fit. By this delay (which the Court may grant more than once) the debtor may be enabled to sell his realty at a value higher than the amount of his debt, because until an interim vesting order is made the debtor remains in control of his realty so as to be able to sell it at the best price obtainable.

Once an interim vesting order is made and its operation no longer postponed, a register of claims against the debtor is opened at the Greffe for 28 days. On closure of the register the claims are marshalled in order of priority and a date is appointed for the final disposal of the property. On that date each

A claimant is asked (in reverse order of priority) to declare before the Court whether or not he elects to have the real property of the debtor vested in him for an estate of inheritance, subject to the condition that he assumes liability for all claims ranking in priority of his own claim. If a claimant on his turn fails to elect to have the realty vested in him, his claim ceases to be of any effect. On each of the claimants (including the lender referred to) electing to have the debtor's realty vested in him, a final vesting order is made, vesting the property in that claimant and setting out the claims B ranking in priority to his claim. That claimant is then liable, unless it is otherwise ordered, to pay the claims in priority to his claim within 15 days.

It is submitted for the Gaudions that, if Weardale simply evict the Gaudions, and then deal with the Gaudions' realty as Monument/Mr. Erb choose, that would drive a "coach and horses" through the safeguards of the Saisie procedure, including

C (1) the protection flowing from the fact that until an interim vesting order is made and comes into operation, the property remains vested in the debtor (the Gaudions) who retain power to sell it and to conduct the sale;

(2) the protection flowing from the power of the Court to postpone the making or coming into operation of an interim vesting order, which allows the debtor to avoid the potential injustice caused if the creditor is allowed to retain any surplus on the sale of the property (this is said here to be a point of importance, given that Mr. Harlow in October 1994 D presented the transaction to Mr. Erb on the basis that the realty was then worth £1.1 million, or more);

(3) the protection flowing from the system by which claims against the debtor are marshalled and prioritised, and each claimant in turn has either to elect to have the property vested in him and to pay all claimants having priority over him, or to lose his claim against the debtor.

E On the view which I have taken as to the position of Weardale, it is not strictly necessary to consider whether this submission is correct. However, since it has been well argued in the written submissions for the Gaudions and by Advocate Ferbrache and Advocate Roberts it is right that the Court should give this question careful consideration in view of its importance in the application of the Guernsey law of real property.

F If the circumstances in this case were as the Bailiff set out, then Monument would effectively have gained a security over the Gaudions' realty without having to go through any formality (other than requiring the directors of Weardale to sell the realty) and without there being any effective protection for the Gaudions as the debtors. In my judgment that would be contrary to the customary law of Guernsey. If security is to be taken over realty in Guernsey, that security must be taken in the usual way by bond and must be registered (as was Mr. Neuman's bond) in the Livre des Hypothéques, Actes de Cour et Obligations. In the absence of these formalities, the taking of security over G land by manipulation through corporate ownership (as would be the case if the submission of Mr. Erb, through Monument and Weardale, in the present appeal were upheld) would lend itself to the oppression of impecunious debtors. It could also work adversely to the interest of creditors, since in the absence of

registration the informal security would have no priority as against later registered securities. A

I should make it clear that I am not saying that a loan transaction can never be structured in such a way that the realty which is to provide security for the loan is vested in a company.

If parties to a loan transaction wish to transfer the borrower's realty into the name of a company, and for the realty to be available to satisfy the borrower's debt to the lender, then the necessary formalities have to be complied with. For example, either the company itself must give formal security over the land by means of a bond to secure the borrower's indebtedness (subject to the grant of such security being *intra vires* the company and *bona fide* in its interest), or the company must give a guarantee of the debt (again subject to *vires* and proper purpose considerations), or alternatively, the shares in the company must themselves be validly charged to the lender by means of a security agreement that complies with the provisions of the 1993 Law. Such a security agreement over the shares would have to specify with adequate clarity the circumstances in which the lender could exercise voting control and other proprietary rights over the shares and the manner in which, by the exercise of such control, the lender could achieve the sale of the property, or of the company, and the application of the proceeds of sale in discharge of his debt. In the absence of any formal security granted by the company itself over the land, or a guarantee by the company of the borrower's debt, the sale of the land simpliciter by the company would not necessarily entitle the company to apply the proceeds in discharge of the debt, or distribute the proceeds to the shareholder or to the creditors with a security interest over the company's shares. The ability of the company (in the absence of any obligation imposed on it to discharge the debt) to distribute the proceeds to the shareholders, or to the creditor with a security interest over the shares, would depend on the availability of distributable reserves. If these were not available, the liquidation of the company might be necessary. This is not an exhaustive summary of how such a transaction might be structured, but it serves to demonstrate why the informal "control" arrangement which Monument sought to put in place were not effective for the reasons which I have already given. B C D E

