

**ROYAL COURT
(Samedi Division)**

32.

3rd March, 1992.

Before: The Deputy Bailiff and Jurats
Coutanche and Vibert.

**Representation of Simon Charles Ogden asking
the Court to order that his Advocate
continue to represent him, contrary to
the Advocate's wish and intention.**

Mr. Ogden on his own behalf
Miss. S.C. Nicolle, Crown Advocate, joined as
Amicus Curiae.

JUDGMENT

THE DEPUTY BAILIFF: The Court is here dealing with a Representation from Mr. Simon Charles Ogden (Mr. Ogden), made on the 7th February, 1992, whereby he asks the Court to order Advocate Ashley David Hoy to continue to represent him, contrary to Mr. Hoy's wish and intention.

The background to this application appears to be as follows:-

On the 29th November, 1991, the Court pronounced the adjudication of the renunciation of all the personal and real property of Mr. Ogden and ordered that a *dégrévement* or *dégrévements* of the real property be conducted. The Court named Advocates Anthony John Olsen and Nicholas Francis Journeaux as *Attournés* to conduct the *dégrévement* or *dégrévements*.

On the 10th January, 1992, the learned Judicial Greffier made a Representation concerning the conduct of the

dégrèvement, seeking directions on some eight questions which had arisen in the course of the conduct of the *dégrèvement*. The Court made an Order that the *Attournés* be convened and that they be responsible for summoning some seven additional parties to appear on the 31st January, 1992.

On the 31st January, 1992, Mr. Ogden presented a document entitled "Affidavit" dated that day and apparently sworn before the Deputy Viscount, in answer to the Judicial Greffier's Representation, in which he made serious allegations against Mr. Peter Wavell Luce, his former legal adviser, and against Hambros Bank (Jersey) Limited his former mortgage creditor; the claims of Hambros Bank (Jersey) Limited having been assigned to Ephrath Investments Limited, the creditor which obtained the renunciation of the property of Mr. Ogden on the 29th November, 1991. The affidavit also complained that Advocate Hoy had ceased to act for Mr. Ogden but sought no remedy. The affidavit merely sought an investigation of the matters raised therein in order to uphold the interests of justice. As we understand it, the Court further adjourned consideration of the Judicial Greffier's Representation to the 14th February, 1992. The Court also ordered that Mr. Ogden's affidavit be referred to the Attorney General in view of the serious allegations made. The Court further ordered that a new advocate be appointed to advise and represent Mr. Ogden. Consequently, the acting *Bâtonnier* appointed Advocate Anthony James Dessain who delegated his partner, Advocate Anthony David Robinson, assisted by Mr. Richard Gerwat, to advise and represent Mr. Ogden.

On the 7th February, 1992, Mr. Ogden, acting in person, presented a Representation seeking an annulment of the Act of renunciation of the 29th November, 1991, as having been made *ex parte* and fraudulently. Mr. Ogden annexed to his Representation a copy of a letter from Crown Advocate Miss S. C. Nicolle to Advocate Hoy in which she stated that Advocate

Journeaux, for Hambros Bank (Jersey) Limited and Ephrath Investments Limited, would be arranging for the renunciation (as regards moveable property) to be cancelled or for Mr. Ogden's moveable property to be re-invested in him. The Representation sought, *inter alia*, a stay of all *dégrévement* proceedings and an order that Advocate Hoy should resume his legal services to Mr. Ogden.

At that stage, Mr. Ogden had not consulted Advocate Robinson because he still wanted Advocate Hoy to represent him. The Court ordered that Mr. Ogden's Representation be served on the *Attournés* appointed to conduct the *dégrévement* and on Hambros Bank (Jersey) Limited and Ephrath Investments Limited as the creditors who brought about the *dégrévement*, with the return date being the 21st February, 1992.

Obviously, Mr. Ogden's Representation would have to be heard first, because if he were to be successful, and the renunciation of his property annulled, there would no longer be a *dégrévement* and the Judicial Greffier's Representation would fall. Therefore, the Court stayed the Greffier's Representation, due to come back before the Court on the 14th February, 1992, until Mr. Ogden's Representation had been disposed of. The Court anticipated that the *Attournés* and the creditors would file answers and that an early hearing would ensue.

