Return to Contents

Case Summaries

Administrative Law

Compulsory Purchase

Lesquende Ltd. v Planning & Environment Committee Privy Council: (Lords Browne Wilkinson, Nicholls of Birkenhead, Hoffman, Clyde and Hutton) February 11th, 1998.

B. Denyer-Green (of the English Bar) for the appellant; W. J. Bailhache, Crown Advocate, for the respondent.

The appellant owned land known as the Belle Vue Pleasure Park which was acquired by the States using the procedures set out in the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 ("the Law"). A lengthy hearing before the Board of Arbitrators followed, during which the appellant made no claim for its costs, relying on the provisions of Article 14 of the Law. The hearing before the Board of Arbitrators predated the coming into effect of the 1994 amendment to the Law.

Article 14 provided that:

> "(1) There shall be paid to the members of the Board fees in accordance with such scale as the States may by regulation determine.
>
> (2) The fees of the Board and all expenses incurred in proceedings under this Law shall be paid by the acquiring authority."

Following delivery of the award, the appellant issued proceedings against the respondent claiming its costs with interest. The Royal Court held that the appellant was in principle entitled to its costs of the arbitration proceedings calculated on an indemnity basis, such costs to be taxed if not agreed. It accordingly did not determine an alternative claim by the appellant for its costs based on the provisions of Article 9(1)(g) of the Law. The Court of Appeal allowed the respondent's appeal holding that under neither Article 14 nor under Article 9(1)(g) was the appellant entitled to its costs incurred in the arbitration.

The appellant appealed.

> Held, allowing the appeal, on a proper construction of the Law, the Royal Court has jurisdiction to order the acquiring authority to pay to the party from whom the lands have been acquired all reasonable costs incurred by him in proceedings before the Board. Whether the costs were reasonably incurred and whether they are reasonably quantified are matters for the Royal Court to determine.

Judicial Review

Planning & Environment Committee v Lesquende Ltd. CA: (Carlisle, Gloster and Beloff, JJA) January 5th, 1998.

W. J. Bailhache, Crown Advocate, for the appellant; M. M. G. Voisin for the respondent.

Following the delivery and registration of an award of compensation by an arbitration board appointed in accordance with the provisions of the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 as amended ("the Law"), the landowner commenced proceedings by order of justice seeking orders that the award be set aside, the matter remitted to the Board and that directions be given on such remission. By its answer, the appellant admitted that the award should be set aside but on different grounds. The Royal Court did set aside the award [1] and the appellant appealed one of the directions given.

The Court of Appeal raised of its own motion whether the Royal Court (and the Court of Appeal) had jurisdiction to set aside the arbitration award given in particular the provisions of Article 12 of the Law which contain a procedure for a case to be stated for the Royal Court.

Held, allowing the appeal:

1. that the Royal Court has inherent jurisdiction by way of judicial review to control excess or abuse of power by executive bodies. That jurisdiction will only be ousted in the case of the clearest statutory provision. Accordingly the presence of an alternative remedy did not oust the jurisdiction of the Court to grant judicial review;
2. that judicial review is however a remedy of last resort and that jurisdiction should not normally be exercised where other remedies are available and have not been used. *Prima facie* the Royal Court should decline to entertain a remedy by way of judicial review in the light of the case stated procedure in Article 12 of the Law;
3. that the case stated procedure in Article 12 was available to the parties both before and after the award was handed down, and indeed registered;
4. that in these circumstances where neither party had appealed the Royal Court's decision to exercise its discretion to grant judicial review, the Court of Appeal would hear the substantive issues in the appeal.

Arbitration

Costs

Olcott Investments Ltd. v Viscount of the Royal Court CA: (Carlisle, Gloster and Beloff JJA) January 14th, 1998 unreported.

