

JERSEY / JUDGMENT

# Bass v Pickersgill and Le Cornu

## [2000] JCA 135 (14 July 2000)

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[2000] JCA 135 [ New search ] [ Help ] 2000/135 16 pages COURT OF APPEAL. 14 July, 2000. Before: The Hon. M. J. Beloff, Q. C., President, de V. G. Carey, Esq., Q. C., Bailiff of Guernsey; and C. S. C. S. Clarke, Esq., Q. C. Between Donald Bass Plaintiff/RESPONDENT. And Barry Keith Pickersgill and David Eldon Le Cornu, practising as Pickersgill & Le Cornu. Defendants/APPELLANTS. Appeal by the Defendants/APPELLANTS against the Judgment of the Royal Court of 21 st May, 1999, whereby they were condemned to pay to the Plaintiff/RESPONDENT £74,000 in special damages and £5,000 in general damages, with interest thereon together with half of the Plaintiff/RESPONDENT's costs. Advocate M. St. J. O'Connell for the Defendants/APPELLANTS; Advocate A. D. Hoy for the Plaintiff/RESPONDENT.

### JUDGMENT.

CLARKE JA: 1. This is an Appeal from the Judgment of the Royal Court given on 21 st May, 1999. By its judgment of that date the Court awarded Mr. Donald Bass special damages of £74,746.13 and general damages of £5,000 as damages for professional negligence against the Defendants, Barry Keith Pickersgill ("Mr. Pickersgill") and David Eldon Le Cornu, practising as Pickersgill & Le Cornu. The Facts 2. Mr. and Mrs. Langdon were, between them, the holders of 2,600 shares (being 51% of the authorised and issued share capital) in a company named Nodol Investments Limited ("Nodol"). That company was the owner of a garage, known as "Crown Garage", with residential flats above, at 9-10 Devonshire Place, St. Helier. Ownership of the 2,600 shares gave to Mr. and Mrs. Langdon the exclusive rights of occupation and use of the garage. 3. In March, 1991, the Langdons became clients of Pickersgill & Le Cornu. They were in need of funds for their garage business. Mr. Pickersgill approached Mr. Bass, one of his clients, to see if he would lend to the Langdons. As a result Mr. Bass, who was an experienced businessman, agreed to lend to the Langdons' £540,000. By a Bond of 12 th July, 1991, the Langdons' acknowledged their indebtedness to Mr. Bass in that sum. As security for the repayment of the amount loaned the

Langdons entered into a security interest agreement whereby they created a security interest in their shares in Nodol. Mr. Pickersgill obtained possession of the Langdons' share certificate and a signed transfer of those shares. 4. In November, 1992, the amount of the loan was increased to £570,000 and a fresh Bond and Security Agreement were entered into. Under the terms of the Bond the £570,000 was repayable at the expiration of six months notice, to be given by either party, but notice could not be given until 12 th November, 1993. So the first time when the principal of the loan could have become repayable (if the appropriate notice was given) was th May, 1994. 5. The Security Agreement provided that by the vesting of possession of the "documents or certificates of title" in respect of the "Collateral", i.e. the Langdons' 2,600 shares in Nodol, security interests would be created in accordance with the Security Interests (Jersey) Law 1983 , ("the Security Interests Law") as amended, in those shares as a continuing security for the payment of all sums due under the Bond. Clause 4 of the agreement provided that: "All rights, monies and other property accruing or offered at any time by way of redemption, bonus, preference, option, dividend, interest or otherwise to or in respect of the Collateral shall be included therein..." The "Collateral" was the 2,600 shares in Nodol. By clause 5(b) of the Agreement the Langdons warranted that they would not: "... create nor attempt to create nor allow the creation of any further mortgage, charge, pledge, security interest or other encumbrance over or in the Collateral." By clause 6 they warranted: "that (they) shall not during the continuance of this Security Agreement attempt to sell the Collateral or any part thereof without previously obtaining the written permission of the Secured Party or to mortgage, hypothecate or otherwise dispose of or deal in any manner with the Collateral or any part thereof." 6. In the Royal Court clause 6 was interpreted as requiring Mr. Bass's consent in writing to any second charge of the shares. In terms clause 5(b) is an unqualified warranty that the Langdons would not create any further charge and the second half of clause 6 is an unqualified undertaking not to mortgage or otherwise dispose of or deal with the collateral. The reference to written permission of the Secured Party constituting a qualification to the undertaking is in the first part of clause 6, which deals with the sale of the Collateral. The distinction is, however, unimportant. If Mr. Bass in fact consented (whether in writing or not) to the creation of a second charge he could not be heard to complain of it. 7. By March, 1993, the Langdons were in difficulty with the Midland Bank, their bankers, who were pressing for a reduction in their overdraft. On 12 th March, 1993, Mr. Bass was asked to increase the amount of his loan by £30,000 but he declined to do so. 8. In April, 1993, Mr. Langdon arranged to borrow the comparatively modest sum of £39,000 from Esso Petroleum Limited, to be secured against the shares of Nodol by a charge to rank after that of Mr. Bass. Esso were to supply petrol to Mr Langdon at a concessionary rate in return for a tie, and, after five years, the debt would be extinguished without the borrower having had to repay. There is no dispute but that Mr. Bass consented to Esso taking such a charge. In the event the contemplated loan never went through. 9. In June, 1993, Mr. Pickersgill negotiated a continuance of finance for the Langdons from the Midland Bank in the sum of £158,000 secured against a second charge over the shares, which Mr. Pickersgill was to hold, subject to the first charge, to the order of the Bank. He did so in the belief that the permission obtained from Mr. Bass in respect of the charge to Esso covered a second charge (of a much greater amount) in favour of the Midland Bank. Accordingly, the first question for the Royal Court was whether Mr.