Instead, Hambros Bank (Jersey) Limited sought to bring a Summons requiring Mr. Ogden to show cause why the Court should not order that the Court's Order of the 7th February, 1992, staying and adjourning the Judicial Greffier's Representation be quashed and that the Judicial Greffier be authorised to proceed with the *dégrévement* without delay; and that Mr. Ogden's Representations and Affidavits of the 31st January, 1992, and 7th February, 1992, should be struck out in whole or in part to the extent that they purported to interfere with or

intervene in the *dégrévement* or seek the annulment of the Act of adjudication of the renunciation of the property both real and personal of Mr. Ogden dated 29th November, 1991, on the grounds that they were scandalous, frivolous and vexatious and were otherwise an abuse of the process of the Court. The Summons further sought a striking out in the exercise of the Court's inherent jurisdiction. The Summons further sought that Mr. Ogden be required to make such application as he might see fit to challenge the *dégrévement* proceedings, including any application to set aside the judgments obtained by Ephrath Investments Limited against Mr. Ogden on 11th May, 1990, on the date of the hearing of the Summons or on such further date as the Court might fix on the date of the hearing of the Summons.

I find it difficult to understand why Hambros Bank (Jersey) Limited chose this course rather than an Answer to Mr. Ogden's Representation of the 7th February 1992. Nevertheless, I abridged time as necessary, to enable the 20th February, 1992, to be fixed for the hearing of the Summons.

In the meantime, on the 14th February, 1992, Mr. Ogden presented yet another Representation, in person. This contained three complaints namely, 1) that Advocate Journeaux, as the legal adviser of Hambros Bank (Jersey) Limited and Ephrath Investments Limited should not be an *Attourné* in the *dégrévement* on the ground that it is unethical and unlawful for the creditors' representative to be also an *Attourné*, who must be impartial; 2) asking that Advocate Journeaux be convened, in view of his failure to appear before the Bailiff's Secretary to fix a date for the hearing of the Summons, to explain his failure, and that the Court award costs and damages, and that the action to appear be dismissed; and 3) that Advocate Hoy and the senior partner in the firm of Vibert and Valpy be convened to explain why Mr. Ogden should be deprived of the legal services of Advocate Hoy.

The Court rejected the Representation of the 14th February, 1992: 1) Advocate Journeaux was not Mr. Ogden's lawyer and Mr. Ogden had no *locus standi* to complain about him on a disciplinary or ethical matter; and Mr. Journeaux had not acted unlawfully. 2) The complaint of non-appearance against Mr. Journeaux was a disciplinary matter to be dealt with elsewhere; the question of dismissal of the action was a preliminary point to be taken under protest, on the 20th February, 1992. 3) Any disciplinary complaint against Advocate Hoy should be addressed to the Bâtonnier, but it was open to Mr. Ogden on the 20th February, 1992, to make a further Representation that Mr. Hoy be ordered to continue to represent him.

On the 20th February, 1992, Mr. Ogden proceeded on the basis of the decision of the Court of the 14th February, 1992. The Court decided that the date had been properly fixed. However, the Court agreed that Mr. Ogden was entitled to legal assistance and that the Summons must be adjourned. The question whether the Court could, and if so whether it should, order Mr. Hoy to represent Mr. Ogden was likewise adjourned, until today. The Attorney General was asked to be kind enough to appear as *amicus curiae*, to assist the Court. The fixing of a date for the further hearing of the Summons was left over to be decided after today's decision, as the period of delay to be allowed would depend on the decision. If Mr. Hoy were to be ordered to continue, then he could appear at short notice, acquainted as he is with the background and the arguments. If Mr. Robinson were to represent Mr. Ogden, he would need longer to take full instructions and prepare his submissions, although it is true to say that he is now already acquainted with the case.

I regret the length of the review of the background to this hearing but I thought it necessary, or at least desirable, to attempt to set it out clearly.

The first question to be resolved today is whether the Court has the power to order an Advocate to represent a particular client against his will. Mr. Hoy says that his previous firm having merged with the firm of Vibert's to form Vibert and Valpy there is now a conflict of interest and that, ethically, he should not any longer represent Mr. Ogden. A contrary view has been suggested, if not advanced, by the learned Judicial Greffier, on the basis that on the narrow aspect of the *dégrévement* proceedings there is no conflict. The Acting Bâtonnier supports Advocate Hoy and is not prepared to instruct him to represent Mr. Ogden; hence he has appointed Advocate Dessain/Advocate Robinson to do so.

As I have said, therefore, the first question is whether the Court could, if it were minded to do so, order Advocate Hoy, notwithstanding the objections, to continue to represent Mr. Ogden. That question appears to me to be one of law alone, which I have to decide. If I decide that the Court does not have that power, that is the end of the matter. If I decide that the Court does have that power, then it will be a matter for the Court, including the learned Jurats, to decide whether, in all the circumstances of the present case, Advocate Hoy should be so ordered.

Mr. Ogden, by his Representation of the 7th February, 1992, sought to rely on the terms of the Advocates' Oath of Office. (Code of 1771, page 174). He submitted that the advocate is an officer of this Court and not beholden to any other body. I have examined the terms of the Oath most carefully. The only part of the Oath which could be held to support Mr. Ogden is the final paragraph which reads as follows:-

"Et finalement, en vos conclusions, vous vous conformerez selon le bon avis de Monsieur le Bailly, ou de Monsieur son Lieutenant, et de Messieurs de Justice; assistant aux Cours, selon le devoir de votre Charge."

