COURT OF APPEAL 73.

18th April, 1996.

Before: J.M. Collins, Esq., Q.C., President,
R.C. Southwell, Esq., Q.C., and
J.G. Nutting, Esq., Q.C.

In the matter of the Representation of Louis Emile Jean

Between	Louis Emile Jean	Representor
And	Colin Douglas Murfitt	First Respondent
And	Murco Overseas Properties Limited	Second Respondent
And	The Viscount	Third Respondent

Appeal by the First Respondent against the Judgment of the Royal Court (Samedi Division) of 17th May, 1995, whereby:

(1) it was declared that the purported signatures of the Representor and of the Representor's late wife contained in an agreement referred to as a "*Séparation des Biens*" was a forgery; and

(2) that the First Respondent pay the Representor's costs on a full indemnity basis.

The First Respondent in person.
Advocate J. D. Kelleher for the Representor.

JUDGMENT

THE PRESIDENT: This is the judgment in the appeal of Mr. Murfitt. I shall deal first with the substantive appeal and then go on to give the reasons for the decisions of the Court as to certain preliminary applications.

By his representation in these proceedings Mr. Jean sought the appointment of a liquidator of a company called Murco Overseas Properties Ltd pursuant to Articles 141 and 155 of the Companies (Jersey) Law, 1991, and further sought directions as to the sale of certain property, the payment of debts and the distribution of the balance between the shareholders, allowance to be made as to the costs of the representation on an indemnity basis.

Under Article 141 of the Law a member of a company may apply to the Court for an Order where the company's affairs are being or have been conducted in a manner unfairly prejudicial to the members or one or more of them and under Article 155 a company may be wound up where the Court considers it just and equitable to do so. Originally, Mr. Jean's shares were held jointly in his name and that of his wife, so it is alleged. She died in June, 1993. The position on her death is in dispute, although that aspect of the dispute does not form part of the issue with which the Royal Court was concerned, or which concerns this Court. I mention however that Mr. Jean contends that he succeeded to whatever interest she had in the shares.

The principal ground for seeking relief was in effect that there was a state of deadlock between Mr. Jean and Mr. Murfitt, it being alleged that they held an equal share holding. Among the allegations made were fraud in relation to the purchase price of the property which represented the sole or major asset of the company, the putting forward of impractical suggestions as to the nature of the development to be undertaken on the property, and false claims on the part of Mr. Murfitt that the company was in his sole ownership. Those were all allegations made by Mr. Jean as the Representor in the proceedings.

Finally, it was alleged, on his behalf, that it was clear from a conversation in September, 1993, between Mr. Jean's advocate and Mr. Murfitt that the relationship between the two remaining equal shareholders had broken down to such an extent that the company should be put into liquidation.

By his Answer Mr. Murfitt pleaded to and joined issue as to the allegations made against him, and further among other things raised an allegation that the rights of the parties had been fundamentally affected by an agreement in writing named a *"Séparation des Biens"*, alleged to have been signed by Mr. & Mrs.

Jean on 18th February, 1991, although not dated on its face. The allegation in the Answer put in on Mr. Murfitt's behalf reads as follows:

> *"The Respondent* (that is Mr. Murfitt) *avers that in the course of discussions between the Representor* (that is Mr. Jean) *and Mrs. Jean and himself in or about the early part of 1991 an Agreement was reached between them which Agreement was evidenced in writing and described as Séparation des Biens of Partnership ("Séparation des Biens"). The Séparation des Biens, although undated, was signed by the Respondent, the Representor and Mrs. Jean on the 18th February, 1991, and provides,* (it was alleged) *inter alia, as follows:-*
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> *(i) that the Representor and Mrs. Jean will pay to the Respondent the sum of £10,000 in consideration of the Respondent ceding to the Representor and Mrs. Jean any interest he might have in a portion of the site measuring 1/16th acre and adjoining that part of the site previously auctioned;*
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> *(ii) that the Representor, Mrs. Jean and the Respondent would procure the transfer out of the company of various portions of the site as shown in a plan attached to the Séparation des Biens, to the Representor and Mrs. Jean on the one hand and to the Respondent and/or his nominees on the other;*
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> *(iii) that the Representor and Mrs. Jean would subsequently resign as directors of the company and of Murco Property (Holding) Limited and would transfer their shareholding in the company and in Murco Property (Holding) Limited to the Respondent".*

It is further alleged that this document provided for the dissolution of a partnership and for the just and equitable division of the assets, namely the site.

