

JERSEY / JUDGMENT

Ball v King [2008] JRC 169 (01 October 2008)

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judgment

the deputy bailiff: 1. By a summons dated 22 nd May 2008 the plaintiff requests me to vary a costs order which I made in favour of the defendant on 28 th November 2006. The application raises the question of whether I have jurisdiction to do so or whether his only remedy is to seek leave to appeal out of time.

Background

2. The background appears from the judgment delivered by the Court on 28 th November 2006

[2006] JRC 171 and for convenience, I repeat the relevant parts. 3. At all material times an English company Blackbrook Nominee 46 Limited ("Blackbrook") was the owner of a residential property in Hampshire ("the Property"). The single issued share of Blackbrook was owned by Aceport Property Limited, another English company which was ultimately beneficially owned by the plaintiff, who resides in England. 4. On 25 th August 2002 the plaintiff agreed with the defendant, who resides in Jersey, to sell the Property. The plan was that a company called McBain Holdings Inc would purchase the entire issued capital of Blackbrook, thereby acquiring indirect ownership of the Property. The defendant was no doubt beneficially interested in some way in McBain. 5. One might have thought that any agreement for the purchase of the share capital of Blackbrook would be between Aceport as vendor and McBain as purchaser. In fact the plaintiff and the defendant personally entered into a homemade written agreement between them dated 25 th August 2002 ("the August agreement"). By that agreement the defendant agreed to purchase the Property from the plaintiff for a total purchase price of £900,000 of which £450,000 was to be paid on completion and £450,000 before the end of November 2003. 6. The agreement went on to provide that the structure of the deal was that McBain would purchase the entire share capital of Blackbrook for £3,500 and that the balance of the first instalment in the sum of £446,500 would be paid to a client account in Gibraltar or otherwise as the plaintiff might direct. 7. Completion duly took place on 29 th October 2002. A formal share sale agreement, drawn up by English solicitors, was entered into and completed that same day concerning the purchase of the share capital of Blackbrook by McBain for £3,500. The

sum of £446,500 was also paid on completion in accordance with the August agreement. 8. It followed that a balance of £450,000 was outstanding and this was due to be paid by the defendant before the end of November 2003. In fact the defendant failed to pay it at that time. There were numerous subsequent requests for payment by e-mail from the plaintiff to the defendant. No valid excuse for non-payment was put forward by the defendant and eventually, one year later in December 2004, he paid the sum of £150,000, leaving £300,000 outstanding. 9. There followed considerable e-mail correspondence between the plaintiff and the defendant whereby the plaintiff pressed for the balance and the defendant made various promises that payment would be forthcoming shortly. It became clear that the defendant was hoping to fund the balance by selling the Property. Eventually on 14 th February 2006 (i.e. some 14 months after the last payment and over two years after the second instalment of £450,000 should have been paid) the defendant sent an e-mail stating that the proposed purchaser of the Property had raised a question on the 'planning and building' on the orangery at the Property. He asked if the plaintiff could provide any background or knowledge that he might have on the issue in order to speed the matter along. The plaintiff replied by e-mail on 16 th February to the effect that the orangery was already built when he had purchased the Property and all he had done was fit out the internal work of the orangery. By now the plaintiff was threatening to institute proceedings against the defendant in Jersey and the defendant was indicating that the agreements were governed by English law with jurisdiction in the English courts. There was subsequently further e-mail correspondence with the defendant again asking for assistance in the planning query but without giving any further clarification as to what the problem was. The plaintiff said that he was unaware of any planning problem and could not help if he was not informed exactly what the alleged problem was. 10. Eventually the parties agreed to meet in order to try and settle the position. They met in Jersey on 9 th March 2006 and, according to the plaintiff, the defendant agreed to pay the outstanding amount in three equal instalments of £100,000 in April, May and June 2006. 11. In early May 2006 a further sum of £65,000 was paid by the defendant. The plaintiff protested that the payment should have been for £100,000 and the defendant subsequently assured him in e-mails that the correct instalments would be sent in May. Despite this, no further payments were made. In an e-mail dated 5 th June the defendant blamed this on the fact that he had lost three purchasers because of 'the situation on the property'. The sum of £235,000 therefore remained due. 12. On 6 th June 2006 the defendant issued proceedings in the Southampton County Court seeking a negative declaration to the effect that he was not liable to the plaintiff in the sum of £200,000 or any other sum. The Particulars of Claim are brief and not specific. After reference to an agreement (of which no particulars are given) between the plaintiff and defendant the two key paragraphs read:- "3 There was a representation that material development at the property complied with the terms of planning permission permitting such material development. It was accordingly an express alternatively an implied term of the said sale that material development at the property complied with the terms of planning permissions permitting such material development. The said material development does not comply with the terms of such

