

The Jersey Law Review - June 2002

CASE SUMMARIES

ADMINISTRATIVE LAW

JUDICIAL REVIEW

In the matter of the Yacht Hotel Ltd. Royal Ct: (Hamon, Commissioner) March 7th, 2002 unreported.

D.J. Benest for the representor; the Solicitor General for the Licensing Assembly.

On the September 23rd, 1999 the Licensing Assembly granted the application of Yacht Hotels Ltd. (“the representor”) to remove the designation of the York lounge bar at the Royal Yacht Hotel as a public bar.

In December 2000, following complaints as to the way in which the premises were being run, the Attorney General made a reference to the Licensing Assembly under Article 9 of the Licensing (Jersey) Law 1974 to enable the Assembly to determine whether it wished to vary the licence by re-imposing the designation as a public bar, or by imposing conditions as to the use of the bar. The hearing took place on July 25th, 2001 at which time the Licensing Assembly re-imposed the designation of the bar as a public bar.

The representor sought a judicial review of the decision of the Assembly, on the following grounds: first, that the Assembly had erred in law, in that Article 9 did not confer upon it the power to make the decision that it had made: secondly, that the representor had not been given a fair hearing; thirdly, that there had been an abuse of process; and fourthly, that the decision of the Assembly was unreasonable within the meaning laid down by *Associated Picture Houses Ltd. v Wednesbury Corporation*^[1]. The representor also sought to argue that, as the Bailiff had presided over the sitting of the Licensing Assembly in September 1999, he should have recused himself from the hearing of the AG’s reference in July 2001.

Held, declining to interfere with the decision of the Assembly,

- (1) approving dicta of Lord Goddard in *R v Nailsworth Licensing Justices*^[2], any claim of bias should be raised before the announcement of the decision which was subject to challenge. In any event, the conduct of the Bailiff, viewed objectively, was not sufficient to give rise to any suspicion of bias;
- (2) in re-imposing the designation of the bar as a public bar, the Assembly was acting on the AG’s reference, and was not acting in excess of the jurisdiction conferred upon it by Article 9;
- (3) the representor had been given a fair hearing, and there had been no abuse of process;

(4) the Assembly had had proper regard to all the material placed before it, and it was impossible to find that it had acted unreasonably.

BANKRUPTCY

LETTER OF REQUEST

In re O.T. Computers Ltd.. Royal Ct: (Bailhache, Bailiff and Jurats Tibbo and Georgelin) January 31st, 2002 unreported.

A.J.N. Dessain for the Representor.

O.T. Computers Ltd. (“the company”) brought a representation before the Royal Court seeking the issuance of a Letter of Request to the English High Court for the making of an administration order pursuant to section 426 of the Insolvency Act 1986.

The question arose as to whether the Royal Court had jurisdiction to make such a request of the English Court.

Held, granting the prayer of the representation and ordering the issuance of a Letter of Request in terms to be approved by the Court,

(1) applying *In Re a Debtor*,^[3] notwithstanding the absence of any statutory authority for such a jurisdiction the Royal Court had an inherent jurisdiction to seek the assistance of the English Court;

(2) the effect of the administration order would be to achieve a more advantageous realisation of the company’s assets than could be achieved on a winding up pursuant to the Companies (Jersey) Law 1991, and the Court was therefore satisfied that it would be in the interests of the company’s creditors for it to be placed in administration;

(3) although the Court had sat in camera to hear the representation, the judgement would be released after the making of the application to the High Court.

CIVIL PROCEDURE

COSTS

Autorain Irrigation Ltd v Pires Royal Ct : (*Le Cras, Commissioner*) April 23rd, 2002 unreported.

A. Clarke for the plaintiff ; R.A. Falle for the defendant.

The plaintiff claimed £6,418 for work done on the defendant’s property. The defendant challenged the quantum and offered £5,418. The plaintiff refused and offered to meet the defendant and his legal advisers on site. This offer was not taken up and proceedings ensued. The defendant eventually sought to withdraw and the plaintiff claimed indemnity costs.

Held, applying *Dixon & others v Jefferson Seal*,^[4] that the defendant's conduct had been tantamount to an abuse of process and that indemnity costs would be awarded.