By his Reply, his wife having by then died, Mr. Jean by his advocate pleaded to this allegation by a denial that his wife had signed the *Séparation des Biens* and he further denied that he did so himself, raising an alternative averment that if he did so he signed without having been aware of having done so and not understanding the nature of what he was signing.

On 7th March, 1995, the Judicial Greffier made an Order, by consent, that the issue as to whether the agreement referred to as *Séparation des Biens* in Mr. Murfitt's Answer, was signed by Mr. Jean or Mr. Jean's late wife or either of them, and that that should be tried as a preliminary issue.

Thus it was that on 11th May, 1995, the issue came before the Royal Court (Samedi Division) for trial. Mr. Murfitt conducted his own case and called evidence, including an expert witness, Mr. Hughes, who, it will appear, did not support his case to the extent that he wished, and a number of other witnesses, much of whose testimony was again of no assistance to Mr. Murfitt.

Although he was putting himself forward as a signatory of the document in question and although it is apparent from the Judgment of the Court now under appeal that he opened his case on the basis that only he himself and Mr. and Mrs. Jean were present when the document was signed, it is to be observed that he did not elect to go into the witness box himself, although given an opportunity to do so.

The burden of proof in relation to the preliminary issue was upon Mr. Murfitt; he was raising the alleged agreement and so it was for him to prove it. The expert witness whom he called, Mr. Hughes, who was a document examiner of nineteen years experience, spoke to two reports. The first report was, I find, rightly put on one side by the judgment of the Royal Court, in that it rested on a comparison of signatures on disputed documents with control documents, the provenance and genuineness of which not only had not been agreed but was challenged.

Mr. Hughes' second report was based on control documents which were accepted and put forward as genuine. On a comparison of those documents Mr. Hughes considered that in the case of Mr. Jean, the signatures under question were either genuine or written by someone else attempting to copy his signature. In the case of Mrs. Jean's signature, however, he was more positive, although not able to form a decisive view. His evidence in chief was as follows: *"And again, whilst it is not possible to express any definite opinion as to whether Maud Jean wrote the signatures in her name, my inclinations are that the differences between the question signatures and specimen signatures are significant and that Mrs. Jean did not sign those signatures"*. I find that that conclusion, together with Mr. Murfitt's failure to give evidence as to the creation of the documents, has the effect (even when looked at in the light of all the other material which Mr. Murfitt has urged upon us) of being in the end fatal to his case and indeed in the end is fatal to this appeal.

The evidence of Mr. Hughes was followed by that of Mr. Ansell, a forensic scientist specialising in the scientific examination of documents and handwriting who was until his retirement the Deputy Head of the document section of the Metropolitan Police. He was called on behalf of Mr. Jean and his evidence was interposed among the various witnesses called by Mr. Murfitt.

Mr. Hughes spoke to a report which he prepared in November, 1994, on a comparison of the disputed signatures and the control documents which had been the basis of the comparison in Mr. Hughes' second report. He considered that the signatures on the original of the alleged *Séparation des Biens* were not genuine and that on the carbon copy the signature of Mr. Jean was not genuine and that of Mrs. Jean was probably not genuine.

In evidence he agreed that he could not be sure in the case of Mr. Jean because the range of control signatures was not particularly extensive.

In addition to the expert witnesses, the Court heard the evidence of six witnesses, each of whom were called by Mr. Murfitt. It is pertinent to note that some of those witnesses were witnesses who were likely to give and did give evidence adverse to Mr. Murfitt's case. It must be borne in mind in looking at their evidence that they being his witnesses he is confined in his case by their answers.

Among the witnesses whom he called were the two sons of Mr. and Mrs. Jean. They were accepted expressly by the Royal Court as witnesses of transparent honesty. This Court has on many occasions stated that an appellant faces a formidable task in persuading an appellate Court to disturb or reverse the primary findings of fact reached by the Court below, which has heard the evidence, had the opportunity of observing the witnesses and of judging their reliability and honesty. In this case this is all the more so in that the hearing was before the Bailiff sitting with Jurats and the decision was the decision of a Court comprised in that way. The evidence of those two sons as accepted by the Court was clearly inconsistent with any concluded agreement having been reached to settle the differences and separate the property rights of the parties; thus Mr. Louis Jean, junior, stated that he was aware that his mother was trying to resolve the differences between her family and Mr. Murfitt before her death and had failed to do so. It had caused her, he said, some anguish that she had been unable to reach agreement with Mr. Murfitt before her death. Mr. François Jean said that he had never seen a copy of the alleged agreement until his mother's death.