conditions. The claimant has suffered loss. Full particulars of such planning permissions and the non-compliance will be provided on disclosure. The claimant is entitled to damages for non disclosure representation and/or breach of contract." 13. On 15 th June 2006 the plaintiff issued proceedings in this Court by way of summons claiming £235,000 together with interest. The defendant subsequently applied for the Jersey proceedings to be stayed on the grounds of forum non conveniens . 14. On 28 th November 2006, in the judgment referred to at para 2 above, the Court upheld the defendant's application and stayed the Jersey proceedings on the ground that the defendant had shown that England was clearly and distinctly the more appropriate forum. This Court ordered the plaintiff to pay the defendant's costs in respect of the forum application on the standard basis on the ground that the defendant had been successful. The quantum of these costs has subsequently been agreed at £23,000. 15. The approach of the two advocates in the forum hearing was very different. Mr Franckel, appearing for the defendant, carefully went through the various connecting factors with each jurisdiction (as required by the authorities on forum non conveniens) and argued that England was the appropriate forum. Mr Sinel, on the other hand, concentrated on the lack of merits of the defendant's case and the specious nature of the Southampton proceedings. 16. The Court's reasons for finding in favour of the defendant on the forum application were summarised at paragraphs 25 and 26 of its judgment. In view of the nature of the arguments put forward in the present hearing, I think it helpful to recite them in full:- "25. The Court acknowledges the force of many of the points made by Mr Sinel concerning the apparent weakness of the defence of misrepresentation concerning a planning matter. However, Mr Franckel's intervention concerning the nature of his legal advice was a salutary reminder that this is not an application for summary judgment; it is a hearing simply to decide whether Jersey or England is the natural forum. Mr Sinel made it clear that, if the case remained in Jersey, he would be bringing an application for summary judgment. Such an application could equally well be brought in the English proceedings. That would be the time (whether in Jersey or England) to decide whether the defendant's defence is not genuine or reasonably arguable as Mr Sinel submits. It would be wrong, on the basis of the limited evidence put forward for a forum hearing, to decide the case on the basis that the defendant's defence is not genuine. We therefore proceed on the basis that there is a dispute between the parties over whether the defendant is entitled to set off against the sum of £235,000 (which is admitted to be outstanding) any amount which he recovers by way of damages for misrepresentation concerning the planning position at the Property. 26. Not without some reluctance - because we have considerable sympathy for the plaintiff's position - we have concluded that, essentially for the reasons put forward by Mr Franckel, the defendant has satisfied us that England is clearly and distinctly the more appropriate forum. The dispute is ultimately concerned with an agreement between an English resident and a Jersey resident, very probably governed by English law, concerning English real property and whether there has been a misrepresentation concerning the planning permission attached to such property, which permission was of course issued by an English authority. Apart from the defendant, the plaintiff and all the witnesses are