Pickersgill had indeed obtained Mr. Bass's consent or whether, on the contrary, he negligently allowed the second charge to subsist by negotiating the giving of it in return for continued finance with the Midland Bank and holding, as he did, the shares not only to the order of Mr. Bass but, also, subject to the first charge, to the order of the Midland Bank, without Mr Bass's knowledge or consent. 10. In October, 1993, Mr Pickersgill's secretary and, in November 1993, Mr. Pickersgill approached Mr. Bass with a view to persuading him to reduce the loan interest from its 15% rate, which was, by then, high compared with the prevailing market rate. Mr. Bass was inclined to consider a reduction in the interest rate but he wanted to see the accounts of Nodol before doing so. 11. By 21 st February, 1994, Mr. Bass had received the accounts, not of Nodol, but of the garage business. These revealed to him the existence of a loan of £150,596 by the Midland Bank secured against the shares in Nodol. On 8 th March, 1994, Mr. Bass gave notice to the Langdons to repay their loan on 10 th September, 1994, (erroneously referred to as 10 th September, 1993). On 12 th April, 1994, the interest due under the loan was unpaid, although it had been duly paid each month before then. That default entitled Mr. Bass, pursuant to clause 2 of the Bond, to demand immediate payment of the loan and interest thereon. In fact, by a letter of 28 th April, 1994, Mr. Bass told Mr. Pickersgill that he would take no action on the loan until the next instalment of interest became due. In May, 1994, Mr. Bass changed solicitors by instructing Michael Voisin & Co. in place of Pickersgill & Le Cornu. 12. On 8 th June, 1994, Mr. Voisin served notice of default, on Mr. Bass's behalf, in accordance with the provisions of Section 8 of the Security Interests Law on the Langdons calling in the loan. On 15 th June, 1994, Mr. Bass issued a Summons for Judgment against the Langdons. On 17 th June, 1994, the Langdons applied for a *remise des biens*, which was ultimately refused. In the affidavit filed in support the value of the garage was put at £900,000. 13. At this point Mr. Pickersgill was in the position of holding the shares in Nodol to the order, firstly of Mr. Bass, and then, subject to the first charge in favour of Mr. Bass, to the order of the Midland Bank. By letter of 17 th May, 1994, Mr. Pickersgill had informed Mr. and Mrs. Bass that he could not release the original share certificate and blank transfer form to them for that very reason. He confirmed that he would continue to hold for both parties, or, if the Langdons' preferred to nominate some other person so to hold them in his place, he would seek the consent of the Bank. On 8 th June, 1994, Advocate Voisin, on behalf of Mr. Bass, asked Mr. Pickersgill to provide him with the original share certificate and transfer form. On 20 th June, 1994, Advocate Voisin, on behalf of Mr. Bass, asked the Midland Bank to consent to the release of the shares by Mr. Pickersgill to him. On 30 th June, 1984, Michael Voisin & Co. gave an undertaking to the Bank that, if the shares were transferred to him, they would not be released to any party other than the Bank save in circumstances whereby the shares might be sold in accordance with Article 8(6) of the Security Interest Law, and that any balance received on such sale after repayment of the indebtedness due by the Langdons to Mr. Bass being then paid to the Bank. On 1 st July, 1994, the Bank formally requested Mr. Pickersgill to release the shares to Michael Voisin & Co. and on 5 th July, 1994, the share certificate and the share transfer form signed by both Mr. and Mrs. Langdon were delivered to Michael Voisin & Co. The share transfer form was then dated th July, 1994, and the transferee named as Mr. Bass. 14. On 1 st July, 1994, Judgment was given in Mr. Bass's favour against the Langdons for £570,000 together with interest at 15% per annum and £7,125 by way of penalty. On 6 th July, 1994, Advocate Voisin, on behalf of