COSTS

Riley v Pickersgill & Le Cornu Royal Ct: (Wheeler, Master of the Royal Court), February 25th, 2002 unreported.

M.J. Thompson for the plaintiff; A.D. Robinson for the defendants.

In June 1998, the plaintiff brought proceedings against the defendants claiming damages for breach of contract and negligence. On July 26th, 2001 the Royal Court pronounced judgment in the plaintiff's favour, and ordered the defendants to pay the costs of the action on the standard basis.

In June 2000, the plaintiff had taken out an insurance policy to provide cover against the costs he would have had to pay if his application had been unsuccessful. The plaintiff sought to recover from the defendants the cost of the insurance premium.

Held, refusing the plaintiff's application,

(1) the Act of Court of July 26th, 2001 required the defendants to pay to the plaintiff "the costs of the action on the standard basis." Applying *The Official Solicitor v Clore*,^[5] these words had to be interpreted more narrowly than the wording used in Article 2(1) of the Civil Proceedings (Jersey) Law 1956, which conferred on the Court jurisdiction to order payment of costs "of and incidental to" proceedings;

(2) the cost of the insurance premium could not properly be regarded as a cost "of" the action;

(3) recovery of the premium could not be ordered pursuant to the Court's inherent jurisdiction, since such jurisdiction was circumscribed by the doctrine of necessity: applying *Eves v Hambros Bank (Jersey) Limited*.^[6]

Per curiam: the Court commented that, even if the words "of and incidental to" had appeared in the order of July 26th, 2001 this would still not have been sufficient to enable the Court to order that the premium be recoverable. In the United Kingdom, the recoverability of "after the event" insurance was governed by the provisions of the Access to Justice Act 1999. In the absence of similar legislation in Jersey, the making of the order sought by the plaintiff would be wrong in principle, and would go beyond the powers available to the Court.

COSTS

Watkins & Connell v Egglshaw & ors Royal Ct: (Page, Commissioner and Jurats Le Brocq and Tibbo) January 8th, 2002 unreported.

M.St.J. O'Connell and F.B. Robertson for the plaintiffs; M.M.G. Voisin and A.D. Hoy for the defendants.

The Royal Court in this case considered the principles guiding the exercise of its discretion to award costs.

Held, making no order for costs, save for an order that the defendants' costs of the first plaintiff's application to adduce evidence by affidavit be borne by the first plaintiff,

- (1) the Court's overriding objective in considering costs was to do justice between the parties, and in many cases that objective would be fulfilled by making an award in favour of the "winning" party, where the "winner" was readily apparent;
- (2) the Court should not however strain to try to label one party as the "winner", and the other as the "loser" when the complexity or other circumstances of the litigation did not readily lend themselves to analysis in those terms;
- (3) the discretion laid down in Article 2 of the Civil Proceedings (Jersey) Law 1956 was a wide one, and ought not to be treated as fettered by any supposed rule or practice, other than that the discretion should be exercised judicially and broadly in accordance with the guiding principles laid down in *In re Elgindata*^[7] and *A.E.I v Phonographic Performance*,^[8]
- (4) applying *BCCI v Ali & Ors*,^[9] the Court was entitled to have regard to any and all considerations that might have a bearing on the overriding objective of doing justice;
- (5) in particular, applying *Ford v GKR Construction (Practice Note)*,^[10] the Court was entitled to consider whether a party had conducted the litigation openly, and in such a way as to enable the issues to be identified and investigated quickly and efficiently;
- (6) the Court was also entitled to have regard to the fact (if such was the case) that the defendant had been responsible for the action being brought against him: applying, *inter alia*, *Walkerv Daniels*^[11]. Regard could also be had to the conduct constituting the alleged cause of action, disapproving *Ritter v Godfrey*^[12] on this point.

COSTS - TAXATION

Tomes v Coke-Wallis & ors Royal Ct: (Birt, Deputy Bailiff and Jurats Bullen and Georgelin) January 14th, 2002 unreported.

R.G.S. Fielding for the plaintiff; the first and third defendants in person; Mrs Coke-Wallis for the second defendant.