likely to be resident in England and the court of trial may have to consider the effect and meaning of English planning permissions. In essence, the only connection with Jersey is that the defendant lives here. We do not think it a significant factor whether the March 2006 agreement is governed by the law of Jersey or the law of England because, on any view, it was simply an agreement to pay an amount due pursuant to the August agreement. We would add that we have placed minimal weight upon the existence of the English proceedings. We note that they were started only a matter of days before the Jersey proceedings, that they have not advanced to any extent and they seek only a negative declaration. Nevertheless we are satisfied for all the other reasons advanced by Mr Franckel that England is clearly and distinctly the appropriate and natural forum." 17. As a result, the matter returned to the Southampton County Court. Through newly instructed English solicitors, the plaintiff filed a Defence (denying any misrepresentation) and Counterclaim (seeking the sum owed to him). He also asked for further particulars of the Particulars of Claim. No response was received and no amended Particulars of Claim or Defence to Counterclaim were filed. Accordingly the plaintiff applied for judgment in default, summary judgment and for the Particulars of Claim to be struck out. His application was listed for 5 th June but was adjourned on the grounds that a family member of the defendant was said to be ill. The application was re-fixed for 20 th September. A few days before the hearing the defendant again applied for an adjournment, this time on the basis that he had recently changed solicitors. 18. The District Judge refused the application for an adjournment, at which point the defendant's representatives withdrew. The District Judge proceeded to hear the three applications of the plaintiff and duly granted judgment in default on the basis of the defendant's failure to file a Defence to the Counterclaim. He also granted summary judgment on the basis that there was no reasonable prospect of the plaintiff's successfully defending the Counterclaim. The District Judge pointed out that the defendant had never specified what misrepresentation had been made despite numerous requests for him to do so both in correspondence and through the pleadings. He concluded that, on the basis of the papers before him, there never had been any representation. For similar reasons he also struck out the Particulars of Claim. He therefore granted judgment against the plaintiff in the outstanding sum of £235,000 plus interest. 19. The defendant still did not pay the amount owed and accordingly the matter returned to this Court, with the plaintiff seeking summary judgment on the basis of the judgment of the Southampton County Court. The matter was fixed for hearing on 5 th March 2008. A matter of days before the hearing the defendant paid the sum which was due. Accordingly the only matter which fell for decision by the Court on 5 th March related to costs. The plaintiff sought indemnity costs in respect of the Jersey proceedings (save for the costs of the forum application, where the Court had previously awarded costs against the plaintiff). 20. This Court held that the defendant had behaved thoroughly unreasonably in the conduct of the litigation and awarded indemnity costs. The relevant paragraph of my judgment summarised the position as follows:- "6. I am quite satisfied that the defendant has at no stage had any defence on the merits to this claim. He has simply been concerned to try and avoid or

delay payment and in this he has, in terms of delay, been successful until a few days ago. Just to give some examples; firstly, he never particularised the alleged misrepresentation which he relied upon. The pleadings were described by the District Judge in Southampton as being hopelessly inadequate. Secondly, he has repeatedly sought adjournments of the proceedings in both Jersey and England, usually at the last moment. Thirdly, he never put in a defence to the counterclaim in Southampton. After failing to obtain an adjournment on 20 th September, he simply withdrew his legal representatives. The judge decided that there was no arguable defence and gave summary judgment. It is particularly noteworthy that the defendant never pursued the Southampton proceedings or filed the necessary pleading to specify his case notwithstanding his assertion before this Court that Southampton was the appropriate forum and that therefore the proceedings here should be stayed so that the matter could be resolved in England. Fourthly, and most importantly, despite the Southampton County Court having given judgment against him on 20 th September 2007, the defendant still did not pay. He has therefore forced the plaintiff to resuscitate these proceedings and incur further legal costs. As I say, he eventually paid up by cheque tendered on 28 th February 2008. 7. I, like the District Judge, am quite satisfied that there was no possible defence in this case. The defendant chose England, he lost there but still he did not accept the result and he forced the plaintiff to incur expense in coming here." 21. At that hearing, Mr Sinel specifically reserved his right to seek to overturn the award of costs against the plaintiff on 28 th November 2006 in respect of the forum application. This application 22. As already mentioned, following its judgment on th November 2006 to the effect that England was the appropriate forum and that the proceedings in Jersey should be stayed so that the matter could be resolved in the Southampton County Court, the Court ordered the plaintiff to pay the defendant's costs in respect of the forum hearing on the basis that the defendant had been successful and the plaintiff had lost. Mr Sinel now applies for a variation of that order and seeks an order that the defendant should be ordered to pay the plaintiff's costs in respect of the forum hearing. 23. This immediately raises the question of whether the Court has jurisdiction to do so. Is it functus officio ? In this connection, I would for convenience repeat what the Court said in *RBC Trustees (CI) Limited v Appleby*