My understanding of that passage is no more than that in his submissions an Advocate must defer to the opinions of the Court. *Conclusions* means pleas or points at issue. It also means the Advocate's case. According to the Dictionnaire Complet of Pierre Larousse (73e édition, 1894) it means nothing more than the *Demandes des parties*. It is not authority for saying that the Court can order an Advocate to represent a particular client against his will.

There is a dearth of authority to assist the Court. In the Report of the Commissioners of 1861 at the end of the passage dealing with Advocates I find the following:-

"...; but the small number of counsel combined indeed with the practice which we found to prevail of not furnishing them with written instructions, has hitherto been a great obstacle to the power of insisting that when one Advocate is prevented from attending, he should rather find another to supply his place than to allow business to be suspended."

Far from suggesting that the Court has the power to order an Advocate to act, that passage indicates that if an Advocate has not found a replacement for himself the Court can but suspend the business under consideration. In the present case Advocate Hoy has been replaced, albeit by the Acting Bâtonnier. thus, the Court has no further rôle to play.

That view is supported to some extent by the earlier Privy Council case In re the Jersey Bar (1859) X11 Moore 263. That case is not directly in point since it concerns the petition of five Advocates against an Act passed by the States for opening up the Bar. However, it is clear from a careful reading of the case that, even where inconvenience or a refusal to act was shown, the Court did not order any Advocate to act. At page 102 one finds that, and here I quote:-

"Business has occasionally been suspended from the difficulty of finding Advocates to act..".

In other words the Court would suspend proceedings rather than order a particular Advocate to represent a particular party.

Advocate Philip Le Maistre was the Bâtonnier in 1946 when he gave evidence before the Privy Council Committee on proposed reforms in the Channel Islands. At page 109 of the report he says:-

"The practice is for all undefended people, as soon as the fact is brought to my notice, I designate one of the junior members of the Bar to undertake the case gratuitously, so there is no question of fees or anything."

Again, one sees that the power of designation is vested not in the Court but in the Bâtonnier.

I now turn to statutory provisions.

Advocates are governed by the Advocates (Jersey) Law 1968, as amended, insofar as their admission to the Jersey Bar is concerned. The Bailiff is the President of the Board of Examiners - Article 6 provides for the swearing-in of successful candidates.

Advocates are also governed by the Loi (1961) sur l'exercice de la profession de droit à Jersey. Article 6 provides that the practising advocates will elect, every three years, one of their number as Bâtonnier, to be *chef de l'Ordre* which I take to be "head of the Order" and to supervise the interests of the Bar.

Solicitors are governed by the Solicitors' (Jersey) Law, 1971, Article 8 of which provides for the constitution of a Disciplinary Committee with functions which include the consideration of complaints made by third parties concerning the conduct of solicitors in the course of practice. The

Disciplinary Committee may reprimand or censure a solicitor or may refer a matter to the Royal Court. It does so by making a report to Her Majesty's Attorney General who presents the case for decision to the Royal Court.

There is no such statutory provision in relation to Advocates simply because the Bâtonnier is the head of the Bar, the *Chef de l'Ordre*, and, as I informed Mr. Ogden at an earlier sitting, any complaint of a disciplinary nature should be made to the Bâtonnier.

It is for the Bâtonnier to investigate such complaints and, if he thinks fit, to bring a Representation to the Royal Court. There are two examples of this to be found in the Table des Decisions, re Richardson, Représentation du Bâtonnier (1909) 226 Ex 49; and re an Advocate (1978) 265 Ex 123, 136; 1.C.A.158. I am confident there are others. I can recall one during my time in the profession.

The Loi (1939) sur les honoraires des Avocats et des Ecrivains recognised, in its preamble, **les pouvoirs disciplinaires pléniers de la Cour sur tous et un chacun desdits Avocats et Ecrivains**. There is no doubt that the Court has full disciplinary powers over each and every advocate and solicitor, but that begs the question how the Court is to be seized of such matters. In my judgment the only proper course is, in the case of Advocates, a Representation of the Bâtonnier, and in the case of Solicitors, a report from the Disciplinary Committee presented by the Attorney General.

Thus, Mr. Ogden is mistaken when he says that the Court has the power to appoint an advocate and also to dismiss an advocate and, therefore, must surely have power between those two extremes. The Court has power to admit and swear-in to office as advocates only those candidates who have first satisfied the Board of Examiners. The Court has power to

dismiss or otherwise discipline only those Advocates who are reported to it by the Bâtonnier as the head of the Bar. The only exception to that, I believe, is where an advocate acts in contempt of Court, when he is liable, as is any other citizen, to be punished for that contempt by the Court of its own motion.