Mr. Bass, instructed Broadland Estates Limited to act on a sole agency basis in connection with the sale of the garage and suggested, on his behalf, an asking price of £825,000. 15. On 8 th July, 1994, the Langdons' declared themselves en désastre . On th July, 1994, Michael Voisin & Co. sent the Viscount a copy of the share transfer form now made out in favour of Mr. Bass and dated the 5 th July, 1994. On 13 th July, 1994, Advocate Renouf on behalf of the Viscount laid claim to the shares on grounds to which I will shortly refer, but, following intervening correspondence, on 5 th September, 1994, Advocate Renouf, on behalf of the Viscount confirmed that the Viscount was satisfied: "that Mr. Pickersgill had possession of Mr. and Mrs. Langdons' share certificate on behalf of the secured creditors pursuant to their respective security agreements". The Viscount's position 16. In his letter of 13 th July, 1994, Advocate Renouf suggested that, because the share certificates were only delivered to Michael Voisin & Co. on Mr. Bass's behalf on or about 5 th July, shortly before the Langdons' désastre application, a question arose as to whether or not the obvious purpose of the transfer was to create a preference. He added that the completion of the instrument of transfer on 5 th July was clearly also designed to give a preference to Mr. Bass such that an application would have to be made to the Royal Court pursuant to Article 17 of the Bankruptcy (Désastre) (Jersey) Law 1990 . In addition the Viscount said that he did not consider it appropriate for the garage premises to be advertised for sale, even if Mr. Bass has a valid security interest, firstly because notice of default had to be given in accordance with the law (in fact it had been) and because, in any event, "Article 6(5) of the Security Interests Law would give the Viscount power to sell the security." 17. Article 6(5) of the law does not in fact give the Viscount power to sell the security. It permits him to apply to the Court for an order vesting in him the rights of the secured party to the collateral and directing that it be sold. As the correspondence proceeded the Viscount made clear that he was considering applying to the Court for such an order. The dispute with the Viscount 18. On 14 th July, 1994, Michael Voisin & Co. wrote a long letter to Advocate Renouf explaining the commercial background. By 21 st July, 1994, Advocate Renouf had obtained the share certificate and transfer form from the company secretary of Nodol Investments Limited, to whom it had been sent by Michael Voisin & Co. for the purposes of securing the registration of Mr. Bass as the owner of the shares. Advocate Renouf's letter of that date recorded a telephone conversation with Mr. Preston of Michael Voisin & Co. on 18 th July. As to that telephone conversation Advocate Renouf said: "... I recall that you shared my view that nothing further should be done at this stage to register the shareholding in the name of your client or to advertise the garage premises for sale. This will afford the Viscount time to formulate a view upon the agreements with your client and Midland Bank and to obtain his own valuation of the garage premises. In the light of your comments in your letter of 14 th July, I will now revert to Mr. Pickersgill and request his explanation of the circumstances in which he was holding the share certificate in the name of Mr. and Mrs. Langdon." Advocate Renouf duly asked Mr. Pickersgill for an explanation of the commercial background on the same day. 19. On 22 nd July, 1994, Advocate Voisin wrote to Advocate Renouf explaining why there was no question that Mr. Pickersgill was holding the shares other than for and on behalf of, initially, Mr. Bass and subsequently both Mr. Bass and Midland Bank Plc. He expressed the view that Advocate Renouf's action in obtaining the share certificate and transfer form from Nodol was quite improper and was causing further interest charges to be incurred, and said that he would hold the Viscount