[2007] JRC 211 at paras 16-19:- "16. The general position in relation to functus officio was not in dispute between the parties. The principle was conveniently summarised by Bailhache, Bailiff in *Jersey Evening Post Limited v Al Thani*

[2002] JLR 542 at 550: "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even where a decision has been communicated to the parties. Proceedings are only full concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its rulings on adjudication must be taken to a higher court if that right is available." 17. It is agreed that, in this case, the order reflecting the outcome of the July judgment has been

perfected and issued. However, the principle only applies to decisions which can be regarded as final. To be final a decision does not have to dispose fully and completely of the case. So, for example, in a personal injury claim, judgment on liability, even where consideration of quantum is deferred, cannot be revisited by the first instance court. The only remedy of a dissatisfied party is to appeal the court's decision on liability. 18. The principle does not apply to a decision which, by its nature, is interim or requires continuing monitoring. Thus the Court regularly makes case management decision in connection with the progress of a case to trial and then varies such decisions in the light of changed circumstances. Similarly, the Court may vary from time to time the terms of an interim injunction and may indeed go so far as to discharge it and then re-impose it. A further example would be where the Court is providing ongoing guidance and direction in connection with a trust. This is a continuing obligation and the Court may re-visit its position from time to time in the light of new developments. The Al-Thani case itself is another example of a continuing obligation. The case concerned an order prohibiting the reporting of in camera proceedings and the Court held that the prohibition imposed a continuing obligation so that, if circumstances had changed, it was open to the Court to review or discharge its order. 19. Thus, when determining whether it is functus, a court must consider the nature of the decision which it is being asked to vary " 24. Mr Sinel argued that the Court had jurisdiction to vary the November 2006 costs order on a number of grounds. I shall take these in turn, although not necessarily in the same order as he presented them. 25. Firstly, he submitted that the order for costs was not a final order; it was an interim order of the nature referred to in para 18 of the judgment in the RBC case referred to above. He pointed out that a stay was an interim order which could be varied, as indeed had happened in this case on 5 th March 2008. As the costs order was merely ancillary to the order for a stay, it too had to be regarded as interim and therefore capable of variation. 26. I accept that a stay is an order which may be re-visited in the light of changed circumstances. In this case, the Jersey proceedings were stayed in November 2006 in order that the case could be determined in the Southampton County Court. Once that purpose had been fulfilled and the defendant had obtained judgment in the Southampton Court for the sum owed, it was clearly appropriate to lift the stay so that he might obtain judgment in Jersey and/or obtain an order for costs in relation to the Jersey proceedings. However, I do not accept that this means that an associated costs order can also be varied. An order for costs is normally intended to be final and to determine once and for all who pays the costs of a particular hearing. It is a common occurrence for costs orders to be made in relation to particular hearings on interlocutory matters as a case progresses. If the judge wishes the costs of such a hearing to be awarded to whoever eventually succeeds in the main case, he will of course make an order that the costs be in the cause. This is a common occurrence. Alternatively he may reserve the question of costs i.e. postpone a decision. But where he feels that a party has clearly 'won' the particular interlocutory argument and justice requires that that party should receive his costs in relation to that hearing regardless of the final outcome of the case, he will make an order awarding costs in favour of that party. Such an order is clearly intended to be

final. It is not to be re-visited or varied depending upon the final outcome of the main case. 27. I accept that the Court in some circumstances may make a costs order which is clearly intended to be an interim order. For example, in trust cases, an order may be made permitting one or more of the parties to receive their costs out of the trust fund on a 'cash flow' basis without prejudice to any final order which the Court may make as to who should bear the costs following final determination of the proceedings. But in the absence of an indication that an order is interim and may be re-visited in this manner, a costs order, in my judgment, is intended to determine finally who should bear the costs of the particular hearing and is therefore a final order for the purposes of the 'functus' principle; the only remedy of a dissatisfied party is to appeal the costs order. 28. Next, Mr Sinel referred to Rule 3.1(7) of the Civil Procedure Rules of England and Wales which provides:- "A power of the court under these Rules to make an order includes a power to vary or revoke the order." He argues that, by analogy, this Court has a similar power and he referred me to two cases in support, namely *Customs and Excise Commissioners v Anchor Food Limited* (No.3)