A. D. Robinson for the appellant; J. C. Gollop for the Viscount.

The appellant appealed against the refusal of the Royal Court to quash an arbitrator's award of costs in favour of the Viscount and to remit the matter to the arbitrator for further

consideration. It was conceded by the Viscount that the Court has the right to interfere with an arbitrator's exercise of discretion if his decision is wrong in law, or unreasonable. In such circumstances, the Court does have jurisdiction to interfere even if the arbitration agreement, as here, provides that the award shall be "final and binding" and contains no provision for an appeal.

The appellant contended:

1. that the arbitrator had failed to address the argument that the appellant should be entitled to recover all, or substantially all, of its costs of the arbitration on the common ground that the arbitration hearing had substantially been concerned with issues on which the Viscount had lost. The Viscount replied that the arbitrator had been under no obligation to state his reasons. Moreover, the Viscount had partially succeeded in the arbitration and the arbitrator had chosen, in his discretion, to order that costs should follow the event;
2. that the arbitrator had misdirected himself in law by holding that an offer which lapsed prior to the hearing provided no protection with regard to costs. The appellant had made two Calderbank offers substantially in excess of the amount eventually recovered. Both were expressed to be open for acceptance for a period of 21 days. The correct principle was that an offer could, as a matter of discretion, be taken into consideration notwithstanding that it had lapsed. The arbitrator should have considered the question whether the subsequent proceedings had flowed from the Viscount's failure to accept either offer. The Viscount contended that the offers were ambiguous and that the arbitrator's decision could not be faulted.

   Held, allowing the appeal:

   1. that in exercising his discretion on costs, the arbitrator should have considered whether there were grounds for depriving the Viscount of his costs because the hearing had been almost entirely taken up with issues on which he had lost. It was clear from the face of the Award that the arbitrator did not address this issue. In awarding the Viscount his costs, the arbitrator had erred because the Award did not reflect the result of the arbitration. A reasonable arbitrator would have considered that there were grounds for depriving the Viscount of a substantial amount of his costs;
   2. that the arbitrator was wrong to conclude that a lapsed offer could not offer any protection in costs. The correct principle of law was that a judge was entitled, in the exercise of his discretion, to disregard a lapsed offer. No rigid rule of law could be laid down as to how the discretion should be exercised in such circumstances. In this case the arbitrator should have taken the offers which were unambiguous into account when exercising his discretion. The costs incurred after the expiry of the 21 day period during which the first offer was open for acceptance, flowed from the Viscount's refusal to accept the offer;
   3. that the Award on costs should be quashed and remitted to the arbitrator with the direction to reconsider.

Bankruptcy

Désastre

In the matter of PSD Enterprises Ltd., en désastre and in the matter of P. E. Barrett Royal Ct: (Hamon, Deputy Bailiff and Jurats Myles and Potter) January 14th, 1998 unreported.

J. C. P. Wheeler for the Viscount; Miss P. E. Barrett represented herself.

PSD Enterprises Limited ("PSD") carried on business as a retailer of greeting cards. Miss Barrett was a shareholder and from July 1992 managed its day to day activities. PSD was declared *en désastre* on 13th April, 1995. In March 1997 the Viscount applied pursuant to Article 17 of the Bankruptcy (Désastre) (Jersey) Law 1990 for an order that Miss Barrett repay the sum of £25,234 which it was alleged she had paid herself in preference to other creditors of PSD. Before the application was heard Miss Barrett was herself declared *en désastre*. Article 17 (1) provides that:

> (1) "where a debtor in respect of whose property a declaration has been made has at the relevant time … (b) given a preference to any person, the Viscount may apply to the Court for such order as the Court thinks fit for restoring the position to what it would have been if that debtor had … given that preference."
>
> Held,
>
> 1. applying the tests set out by Millett J in Re MC Bacon Limited [2], that the Court should examine the transaction and decide whether the company was motivated by proper commercial considerations or was desirous of improving the creditor's position in the event of insolvency.
> 2. On that basis the Court was satisfied that the order should be made.