There was a Mr. Welsh who administered the affairs of the company at ANZ Grindlays Trust Corporation who spoke in somewhat contradictory and uncertain terms to the existence to his knowledge in 1991 or 1992 of such a document. It is right to say that Mr. Welsh was no longer employed by that company and did not have access to papers and was doing his best to remember something which happened a few years before. He stated that he had passed such a document to Mr. Clyde-Smith, and Mr. Clyde-Smith was called by Mr. Murfitt but he had no recollection of it. Mr. Welsh also spoke to Mrs. Jean having complained in 1991 or 1992 of having been harassed by Mr. Murfitt and further gave evidence that no

such agreement as the *Séparation des Biens* had been implemented on the ground.

Even, however, if a *Séparation des Biens* as a document existed at that date, this does not prove its genuineness. All it would prove would be that there was such a document, but that would not indicate whether it had been truly signed by Mr. and Mrs. Jean, or whether it had been forged and then put into circulation.

It appears that the first that Mr. and Mrs. Jean knew of it, the first time it was drawn to their attention, was in 1993 when Mrs. Jean was gravely ill. The Court was clearly justified in disregarding any inference to be drawn from the fact that in her letter to Advocate Perrot, who sent it to her in March, 1993, she did not unequivocally deny the signatures. While it is not clear whether Mr. Jean was suffering from senile dementia in 1993, it is to be observed that it was Mrs. Jean who dealt with the business side of things and the evidence was that Mr. Jean had had a long history of heavy drinking.

Against this background I turn to consider the grounds of the amended notice of appeal. The first seven grounds relate to the fact that Mr. Jean was not called to give evidence. Before looking at the circumstances in which he came not to be called I would remark first that these grounds come ill from a party who was one of the two potential witnesses remaining alive who could speak as to the signature to the document under challenge and who puts himself forward as a signatory to the document and yet elected not to give evidence himself.

Secondly, I draw attention to the fact that the burden of proof as to the issue being tried was on Mr. Murfitt and not on Mr. Jean. Even without the evidence as to Mr. Jean's state of health which was put before the Court in order to explain the fact that he was not being called it might well have been that the state of the evidence called by Mr. Murfitt would have been such as would have led Dr. Kelleher not to call his client. Mr. Murfitt may well have wished to cross-examine Mr. Jean but there was no obligation on him or his advocate to expose him to cross-examination in such circumstances.

Whereas in a criminal case there is power, which itself is only to be used rarely and sparingly, in the Court to call a witness, the position is different in civil proceedings, which are adversarial in nature and where there is not the same call for the Court to control the proceedings. In general terms a witness cannot be called by the Judge in a civil case without the consent of the parties and I refer in that connection to Phipson on Evidence (14th Ed'n) para. 11/31. The Court is of course enabled to draw inferences from the failure of a party to call a particular witness or to give evidence himself and this sanction

is sufficient. In the present instance the Court received evidence by affidavit as to the mental state of Mr. Jean and I interpose the fact that Mr. Murfitt expressly agreed to such evidence being given by affidavit. The Court quite clearly did not in these circumstances draw any inference against Mr. Jean from his not being called.

In my judgment the Court was right to act upon the affidavit evidence of Dr. Robertson as to the mental state of Mr. Jean and thus to draw no adverse inference from his not being called to give evidence. The note made by the learned Bailiff makes it quite clear that Mr. Murfitt agreed to Dr. Robertson's affidavit being admitted without his being present. The terms of that affidavit were clear enough to indicate that Mr. Jean's mental state was such that he could not give reliable evidence. He was diagnosed by Dr. Robertson, after examination and after he had tested Mr. Jean by a Government approved test, as suffering from senile dementia and the view was expressed by Dr. Robertson that: *"his mental state would undermine any value he has as a witness although I know he is ready and willing to pursue this action and will give evidence if necessary. I am of this opinion because dementia affects the power of memory and will-power. I believe* (continued Dr. Robertson) *that if Mr. Jean is subjected to rigorous questioning he would provide any answer which may allow him to be released from the questioning. In other words he is looking for a quiet life. I also believe that his state of mind would lead him to say what he wishes would have happened rather than provide any form of objective truth".*

That having been placed before the Court as Dr. Robertson's evidence, without objection, I reject any suggestion that the Bailiff should have drawn any adverse inference from the fact that Mr. Jean was not called. Furthermore I do not accept that the Bailiff erred in describing Mr. Jean in the light of the evidence as *"unfit to give evidence".*

For the above reasons I dismiss the first seven grounds of the amended notice of appeal.