[1999] EWHC 834 (Ch) and *Lloyds Investment (Scandinavia) Limited v Ager-Hanssen*

[2003] EWHC 1740 (Ch) . 29. I do not consider that this point assists Mr Sinel. The Civil Procedures Rules reflect the substantial changes in procedure brought about by the Woolf reforms. There was no equivalent in the Rules of the Supreme Court (which governed the position in England previously and upon which the Royal Court Rules are based), nor is there such a provision in the Royal Court Rules. 30. In any event, the provision is clearly intended to be of limited effect and it is not clear that it covers an order for costs. In the *Customs and Excise* case Neuberger J had made an order at an initial hearing at the request of the Customs restraining Anchor Foods from transferring its business to another company. The order was based upon the contention of the Customs that the transfer was at an under value. The judge ordered that the costs of that application should be costs in the cause. Subsequently, the Customs accepted that they could no longer maintain that the proposed transfer was at an under value. Anchor requested Neuberger J to vary his order and award Anchor its costs in connection with the initial hearing. Neuberger J made it clear that he felt that this would be the just outcome but concluded that he could not vary the order. He said this on page 2 of the judgment:- "The point taken by Mr McCombe is that I ordered costs in the cause and I cannot go behind that. Two arguments are put the other way by Mr Lewis. The first is that I have a wide discretion on costs, in particular in light of CPR Rule 44.3, and that I can, as it were, re-visit my order on costs which is pre-eminently a matter of discretion. Attractive though that argument is, I must reject it. It seems to me that when a court makes an order, only in the most exceptional circumstances such as those involving fraud or the slip rule, could the court re-visit the order even where it is for costs. The court cannot act as an appellate court in respect of its own orders....." In my judgment, the view of costs orders expressed by Neuberger J in that passage is consistent with that which I have expressed at paras 26 and 27 above. 31. In the *Lloyds Investment* case, judgment in default of defence had originally been granted

against the defendant. The defendant applied for it to be set aside. The deputy judge (Mr Berry QC) granted that application subject to payment into court of certain monies within a stipulated period. The defendant did not pay the sum into court within the stipulated period with the result that the judgment remained in force. The defendant subsequently sought leave that he be permitted to defend the case and that execution of the judgment be stayed. The matter came before Patten J who said that it was in effect an application to vary the order made by the deputy judge. At page 7 of his judgment Patten J said this:- "7 The Deputy Judge exercised a discretion under CPR part 13.3. It is not open to me as a judge exercising a parallel jurisdiction in the same division of the High Court to entertain what would in effect be an appeal from that order. If the Defendant wished to challenge whether the order made by Mr Berry was disproportionate and wrong in principle, then he should have applied for permission to appeal to the Court of Appeal. I have been given no real reasons why this was not done. That course remains open to him even today, although he will have to persuade the Court of Appeal of the reasons why he should have what, on any view, is a very considerable extension of time . It seems to me that the only power available to me on this application is that contained in CPR Part 13.1(7), which enables the court to vary or revoke an order . This is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 13.1(7) is exercisable, it seems to me that, for the High Court to re-visit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ....." 32. In my judgment, far from assisting Mr Sinel, this case is against him. In the first part of the paragraph, the judge explains the position as I believe it to be, namely that a court cannot normally re-visit one of its own decisions; the only remedy lies by way of appeal. The judge goes on to say in the second part of the paragraph that the only power which he has to vary the earlier order is that conferred by CPR Rule 13.1(7). In other words, in the absence of that rule, he would have no such power. As CPR Rule 13.1(7) has no equivalent in the Royal Court Rules, the decision seems to me to be against Mr Sinel's primary submission that I have a general power to vary a previous costs order. 33. Mr Sinel also referred to CPR Rule 44.14 and to its predecessor RSC 62/10/(1) which stated:- "Where it appears to the court in any proceedings that any thing has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the court may order that the costs of that party in respect of the act or omission as the case

may be, shall not be allowed and that any costs occasioned by any other party shall be paid by him to that other party." Although there is no equivalent in the Royal Court Rules, I accept that the Court has an inherent power to take such matters into account when deciding what costs order to make in the first place. But the provisions says nothing to imply that, once the Court has made a decision on costs, it has power to re-visit and vary that decision. 34. Mr Sinel also referred to the Court's inherent jurisdiction, as explained in *Mayo v Cantrade Private Bank Switzerland (CI) Limited*