Civil Procedure

LitigantsIn Person

Eves and others v St. Brelade's Bay Hotel Ltd. CA: (Bailhache, Bailiff and Collins and Southwell JJA) February 10th, 1998 unreported.

The applicants applied for an extension of time within which to lodge their case and supporting documentation.

> Held, dismissing the application, that there had been very substantial delay.

Obiter: per Southwell JA: that as a matter of general observation in cases of this kind litigants in person could pursue too many applications and appear before the courts on too many occasions without good effect; the authorities should consider the position of litigants

in person and whether there should be any filter by which they are enabled to come to the courts.

Striking Out

Beasant v Pavan and Public Health Committee Royal Ct: (Le Marquand, Greffier Substitute) October 22nd, 1997 unreported.

P. S. Landick for the plaintiff; M. St. J. O'Connell for the second defendant.

The plaintiff was admitted to the Jersey General Hospital on 20th December, 1984 by reason of fractures to his right leg. He alleged that he suffered from chronic cellulitis and that he had informed staff in the Accident and Emergency Department that this was so. On 21st December, 1984 the plaintiff underwent an operation by virtue of which a metal plate was inserted in the leg. The plaintiff alleged that this was the wrong treatment for someone suffering from chronic cellulitis and that as a result he had suffered a serious exacerbation of his existing condition.

The plaintiff issued an Order of Justice which was served on 18th December, 1987 just within the relevant limitation period in tort. The action was placed on the pending list as against the second defendant on 22nd January, 1988. The second defendant brought a summons seeking an order striking out the plaintiff's claim on the ground of inordinate and inexcusable delay on the part of the plaintiff in the prosecution of the action. The second defendant submitted that the only activity between 29th January, 1988 when the second defendant had filed an answer, and late June 1995 was the sending of a copy of a medical report to the second defendant on 21st September, 1990 and a letter quantifying the plaintiff's claim on 12th November, 1993.

The Greffier applied the test in *Skinner v Myles* [3] and held that to the requirement that there has been inordinate and inexcusable delay on the part of the plaintiff there must be added one of two additional grounds for striking out. These are (a) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action; or (b) that it is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiff, or between each other, or between them and a third party.

Applying the commentary contained in the 1997 Whitebook at section 235/1/6, the Greffier found that "inordinate delay" meant "materially longer than the time usually regarded by the profession and the Courts as an acceptable period". This was easier to recognise than to define.

On the question of "inexcusable delay" the Greffier found that this ought to be looked at primarily from the defendant's point of view or, at least, objectively.

As regards "prejudice to the defendant" the Greffier held that this was a matter of fact and degree. There had to be some indication of prejudice, eg that no witness statement was taken at the time so that a particular witness had no means of refreshing his memory or was of advanced age and no longer wished to give evidence or had become infirm or unavailable to give evidence.

Applying those tests the Greffier was satisfied that this was a clear case of inordinate delay. He was also satisfied that the delay was inexcusable. He then went on to consider the question of whether or not the inordinate and inexcusable delay had given rise to a substantial risk that it was not possible to have a fair trial of the issues in the action. On the facts of this case, due to the inactivity on the part of the plaintiff in prosecuting his claim, the second defendant had routinely destroyed the notes within the Accident and Emergency Department so that it was not possible to produce any documentary discovery in this area and impossible to identify the staff who were on duty at the material time.

> Held, granting the application, that the plaintiff's action against the second defendant would be struck out.

Le Gall v Coutanche Royal Ct: (Le Marquand, Greffier Substitute) December 9th, 1997 unreported.

The defendant brought a striking out application seeking the dismissal of the plaintiff's claim for want of prosecution by reason of inordinate and inexcusable delay. The action related to a building contract which was completed in early 1985. The plaintiff's legal adviser was instructed almost six years later, and proceedings were instituted in early January 1992. The defendant's summons was issued in August 1997, by which time the action had not yet been set down on the hearing list.