responsible for any further loss if he persisted in what he was doing. He added that he did not see that any benefit was to be obtained by the Viscount obtaining his own valuation of the garage premises "to the extent that the Viscount has no legal right or title to the shares in Nodol Investments Limited which are clearly held by my firm on Mr. Bass's behalf pursuant to the provisions of the Security Interest Agreement entered into by Mr. and Mrs. Langdon." On 7th July, 1994, Advocate Renouf maintained his former position and told Advocate Voisin that the Viscount was obliged to consider the transaction with the Langdons in the light of Article 17 of the Bankruptcy Law and said that there was no "entitlement" for Mr. Bass to have the shares transferred into his own name since Article 6(5) envisaged a sale by the Viscount of collateral as a security interest. He also indicated that the Viscount was seeking a valuation of the garage premises because if the value exceeded the total amount of the claimed secured debts the Viscount would certainly be interested in the proceeds of sale. On the same day Mr. Pickersgill provided Advocate Renouf with an account of the circumstances in which the security interest agreements were made. On 29th July, 1994, the Viscount told Advocate Voisin that he anticipated that the question of the validity of the Security Interest Agreement would be agreed once an appropriate response had been received from Mr. Pickersgill, and said that he would then proceed to consider whether it was necessary for him to apply to the Court for a vesting order, a decision which would largely be shaped by the valuation of the premises currently being sought from Messrs. William A Bull & Co. He suggested that it might be possible to proceed to market the property by agreement pending the resolution of the difficulties. 20. On 5th September, 1994, Advocate Renouf confirmed to Michael Voisin & Co: "that in the light of correspondence from Mr. B. K. Pickersgill, the Viscount is satisfied that Mr. Pickersgill had possession of Mr. and Mrs. Langdons' share certificate on behalf of the secured creditors pursuant to their respective security agreements." He also proposed, on the Viscount's behalf, that the garage premises should be marketed by William A Bull & Co. (International) Limited and an agent of Mr. Bass's choosing on a joint agency basis at an asking price of £650,000 or such other higher price initially as the agents might advise. By a letter of 7th September, 1994, Advocate Voisin wrote to Advocate Renouf noting the Viscount's acceptance of the validity of the security agreements and saying: "We take the view in those circumstances our client Mr. Bass is entitled to proceed with the sale of the shares pursuant to the terms of his security interest agreement but, nevertheless, and without prejudice to what we have just stated, we are prepared to proceed upon the basis proposed by you and this has been confirmed by our client. In particular we agree that the transfer of shares be effected by the Viscount as administrator of the *désastre* of Mr. And Mrs. Langdon." On the same day Broadland Estates Limited were instructed to act as joint agents with William A Bull & Co. The marketing of the garage 21. Despite extensive marketing the only bid that was received was in the sum of £480,000, that bid being received on 17th October, 1994. On 28th October, 1994, Advocate Voisin wrote to Broadland Estates Limited confirming that both Mr. Bass and Mr. C. Renault of the Viscount's Department were of the opinion that the anticipated offer was not sufficiently high and wished that the garage premises should still continue to be marketed with a view to reviewing the matter in early 1995 should Broadland Estates be unable to obtain a satisfactory offer in the meantime. A copy of the letter was sent to William A Bull & Co. Limited. 22. On 25th January, 1995, Advocate Voisin informed the Viscount that his client's claim