On January 25th, 2001 the Royal Court ordered the defendants to pay the costs of a hearing concerning interim injunctions on the standard basis, and the costs of a hearing for contempt on an indemnity basis.

The procedure for taxation of costs is governed by Rule 9A of the Royal Court Rules, 1992.

On February 20th, the plaintiff's advocate forwarded two copies of the bill of costs to the taxing officer, with a further copy to the defendants. By letter dated March 7th, the Proceedings Officer of the Judicial Greffe informed the defendants that they had the right to respond to the bill of costs by written objections or, in the alternative, to elect to be heard at an oral taxation hearing. The defendants were requested to reply by March 28th.

On April 11th, the defendants submitted their written objections. On May 2nd, the plaintiff's advocate filed a reply, but a copy of this was never sent to the defendants. The taxing officer then proceeded to a final taxation.

The defendants appealed against the order.

Held, quashing the taxation and remitting the matter to the taxing officer for an oral taxation hearing,

(1) the Proceeding Officer's letter of March 7th did not comply with the requirements of paragraph (1) of Rule 9A/11, in that it wrongly suggested that the defendants had to make a choice between detailed written objections and summary objections followed by an oral hearing. Paragraph (1) did not envisage such a choice;

(2) the time limit stipulated in the letter did not comply with the time limit laid down by paragraph (1) of Rule 9A/11, and the defendants had therefore been faced with conflicting guidance on this point;

(3) as a result of the procedure that had been followed, the defendants had, through no fault of their own, been deprived of the right to elect for an oral taxation hearing.

Per curiam: The Court expressed the view that the procedure governing taxation needed to be reviewed. In particular, Rule 9A/11 should stipulate who was to send to the paying party a copy of any reply filed to written objections. The Court also commented that, in the case of a litigant in person, the time limit laid down in paragraph (4) of Rule 9A/11 should be specifically drawn to the paying party's attention at the relevant time.

CRIMINAL PROCEDURE

CONDUCT OF TRIAL

Evans v Att. Gen. Royal Ct: (Bailhache, Bailiff and Jurats Rumfitt and Tibbo) February 4th, 2002 unreported.

J. Michel for the appellant; C. Yates for the Crown

The appellant appealed against the Magistrate's decision to award only half the costs of the defence following his acquittal of public order offences, on the ground, *inter alia*, of the long delay that had occurred. The evidence of some witnesses was heard on July 20th, further witnesses on September 6th, and another witness on October 2nd, 2001 when the case was concluded. Applying *Romeril v Att. Gen.*^[13] the Court allowed the appeal but also observed that lengthy adjournments were not consonant with the doing of justice and that a criminal trial should continue without significant interruption until its conclusion. Adjournments should in general be to the next working day.

DRUG TRAFFICKING

Representation of Tomas Batalla – Esquivel Royal Ct: (Bailhache, Bailiff) February 7th, 2002 unreported.

M.G.P. Lewis for the representor; A.J. Belhomme for the Crown.

The representor complained that the Viscount's costs of administering assets subject to a *saisie judiciaire* at the instance of the U.S. Attorney General were excessive, amounting over an 18 months' period to 10% of the value of the assets seized. He sought a cross-undertaking in damages as a condition of the continuance of the order, relying by analogy on the practice in relation to Mareva injunctions.

Held, dismissing the application, that the Court had no jurisdiction to require a cross-undertaking in damages from either the Attorney General or the appropriate authority of a designated country. The Drug Trafficking Offences (Jersey) Law 1988 existed to curb the evil of drug trafficking and there should be no inhibition upon enforcement authorities seeking *saisies judiciaires*; the remedy of the representor was to seek the discharge of the order.

EQUITY

TRACING - RESTITUTION

Grupo Torras S.A. v Sheikh Fahad Mohammed Al Sabah & ors Royal Ct: (Birt, Deputy Bailiff and Jurats de Veulle and Georgelin) January 17th, 2002 unreported.

J.A. Clyde-Smith for the trustee and for the sixth and seventh defendants; N.F. Journeaux for the plaintiff; N.M. Santos-Costa for the second and third defendants; the first, fourth and fifth defendants did not appear and were unrepresented.