As to the eighth ground of appeal, namely that the learned Bailiff placed too much reliance on the reports of the expert witnesses, I find this to be an untenable proposition in the light of the fact that Mr. Murfitt chose not to give evidence himself, added of course to the fact that Mr. Jean was unfit to give evidence and Mrs. Jean was dead.

The expert called by Mr. Murfitt did not support his case as he would have wished; the burden of proof being on him, that, to all intents and purposes, should have been the end of the matter. I can find no error in the Court's interpretation of the reports and the control documents and also do not consider that there is anything to criticise in the Court's setting the first report from

Mr. Hughes to one side. So much for the eighth ground in the amended notice of appeal and likewise the ninth.

In the tenth ground Mr. Murfitt raises the point that the learned Bailiff failed to give sufficient weight to the evidence of Mr. Welsh relating to the alleged agreement. That is the gentleman that I have referred to already who, as I say, gave evidence which was somewhat inconsistent, whose memory was clearly at fault and who no longer had access to any documentation; he no longer being employed by the company by whom he had been employed at the time. I find no substance in that ground of appeal.

By the eleventh ground of appeal it is said that the learned Bailiff failed to appreciate discrepancies from the evidence given by the Jeans' in relation to the evidence given by the other witnesses. I have already referred to the view which the Court which had heard the evidence expressed with regard to the honesty and reliability of those two witnesses, Louis Jean and François Jean and I have no hesitation in dismissing that ground also.

The final ground, effectively, was ground twelve, namely that it was asserted that the learned Bailiff failed to place sufficient weight on the letter of 10th March, 1993. This was a letter which was clearly carefully considered by the Court and which it dealt with in terms in the Judgment in which I find nothing to criticise. Accordingly, my decision is that this appeal should be dismissed.

So much for the substantive grounds of appeal; now I turn to give the reasons for the decisions which we gave on Tuesday with regard to the preliminary matters which had been argued in front of us at the start of the hearing and which occupied Monday afternoon (See Jersey Unreported Judgment of 16th April, 1996).

First, Mr. Murfitt applied to us under Article 18(2) of the Court of Appeal (Jersey) Law, 1961 to set aside the Order of a Single Judge of this Court made on 28th March, 1996. By that Order a summons taken out by Mr. Murfitt on 29th February, 1996, was dismissed with costs. By that summons Mr. Murfitt raised two matters. First he applied for a stay on the ground of the alleged disability of Mr. Jean and for an Order that any further action by Mr. Jean should be taken only by a guardian or curator to be appointed to act on his behalf by the Court of Alderney.

Secondly, he sought discovery of a certified copy of Mrs. Jean's will. The second of the matters can be shortly dealt with.

It is not the function of an appellate Court to give orders for particular discovery. The appropriate course for the Appellant to take is to apply for particular discovery from the Royal Court and it will then be a matter for the Royal Court to decide, applying well-known principles.

The first matter, that relating to the mental state of Mr. Jean, however, was treated as a matter going to jurisdiction in this Court and for this purpose and this purpose alone this Court was prepared to look at the affidavit of Dr. Quanten which was put in by Mr. Murfitt and a second affidavit from Dr. Robertson which was put in on behalf of Mr. Jean. We were also invited by Mr. Murfitt to look at a letter from a Dr. Stocker of the Island Medical Centre, Alderney. I say straightaway that that letter did not appear to me to make any effective contribution to the matter being considered in the Court.

Dr. Quanten's affidavit was by way of comment on Dr. Robertson's first report and having defined senile dementia expressed the view that the common practice in Alderney was to appoint a guardian or the like to ensure the proper and correct handling of Mr. Jean's affairs. This led to a second affidavit from Dr. Robertson, whose description in his first report of Mr. Jean's state at the time he made it I have already referred to.

After the affidavit of Dr. Quanten had been received, Dr. Robertson re-examined Mr. Jean on 20th March, 1995; thus there were two examinations spoken to by Dr. Robertson. He said in that second affidavit that he found Mr. Jean on that occasion alert, capable of answering questions, and that he did better when making various adjustments with the Government approved mental test to which he had referred in relation to his first report. He gave the opinion that Mr. Jean was capable of dealing with his affairs.

Mr. Murfitt said that Dr. Robertson's affidavits were misleading in that they described Mr. Jean as his patient, although Dr. Robertson had retired. However, in the absence of any requirement by Mr. Murfitt either in the Court below in the case of the first report, or before the learned Deputy Bailiff in the case of the second affidavit, this could not be ascertained even if it were to be relevant: however, I do not consider that it was of any relevance in any case.