was well in excess of even the high valuation of William A Bull & Co. and wrote to propose that the Viscount should disclaim any entitlement to the shares arising out of the *désastre* against Mr. Bass, upon being registered as the owner of such shares, then withdrawing any claims in the *désastre* proceedings. On 8<sup>th</sup> February, 1995, Advocate Renouf on behalf of the Viscount responded to that request saying that the Viscount took the view that if he were immediately to accede to it he would not have tested the wider UK market and would have given up an asset which, by agreement with Mr. Bass, had been offered for sale at a price which was still in excess of Mr. Bass's claim. He accepted, however, that the position could not continue indefinitely and proposed that the property should continue to be advertised in Jersey and in the UK until the end of the month upon the basis that if no firm response had been received by then, Mr. Bass should be allowed to proceed with the exercise of his power of sale over the shares. On 14<sup>th</sup> March, 1995, Advocate Renouf on behalf of the Viscount said that the Viscount was prepared to accept that Mr. Bass could pursue his rights under the Security Interest Agreement if he released any further claim Mr. Bass might have in the *désastre* proceedings. He enclosed with that letter the share certificate relating to the shareholding together with the stock transfer form, thus enabling the shares to be registered in the name of Mr Bass. The Letting 23. By an agreement dated 21<sup>st</sup> March, 1995, Mr. Bass granted to Daets Motors Limited an exclusive licence to the garage premises to hold for the term of 9 consecutive years commencing on the 24<sup>th</sup> March, 1995, at an annual licence fee of £60,000 payable in respect of the period beginning on 1<sup>st</sup> May, 1995. That licence fee was subject to an increase in the years 1998 and 2001 and now stands at £66,738. The pleadings 24. In his pleadings in the action Mr. Bass claimed damages in the sum of approximately £700,000 on the basis that he had suffered a capital loss of the value of the garage premises. This claim did not give credit for the value of the garage, which was valued in 1999 at the sum of £675,000. But, against payment of the full sum, Mr. Bass offered delivery of the shares, subject to the interest of the Midland Bank, or, in the alternative he offered credit for the net value of the shares at the date of trial. This claim, which was not, in my view, sustainable was maintained until after the hearing had begun. It was replaced, on the second day of the trial, by a claim for a loss of income. The Judgment below 25. The Royal Court found that Mr. Pickersgill neither told Mr. Bass about the Midland Bank loan nor obtained his consent to the giving of a second charge and was, accordingly, in breach of his duty, as a solicitor, of reasonable competence. In my judgement those findings were sound in fact and law. The real question in this appeal is whether the damages award can stand. 26. The Royal Court found that Mr. Bass was entitled to recover £74,746.13, which was, for the most part, a sum representing rental in respect of the premises from 26<sup>th</sup> April, 1994, until 1<sup>st</sup> May, 1995. Damages 27. If Pickersgill & Le Cornu were negligent, as in my judgment the Royal Court rightly found that they were, they are liable for such loss, if any, as Mr. Bass has suffered because of their breach, provided that such loss is of a kind that the parties may reasonably be supposed to have had in contemplation, when the contract was made, as a not unlikely consequence of the breach. 28. I accept the submission of Advocate Hoy that, on a proper analysis, Mr. Pickersgill's breach consisted of his doing two things wrong. Firstly, he allowed the second charge to be granted without Mr. Bass's consent; and, secondly, he did not tell Mr. Bass that the second charge had been sought or had been granted. So the next question must be whether any and, if so, what loss was caused by one or other or both of