Sheikh Fahad (the "first defendant") was the chairman of Grupo Torras S.A ("GT") a company owned by the Kuwait Investment Office. Between May 1988 and October 1990, he conspired with others to defraud GT of the sum of US\$430 million.

GT subsequently obtained judgment against the first defendant in the UK in the sum of US\$800 million, which was registered in Jersey under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

Between 1981 and 1994, the first defendant had established various trusts, two of which, the Esteem Settlement and the Number 52 Trust, were situated in Jersey ("the Jersey Trusts").

In proceedings commenced in 1999, GT laid claim to the assets held in the Jersey Trusts in order to satisfy its judgment debt. On February 12th, 2001, the Royal Court ordered that the following issues be tried as preliminary issues: first, whether GT was entitled to assert a proprietary claim in respect of the sum of £1.276 million, being the balance of certain funds which the first defendant had stolen from GT; secondly, whether GT was entitled to bring a claim in restitution in respect of this sum; and thirdly, whether transfers made into the trusts should be set aside on the basis that they constituted a fraud on the first defendant's creditors ("the Pauline action").

GT's claim raised the following issues -

- (1) whether Jersey law recognised the ability to trace assets and, if so, in what circumstances;
- (2) whether Jersey law recognised a claim in restitution even where there was no fault on the part of an innocent recipient;
- (3) what were the limits of, and principles underlying, the Pauline action;
- (4) what was the limitation period applicable to the Pauline action.

Held, making an order that GT was entitled to trace into certain of the assets of the Trust, but deferring a final decision on the Pauline action pending further argument,

Tracing

- (1) applying *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*^[14] and the dicta of O'Connor J in the Australian case of *Black v S. Freedman & Co.*^[15] a person who had defrauded a company of which he was a director held the proceeds of fraud on a constructive trust for the company, which had an equitable proprietary interest in the property in question;
- (2) applying *Re the Viscount in the matter of PKT Consultants (Jersey) Limited*^[16] and *Royal Bank of Scotland Limited v Khan*^[17] the principle of tracing formed part of the law of Jersey where the claimant had an underlying proprietary interest;
- (3) where proprietary funds had been mixed with funds belonging to an innocent third party, there was no advantage in adopting into Jersey law the rule laid down in *Devaynes v Noble, Clayton's case*.^[18] Tracing of such funds was to be dealt with by application of the "apportionment method" as described in *Barlow Clowes International Limited (in liquidation) v Vaughan*,^[19]
- (4) where proprietary funds were injected into a company which was wholly owned by an innocent volunteer, whether by way of share capital, loan account or otherwise, the tracing exercise should be continued into the assets acquired by that company with the proceeds;
- (5) where proprietary funds were expended on improvements to land already owned by an innocent volunteer, the claimant was entitled to trace into the increase in value of such land which was attributable to such funds: not following *Re Diplock*;^[20]
- (6) the right to trace was lost, either in whole or in part, in circumstances where it would be inequitable to allow the claimant to do so;
- (7) applying the above principles, the first defendant was a constructive trustee in respect of the monies received from GT, and GT had an equitable proprietary interest in that sum. GT was therefore entitled to trace into such increase in the value of properties owned by the Trusts as was attributable to such monies. Furthermore, on the particular facts of the case, it would not be inequitable to allow the tracing claim

Restitution

(1) where property in respect of which a person (“the beneficiary”) had an equitable proprietary interest was received by an innocent volunteer, the beneficiary had a personal claim in restitution against the recipient, even where the recipient was not guilty of any “fault” in receiving the property. Such a claim would only succeed to the extent that the recipient remained unjustly enriched, and the defence of change of position was available;

(2) applying the above principles, there was an obligation on the trustee of the Jersey Trusts to make restitution of the sums received, subject only to a change of position defence.

