

105 of 1992.

Court of Appeal of Guernsey.  
Kirk-v-Blackwell.  
Application for leave to adduce further evidence

*At the request of a Member of the Bar, the attached Judgment which was delivered by J.T. Cameron, Esq, Q.C., as he then was, in the Court of Appeal of Guernsey, on 31st October, 1986, is being circulated to subscribers.*

*The Judgment has been quoted as an authority in the Court of Appeal of Jersey in Hacon-v-Godel & Anor (27th October, 1989) Jersey Unreported; (1989) JLR N4.*

COURT OF APPEAL OF GUERNSEY

31st October, 1986

Before: Sir Charles Frossard, Kt., Bailiff of Guernsey (President)  
J.M. Collins, Esq., Q.C.  
J.T. Cameron, Esq., Q.C.

---

Between: Maurice John Kirk Appellant  
And: Nicholas John Blackwell Respondent

---

Application to adduce further evidence  
pursuant to Rule 12(2) of the Court of Appeal  
(Civil Division) (Guernsey) Rules, 1964.

---

Mr. Kirk on his own behalf.  
Advocate PJG Atkinson for the Respondent.

---

**JUDGMENT**

**CAMERON, J.A.:** This is an appeal against a decision of Sir Frank Ereaut dated 1st July, 1986, refusing the applicant, Mr. Kirk, leave to call further evidence in relation to his appeal against the judgment of the Royal Court of 26th September, 1984.

At the outset of the proceedings in this appeal, Mr. Kirk made a number of applications which it is necessary to deal with before proceeding to the substantive matters of the appeal. First, Mr. Kirk objected to the Bailiff's sitting as a member of the Court, on the ground that the Bailiff had adjudicated on previous matters in which he was concerned, and in particular proceedings relating to a *Clameur de Haro*, which he had raised.

Secondly he said that the Bailiff was the defendant in proceedings raised by him arising from that *Clameur de Haro* and, thirdly, that the Bailiff was involved in certain "*chambre de discipline*" proceedings raised or instigated by Mr. Kirk. It was not, however, suggested that the Bailiff had any personal pecuniary interest in any matters involving the appellant.

It is therefore in the Court's discretion to decide whether it is appropriate for the Bailiff to sit on this appeal. The fact that an appellant comes before a Court which has previously

adjudicated against him, or whose decision is or might be liable to be upset on appeal or by other proceedings, is not a ground for disqualification of the Court.

In the course of raising his objection to the Bailiff's sitting, Mr. Kirk made a number of other observations on the judicial system of Guernsey with which it is not necessary to deal in any detail. It is sufficient to say that the Court is satisfied that this Court is duly constituted according to the Law of Guernsey.

The second matter raised by Mr. Kirk at the outset of the appeal, and repeated on a number of occasions during it, was an application for an adjournment of the hearing. In substance it appears that the ground for this application was that Mr. Kirk was not adequately prepared for the appeal, but in the Court's view there is no reason why he should not have been properly prepared, because he was at liberty until the day the hearing began and had been able to provide himself with a large number of documents and other materials for the appeal.

The third application made by Mr. Kirk was that the proceedings in this appeal should be adjourned on the ground of "*Excusation du Prison*". This is a rule found in the ancient customs of Normandy and is stated in Terrien in the following terms:

***"Si aucun est tenu en prison il n'est pas tenu à répondre des querelles devant qu'il soit delivré de prison".***

And the rule is repeated in almost the same terms in Le Marchant.

Without expressing any opinion on the general applicability of this rule in modern conditions, the Court considers that Mr. Kirk's present situation does not come within the rule as so stated.

Mr. Kirk was the first plaintiff in the proceedings between him and Mr. Blackwell. The substantive appeal against the decision of the Royal Court is Mr. Kirk's appeal and it is his application to allow further evidence to be adduced. The proceedings with which the Court is concerned are therefore proceedings at his instance and not against him and do not come within the rule as it is stated in the authorities.

The fourth matter raised by Mr. Kirk at the outset of the proceedings was his dissatisfaction with the order in which matters were being heard by the Court, and in particular at the hearing of this application to adduce further evidence before the hearing of the substantive appeal. The Court, however, is satisfied that it is proper that any application to adduce

further evidence should be dealt with before a date for the hearing of the substantive appeal is fixed.

Turning to the substantive application and appeal, under Rule 12 of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964, subsection (2), the Court has full discretionary power to receive further evidence upon questions of fact either by oral examination, by affidavit or by deposition. The power so stated is in similar terms to the powers of the Court of Appeal in England and the rule on which the Court of Appeal proceeds in applications to admit further evidence is stated in Halsbury at Volume 37 at paragraph 693 as follows, [and I quote:]

***"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 is satisfied that the powers which this Court has should be exercised in accordance with the same principles.

In presenting his substantive appeal Mr. Kirk ranged over a wide field and raised a variety of different matters, and the Court has endeavoured to consider all the applications which he has made but is satisfied that none of them come within the principles which I have just set out.

I deal in the first place with the applications which Mr. Kirk made in connection with the production of further documents for the purposes of the appeal. In the first place Mr. Kirk asked that the Court should accept a document described as the practice day-book, and along with the day-book I deal with a graph prepared by him showing the practice takings over a period, the material for which comes from the day-book. Some sheets of the day-book were reproduced as item 233 of the file of documents presented to the Court by Mr. Kirk.

The ground for seeking to use this day-book was that it contained information both about payments made from the practice funds, purchases made in connection with the practice, and information about the movements of Mr. Kirk and Mr. Blackwell which might have a material effect upon the assessment of their respective evidence.

