

ROYAL COURT
29th July, 1991 110.

Before the Judicial Greffier

Application by John Douglas Hanson and others (hereinafter referred to as "the applicants") to register a special Power of Attorney granted under English Law by British Aerospace (Commercial Aircraft) Limited (hereinafter referred to as "the donor").

Advocate M.S.D. Yates for the Applicants

JUDGMENT

JUDICIAL GREFFIER:

The power of the Judicial Greffier to deal with such an application is set out in Rule 13/3(1)(b) of the Royal Court Rules, 1982, as amended, and reads as follows:-

"13/3.(1) The following non-contentious business may be transacted in chambers before the Greffier, namely -

(b) the hearing and determination of an application for the registration of a power of attorney (other than a power naming an attorney without whom the donor may not transact in matters real or personal) or of an instrument revoking or abandoning a power of attorney (other than such a power as aforesaid);"

Advocate Yates invited me to do one of the following three things:-

(i) To register the Power of Attorney in accordance with the relevant section of the Code of 1771 (hereinafter referred to as "the Code") and in accordance with Article 1(2)(b) of the Powers of Attorney (Mode of Execution) (Jersey)

Law, 1962, as amended, (hereinafter referred to as "the 1962 Law"); or

(ii) To register the Power of Attorney under the Code and under the common law practice which existed prior to 1962 in relation to the execution of Powers of Attorney outside of the Island of Jersey; or

(iii) To give a declaration that the registration of this Power of Attorney was not required under the Code.

The Power of Attorney is a special Power of Attorney which relates to certain documents referred to in the schedule as "transaction documents". These documents are agreements relating to an aircraft and the common parties to the agreements are the donor, which is an English company, and an Italian company, although one of the agreements has a Jersey company as a party to it. It was originally intended when the Power of Attorney was drawn up that the documents be executed in Italy, however, they were eventually executed in Jersey, and it is for that reason that registration was sought. The applicants are not residents of Jersey.

The Power of Attorney document is drawn up on a paper which does not correspond in size to that set out in Rule 14/8(2)(a) of the Royal Court Rules, does not have a coding in accordance with Rule 14/8(2)(d) and generally does not conform with the terms of Rule 14/8. It contains a paragraph which reads:-

"THIS POWER shall be irrevocable for a period of one year from the date hereof."

The attestation clause states that the Power of Attorney was executed "as a deed in accordance with English law". The common seal of the donor was affixed in the presence of two directors at the end of the document but the affixing of the seal and the

signature of the directors was not witnessed. There was however, attached as a separate document, the certificate of a notary to the effect that the common seal was the genuine common seal of the donor, that the signatures were those of two directors of the donor and that the document was duly executed by and binding on the donor in accordance with the regulations thereof and the provisions of English law. On the back of that certificate was an apostille under the Hague Convention to the effect that the certificate had been signed by a notary public.

The Code contained a section headed "Regîtres" which exists to this day in a slightly amended form. Originally, the Code contained another section headed "Enregîtreur" but this was repealed by Rule 33(b) of the Royal Court (General) (Jersey) Rules 1963. The section on "Regîtres" begins with the following words-

"Conformement à l'Ordonnance des Etats, portant date le 24e. jour de Juillet l'an mil six cens deux, pour l'établissement du Regître, il est ordonné".

The section then goes on to deal with various requirements in relation to contracts. Amongst those requirements is the following:-

"Tous Procureurs et Tuteurs doivent faire entrer au Regître, les lettres qui les autorisent, sur peine de cent sous d'amende."

It is clear to me that this provision which originally came into existence in 1602 at the time of the foundation of the Public Registry, was creating a statutory offence. This provision does not state that the failure to register will lead to the Power of Attorney or Tutelle being void. However, the original section contained a proviso that in the event of anyone refusing or neglecting to register within six months from the passing the rights would be deemed to be of no effect. This proviso originally applied to all forms of contract and also to Powers of Attorney and Tutelles. However, it was repealed by Article 1 of the code of 1771 (Revision) (Jersey) Law 1965.