The Greffier concluded that, in the present case, where the action had been commenced seven years after the contract had been completed, there was a higher duty to prosecute the claim expeditiously than if the action had been commenced at an earlier date. It was found on the facts that there had been inordinate delay, and that there was no reasonable excuse for such delay.

The plaintiff argued that there was no substantial risk that a fair trial of the issues in the action could not take place. Rejecting that argument, the Greffier found that the memories and reliability of witnesses were bound to have declined during the period of culpable delay and that, on balance, there was a substantial risk that it was not possible to have a fair trial of the issues in the action.

> Held, that the claim would be struck out.

Gamlestaden Fastigheter AB v Boleat and others Royal Ct: (Le Marquand, Greffier Substitute) February 23rd, 1998 unreported.

N. M. Santos-Costa for the plaintiff; T. J. Le Cocq for the defendants.

The first, second and third defendants were all employees of the fourth defendant which was a specialist company and trust administrator. Through an arrangement between the fourth defendant and the fifth defendant, Baltic Partners Limited ("Baltic") they were also directors of Baltic.

The plaintiff was a minority shareholder (22%) in Baltic and brought the proceedings in that capacity. The plaintiff alleged that the defendants (excluding Baltic) had been negligent in permitting Baltic to enter into certain transactions concerning its interests in a German property owning partnership to its detriment and moreover alleged that the first, second and

third defendants had acted at the behest of or in the sole interest of, Baltic's majority shareholder or the person who allegedly owned the majority shareholding.

The defendants applied to strike out the action on the basis that the rule in *Foss v Harbottle* [4] applied and accordingly any course of action could only vest in Baltic.

The defendants argued that the law was as stated by the Royal Court in *Khan v Leisure Enterprises Limited* [5] and the plaintiff's case did not fall within any of the exceptions to the rule.

The plaintiff accepted that the rule applied but claimed that the "fraud on the minority" exception applied. The plaintiff argued that the term "fraud" should be given a wide interpretation which could extend to negligence and applied in the present circumstances.

The defendants contended that, to fall within the "fraud on the minority" exception the actions which formed the basis of the plaintiff's claim had either to be fraudulent within the normal meaning of that term or, if only negligent, must have resulted in a benefit to the alleged wrongdoers. In addition it was argued that the plaintiff could only sue if it had no alternative relief.

Held, the action must fail and the application to strike out succeed because:

1. the persons against whom relief is sought must hold and control the majority of shares in the company and have refused to permit an action to be brought in the company's name. The defendants were not in sufficient control of the company to prevent the company from bringing the action against them;
2. the plaintiff had an alternative remedy under Article 141 of the *Companies (Jersey) Law 1991*.

The court noted that there was no allegation that the defendants had in any way benefited themselves at the expense of Baltic and accordingly the only remaining question was whether the allegations against them could amount to allegations of fraud. Having decided on other points in the defendant's favour the court felt that a determination of this point was not needed.

[Editorial Note: this judgment is being appealed to the Inferior Number.]

Conflict Of Laws

Reciprocal Enforcement Of Judgments

Majormine Ltd. and others v Lindmer Trust Company Ltd. and another Guernsey CA: (Southwell, Collins and Bailhache JJA) October 23rd, 1997 Guernsey unreported.

A judgment had been registered in Guernsey under the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 ("the 1957 Law") for a sum of £26,396 in relation to the costs of a legal action in England. The shares of Majormine Limited were held by two nominee shareholders in Guernsey who were the judgment debtors in this action. They took their

instructions from a Belgian lawyer who had been the trustee of an underlying trust. The Belgian lawyer had been removed from office as there had been a failure to lodge the annual returns and accounts of Majormine which had led to its being struck off the English register of companies.

New trustees were appointed and applied firstly to have the company restored. They also applied *ex parte* for removal of the two nominee shareholders and their replacement by their own nominees under Section 359 of the Companies Act, 1985. The nominee shareholders in Guernsey applied to set aside the *ex parte* order. This application failed and costs were awarded against them.