[1998] JLR 173 and the ability of the Court to prevent abuse of its process, as exemplified in *Jakobsson v Offshore Nautical Sales Limited*

[2003] JLR 71 . However, I do not consider that either of these assists in determining whether the Court has power to vary a decision which it has already made in relation to costs. 35. Mr Sinel's final point is that the Court has power to set aside or vary a decision which has been obtained by fraud. Here, he was on somewhat stronger ground. He cited in support of that proposition the case of *Sturrock v Littlejohn*

(1898) 68 LJQB 165. In that case the original defendant had been persuaded to agree to a consent order in proceedings brought by the original plaintiff on the basis of a statement in an affidavit sworn by the original plaintiff to the effect that he had paid out certain monies on the original defendant's behalf. The original defendant also consented to an order that he should pay the costs of the first action. Subsequently it was discovered that the original plaintiff had not in fact paid out the money which he had sworn he had paid. Accordingly the original defendant (now as plaintiff) brought a fresh action to set aside the consent order made in the first proceedings. The original plaintiff failed to file a defence and accordingly the original defendant sought judgment in default. The court granted judgment and set aside the original consent order. The court also held that it had jurisdiction to set aside the original costs order and to order that the original plaintiff pay the original defendant the costs of the first action as well of the second action. 36. The case is an example of a well established principle. Although it was not cited to the Court, a convenient summary of the principle is to be found in *Halsbury (4 th Edition) Vol 37 at para 1210*: - "A judgment which has been obtained by fraud either in the court or of one or more of the parties may be set aside if challenged in fresh proceedings alleging and proving the fraud. In such proceedings it is not sufficient merely to allege fraud without giving any particulars, and the fraud must relate to matters which *prima facie* would be a reason for setting the judgment aside if they were established by proof, and not to matters which are merely collateral. The court requires a strong case to be established before it will set aside a judgment on this ground and the proceedings will be stayed or dismissed as vexatious unless the fraud alleged raises a reasonable prospect of success and was discovered since the judgment." 37. Mr Sinel argued that the decision in favour of the defendant on the forum application and the consequential costs order were obtained by the defendant's fraud. He referred to the affidavit of 16 th October 2006 sworn by the defendant for the purposes of the forum hearing. In that affidavit the defendant admitted

that he owed £235,000 pursuant to the sale agreement but stated that, on attempting to sell the Property, he discovered that it did not comply with the terms of planning permission permitting material development of the Property. He said that there had been a specific representation to him that the Property complied with such planning permission. The Property was therefore worth less than he paid for it and hence his retention of the £235,000 against the damage he had suffered as a result. He also asserted at paragraph 15 of the affidavit that he intended to pursue the English proceedings and was in the process of instructing his solicitors to draft amended Particulars of Claim. 38. Mr Sinel submitted that the defendant lied in at least two respects in that affidavit. Firstly, there was never any representation in connection with the planning permission or any breach of a planning permission and secondly, the defendant had no intention of pursuing the English proceedings. He said that the proof of these lies lay in the fact that the defendant had taken no further steps in relation to the English proceedings, that he had never specified what the alleged breach of planning permission was, and that the Southampton County Court had struck out his claim on the grounds that it was not reasonably arguable. 39. I have carefully considered Mr Sinel's

submissions.