The Pauline action

(1) a Pauline action could only be brought by a creditor whose debt preceded the transaction which was to be set aside. A person became a creditor when the facts giving rise to his cause of action occurred, even if the validity of the cause of action was not established until later;

(2) the creditor had to prove that the debtor was either insolvent at the time of the disposition in question, or that the disposition had exacerbated a pre-existing insolvency: applying *Golder v Société des Magasins Concorde Ltd.*^[21] In determining this issue, the Court was not required to carry out a meticulous balance sheet exercise, but simply had to satisfy itself that there was a close connection in time and effect between the disposition and the insolvency;

(3) in the case of a disposition made to a volunteer, the alienation was voidable when the alienor alone was guilty of an intention to defeat his creditors. Mere recklessness would not suffice, but the fact that the defeat of creditors was the natural result of a transaction was a material factor to take into account. In the case of a disposition made for a value commensurate with the value of the object alienated, the alienation was only voidable where both the alienor and the alienee were aware of the real nature of the transaction;

(4) where more than one purpose existed for carrying out the disposition, the requirements of the Pauline action were satisfied where a substantial purpose of the transaction was to defeat creditors;

(5) the Court should also consider whether, in reliance upon a receipt, an innocent recipient had so changed his position that it would be inequitable to require him to make restitution, or to make restitution in full;

(6) the burden of showing that it would be inequitable to order restitution lay upon the recipient;

(7) a final decision on this part of GT’s claim was deferred pending further argument on the issue as to change of position/continuing unjust enrichment.

Limitation

A Pauline action was to be classified as a personal action relating to movables. Applying *Albright v Wailes*,^[22] the prescription period for such actions was ten years.

EVIDENCE

ADMISSIBILITY

Att. Gen. v Buckley and others Royal Ct: (Birt, Deputy Bailiff) January 22nd, 2002 unreported.

B.H. Lacey, Crown Advocate, for the Crown; C.J. Scholefield and M.L. Preston for two of the defendants.

The two defendants challenged the admissibility of evidence obtained by the police by intrusive surveillance, *i.e.* by means of recording devices placed secretly in the car and home of one of the defendants. The conversations between the two defendants that were secretly recorded were said to provide compelling evidence of their guilt. The devices were placed after applications made to the Chief Officer for authority. The police followed a code of practice on intrusive surveillance issued by the Home Office although it had no statutory backing in Jersey.

The defendants objected that the evidence was obtained in breach of their right to privacy under Art 8 of the ECHR and that they would be unfairly prejudiced by its being admitted.

Held, rejecting the objection, that –

- (1) the right to privacy under the ECHR was not unqualified and could be interfered with for the prevention of disorder and crime;
- (2) even if the interference was not prescribed by law, applying *R v Khan (Sultan)*^[23] and *Clarkin v Att. Gen.*,^[24] the admission of the evidence in all the circumstances would not be unfair nor would it undermine the justice of the trial.

LAND LAW

OWNERSHIP EN INDIVIS

Haas v Duquemin CA (Vaughan, Tugendhat, and Hodge JJA) January 17th, 2002 unreported.

D.J. Benest for the appellant; the respondent on his own behalf.

The appellant appealed against a ruling of the Royal Court that co-owners of land are each entitled to the full use and enjoyment of the jointly owned land to the extent that they are not legally inhibited from so doing. The relevant inhibition was the right of the appellant to park three cars in the jointly owned yard. The Court had ruled that, subject to that right, both co-owners could use the yard. for further parking or otherwise.

The appellant contended that she had the exclusive right to park cars in the yard. The respondent cross-appealed to contend that he had an exclusive right to park in that part of the yard not subject to the servitude in favour of the appellant.

Held, dismissing both appeals, that the co-owners were entitled to the full use and enjoyment of the property owned *en indivis* subject only to the appellant's rights.

Per curiam: acknowledging that this ruling did not put an end to the dispute between the parties, the Court indicated that if the parties could not find a *modus vivendi*, the Royal Court had a power of judicial regulation to impose a settlement

SUCCESSION

WILLS

In re Estate of Vickers Royal Ct: (Hamon, Commissioner) November 29th, 2001 unreported.

R.J. Michel for representors.

The representors were the heirs, according to English law, of the deceased's estate in England and Jersey. The deceased had made three separate wills relating to her assets in Portugal, New Zealand and elsewhere in the world.

The deceased's will in relation to her world wide estate was dated September 26th, 1990 and contained a revocation clause which read -

"I hereby revoke all previous testamentary dispositions made by me except in so far as they relate to property situate in Portugal and New Zealand".