It follows that, if I were wrong as to the requirement of authority from the Gaudions before any action was taken by Weardale, I would allow this appeal on the ground that as a matter of Guernsey customary law Monument and Weardale could not seek to enforce an informal security over Guernsey realty.

The second ground submitted for the Gaudions is that the Erb loan was tainted with illegality insofar as it was made to discharge the Sigmet loan, because the Sigmet Loan Agreement provided for interest contrary to the Ordonnance as to Interest. This ground is in my judgment misconceived. An application to reduce the Sigmet loan interest could have been made under the Ordonnance, and might or might not have succeeded. The Gaudions may or may not have a claim against Ernst & Young or Advocate Dadd for failing to advise the Gaudions as to their rights under this Ordonnance. (Similarly, the Gaudions may be able to apply to reduce the Erb loan interest). But the mere fact that interest has been charged at a rate higher than the rate which the Court might order if application were made under the Ordonnance as to Interest does not render either the Sigmet Loan Agreement or the Erb Loan Agreement illegal. F G

A The third ground is that the Erb loan is void as an "unconscionable bargain" by virtue of the Guernsey customary law principle of lésion ultradimidiaire and that of Marché déraisonnable. There is nothing in this ground, which is not supported by either of the Guernsey cases cited of *Priaulx v Le Ray* (1980) 13 Guernsey Judgments 474 and *Watson v Trouteaud* (1987) Royal Court.

The fourth ground is that the Erb Novation Agreement was induced by undue influence on the Gaudions by Mr. Harlow and Advocate Dadd acting on behalf of
B Mr. Erb and Monument as well as the Gaudions. They rely on the influence of those two men, and on the giving by Mr. Harlow of a guarantee to Sigmet in return for a fee, which came to their notice (the Gaudions contend) only in the course of discovery in the Monument action in June 1996. But the fact that such a guarantee had been given was expressly dealt with in clause 11 of the Erb Novation Agreement of December 1994. They also rely on the alleged failure of Mr. Harlow and Advocate Dadd to inform them of those gentlemen's connection with Monument, or to explain the disadvantages of the Erb Loan Agreements. It
C is necessary to consider this ground further in the present appeal. But it is an issue raised in the proceedings brought by Monument against the Gaudions and may have to be considered in those proceedings in relation to the contractual provisions for interest and the arrangement fee.

In conclusion, therefore, in my judgment the appeal should be allowed and the eviction order set aside, because

D (1) the Gaudions did not have a fair trial in the Court below;

(2) neither Monument nor Mr. Erb has any security or other interest in or over the Weardale shares;

(3) Weardale are not entitled to pursue the present action without the authority of the Gaudions, who are beneficially entitled to the shares of Weardale.

E **COSTS**

It was made clear by Advocate Ferbrache that this action is being pursued, purportedly, by Weardale at the behest of Monument acting on behalf of Mr. Erb. In my judgment (subject to further argument, if appropriate) the costs of this appeal, and of the hearing before the Royal Court, should be paid at the standard rate, not by Weardale, but by Monument in accordance with the
F principles expressed by the House of Lords in *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] 1 AC 965; [1986] 2 AER 409 HL(E). If Monument wishes to challenge this proposed costs order, it must so inform the Greffe in writing on or before 13 February 1998. In that event the appeal will be restored for argument as to costs.

Gloster JA I agree and have nothing to add.

Smith JA I agree and have nothing to add.
G

Appeal against eviction allowed - declaration that AA were owners of shares - costs awarded against C1

[CIVIL DIVISION - APPEAL NO. 242]

1998 MARCH 20

GEOFFREY FRANK NASH Appellant
v.
THE STATES OF GUERNSEY Respondents

Before: CALCUTT, LORD CARLISLE and CLARKE, JJ.A.

Contract of employment - construction - whether term to be implied - test to be applied

See paragraph 25.

A.M.Merrien, for the Appellant.
H.E.Roberts, for the Respondents.