It is helpful and instructive to look at the 1602 Act of the States and this is recorded on pages 190 and 191 of the Book on the Governorship of Sir Walter Raleigh. The interesting part of that is the preamble which forms the second paragraph thereof and which reads as follows:-

"Pource que plusieurs pertes et inconveniens sont advenus en ceste Republicque et grandz et somptueux proces suscites les uns a cause des retraits des heritaiges vendus, les aultres pour la recourance de leurs droictz et Chartres qu'ilz auroient perdues fust par accident de feu, minorité d'aige, ou aultre subtraction illicite: pour remedier a ces choses, il a esté trouué expedient par Monsr. le Gouverneur bailly Justice et Estatz que vng enregistrement soit faict de tous contractz heritaux qui se passeront en tempz advenir par deuant iustice, en la forme et maniere qui ensuit suyuant les Ordres des Commissaires."

The problems set out there were partly in relation to realty sold and partly in relation to the recovery of rights and charters lost for various reasons and the Public Registry was clearly established in order to deal with the registration of all contracts of realty passed from time to time.

Although the Code sets out the main provisions in more modern French it does not appear to alter the original 1602 statute's intent.

The first question which I had to ask myself was what kind of Powers of Attorney were envisaged by the requirement to register. Advocate Yates urged me to take a very narrow view on this point and to find that it was only Powers of Attorney relating to real property. That has certainly not been the practice followed by the Court or by the Public Registry over the centuries inasmuch that Powers of Attorney relating solely to movable property have also been registered. The statutory provision in 1602 also related to tutelles and tutelles would of necessity deal both with real property and also with personal property.

However, it is clear to me that the only kinds of Power of Attorney which would have been envisaged in 1602 were those which were to be operative under Jersey Law and to take effect in Jersey. The concept of someone using a foreign Power of Attorney in order to execute a document in Jersey relating to foreign assets would certainly not have been in the mind of the legislature and would at the time have been well into the realms of fantasy. Thus I find that the requirement to register under the Code and the criminal provision can only apply to Jersey Powers of Attorney, that is to say Powers of Attorney giving a power within the Island of Jersey and which are intended to be used to give effect to transactions in relation to real or movable property in Jersey or contracts or other transactions which are governed by Jersey Law. The above is a general definition rather than an exhaustive definition of a Jersey Power of Attorney.

I next moved on to ask myself the question as to whether this particular Power of Attorney fell within that category. This Power of Attorney was given in England by an English registered company, relates to contracts governed by English Law and aircraft which are neither situate in Jersey nor registered in Jersey and is expressed to be in accordance with English Law. The applicants are not residents of Jersey. The only Jersey connections are that one of the contracting parties to one of the agreements was a Jersey company and that the documents happened to be executed in Jersey. The Power of Attorney includes the words:-

"On behalf of the company and in its name or otherwise whether within the United Kingdom or elsewhere to".

Although the word "elsewhere" will include the Island of Jersey the subject matter of the Power of Attorney is such as to make it clear that it was never intended that the Power of Attorney be effective for the purposes of Jersey Law. Accordingly, I find

that the Power of Attorney does not fall within the category which is required to be registered under the Code.

However, the next question which I must determine is the question as to whether the Power of Attorney in its present form is registerable under Jersey Law or to put it another way, whether the Royal Court should register it.

By the end of the nineteenth century, Powers of Attorney executed in Jersey were executed by means of being passed before the Royal Court. However, a practice had grown up, in order to deal with the need to execute Powers of Attorney outside of the Island of Jersey, of registering documents which had been executed in a prescribed manner, and a large number of instances of this are set out in the Table des Decisions. The following extracts are of interest:-

- (a) *Number 9 on page 140 of the 1894-1900 Table des Decisions is the matter of ex parte Oberlé in which registration was refused as it had not been passed before a notary;*
- (b) *Number 10 of the same volume which is ex parte Bois was a case of refusal because the signature had not been attested by a witness.*
- (c) *Number 11 on the same page of the same volume which is ex parte Le Gallais was a case of a Power of Attorney passed before the British Consul in Rome and this was acceptable when the Attorney declared in Court that he accepted all the responsibilities of the declarations contained therein.*
- (d) *Number 13 on the same page of the same volume is the case of ex parte Falla and there registration was refused because there was nothing to indicate that the parties had signed the Power of Attorney in the presence of a notary or another competent person.*
- (e) *Number 17 on page 141 of the same volume is the case of ex parte Syvret in which case registration was refused because the signature of the notary had not been legalised by a representative of Her Majesty's Government.*

The Syvret case suggests that both a notary and legalisation were required but that case was in America. On the other hand, the other cases do not say anything about legalisation and I am therefore left in some doubt as to whether under the old procedure both were required in

all cases. However, what is clear is that the document was presented together with a request for registration to the Samedi division of the Royal Court which exercised a discretion in relation to whether or not to register the same.

