

Application for leave to appeal without prejudice to the Applicant's submission that such leave is not required, in that the Judgment is of the nature of a final decision even if it is interlocutory and whether or not leave should be granted.

[2020]GRC036

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between:

(1) EDNA BARTER

Applicant

-v-

(1) DENNIS SHANE JACKSON

(2) DAVID FRANK JACKSON

(3) VALERIE SANDRA REOCH

(4) ROBERT JACKSON

Respondents

**Application for Leave to Appeal
(Decision on the Papers)**

Judgment handed down: 17th June 2020

Before: Sir Richard Collas, Lieutenant Bailiff

**Advocate for the Applicant: Advocate L Le R Strappini
Advocate for the Respondents: Advocate N J Barnes**

Cases, Texts and Materials referred to in Judgment:

Court of Appeal (Guernsey) Law, 1964, Section 15 (e)

Havilland Estates Ltd v Channel Island Ceramics Ltd 15.GLJ.81

Salter Rex v Ghosh 2 QB 597

1988 edition of the Annual Practice para 59/1/25

La Loi Relative à la Prescription Immobilière, 1909, section 1

Vaudin v Hamon [1974] A.C. 570

The Application

1. The Applicant has applied for leave to appeal the judgment handed down by me on 7th May 2020 ("the Judgment") without prejudice to her submission that such leave is not required in that the Judgment is of the nature of a final decision even if it is interlocutory. There are two issues: (i) whether leave to appeal is required; and (ii) if it is, whether or not to grant leave. The first issue is probably a matter for the Court of Appeal because if it is not needed the first

instance judge is *functus* nevertheless, I will express a view in the hope that doing so will not offend the higher Court.

2. The Application has been brought by Edna Barter who is only one of the Defendants to the original action because she is the only one to have been given legal aid to enable her to apply for leave.

The Court of Appeal Law

3. Section 15 (e) of the Court of Appeal (Guernsey) Law, 1964 provides that:

“15. *An appeal shall not lie to the Court of Appeal under this Part of this Law – (e) without the leave of the presiding judge of the court whose decision is sought to be appealed from or of the Court of Appeal, from any interlocutory order or any interlocutory judgment, except in the following cases –*

- (i) *where the liberty of the subject or the custody of infants is concerned,*
- (ii) *in the case of a decree in a matrimonial cause or a judgment or order in an admiralty action determining liability,*
- (iii) *in such other cases, to be prescribed by rules of court, as are of the nature of final decisions.”*

There are no relevant rules of court.

4. The Application was preceded by an exchange of emails between counsel and Deputy Greffier Robilliard (writing on my directions) in which Advocate Strappini said that he considered leave to appeal was not required but I questioned whether that was correct. We failed to reach a common view so he has submitted the Application as a precautionary measure whilst reserving his client’s right to argue leave is not needed. Advocate Barnes has accepted, and I agree, that the Application was lodged in time or, failing that, within the period of an extension of time agreed by him. I therefore have jurisdiction to grant leave if it is required.

The Legal Test as to whether Leave is required

5. The test to be applied in this jurisdiction when deciding whether a decision is interlocutory in nature was laid down by the Court of Appeal in Havilland Estates Ltd v Channel Island Ceramics Ltd 15.GLJ.81 in which it applied the test in Salter Rex v Ghosh 2 QB 597 as it had been expressed in the 1988 edition of the Annual Practice para 59/1/25: “*In deciding whether an order is final or interlocutory the Court of Appeal applies the test in (the Salter case). To determine whether an order is final or interlocutory regard must be had to the nature of the application made in the Court below. An order is not final unless it would have finally determined the proceedings whichever way the application in the Court below had been decided.*”

The Parties’ Submissions

6. Advocate Strappini’s submission, set out in an email of 5th June is:

“It is my client's respectful submission therefore that, with regard to the Bailiff's judgment of 7th June (sic) 2020:

- (1) it is not an interlocutory judgment, in that its effect was to finally dispose of all the issues that had, prior to its date, been formally pleaded in the proceedings.*
- (2) this can be seen from the fact that, if the Defendants pleaded no niances or pretentions, and absent an appeal, the case would be at an end.*
- (3) it would, unless challenged on appeal, create a res judicata or issue estoppel between the parties as to all the issues decided in it, such that those issues could not be re-opened between the parties even at any later trial, and certainly not (in the absence of leave to appeal out of time) in any appeal from the trial.*
- (4) it is in every sense "of the nature of a final decision" as to all matters decided by it.*
- (5) Further or in the alternative, even if (which is disputed) it is strictly to be regarded as being of an interlocutory nature, its status as "an interlocutory judgment ... of the nature of a final decision" renders it essential, in the interests of justice, for leave to appeal to be granted.*
- (6) it would be hard to imagine a better candidate for inclusion in the class of cases mentioned in the first paragraph above ("interlocutory orders or interlocutory judgments...of the nature of final decisions") than this one.”*

7. Advocate Barnes submission was concise: *“I think leave is needed, see Havilland Estates GLJ 15.81”*.

Is Leave to Appeal required?

8. In my judgment, leave to appeal is needed because it cannot be said that the order dismissing the Exceptions de Fond raised by the Defendants would have finally disposed of the matter whichever way they were decided. The relief sought by the Plaintiffs in the substantive action was *“a declaration that they are the lawful owners of the Property in undivided one quarter shares”*. The Exceptions de Fond were heard on the basis of a number of agreed facts set out in paragraph 6 of the Judgment. However, no evidence has been given by any of the Plaintiffs and I remain of the view I have expressed previously that the true facts may be different. I would not be prepared to grant any form of declaratory relief without hearing at least some evidence given by or on behalf of the Plaintiffs.
9. Advocate Strappini submitted that the Judgment created an issue estoppel or *res judicata* as between the parties. That may well be correct in so far as the agreed facts are concerned but if evidence were later given that established the true facts were not as agreed between these parties, I do not consider it would follow automatically that the declaration should be granted in favour of the Plaintiffs. If the true facts did not establish that they are entitled to the declaration sought, they would not be vested with title to the Property.
10. For those reasons, I remain of the view, expressed by me in the earlier email exchange, that leave to appeal is required.

To Grant or not Grant Leave

11. On the question of whether to grant leave, I accept that an issue of public importance is raised in the Judgment. That issue is the meaning of “bonne foi” or “good faith” in section 1 of La Loi Relative à la Prescription Immobilière, 1909. Although Advocate Strappini has not submitted detailed grounds of appeal and has merely said that the decision was wrong in law, I have no doubt as to the issue which lies at the heart of the appeal.
12. That would normally be sufficient justification to grant leave. However, I am conscious of the criticism made by the Judicial Committee of the Privy Council in Vaudin v Hamon [1974] A.C. 570 where the case that had proceeded all the way from the Court of the Seneschal through three appeal courts on facts which had not been put in evidence or proved.
13. In my judgment, it is imperative that the true facts of the present case be given and tested in evidence so they can be determined before the case proceeds further.
14. For those reasons, I find that leave to appeal is required and although there is an issue of public importance at the heart of the decision in the Judgment, I refuse leave to appeal. Unless the Application is to be renewed before the Court of Appeal or a single judge thereof, I direct that the matter proceed to a hearing on the evidence.