In the Royal Court of Guernsey the judgment debtors applied to have the registered judgment set aside *inter alia* under section 6 (2) (a) of the 1957 Law the material part of which provides that the original court shall be deemed to have jurisdiction only if the judgment debtor:

> "… being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings …"

The Royal Court had decided that the judgment debtors had appeared in the English High Court in order to recover assets seized in the *ex parte* proceedings and that therefore they could not be said voluntarily to have submitted to the English Court's jurisdiction.

The judgment creditors appealed to the Guernsey Court of Appeal.

> Held, allowing the appeal, that Section 359 of the Companies Act 1985 could not be said to be a "forfeiture provision" but that "… an entry in the register, whilst evidencing membership and relevant disputes as to title where this is challenged, is not in itself "property" and is not capable of being seized as property; it may or may not be evidence of title; it is evidence of membership; it is the shares that are the property and not the register which is no more than evidence."

Comment: (Advocate St. John Robilliard)

From this it would appear that if one had intervened to prevent the seizure of the actual shares, that is the property, the decision could have been different. However, in the instant case the nominee shareholders could not have done this because: "… the only link between the judgment debtors and the shares in question was their registration as nominees of an erstwhile trustee who by the time of rectification long ceased to be such a trustee and to have any interest, fiduciary or otherwise, in the shares. This was an erstwhile trustee who was …[taking] … a course which he was in no position to instruct and which was at least likely to be inimical to the interest of the ultimate beneficiaries by whom he had originally been appointed, and moreover a trustee who had been dismissed well over a year before, there being no other probable reason for his having formulated such instructions and such circumstances than to cause trouble".

In other words it could not be said that the judgment debtors here had property which they should have been protecting. Whilst this decision is no doubt correct on the facts it does raise the question of exactly what enquiry nominee shareholders should make in such a situation. The nominee shareholders had stated that they knew nothing beyond the Belgian lawyer who was instructing them. Presumably in this case the reason that one could look through the apparent ownership related to the fact that the true beneficial ownership was represented by the other side. The interesting question is whether a third party can also raise the point once it realises that it is dealing with a nominee shareholder. Those acting as nominee shareholders will, no doubt, as they have done in the past, seek the assurance of a suitable indemnity before getting involved in such a situation.

[Editorial note:The relevant provisions of the Judgments (Reciprocal Enforcement) (Jersey) Law, 1960 are in identical terms to the equivalent provisions in the 1957 Law.]

Contract

Implied Terms

Hotel Savoy Ltd. and another v Destination Specialists Ltd. and others Royal Ct: (Crill, Commissioner and Jurats Vibert and Rumfitt) December 4th, 1997 unreported.

P. C. Sinel for the plaintiffs; A. D. Hoy for the defendants.

The defendants agreed with the plaintiffs to provide booking and reservation services for their hotels. The question arose whether the defendants were themselves entitled to operate as tour operators. The plaintiffs claimed that the defendants were not so entitled under an implied term of the agreement and also claimed that the defendants were the agents of the plaintiffs and as such owed fiduciary duties, in particular not to make secret profit or commissions. The defendants denied any such implied term and owing any fiduciary duties.

Held,

1. applying Sibley v Berry [6], that the Court could imply a term into the contract on the ground that without it the contract would not work. This test was a strict test. The object of the contract was to maximise the plaintiffs' turnover and any arrangement which reduced that turnover would render the agreement inefficacious or futile;
2. that a fiduciary relationship existed which required the defendants to prefer the plaintiffs' interests to their own and to account for any profit made.

Companies

Inspectors

Morgan and Chase Financial Corporation Inc. v Finance and Economics Committee Royal Ct: (Hamon, Deputy Bailiff) December 8th, 1997 unreported.