The exclusive jurisdiction of the Bâtonnier was recognised by the Court of Appeal in In re Manning (1985-86) JLR Note. 16, where the Court of Appeal declared that the granting or refusal of legal aid is exclusively in the discretion of the Bâtonnier and that a single judge of the Court of Appeal has no jurisdiction to consider an application for legal aid by a party who has lodged an appeal to the Court of Appeal. It must be an inevitable consequence of that decision that the Court has no jurisdiction to designate a particular advocate to act on legal aid if legal aid is granted by the Bâtonnier.

In in re The Jersey Bar (supra) the Privy Council relied upon Jersey and French authorities, at page 274, on the basis that **"the Jersey Law and customs being derived from and more in consonance with French than English usages"**.

For that reason, it is proper to have regard to Hamelin and Damien, Les Règles de la Profession d'Avocat (6e edition). At p.454 para 279 the learned authors say that:

"L'Avocat ne doit, en effet, pas se charger d'une cause qu'il ne se sent pas en mesure de défendre utilement... il doit dès lors, dans un délai convenable, informer le client de son refus pour que celui-ci ait la possibilité d'organiser par ailleurs la défense de ses intérêts".

This Advocate Hoy did, assisted by the adjournment granted by the Court to enable Mr. Ogden to be provided by the Bâtonnier with new representation.

At p. 521, para 308, the learned authors say that:

"L'Avocat qui accepte un dossier ou qui se voit attribuer un dossier par le bâtonnier..." and

"Le client peut être accepté librement par l'avocat ou lui être imposé par la décision du bâtonnier..."

These provisions apply directly to Advocate Robinson in the present case. The Bâtonnier has imposed Mr. Ogden upon him and the Court knows that he will accept the charge and the duty; indeed the correspondence shows that he did everything reasonable to try to assist Mr. Ogden.

The only exception in France, which does not apply here, is a statutory provision that the presiding judge at Assizes can require an advocate to represent an unrepresented accused.

At page 538 para 309 (bis) the learned authors say this:

"De même c'est un devoir qui pèse désormais sur le barreau en vertu de son monopole de représentation, de permettre à chaque plaideur de trouver un avocat. Si un plaideur ne trouve aucun avocat qui veuille se constituer pour lui, les avocats n'ayant plus l'obligation qui pesait sur les anciens avoués d'accepter les constitutions, le bâtonnier commet d'office un avocat... Le bâtonnier a toujours désigné des avocats dans toutes les matières où cela présentait un intérêt pour la défense du justiciable".

It is abundantly clear that only the Bâtonnier designates the advocate who is to represent the litigant.

Mr. Ogden, in his reply, submitted that Crown Advocate Miss Nicolle had been very selective and biased in the authorities which she had been using. The Court rejects that submission. The Crown Advocate, as *amicus curiae*, has been of great assistance to the Court.

The Court also refutes the suggestion that Advocate Hoy's decision was arrived at "under duress". The Acting Bâtonnier accepted his decision, based on conflict of interest, and designated another Advocate to act in his stead.

The submission that a tribunal set up by the Law Society of Jersey would be the best way to proceed is likewise refuted. The Law Society of Jersey has no status in law - it can, of course, like any other association or society, examine the conduct of members *inter se* and towards third parties, but the results have no legal status and the society would have to persuade the Bâtonnier to act on his own responsibility.

Finally, Mr. Ogden complains of insufficiency of time and wishes a further adjournment. Indebted though I am to Crown Advocate Miss Nicolle, I have, of course, made my own researches. I am satisfied that an adjournment would result only in a further manipulation by Mr. Ogden of the processes of this Court. The result would be the same. The interests of justice demand that this matter be now progressed.

Therefore the Representation of Mr. Ogden asking that the Court order Advocate Hoy to resume his legal services is dismissed.

The Court further orders that the representation of Mr. Ogden of the 7th February, 1992 seeking an annulment of the Act of renunciation of the 29th November, 1991, and the Summons of Hambros Bank (Jersey) Limited, be consolidated to be heard together as soon as possible.

As a result of the Acting Bâtonnier's order, Advocate Robinson will represent Mr. Ogden, unless, of course, Mr. Ogden chooses to represent himself. On the assumption that he will now instruct Advocate Robinson a delay must be granted to enable Advocate Robinson to prepare. The Court charges Advocate Journeaux, Advocate Robinson and Mr. Ogden to fix a date, as soon as possible, in consultation with the Bailiff's Secretary. In default of agreement either party has leave to apply to the Court.

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