On March 21st, 1991 the deceased executed a will declared to deal only with her property in New Zealand, but that will opened with the following words -

"This is the last Will of me Phyllis Maud Vickers, widow of Lagos, Portugal and I revoke all earlier Wills made by me".

The will relating to the deceased's estate in Portugal was made on March 29th, 1992, and contained a revocation clause which related only to a previous Portuguese will.

The New Zealand Court had issued the equivalent of a grant of probate in New Zealand limited to the New Zealand estate. The Portuguese will had been admitted to the Portuguese equivalent of probate. In neither jurisdiction was a claim made to administer the deceased's estate in England or in Jersey.

On August 23rd, 2001, a Grant of Letters of Administration with the deceased's will of September 26th, 1990 attached was issued by the English Court.

The question before the Royal Court was whether the revocation clause in the New Zealand will revoked the will of September 26th, 1990.

Held; ordering probate of the will of September 26th, 1990,

- (1) applying *Béghin v Bilodeau*^[25] in the Supreme Court of Canada, that a revocation clause is not to be treated as conclusive if it can be shown that the two wills may be dealing with property in different jurisdictions;
- (2) that whilst a testator may *prima facie* be taken to know and approve what he executes, there is no presumption of law and if obvious facts militate against such an intention as expressed in the document the Court can act on the real intention as found by it. *Re Phelan deceased*;^[26]
- (3) that whether a will or codicil has been validly revoked can only be determined by considering whether the testator had the intention to revoke it. *Perrier v Minchington*;^[27]
- (4) that on the particular facts of this case it was clear that all three wills were intended to stand separately and independently of each other.

TRUSTS

DISCLOSURE OF TRUST DOCUMENTS

Re the CA Settlement Royal Ct: (Birt, Deputy Bailiff and Jurats Potter and Georgelin) May 2nd, 2002 unreported.

K. Lawrence for the representor; F.B. Robertson for the trustee; J.D. Kelleher for the executors; G.R. Boxall for the adult beneficiaries.

The representor applied for disclosure of certain documents by the trustee of the CA Settlement of which she was not a beneficiary. The representor was the only daughter of the settlor who died domiciled in Jersey in 2000. By his will he left everything to his son. The representor applied successfully to have the will reduced *ad legitimum modum* but the bulk of his estate had been settled on trust in 1991. The representor claimed that the Court had jurisdiction under art. 25 of the Trusts (Jersey) Law 1984 (“TJL”) to order disclosure notwithstanding that she was a stranger to the trust, and that the Court should exercise that jurisdiction because, if proceedings were brought against the trustee, she would be entitled to the information on discovery.

Held, refusing the application,

- (1) that art. 25 of TJL conferred jurisdiction on the Court to order disclosure of trust documents to a stranger to the trust, but
- (2) that, save in exceptional circumstances, it would not be right to give pre-action discovery to such a stranger.

^[1][1948] 1 KB 223

^[2][1953] QBD 652

[\[3\]](#)[1981] 1 Ch 384

[\[4\]](#)1998 JLR 47

[\[5\]](#)1984 JJ 81

[\[6\]](#)2000 JLR 221

[\[7\]](#)[1992] 1 WLR 1207

[\[8\]](#)(No 2) [1999] 1 WLR 1507

[\[9\]](#)(No 4) (1999) NLJ 1734

[\[10\]](#)[2000] 1 WLR 1397 CA

[\[11\]](#)May 3rd, 2000 unreported

[\[12\]](#)[1920] 2 KB 47

[\[13\]](#)March 26th, 2001 unreported

[\[14\]](#)[1996] AC 669

[\[15\]](#)(1910) 12 CLR 105

[\[16\]](#)August 1st, 1991 unreported

[\[17\]](#)October 19th, 1999 unreported

[\[18\]](#)(1816) 1 Mer 572

[\[19\]](#)(1992) BLC 838

[\[20\]](#)(1948) All ER 318

[\[21\]](#)1973 JJ 721

[\[22\]](#)1951 JJ 31

[\[23\]](#)1997 3 All ER 289

[\[24\]](#)1991 JLR 232

[\[25\]](#)(1951) SCR 699

[\[26\]](#)[1971] 3 All ER 1256

[\[27\]](#)1997 JLR N-15