D. J. Petit for the representor; P. Matthews, Crown Advocate, for the respondent committee.

On 20th January, 1997 the respondent committee appointed an inspector to investigate the affairs of the representor, a Liberian company which the respondent committee believed had been set up and used as a staging post for a fraud. The power to appoint an inspector is conferred by part XIX of the Companies (Jersey) Law 1991. Article 128 of the Law applies to Jersey registered companies but has effect also in relation to external companies by virtue of Article 140. An "external company" is defined in Article 1 of the Law as:-

> "a body corporate which is incorporated outside the Island and which carries on business in the Island or which has an address in the Island which is used regularly for the purposes of its business".

The representor challenged the validity of the appointment of an inspector on the basis that the representor did not carry on business in the Island nor did it have an address in the Island which was used regularly for the purposes of its business.

The representor had two Liberian companies as corporate directors and a Jersey registered company as corporate secretary. The officers of the corporate directors and the secretarial company of the representor were resident in Jersey operating from offices in St. Helier and were unaware that the representor was allegedly being used as a vehicle for fraud. No directors' meetings of the representor were held other than the inaugural meeting which was held at the St. Helier offices. The representor was established with bearer shares which at no time became situate in Jersey. The representor issued no letterheads and did not authorise the release of any address in Jersey.

Eight cheques were received at the St. Helier offices during November 1993 and funds were received by telegraphic transfers into a Jersey bank account opened and maintained by the representor. The cheques and the transfers were sent as a result of literature and advertising publications issued by a Cayman company having an identical name to the representor but legally distinct therefrom. The eight cheques were sent to a Guernsey bank account which was opened and maintained by the representor.

The Court decided that it had first to establish whether or not the representor carried on a business. If the representor did carry on business then, as the representor was managed, controlled and resident in Jersey, it would be carrying on business in Jersey.

> Held, that the opening of the bank accounts in Jersey and Guernsey, the receipt of the eight cheques and subsequent transfer of the monies to the Guernsey bank account amounted to carrying on business in Jersey.

Obiter: the fact that eight cheques were received during a two week period and thereafter sent to Guernsey was sufficient to establish that an address in the Island was used regularly for the purpose of the business of the representor.

Courts

Royal Court : Constitution Of Court

Att. Gen. v Young and Williams Royal Ct: (Le Quesne, Commissioner) March 24th 1998, unreported.

C. E. Whelan, Crown Advocate, for the Crown; D. F. Le Quesne and S. J. Young for the respective accused.

In Snooks v Att Gen [7] the Court of Appeal had been called upon to examine the summing-up procedure in trials before the Inferior Number of the Royal Court. The Court pronounced itself upon the respective questions of the venue and content of the summing-up in such trials (see 1998 JL Review 82) but left open the question of whether it was proper and desirable for the Bailiff to retire with the Jurats while they reached their verdict.

The instant case was a trial by the Inferior Number and the presiding Commissioner canvassed the submissions of prosecution and defence counsel on this question before summing up. It was known that within days the question, among others, was to be considered by the Judicial Committee of the Privy Council on the petition of Snooks for special leave to appeal.

In the instant case counsel put to the Commissioner an agreed note, supported by submission, offering the consensus view that it was both proper and desirable for the presiding judge (i.e. the Bailiff, his deputy or appointee) to retire with the Jurats after the summing-up in open Court.

> Held, that it was proper to maintain the traditional practice of the presiding Judge retiring with the Jurats while they deliberated upon their verdict.

Comment: In his judgment on the point, the Commissioner adverted to the fact that by virtue of Article 13 of the Royal Court (Jersey) Law, 1948 the two Jurats are the primary judges of fact, but that the presiding Judge is a reserve judge of fact in that he has the casting vote if the Jurats are divided in their opinion of the facts. Furthermore the Inferior Number is a composite tribunal comprised of three persons. Specific authority would be necessary in order to justify the discharge of any part of the Court's functions by only two out of its three members. Such authority was identifiable on questions of law (Rule 3/6 of the Royal Court Rules 1992 provides that the Inferior Number is properly constituted if the Bailiff sits alone to determine such questions) but not on questions of fact.