those breaches. The judgment of the Royal Court 29. The reasoning of the Royal Court on this question is contained in the penultimate paragraph of their judgment where the Court says this: "If Mr. Bass, in our opinion, had been alerted by Mr. Pickersgill to the financial position of the borrowers at a much earlier date in (sic) February 1994, when Mr. Bass discovered the position it does not follow that there would have been a *désastre* so soon after his taking possession of the shares. We find that Mr. Bass acted with reasonable speed and that the insolvency of the Langdons - to the detriment of Mr. Bass - flowed naturally, we think, from the failure of Mr. Pickersgill to carry out his instructions properly." Both parties find fault with this passage. The Appellants say that it shows the fallacy of the Court's reasoning. The Respondent says that, taken literally, it is obviously wrong, and the Court must have intended to say, or at any rate to mean, something else. 30. The passage in its own terms is unclear or wrong in three respects. Firstly, it appears to assume that Mr. Pickersgill was liable to alert Mr. Bass as to the financial position of the Langdons. In my judgment he was under no such general duty. But he was under a duty to tell Mr. Bass about the second charge, which would have revealed - at least to some extent - the Langdons' financial difficulties. Secondly, whilst the Court states what would not necessarily follow from an earlier discovery of the Langdons' financial position, it does not state what would have followed such a discovery. In particular, it is unclear whether the Royal Court meant to find that, if Mr. Pickersgill had alerted Mr. Bass to the financial position of the Langdons at a much earlier date than February, 1994, the *désastre* would not have followed so soon after Mr. Bass took possession of the shares. There is a further difficulty in this respect. Mr Bass did not take possession of the shares shortly before the *désastre*. The shares were at all relevant times held to the order of Mr. Bass - initially to his order alone and from mid-1993 to the order of both him and the Midland Bank. What happened just before the *désastre* was that the shares were on 5 th July, 1994, delivered to Advocate Voisin, as Mr. Bass's new adviser, following the consent of the Midland Bank to that occurring. Thirdly, Mr. Pickersgill's failure to carry out his instructions did not lead to the insolvency of the Langdons. If, as the passage cited says, Mr. Pickersgill's breach of duty had led to the Langdons' insolvency, Mr. Bass could recover the losses that he suffered as a result of that insolvency: but that is a claim which has - sensibly - never been advanced. 31. Advocate Hoy, on behalf of Mr. Bass, submits that it is likely that the Court meant to say something along the following lines: "The detriment which Mr. Bass suffered when the *désastre* took place (i.e. that the realization of his security was complicated because the Viscount was concerned to investigate the possibility of a preference) flowed naturally from the failure of Mr. Pickersgill to carry out his instructions properly." For my part I do not think we can tell whether the Royal Court said what it did not mean and, if so, what it was that it meant to say. In these circumstances, since we cannot make muddy water clear, we must seek to discern for ourselves the damages, if any, to which Mr. Bass may be entitled, as a result of the relevant breach, having regard to the findings of fact made by the Royal Court, and any other findings that the evidence demands. 32. Since the relevant breach consists of allowing a second charge to be created without informing Mr. Bass of that fact, it is, first, necessary to determine what would have happened if Mr. Bass had been told of the proposal to create the second charge. 33. If Mr Bass had learnt in June, 1993, that the Langdons were seeking to give a second charge on their shares in favour of the Midland Bank it is possible that he would have given them notice to repay the

loan on the earliest possible date i.e. 12 th November, 1993. His evidence was that he would have done. But any such notice could not have expired until May, 1994. It would not, therefore, itself, have accelerated the time when the Langdons' were in default, which first occurred in April, 1994. Mr. Bass would, also, have objected to the second charge, which, in that event, would, no doubt, not have been given. Such a conclusion is implicit in the judgment of the Royal Court and amply justified by the evidence. 34. It is necessary, therefore, to examine what loss Mr. Bass can be said to have suffered which is attributable to the existence of that second charge. The Royal Court awarded him the rental value of the premises from 26 th April, 1994, until 1 st May, 1995. The former date is 14 days after the first default; the latter date is the date from which a licence fee for the premises was, in the event, payable. The award, therefore, necessarily assumes that, but for the second charge, Mr. Bass both could and would have let the garage premises within 14 days of the first default. There is, in my judgment, no sound basis for such a finding. 35. Advocate Hoy, in a very helpful submission on behalf of Mr Bass, submitted that the security agreement drafted by Mr. Pickersgill was designed to enable Mr. Bass swiftly to register himself as the owner of the shares in Nodol, if the Langdons' defaulted, so that, once that had been done, he would be able to exercise all the rights of ownership attaching to the shares - including the right to sell the shares or to let the property. In the absence of the second charge - so he submitted - there would have been no legal impediment to registration and Mr. Bass both could and would have let the garage before the *désastre*. If that had happened he would have received the rental for the premises and the Viscount would not then have been able to deprive him of the benefit of it. 36. I cannot accept that submission for a number of reasons. Firstly, the Royal Court made no finding to that effect. Secondly, Mr. Bass never gave evidence that, had there been no second charge he would, after an immediate registration of the shares, have let the garage as soon as he could. What he did say was that, if he had been told about the proposed loan by the Midland Bank with a second charge in support, he would have probed the position with the Langdons, might have sought to participate in the Langdons' business, and might have asked the Bank to take over his loan. But his claim is not based on his inability to do any of those things. Thirdly, the evidence shows that Mr. Bass was primarily interested in a sale of the garage with vacant possession and not a letting. Thus, on 6 th July, 1994, after the share certificate had been obtained, and before the *désastre*, Advocate Voisin, on Mr Bass's behalf, instructed Broadland Estates Ltd. to sell the property. In the succeeding correspondence there is no reference to letting, nor complaint that Mr. Bass is being precluded from letting, until 1995. Further the agreement made in September, 1994, with the Viscount was for a joint marketing effort to sell the shares representing the garage. Fourthly, no evidence was given that any identified or specific person was prepared to rent the garage at an acceptable rent at any particular stage. Such evidence of the availability of a tenant was either in the most general of terms of reports from the Estate Agents ("Lots of people asked if they could rent it") or consisted of the undoubted fact that the eventual letting in 1995 was agreed very shortly after the share certificate and transfer form were delivered to Advocate Voisin. Nor was any expert evidence tendered as to the ease or otherwise with which the garage might have been let in 1994 at an acceptable price. This paucity of evidence was consistent with the pleadings in which the identity of any potential tenant was twice probed by a request for particulars. This revealed nothing specific save the contention, not supported in evidence at the