The 1962 Law changed the procedure in relation to the execution of Powers of Attorney. Article 1(2) of that Law begins as follows:-

"An instrument creating a power of attorney shall be deemed to be duly executed if it is signed by the donor and attested by one witness, other than a party to the instrument, and such witness shall be -"

In the case of a Power of Attorney executed in the Island the former procedure of passing before the Royal Court was replaced by witnessing by a Jurat of the Royal Court, a member of the States, an Advocate or Solicitor of the Royal Court or a Notary Public.

However, the Law also formalised the procedure in relation to Powers of Attorney executed outside of the Island and this was further widened by the 1971 amendment. In addition to the list of potential witnesses there was a proviso as follows-

"Provided that the Royal Court may accept as duly executed an instrument creating a Power of Attorney which is attested by a witness other than one of the persons specified in this paragraph if it is satisfied that, having regard to the conditions prevailing at the time and place of signature, it was not possible without unreasonable delay or expense for the said instrument to be tested by one of such persons."

Article 1(3) reads as follows:-

"A corporation may execute a power of attorney by affixing thereto its common seal, and such execution shall be equivalent to signature."

Again I must begin by asking myself the question, what types of Power of Attorney were envisaged by the 1962 Law. I find that I

come to exactly the same conclusion in relation to this as in relation to the code. Clearly, what was envisaged here is Jersey Powers of Attorney, that is to say, Powers of Attorney giving a power within the jurisdiction in order to effect transactions in relation to property situate here, or contracts or other transactions governed by Jersey Law. This must be so because the 1962 Law was clearly a Jersey Law meant to apply in relation to the Law of the Island of Jersey and therefore to transactions governed by that Law. This Power of Attorney again does not fall within that test.

It must therefore inevitably follow that if a Power of Attorney is not a Jersey Power of Attorney within that definition then it ought not to be registered in the Royal Court of Jersey. That line of reasoning applies both to Powers of Attorney under the 1962 Law and to Powers of Attorney executed outside the Island under the procedure prior to 1962. However, no real difficulty applies here inasmuch that the 1962 Law merely simplified the procedure existing before then in relation to Powers of Attorney executed outside the Island and widened the list of acceptable witnesses. Thus, my first ground for refusal of registration is that this is not a Jersey Power of Attorney.

However, even if I had found otherwise there are further difficulties in relation to this document. The document claims to be irrevocable for a period of one year from the date of its execution. Article 2(1) of the 1962 Law states -

"(1) Subject to the provisions of paragraph (1) of Article 3 of this Law, a power of attorney may be revoked or abandoned by an instrument, in one or other of the forms set out in the Schedule to this Law, executed in the same manner as a power of attorney."

The concept of an irrevocable Power of Attorney appears to fly directly in the face of that Article and indeed I believe this concept to be one unknown to Jersey Law. For instance, under

Jersey Law a Power of Attorney will automatically cease to have effect if the donor becomes insane or dies or loses the power to act due to bankruptcy. I have to answer the question as to whether the Royal Court should register Power of Attorney which contains in it a provision which is contrary to the Law of Jersey. In my view, and in the light of the authorities in the Table des Decisions which show a very careful and cautious approach on the part of the Court to registration, I believe that it would be wrong so to do and this is my second ground for refusal.

As I have already said the document does not comply with the provisions of Rule 14/8. In my opinion, the Royal Court has the power to waive the strict enforcement of that Rule in cases of urgent necessity. However, in general, the Rule should be followed and the incorrect form is my third ground for refusing registration.