As the reserve judge of fact the Bailiff would have the benefit of hearing the deliberations of the Jurats in crystallising his own view of the facts. Moreover, he would be present to identify any question of law arising which had not been dealt with in open Court. Thus alerted to that situation he could respond appropriately - probably by a return to open Court for further legal direction to be given, possibly after further assistance from counsel.

[Editorial note:a contrary view of the propriety and desirability of the practice did not recommend itself to the Judicial Committee of the Privy Council. Snooks' application for special leave was refused on 30th March, 1998 after a hearing on that day. It is not their Lordships' practice to deliver a reasoned judgment in those circumstances.]

Royal Court - Récusation

Mayo Associates SA and others v Cantrade Private Bank Switzerland (C.I.) Ltd. and others Royal Ct: (Bailhache, Bailiff and Jurats Gruchy and Tibbo) January 21st, 1998 unreported.

P. C. Sinel for the plaintiffs; D. Wilson for first defendant; D. F. Le Quesne and N. F. Journeaux for the other defendants.

The plaintiffs, without notice to the Court, brought a challenge (*récusation*) objecting to the Bailiff presiding over the hearing of two summonses. The ground of the objection was that the Bailiff had remarked in a speech at a private dinner, part of which had nevertheless been reported, that certain reporting by the media outside the Island of controversial issues which touched tangentially upon the litigation was open to criticism. The perception of the plaintiffs was that the reporting in question did not unfairly criticize the Island.

> Held, that on any objective view the comments in question could not fairly be construed as giving rise to the appearance of bias; but that in the exercise of his discretion the Bailiff would disqualify himself from presiding.

Obiter: in Jersey the traditional way of making objection to a judge presiding in a particular case was first to make an informal approach to the judge in Chambers in order to explain the grounds of objection. The traditional way had the merits of encouraging courtesy and mutual respect between Bench and Bar and of avoiding wasted time and costs if the judge acceded to the informal approach.

Criminal Law

Breach Of Trust: Sentence

Att. Gen. v Stilwell Royal Ct: *(Hamon, Deputy Bailiff and Jurats Myles, Gruchy, Le Ruez, Vibert, Herbert, Rumfitt, Potter, de Veulle, Querée, Le Brocq and Tibbo)* January 19th 1998, unreported.

C. E. Whelan, Crown Advocate, for the Crown; J. Melia for Stilwell.

The accused pleaded guilty to 13 counts of fraudulent conversion. Over a 5 year period he had converted £1.3m of client funds while acting as a self-employed trust and company administrator. The ultimate deficit amounted to some £844,000. The money had been used to fund successive purchases of family homes and to pay for living and business expenses. A significant proportion of the money was lost in a fraudulent Nigerian ‘get rich quick scheme’ into which the accused had been drawn in an attempt to recoup his earlier defalcations.

Sentencing observations: This was a serious breach of trust. The mitigation - in particular the plea of previous good character and successful rehabilitation efforts since arrest - were to be given full weight. These features were not, though, exceptional in any sense which took the case outside the Court’s custodial sentencing policy in breach of trust cases. Concurrent sentences of 5 years’ imprisonment were imposed on each count.

In passing sentence the Superior Number emphasised the need to preserve Jersey’s reputation for financial integrity.

[Editoral note:the case was reported in The Times, 20th January, 1998.]

Prescription Of Infractions

Att. Gen. v Young, Cantrade Private Bank Switzerland (C.I.) Ltd., Stoneman, and Williams Royal Ct: (Le Quesne, Commissioner) January 12th, 1998 unreported.

C. E. Whelan, Crown Advocate, for the Crown; D. F. Le Quesne, A. R. Binnington, M. M. G. Voisin and S. J. Young for the defendants.