CLARKE, J.A.: In this appeal the Appellant, who was formerly employed as an air traffic control officer in Guernsey, appeals against a decision of the learned Deputy Bailiff of 30th December 1996, whereby he upheld the Respondent's Exceptions de Fonds, and dismissed the Appellant's application for certain orders.

The dispute involves a claim by the Appellant that there should be implied into his contract of service with the Respondents a term which would have granted him certain benefits as a consequence of the termination of his employment with the Respondents.

It is one of the significant features of this case that the term which the Appellant seeks to have implied into the contract in question as it was set out in his pleadings, requires a fairly elaborate formulation, although in discussion before this Court, its formulation became, as will be seen, somewhat more sharply defined. The way in which the Appellant formulated the term is set out in paragraph 4 of his pleadings.

The factual background averred by the Appellant, upon which the learned Deputy Bailiff proceeded to determine the matter, is as follows. The Air Traffic Control Officers in Guernsey are employed as members of the established staff of the Guernsey Civil Service. In the contracts of employment of Air Traffic Control Officers there are expressly incorporated certain special conditions. The Appellant took up employment with the Respondents in or about 1986. At that time the edition of the Special Conditions, which both parties agreed, formed part of the Appellant's contract of employment, was dated August 1985. Those Special Conditions were subsequently varied in one relatively minor respect, and the version of the Special Conditions which applied to the Appellant's contract of employment at the time of the termination of his employment, was dated 1991.

The 1991 Special Conditions read as follows:-

"These are in addition to those normally applicable to members of the established staff of the Guernsey Civil Service:-

1. Notice of termination of engagement is to be three months (calendar) on either side.

2. The medical examination which is to be taken prior to engagement is to be repeated thereafter at intervals throughout the period of engagement, any such interval being not longer than twelve months. The Civil Service may also require an officer to undergo a medical examination at any time.

3. Where an Air Traffic Control Officer fails to satisfy the standards required by the Board of Administration at any medical examination which the Board may require him to undergo and, because of such failure, the Board has terminated his engagement as an Air Traffic Control Officer-

(a) he shall, if the Board is satisfied that such failure to conform to the said standards was not caused by his own neglect or default, continue to receive full pay for a period of not less than twelve months, provided that if, during that period, he resigns from the service of the States and takes up other employment, the amount he shall thereafter receive from the States, including such pension as may be awarded shall not exceed such sum as, together with the remuneration he receives from his new employment, amounts in total to his previous full pay;

(b) if, at any time during the period of not less than twelve months mentioned in paragraph (a) above when the officer is in the service of the States, it is established on medical advice that the incapacity is permanent, or if at the end of the period the incapacity remains, then

(i) the officer shall, if it be available, be offered alternative employment with the States of Guernsey, or if he so wishes

(ii) the Civil Service Board will grant him a pension on the grounds of his incapacity in accordance with Rule 19 of the States of Guernsey Civil Service (Pensions and Other Benefits) Rules 1972, as amended.

provided, however, that if the employment offered to the officer under paragraph (b)(i) above is on terms not less favourable than those already enjoyed by him, the provisions of paragraph (b)(ii) shall not apply."

It should be noted that those provisions have clearly been drafted with some precision as to the circumstances in which certain benefits are to be made available to Air Traffic Control Officers. In particular, the sine qua non before eligibility for those benefits arises as far as these written terms are concerned, is that:-

1. The Board has required the officer to undergo a medical examination.

2. He has failed to satisfy the standards required by the Board at any such medical examination; and

3. Because of such failure, the Board has terminated his engagement as an air traffic control officer.

Furthermore, it is to be observed that by paragraph 3(b) of the Special Conditions:-

> "The Civil Service Board has the right to offer employment by them to an officer who, if it is established after a year has been permanently disabled from working as an Air Traffic Control Officer, on terms not less favourable than those already enjoyed by him, and in such a case the officer has no right to have an incapacity pension."

In March 1992, the Appellant avers that he contracted conjunctivitis in the left eye which required treatment with antibiotics. He went off work as a result. He, however, returned to his duties on 11th March 1992, and worked until 7th April 1992, when he went off on his annual leave. He returned to work after his holiday on 22nd April 1992. The following day, that is 23rd April, he gave notice in writing to the Respondents of his resignation with effect from 5th August 1992.