It appeared, however, that this was a book which Mr. Kirk had had in his possession and he indicated that he had not shown

it to his Advocate. He was reluctant to reveal it to his Advocate even though there had been reference in the course of evidence to the material which the day-book contained.

The Court is satisfied that this is information which could, with reasonable diligence, have been available at the time of the trial.

The second principal piece of documentary evidence to which Mr. Kirk referred were certain cheque stubs which are reproduced at item 76 of his bundle of documents. These stubs, it was said, would show certain payments made by Mr. Kirk in connection with the purchase of drugs, information about which was not before the Court at the time of the trial. It was not asserted in positive terms that Mr. Kirk did not have this material among the papers available to him at the time of the trial.

However that may be, reference would be made at the trial and at the time of preparation for the trial to payments made by Mr. Kirk in the purchase of drugs, and from, at latest, the time when he received the pleadings in Mr. Blackwell's action, raised on the 15th December, 1983, he would have been aware that the issue of payments for drugs arose as a material issue in the trial.

Mr. Kirk was not in custody until 19th June, 1984, and he was present in Court during the trial when the information submitted to the Court included past bank pass sheets and a previous cheque book, which again related to payments made in connection with the affairs of the practice of Blackwell and Kirk.

Again the Court is satisfied that reasonable diligence on the part of Mr. Kirk and his Advocate would have revealed the fact that payments to which these cheque stubs relate had been made, and the reason for them, and would have enabled the appropriate information to be laid before the Court.

I deal thirdly with a miscellaneous group of documents which were referred to by Mr. Kirk and which are found at items 50 and 54 to 61 in his bundle of documents, together with certain tapes, tape recordings and the transcripts of those recordings which are also included in the bundle. These documents relate to matters such as the professional insurance of the practice, the rent paid and the relationships between Mr. Blackwell and Mr. Kirk during the continuance of the partnership.

All these documents appear to have been included among a substantial quantity of documents which were under the control of Mr. Kirk. Again there is no reason why with reasonable diligence the relevant items should not have been obtained and

produced. In any event this group of documents appears to be at best of marginal significance in relation to the issues at the trial.

A fourth group of documents consists of items 51 to 53 in Mr. Kirk's bundle. These are documents which were sought to be introduced at the trial. Leave to introduce them was refused. Accordingly this is not a proper subject for an application for leave to adduce further evidence and if any issue arises in connection with these documents it can be raised by way of appeal against the decision to refuse to admit them in the course of the substantive appeal.

The documents so far mentioned are all the documents, so far as the Court can determine, which Mr. Kirk referred to as providing evidence related to the issues in the partnership dispute as distinct from documents showing Mr. Kirk's relationship to the prison and other authorities with whom he had to deal from time to time.

We have, however, examined all the documents contained in the bundle produced by Mr. Kirk and have been unable to see any other documents which might be of use or significance as evidence in connection with the partnership dispute.

I turn next to the question of additional witnesses whom Mr. Kirk might seek to adduce. There was reference to three members of the staff of the practice, Mrs. Street, Mrs. Browning and Mrs. Falla, and to two doctors, Dr. Farmer and Dr. Costen. The members of the staff, it was suggested, would be able to give evidence about the transactions in the partnership and the relationship between the partners, and the two doctors would be able to give evidence about the state of health of Mr. Blackwell during the material period.

The identity of all of these witnesses was known at the time of the trial and even if, in the course of the trial, some issue had been raised and it was thought necessary to obtain evidence from these witnesses, which had not previously been prepared for, Mr. Kirk's Advocate could have applied for leave to call the witnesses and for any necessary adjournment to enable that to be done. Any evidence that these witnesses can give is therefore evidence which would have been available at the time of the trial and no sufficient reason was advanced why they should not have been called if it was thought desirable to do so.

It should be added that at the start of the trial Mr. Kirk's Advocate indicated very clearly that Mr. Kirk would be the only witness whom he intended to call and after Mr. Kirk had given evidence his Advocate closed the case.

It was suggested that by the time of the proceedings on the last two days of the trial in September, 1984, the Advocate's instructions had been withdrawn, but it is evident from a letter produced by Mr. Kirk, No. 158 in his bundle, that the Advocate was still retained by him at that time.

Apart from these witnesses, with whom I have dealt already, no others were mentioned who appeared to be in a position to give evidence about the substantive issues arising in the partnership dispute. There was particular mention of four other witnesses, a Police Constable Morellec, a Mr. Gillow, Mr. A.C.K. Day and a Mrs. Le Prevost, but there was nothing to indicate that these witnesses could give any material evidence on the issues in the partnership dispute as distinct from evidence in connection with Mr. Kirk's difficulties with the prison and other authorities.

The applicant repeatedly referred to his difficulties with and his complaints about those authorities, and in particular to interference with his correspondence while he was in custody after 16th June, 1984. The Court is however satisfied that if these matters had caused any material difficulty in the preparation for or conduct of the trial application could and would have been made for an adjournment to enable those difficulties to be resolved.

The opinion of the Court, therefore, is that this appeal should be refused.

**COLLINS, J.A.:** I agree.

**THE PRESIDENT:** I agree.

Authorities

Terrien: Commentaires du Droit Civil (Rouen, 1654).

Thomas Le Marchant: Remarques et Animadversions sur  
l'approbation des loix et coustumier de  
Normandie usitées ès jurisdiction de  
Guernezé et particulièrement en la Cour  
Royale de ladite Ile. (Guernsey, 1826).

4 Halsbury 37, para. 693.

Court of Appeal (Civil Division) (Guernsey) Rules 1964.