

Ex-tempore judgment on the question of how the trial should proceed in circumstances where the Company is in voluntary liquidation and the Liquidators have indicated that they consider themselves unable to take an active role at trial, there being no funds for representation or to fund any financial penalty which might be imposed if the Company is found guilty and they having no knowledge of the events which are the subject of the trial.

[2023]GRC068

**IN THE ROYAL COURT OF GUERNSEY  
(CRIMINAL DIVISION)**

**Between:**

**LAW OFFICERS OF THE CROWN**

**Prosecution**

**-and-**

**HUREL LTD**

**First Defendant**

**-and-**

**TREVOR WAINWRIGHT**

**Second Defendant**

**Ex-Tempore Judgment on issue of trial in the  
absence of the First Defendant**

**Date of hearing: 14<sup>th</sup> July 2023**

**Judgment sent in draft to the parties: 10<sup>th</sup> August 2023**

**Judgment handed down: 17<sup>th</sup> August 2023**

**Before: Catherine Maureen Fooks, Judge of the Royal Court**

**Counsel for the Prosecution: Crown Advocate F M Russell**

**First Defendant: Absent and not represented**

**Second Defendant: Attendance excused**

1. This is a short ex-tempore judgment on the question of how the trial against Hurel Ltd (formerly R G Falla Ltd) (“the Company”) and Trevor Wainwright (“D2”) should proceed in circumstances where the Company is in voluntary liquidation and the Liquidators have indicated that they consider themselves unable to take an active role at trial, there being no funds for representation or to fund any financial penalty which might be imposed if the Company is found guilty and they having no knowledge of the events which are the subject of the trial.
2. This is a case concerning an allegation of breach of Health & Safety regulations by the Company and D2 arising from an incident in which a person lost his life. Previously, the Company was represented by Advocate Mark Ferbrache funded by indemnity insurance and D2 has been represented throughout by Carey Olsen. The case was listed for trial on 20<sup>th</sup> March but could not proceed at that time for reasons which are set out in an Ex-Tempore Judgment issued on that date. Shortly afterwards the Company went into voluntary liquidation and the position of the Liquidators is as stated above.

3. There has been correspondence with the Liquidators at my request. With respect to them I consider that, at least initially, they have failed to grasp the seriousness of this matter; this is not a civil case but a criminal prosecution.
4. The Prosecution wishes to continue with the trial notwithstanding the Company's entry into the liquidation process and that is why the hearing was set for 14<sup>th</sup> July. The Liquidators were given notice of the hearing but did not attend for reasons outlined above. D2 did not attend and was not represented at that hearing although had an opportunity to make submissions if he desired. Crown Advocate Russell was directed to file submissions for that hearing on the issue of how the trial would proceed against the Company, if it continued not to participate in the criminal trial process. Some doubt had been expressed as to whether there could be a trial in absence in Guernsey. I am grateful to Crown Advocate Russell for her helpful submissions.
5. Crown Advocate Russell drew my attention to the Proceedings against Corporations (Guernsey) Law, 1951, as amended and specifically section 6 which reads as follows:

*“If, on a trial before it either the corporation does not appear by a representative or, though it does so appear, fails to plead to the indictment, the Royal Court shall order a plea of not guilty to be entered and the trial shall proceed as though the corporation had duly entered a plea of not guilty”.*