The Banking Business (Jersey) Law, 1991 repealed much of the Depositors and Investors (Prevention of Fraud) (Jersey) Law, 1967 ("the 1967 Law"). Article 12 of the 1967 Law survived. Broadly, the article, at paragraph (c), proscribes the inducement of persons to take part in financial arrangements by the making of false or misleading statements. Charges under the article were those best suited to meet the facts of the instant case.

As a result of the repeal process described above a saving provision in the 1967 Law about prescription was lost. The charges were therefore subject to the provisions of the Law Reform (Miscellaneous Provisions) (Jersey) Law, 1978. The proceedings had to be instituted within three years from the date of commission of the offence charged. In the case of each charge, it became necessary, therefore, to identify two parameters, namely the date of the institution of proceedings, and the date of the commission of the offence.

The defendants contended that a number of the charges were prescribed.

Held,

1. that proceedings in respect of an offence are instituted when the first step is taken in a process which will culminate in the appearance of the defendant in court for trial for that offence. On the facts of the instant case that happened when written charges were put to the defendants by the Centenier in the Magistrate's Court, even though they were not read out and no plea was taken
2. that oral charging by a Centenier in the usual way constitutes the institution of proceedings;
3. That it was not necessary to decide whether the issuing of an arrest warrant by the Bailiff constituted the institution of proceedings because in the instant case the warrant was not so drafted as to cover the charges in issue;
4. that in the case of a summons into the Royal Court, proceedings are instituted by the issuing of the summons. There is no requirement that the summons should be verbally identical to the charges eventually brought. It is enough if the defendant is given adequate notice of the conduct which is impugned and the offence which is alleged;
5. that as to the date of commission of the offence, the offence is complete, and terminates, when as a result of a proscribed inducement the victim does something which gives him a part in the material arrangements. The offence does not continue from day to day all the time the victim maintains that part. It is the case, though, that new

features - for example an increased investment or subscription to new conditions - may themselves amount to a fresh taking part.

Per curiam:

(a) it is within the Attorney General's discretion to decide whether there is sufficient evidence to commence a prosecution. That discretion, exercised *bona fide*, is not readily susceptible to an argument founded upon assertions of abuse of process;

(b) charges otherwise good do not become bad because they are made to avoid the expiration of a period of prescription.

Tort

Occupiers' Liability

Knight v Thackeray's Ltd. Royal Ct: (Bailhache, Bailiff and Jurats Le Ruez and Vibert) November 17th, 1997 unreported.

M. J. Thompson for the plaintiff; M. G. P. Lewis for the defendant.

The plaintiff issued proceedings against the defendant, the owner and operator of a night club seeking damages for personal injury suffered while on the premises. The claim was based on an allegation of a breach of duty of care, the plaintiff not having entered into a contract with the defendant.

The Court was invited to declare that the distinctions between invitees, licensees and trespassers reflecting the English common law position prior to the enactment of the Occupier's Liability Act 1957 no longer represented the law of Jersey, and to follow the decision of the Guernsey Court of Appeal in *Morton v Paint* [8] .

> Held, that the duty of care owed by the defendant to the plaintiff "should be declared to be a duty to have done what a reasonable man would have done in the circumstances by way of response to the risk, in so far as foreseeable, in accordance with the Donoghue v Stevenson [9] principles of the law of negligence" and that Morton v Paint should be followed. The Court further held that the duty of care no longer depended exclusively upon whether the plaintiff was an invitee, licensee or trespasser. On the facts the defendant was held not to have breached the duty of care owed to the plaintiff.

Footnotes - (Top)

[1] - See 1997 JL Review 182

[2] - 1990 BCLC 324

[3] - 1990 JLR 89

[4] - (1843), 2 Hare 461

[5] - December 18th, 1997, unreported; 1998 JL Review 75

[6] - 1992 JLR N4

[7] - September 26th 1997, unreported

[8] - February 9th, 1996, Guernset unreported

[9] - 1932 AC 562 HL