There is nothing to suggest in the pleadings that that decision was in any respect associated with the trouble which he had been experiencing with his eye or, indeed, any other medical reason. He does aver, however, that he continued to suffer from eye problems and, after having given in his notice, he consulted doctors in Bournemouth. These doctors referred him to a specialist on the Island who saw him on 20th May 1997. In the meantime the Appellant had ceased operational duties on 28th April 1992, upon the instructions, not of the Respondents, but of the Civil Aviation Authority.

On 18th May 1992, in accordance with the Air Navigation Order, Article 73, September 1991, the Appellant informed the medical branch of the Civil Aviation Authority that he had been unable to work for twenty consecutive days. That resulted in his Class 1 medical certificate being automatically suspended by the Civil Aviation Authority.

By letter dated 13th July 1992, the Appellant wrote to the Respondents' Civil Service Board requesting that the Board grant him a pension on the grounds of incapacity. He also, at that stage, sought to withdraw his notice of resignation. The Civil Service Board wrote to the Appellant on 16th July 1992, refusing to grant him an ill-health pension. They also refused to allow the Appellant to withdraw his letter of resignation.

The Appellant's case, in a nutshell, was that the refusal by the Respondents to grant him ill-health pension benefits was a breach of an implied term of the Appellant's contract of employment to the effect that the Respondents were obliged to do so in the circumstances that had arisen.

Mr. Merrien, for the Appellant, in his submissions to this Court, stressed that it was an implied term of the Appellant's contract of employment, as an Air

A Traffic Control Officer, that he should be in possession of a Civil Aviation Authority medical certificate, and that loss of that certificate would inevitably result in the termination of his employment as an air traffic controller. Mr. Merrien's position was that it was necessary furthermore, however, to imply into the contract between the parties an obligation on the part of the Respondents to pay the benefits set out in the Special Conditions in such an event.

B Both parties were in agreement as to the law on the matter. It is, perhaps, as clearly and as comprehensively set out, as one could wish for, in a passage from the speech of Lord Pearson in the case of Trollope & Colls Limited v. North West Metropolitan Regional Hospital Board (1973) 1 WLR p. 601-609, where after referring to the basic principle, that the Court does not make a contract for the parties, Lord Pearson said:-

> "... The Court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The C Court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the Court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the Court finds that the parties must have intended the term to form part of the contract: it is not enough for the Court to think that such a term would have been adopted by the parties D as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

Mr. Merrien, for the Appellant, accepted that he had to persuade this Court that the term he desiderated should be implied not simply because it was a reasonable thing to do, but because it was necessary for the business efficacy E of the contract. He accepted also, as I understood him, that such a question had to be determined by reference to the circumstances that existed at the time the contract was entered into and by reference to the type of contract in question. The test was graphically formulated by Scrutton, LJ, in the case of Reigate v. Union Manufacturing Company (Ramsbottom) Limited (1918) 1 KB 593 at p. 605, in the following terms:-

> "A term can only be implied if it is necessary in the business sense to F give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would both have replied: 'Of course, so and so will happen; we did not trouble to say that; it is too clear.' Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

G In the present case the question then, in my view, comes to this; at the time the parties entered into the contract of employment in or about 1986, had the parties been asked the following question: "Will Mr. Nash be entitled to obtain the benefits set out in the Special Conditions in the event of his resigning voluntarily for non-medical reasons from the employment of the States

by giving due notice, but during the period of notice he is discovered to have a medical condition which results in the CAA withdrawing his medical certificate?" what would their answer have been? The answer to that question was given by the learned Deputy Bailiff at page 8 of his judgment in the following terms:-

> "I certainly cannot consider that it is in any way obvious or necessary to imply that the States would have said: 'Of course, Mr. Nash, in such circumstances you should be entitled to a full year's pay and a pension.' "

For my part I can find no flaw in the Deputy Bailiff's approach. It seems to me that where, as in this case, the parties have agreed, in clear and precise terms, the exact circumstances in which a certain benefit or benefits will be payable, the person arguing for an implied right to be given those benefits, in other circumstances, has a substantial obstacle to overcome where the test is one of necessity. In my opinion, it was clearly not necessary for the operation of this contract of employment that the Appellant should be entitled to obtain the benefits set out in the Special Conditions, where he had voluntarily terminated his employment with the Respondents, notwithstanding that he subsequently, while working out his notice, lost his CAA medical certificate.