6. It is to be noted that the Company has already pleaded not guilty to all counts on the Indictment so the issue with which I am concerned is what should happen at the trial. Crown Advocate Russell's submission was that section 6 provides the Court with an express power to hear a criminal case in the absence of a corporate defendant. Crown Advocate Russell further submitted that the purpose of a corporate prosecution is to hold companies to account, that it is not uncommon in other jurisdictions for corporate entities to be prosecuted after they go into voluntary liquidation, that the liquidation process is no impediment to the prosecution nor is there any requirement in the UK to seek the cooperation of the Liquidators, creditors or Company Registry or indeed the Court itself in such prosecutions. She went to say this at paragraph 11 *“it would be contrary to the over-riding interests of public justice to permit a corporate defendant to thwart criminal prosecution by the simple expedient of non-participation”*. She proceeded to describe what happens when an individual fails to engage in the criminal trial process. She submitted that, if the trial proceeds in the absence of the Company, the Court can give appropriate directions to ensure proper safeguards for a fair trial. In all the circumstances and particularly bearing in mind that this case was ready for trial, Crown Advocate Russell asked me to exercise the power under the 1951 Law to proceed with the trial in the absence of the Company. She also draws attention to the wider inherent powers of the Royal Court.
7. Section 6, on its face, deals with two situations, the first where the corporation does not appear by a representative and the second where it does appear but fails to plead to the Indictment. In both cases it is mandatory for the Royal Court to order a plea of not guilty to be entered. Thereafter the trial is to proceed as though the Company had entered a plea of not guilty. It is implicit, therefore, that the Court has the power to try a corporate entity in its absence with fairness ensured by the Court treating a corporate entity which has no representative/or which has not entered a plea as having entered a not guilty plea.
8. As I said at the hearing, I cannot improve on Crown Advocate Russell's submission from her paragraph 11 which I have extracted above. It is simply cannot be right that a criminal trial would not proceed because a corporate entity did not engage with the process for whatever reason. If there were any doubt about that, section 6 of the 1951 Law puts the matter beyond dispute. In those circumstances I am entirely satisfied that the trial should proceed in the absence of the Company if it continues to be absent and unrepresented at the date of the trial.

9. The next issue for consideration is how to ensure that the trial is fair for the Company and indeed D2 if the Company is not present and not represented at the trial. Crown Advocate Russell, as prosecutor, is a minister of justice and she alluded to her duties in that regard at the hearing and she will ensure that the case is presented fairly to the Court. In addition, I am required to ensure that the Defendants have a fair trial and I am the gatekeeper of fairness. There is to be a review on 17<sup>th</sup> August at which we will consider in more detail exactly how the evidence will be presented to ensure that there is a fair trial and I will issue such directions as may be appropriate.
10. Section 5 of the 1951 Law enables the Court to “*allot an Advocate to a corporation for its defence at trial before it in the same manner as if the corporation were a real person, save that if the Corporation does not choose an Advocate, an Advocate may be allotted to it.*” The reference to the procedure for a “*real person*” to have allotted to him or her an Advocate is reference to the procedure that was in place prior to the implementation of Legal Aid which process was that the Defendant was brought before the Royal Court and chose an Advocate from the roll of Advocates and that Advocate had to represent the person (with very few exceptions) and without payment. Bearing in mind that we are now in 2023 and the Legal Aid system is in force, I agree with Crown Advocate Russell that it would not be appropriate for me simply to allot an Advocate to represent the Company.
11. That is not the end of the matter in my view. Advocate Ferbrache was representing the Company and was receiving funding from indemnity insurance underwritten by two insurers. He has indicated to the Court that he is not in a position to represent the Company because the Liquidators have declined to instruct him and he clearly requires instruction on behalf of the Company. Additionally, one of the two underwriters has withdrawn funding. I wish to explore the possibility of Advocate Ferbrache being able to represent the Company on a funded basis (by which I mean through the policy of indemnity insurance and nothing else). On the making of an order for voluntary liquidation, under section 395 of the Companies (Guernsey) Law, 2008, the Directors become defunct save to the extent that any powers are reserved to them, which I do not believe was the case in relation to the Company. In my view this leaves the Liquidators as the only directing mind of the Company. Whilst I recognise that their duties as (voluntary) liquidators are different from the duties, for example, of administrators, I do consider that they should take any steps reasonably open to them to secure the legal representation of the Company at the trial and in particular explore whether they could engage Advocate Ferbrache to represent the Company. I observe that he had already pretty much finally prepared the case and he is in a good position to indicate how much or little he might need from the Liquidators in order to represent the Company at trial. I acknowledge that Advocate Ferbrache would have to be satisfied that there is still funding acceptable to him for that representation.
12. I direct that a copy of this judgment be made available to the Liquidators, D2 and Advocate Ferbrache. I invite the Liquidators to have some dialogue with Advocate Ferbrache to see if he can represent the Company. I observe that the Liquidators could apply to the Royal Court (Commercial Court) for directions if they deemed that course appropriate.

**Catherine Maureen Fooks**  
**Judge of the Royal Court**

**17th August, 2023**