The outstanding fact with regard to these matters is that Dr. Robertson's two affidavits were based on physical examinations in each case of Mr. Jean and the putting of Mr. Jean through the relevant tests. Dr. Quanten on the other hand conducted no examination and no such tests. Accordingly I find that we have little or no alternative to affirming the decision of the learned Deputy Bailiff and accordingly I do so.

The other matters before the Court by way of application, stemmed from Mr. Murfitt's bare statement in ground thirteen of his amended grounds of appeal that he intended to call further evidence.

This prompted an application by the Advocate acting for Mr. Jean for an Order identifying the witnesses stating the nature of the evidence which they were intended to give and stating the reason why they were not called at the trial.

The Judge, no doubt with the imminence of the hearing in mind, made what was in effect a peremptory order to the effect that the information was to be given within seven days and otherwise paragraph thirteen of the amended notice of appeal was to be struck out.

On 29th March, 1996, Mr. Murfitt sent a letter complying with the Order in so far as the first two limbs were concerned but giving no explanation as to why the witnesses had not been called at the trial.

This led to an application before this Court on behalf of Mr. Jean to strike out paragraph thirteen of the notice of appeal.

It became apparent, however, that there was a further letter of 29th March in which in a different context the Appellant said:

> *"You will appreciate that I only saw the first affidavit of Dr. Robertson just before the trial of the preliminary issue and did of course not have sufficient time to consider it properly".*

The presence of this paragraph, in my view, makes it impossible to say in relation to the evidence of Dr. Quanten bearing as it did upon Dr. Robertson's first affidavit that there had been any such intentional and contumacious conduct as is required in such cases before matters are struck out. I refer in this connection to re Jokai Tea Holdings Ltd (1993) 1 All ER 630 CA.

On the other hand we had no explanation as to the failure to call Mr. Ozanne at the trial, although Mr. Murfitt was in the course of the hearing on Monday afternoon (which was an extensive and lengthy hearing,) given the opportunity on many occasions to do so. In the absence of such an explanation, despite repeated requests by the Court, we acceded to the application made on behalf of Mr. Jean so far as his evidence was concerned. It is right to say that after we had given our decision, Mr. Murfitt said that he would have liked an opportunity to *"eat humble pie"*.

In those circumstances the application to strike out ground thirteen so far as Dr. Quanten's evidence was concerned failed. However of course that did not mean that his evidence was to be produced before the Court for the purpose of the hearing against the substantive matter.

The calling of evidence before the Court of Appeal is a discretionary power arising under Rule 12 of the Court of Appeal (Civil) (Jersey) Rules, 1964, and it requires an application by the person wishing to call that evidence and the exercise of a discretion by the Court in considering it. In the exercise of the discretion it has long been the practice of this Court to follow the practice of the Court of Appeal in England in applying a provision stated in similar terms. That practice can be found conveniently summarised and stated in 4 Halsbury 37 para. 693, a passage which was applied by the then Bailiff sitting as a Single Judge of this Court in Hacon -v- Godel & Brocken & Fitzpatrick Ltd. (27th October, 1989) Jersey Unreported CofA; (1989) JLR N.4:

> ***"The Court of Appeal has power to receive further evidence on questions of fact. Before further evidence will be admitted (1) it must 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".***

We had no hesitation in finding that the second of these requirements was not satisfied. Not only did Mr. Murfitt consent to the admission of Dr. Robertson's first affidavit without seeking his presence for the purpose of cross-examination, but more significantly he would have been putting up a witness who had never examined Mr. Jean as I have already mentioned and never conducted any tests of his mental ability and attempting to put that up against Dr. Robertson who had fully qualified himself to give evidence in those respects for the purpose of his first affidavit. Therefore, accordingly the application to adduce further evidence made by Mr. Murfitt was dismissed by the Court.

In all those circumstances this appeal is dismissed so far as I am concerned.

SOUTHWELL, J.A.: I agree, and have nothing to add.

NUTTING, J.A.: I agree, and have nothing to add.

Authorities.

Phipson on Evidence (14th Ed'n): para. 11/31.

Hacon -v- Godel & Brocken & Fitzpatrick. (27th October, 1989) Jersey Unreported CofA; (1989) JLR N.4.

4 Halsbury 37 para. 693.

re Jokai Tea Holdings (1993) 1 All ER 630 C.A.