I have considerable sympathy with the plaintiff and have already held in my judgment of 5 th March 2008 (see para 20 above) that the defendant had behaved unreasonably in relation to the conduct of this litigation generally such as to attract an order for indemnity costs. However, that is entirely different from a finding that the forum decision and the consequential costs order were obtained as a result of fraud. 40. I have concluded that the plaintiff has not established grounds upon which I could properly set aside my costs order on the grounds of fraud. 41. Firstly, I am concerned at the procedure which has been followed by the plaintiff. The extract from Halsbury quoted above makes it clear that proper particulars of the alleged fraud must be given and a strong case must be established before a judgment will be set aside. This is clearly an important requirement and the law attaches great importance to the need for finality in litigation. It is likely to be a rare occurrence for a judgment obtained after a full hearing to be set aside on the grounds of fraud. Inevitably, many cases turn on oral evidence and the party who has lost will often wish to have a second bite of the cherry by trying to show that the other party has not told the truth. Hence the requirement for a strong case to be shown and for there to be proper and full pleading of the alleged fraud. 42. In this case, the plaintiff filed a summons on nd May 2008 simply seeking an order that the costs order of 28 th November 2006 should be varied to the effect that defendant should be ordered to pay the plaintiff's costs of the forum hearing on an indemnity basis. No ground for the summons was given and there was no reference to any allegation of fraud. Furthermore, no evidence was filed in support of the summons at that stage. 43. On 30 th May, Advocate Buckley, on behalf of the defendant, e-mailed Sinels pointing out that it seemed somewhat novel to seek to 'vary' a costs order rather than appealing it. He asked Sinels to provide him with any authorities upon which they proposed to rely so that he could see the legal basis for the summons. No acknowledgement was received and he sent a reminder on 9 th

June. Sinels replied on 16 th June but declined to provide the authorities as requested. Mr Buckley repeated his request by e-mail dated 17 th June. 44. The hearing was fixed for 18 th July at 10.00 a.m. It was only at 5.05 p.m. on 15 th July that the plaintiff's skeleton argument and bundle were delivered to Mr Buckley. The bundle contained no evidence sworn specifically in support of the summons. The only evidence contained in the bundle was the affidavit which had been sworn on 31 st January 2008 by the plaintiff in support of his application (heard on 5 th March 2008) for summary judgment and for an order that the defendant pay the costs of the Jersey proceedings (other than the forum application) on an indemnity basis. The only reference in that affidavit to the November 2006 costs order(which is the subject of this application) was a statement to the effect that the plaintiff expressly reserved his right to re-visit the costs order in relation to the forum hearing on the grounds that the defendant had perpetrated deception on the Court. No further details were given. 45. It was only on receipt of Mr Sinel's skeleton argument that the exact basis for the allegation of fraud was spelled out. (See in particular para 9 of the skeleton). As Mr Buckley pointed out, this gave next to no opportunity for the defendant to respond to the specific allegations and the fact remains that the Court has received no evidence from either party sworn specifically in relation to the summons currently before me. 46. In my judgment, such a method of proceeding does not comply with the requirements for alleging fraud. If a party seeks to set aside a previous order on the ground that it was obtained by fraud, he must fully particularise the alleged fraud in the ordinary way required for allegations of fraud and must do so in adequate time to allow the other party a proper opportunity to respond. 47. Secondly, even setting aside that concern for the moment, I must consider whether any fraud on the defendant's part (if proved) related to matters which were the grounds for the judgment in question rather than to merely collateral matters. I must therefore have careful regard to the reasons for the Court's decision on forum as set out in the extracts quoted at para 16 above. 48. It is quite clear from the judgment that the Court expressly declined to enter into the merits of the alleged defence of the defendant. The Court did not stay the proceedings because it believed that the defendant had a good or arguable defence. It did not consider that aspect at all. It stayed the proceedings solely on the ground that the various connecting factors which the Court is required to consider on such applications in order to determine the natural forum, pointed clearly and distinctly to England rather than Jersey. 49. It is no doubt a common occurrence for a defendant who succeeds in obtaining a stay in a forum application subsequently to lose the main action when it is heard in the foreign jurisdiction. In many cases, this will no doubt have been because the witnesses called by the defendant have been disbelieved, from which it follows logically that the defendant would have been lying when he asserted in the forum hearing that he had a defence to the action. I put it to Mr Sinel that it could not possibly be the law that, because a defendant who had succeeded on a forum hearing eventually lost the main action, the Court could therefore re-visit its decision on the costs of the forum hearing. That would in effect lead to the consequence that the costs of a forum application would always be dependent on and follow the result of the main action. He conceded that that was not the position, but asserted that this case was exceptional, because the defendant had not failed after fighting and losing the case in Southampton in the ordinary way; he had failed even to progress the matter or to particularise the alleged misrepresentation and the Southampton County Court had granted summary