To imply such a term would mean, in the circumstances of this case, that the Appellant was entitled to the benefits without being subject to the restriction in the Special Conditions which entitles the Respondents to provide a person whose employment as an Air Traffic Controller has been terminated because of ill-health with alternative employment which, if it is on the same terms and conditions as previously enjoyed by the employee, will mean that there is no right to the disability pension. I see no basis for holding that the Respondents would necessarily have agreed to such a term being incorporated into the contract if the matter had been raised expressly at the time the contract between the parties was prepared.

For the foregoing reasons, I am of the opinion that the learned Deputy Bailiff was well founded in upholding the Exceptions de Fonds, and finding that there was no basis set out in the pleadings for implying the term into the Appellant's contract with the Respondents as desired by him. I would accordingly refuse the appeal.

SIR DAVID CALCUTT: I agree.

LORD CARLISLE: I agree.

Appeal dismissed.

PUBLICATIONS REVIEW

The Editorial Committee of the Law Journal has decided that it will include from time to time a section drawing attention to recent publications of interest to practitioners and students of Guernsey Law. Unlike other sections of the Journal which adhere to the principle of recording only material arising in the six month period to which the issue relates, material reviewed here may have appeared more recently.

Reformation and Society in Guernsey

by Dr. D. M. Ogier, published by the Boydell Press 1996, price £39.50.

This scholarly work follows closely the text of the author's doctoral thesis presented to the University of Warwick in 1993. It traces the history of the Reformation as it came to Guernsey and the relationship between the ecclesiastical authorities and the secular administration and in so doing paints a clear picture of the Royal Court both as legislator and dispenser of justice. Most interestingly it shows how the tightly knit group of leading island families reacted to the religious storms sweeping through Europe and turned events to their continued advantage. Like all theses the book demands concentration from its reader but is well worth the effort. It is to be hoped that Dr. Ogier, who has recently been appointed Island Archivist, will find the time to produce further material of this quality relating to Guernsey's legal history.

Offshore Red/Offshore Financial Law Reports

Edited by Milton Grundy and Philip Baker
Published by Camden Publishing Limited, Threeways House, 40-44 Clipstone Street, London W1P 8LX. Annual subscription for each publication £495.

Offshore Red is a newsletter published ten times a year claiming to be the first with the news in offshore finance and international tax planning. It covers comprehensively new legislation in all the familiar offshore jurisdictions including the less well known jurisdictions such as Labuan, Samoa and Uruguay. It also reports on relevant court decisions.

The Offshore Financial Law Reports bring together cases on banking and finance, marevas, trusts and taxation from all countries of the world. They are published six times a year. The copy I had to review had three cases of local interest, Solvalub v. Match Investments from Jersey, Century Holdings Limited v. H.M. Procureur and Revenue v. Professor Willoughby. Whilst the Royal Court Library may not be able to stock these publications they could prove a useful resource to local practitioners and those in government charged with keeping an eye on the competition.

The Jersey Law Review

Editor Sir Philip Bailhache. Three issues per year £80.00.

Whilst Jersey has for some years had the benefit of a professionally edited series of law reports both of Royal Court and Court of Appeal decisions it has had no equivalent of the Manx Law Bulletin or the Guernsey Law Journal. That gap has now been filled by the appearance of the Jersey Law Review under the distinguished editorship of the Bailiff of Jersey. The Review will contain sections containing summaries of recent decisions of the Courts and local legislation. The first edition contained a valuable collection of articles including one from a Guernsey Advocate on Morton v. Paint. Letters to the editor are to be encouraged and the editor says that it is hoped that debate on issues of current interest might be stimulated through the correspondence columns: whether this will be interpreted as an invitation to members of the bar to write critiques on recent judgments remains to be seen.

Sir Peter de Havilland

by Richard Hocart, published by La Société Guernesiaise, price £9.50.

Peter de Havilland had an unfulfilled career at the Bar having had a row with the autocratic Bailiff of the day, William Le Marchant. This did not however stop de Havilland progressing to the office of Jurat and later Bailiff. This excellent and readable review of the life of Sir Peter as seen in the main through his correspondence but also through a number of other carefully researched sources provides a fascinating insight into Guernsey society 200 years ago. It is book to take away on holiday and read from cover to cover and then keep it on one's shelves as a resource for drawing on when ever one is asked to talk about the history of Guernsey and its legal system. Mr. Hocart is to be congratulated on what he has produced and encouraged to produce further monographs of this quality.