I come next to the question of the witnessing of the document. The question is, what do the words, "signed by the donor and attested by one witness," mean? The shorter Oxford English Dictionary gives a wide definition of the word "attest" to include to bear witness to, affirm the truth or genuineness of; to testify, certify. However, the specialist text books on the legal definition of words take a narrower view. Jowitt's Dictionary of English Law 1959 edition at page 176 gives the following definition of "attesting witness" -

"Attesting witness, a person who has seen a party execute a deed or sign a written document. He then subscribes his signature for the purpose of identification and proof at any future period."

Similarly the definition for attestation begins as follows -

"attestation, the signing by a witness to the signature of another of a statement that the document was signed in the presence of the witness."

In the 1969 second edition of Words and Phrases Legally defined the following definition is given of attest -

"To attest is to bear witness to a fact, take a common example: a notary public attests a protest; he bears witness, not to the statements in that protest but to the fact of the making of those statements; so I conceive the witnesses in a will bear witness to all that the statute [S.9 of the Wills Act 1837] requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence."

It is also significant that Article 2(1) of the 1962 Law refers to a revocation or abandonment of a Power of Attorney as being executed in the same manner as a Power of Attorney. The 1962 Law contains schedules setting out forms of revocation and abandonment and in each case the attestation clause pre-supposed that the document would be signed in the presence of the witness. Thus I have no difficulty in finding that a Power of Attorney, is, under the Law of Jersey, not properly executed unless the witness is present at the time of execution or unless the signature is recognised in the presence of the witness by the donor. The latter clearly did not occur in this case. This also was the situation prior to the 1962 Law in relation to Powers of Attorney executed outside the Island as is indicated by the case of *ex parte Falla* mentioned above in which there was nothing to show that the parties had signed the Power of Attorney in the presence of a notary or other competent person. This then is my fourth reason for refusing registration, namely the fact that the Power of Attorney is not properly witnessed.

Although I do not have to determine this further issue it occurs to me that it will be of great assistance to the legal profession if I say something about the effect of registration.


Article 3(3) of the 1962 Law states -

"Nothing in this Law shall affect the requirement that a power of attorney shall be registered by the Royal Court."

Prior to the Loi (1931) constituant le Département du Greffe Judiciaire Powers of Attorney created in Jersey were passed in Jersey before Court and were then sent to the Registrar of Deeds. Those executed out of Jersey were registered in the Samedi division books and then sent to the Registrar of Deeds. In 1931 the Judicial Greffier took over the responsibilities of the Registrar of Deeds. In my view, prior to the 1962 Law, Powers of Attorney executed outside the Island were not effective until registered in the Royal Court as execution and registration were together the equivalent of the passing before the Royal Court of a Power of Attorney. The effect of the 1962 Law was to widen the pre-1962 procedure in relation to Powers of Attorney executed outside of Jersey, in order to include additional types of witness and also to allow the execution of Powers of Attorney in the Island in a new manner. Article 3(3) retained the requirement for registration by the Royal Court. In my view that is not registration in the Public Registry but registration by the Court. The terms of Rule 13/3(1)(b) bear this out. Thus, in my view, in Jersey execution and registration are both required before a Power of Attorney executed under the terms of the 1962 Law takes effect.

The revocation in 1965 of the words at the end of the section of the Code in Regîtres tends to confirm this. The words were, in my view, cancelled as being redundant as the Judicial Greffier was both Greffier of the Court and Registrar of Deeds. There was no longer a need for an individual to present his deed to the Registrar of Deeds after passing as this happened internally within the Judicial Greffe. If the execution of the document alone had made the Power of Attorney effective then the words would have been retained in relation to Powers of Attorney.

In an attempt to assist the members of the legal profession in relation to this area, I am about to produce a circular letter



setting out guidelines in relation to the registration of Powers of Attorney in Jersey.

Finally, Advocate Yates invited me to declare that the Power of Attorney did not need to be registered under the Code. I have in the past, refused to grant a declaratory Judgment where this was part of the relief being sought in an action. However, the Royal Court has under Rule 13/3(1)(b) delegated to the Greffier, subject to appeal, jurisdiction in relation to applications for the registration of Powers of Attorney. If the Royal Court would have had the power to give such a declaration in relation to such a matter then the Greffier must also have this power. In my view, there is no doubt that the Royal Court has the necessary power and therefore that I am able to give such a declaration which I do.

Judicial Greffier

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