judgment on the basis that he had no reasonable defence. 50. I do not consider that the fact that the plaintiff obtained summary judgment is sufficient to lead to a different conclusion from where the defendant is disbelieved after a full trial. It is of course always open to a court hearing a forum application to make an order in relation to the costs of that application which is dependant on the outcome of the main hearing. It may do this either by ordering costs in the cause or by reserving its decision on costs until the outcome of the main hearing. But, by making an order that the plaintiff should pay the costs in any event, the Court was not adopting that option. The Court was deciding that, regardless of the outcome of the main hearing, the costs of the forum hearing should be borne by the plaintiff. 51. As already mentioned, the Court decided the forum application entirely by reference to the question of which jurisdiction was that with which the dispute had the closest connection. It considered the various issues of witnesses, the parties, the system of law etc as required by the leading case of *Spiliada and Maritime Corp v Cansulex Limited*

[1986] 3 All ER 843 . It is of note that the plaintiff's English solicitors at the time wrote to the defendant's English solicitors on 20 th June 2006 to say that they had advised Sinels that the Jersey proceedings should be withdrawn or discontinued leaving the parties to litigate their dispute in the Southampton County Court. If that advice had been accepted, the costs of the forum application would never have been incurred. The defendant would in due course have lost the Southampton County Court proceedings (as he did) and the plaintiff would then only have incurred the costs of seeking to enforce the judgment in Jersey and in that respect he has already been awarded his costs on an indemnity basis. The only reason that the costs of the forum hearing were incurred was because the plaintiff chose to ignore the advice of his English solicitors and to litigate the issue. He lost on the forum issue, not because the Court thought that the defendant had an arguable defence, but because the various connecting factors led to the conclusion that England was clearly and distinctly the more appropriate forum to decide whether he had a defence. It was on that argument that the plaintiff lost and it was for that reason that he was ordered to pay the defendant's costs in relation to that hearing. Accordingly, even if it is assumed that the defendant was lying in respect of his alleged defence to the claim, I do not consider that that was a fraud which entitles the Court to reverse the costs order in relation to the forum hearing, because it was not the basis upon which the Court decided the matter. The defendant's position in that respect is no different from any other defendant who is eventually found in the main hearing to have put forward a defence which the foreign court does not believe. 52. I should add that Mr Sinel also referred to the statement in the defendant's affidavit sworn for the forum hearing that he intended to proceed with the proceedings in the Southampton County Court. Mr Sinel said that this was clearly a lie because the defendant did not in fact proceed and it was clear that this Court would not have held that England was the more appropriate forum if it had known that the defendant was not going to proceed with the action there. The difficulty with this submission is that the Court stated expressly in paragraph 26 of its judgment of 28 th November 2006 that it had placed minimal weight upon the existence of the English proceedings. It went on to

say that the stay was granted for all the other reasons advanced by Mr Franckel that England was clearly and distinctly the appropriate and natural forum. Accordingly, even if the defendant lied when he made that statement (rather than subsequently changing his mind) it was not a lie which led to the Court making a different decision and would not be a reason for setting the order aside. 53. For these reasons I dismiss the plaintiff's summons. *Authorities Ball v King*

[2006] JRC 171 . *RBC Trustees (CI) Limited v Appleby*

[2007] JRC 211 . *Civil Procedure Rules of England and Wales. Customs and Excise Commissioners v Anchor Food Limited (No.3)*

[1999] EWHC 834 (Ch) . *Lloyds Investment (Scandinavia) Limited v Ager-Hanssen*

[2003] EWHC 1740 (Ch) . *Mayo v Cantrade Private Bank Switzerland (CI) Limited*

[1998] JLR 173 . *Jakobsson v Offshore Nautical Sales Limited*

[2003] JLR 71 . *Sturrock v Littlejohn (1898) 68 LJQB 165. Halsbury (4th Edition) Vol 37. Spiliada and Maritime Corp v Cansulex Limited*

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