trial, that the eventual lessee in March, 1995, would have rented the property in May, 1994. Fifthly, the Langdons' did not leave the premises until 1 st July, 1994. The evidence reveals no indication of any attempt to remove them earlier. 37. I do not forget that the question whether Mr. Bass would, in the absence of a second charge, have let the property is a hypothetical one. What he actually did or did not do may not therefore be an entirely safe guide to what he would have done in different circumstances. That said, the impediment to the exercise of the rights of ownership constituted by Mr. Bass's inability swiftly to register himself as the owner of the shares, because of the second charge, applied equally to the right to sell and the right to let. If Mr. Bass was really intending to let as soon as he could in 1994, I would expect the correspondence in the Spring and Summer of 1994 - when he was attempting to remove the impediments in the way of his disposing of the property - to reflect that intention. In fact the correspondence reveals an initial preparedness of Mr. Bass to wait and see whether the Langdons' would default in May, followed by attempts to get himself in a position where he was able to sell the property. 38. Thus on 28 th April, 1994, Mr. Bass agreed to take no action until the next instalment of principal was due. After the Langdons' failure to pay that instalment on 12 th May, Mr. Bass called in the loan on 8 th June. On 20 th June, 1994, Michael Voisin & Co. sought the Midland Bank's consent to the release by Mr. Pickersgill of the share certificate and transfer form to themselves. On 30 th June, 1994, Advocate Voisin gave the undertaking to which I have already referred. On 1 st July, 1994, the Bank agreed to the release of the share certificate and transfer form and on 5 th July, 1994, they were delivered to Michael Voisin and Co. 39. I am prepared to accept that, if there had been no second charge, at least some of the 16 days' delay between 20 th June, 1994, and 5 th July, 1994, in ensuring that the shares were in the hands of Mr. Bass's advocate, without being held to the order of the Bank, would not have occurred. But it does not follow that, but for that delay, up to 16 more days of rental income would have been obtained - not least because at this stage Mr. Bass was attempting to sell the shares and, thus, the garage. Even if the shares were in the hands of Michael Voisin & Co. on the 20 th June, 1994, and not held to the order of the Midland Bank, it seems to me unlikely - and certainly not established - that the garage could, still less would, have been let any earlier than it was. On the contrary it seems to me that Mr. Bass would have continued to try to procure, with the Viscount, a sale until at least January, 1995. 40. The Langdons were declared en désastre on 8 th July, 1994. From then onwards Mr. Bass had to deal with the points raised by the Viscount. 41. Between the 13 th July, 1994, and the 5 th September, 1994, the correspondence to which I have already referred took place between Advocate Renouf and Michael Voisin & Co. In his letter of 13 th July, 1994, Advocate Renouf, on behalf of the Viscount, suggested that the delivery of possession of the share certificate to Advocate Voisin (on 5 th July, 1994) and the dating of the instrument of transfer on that date - constituted a preference, which could be assailed under Article 17 of the Bankruptcy law. 42. In respect of this period three points are of significance. Firstly, what caused the Viscount to assert that a preference had been created was not the existence of the second charge (for which Mr. Pickersgill was responsible) but his or his office's erroneous belief that a security interest had only been created in July, 1994, when, as he thought, possession of the shares had been obtained for the first time. In that he was mistaken since the security was created in 1991 and 1992. Insofar as he, or Advocate Renouf, continued to maintain, or not to abandon, that assertion after the true

position had been explained to him, the cause of Mr. Bass' inability to progress matters was the intransigence or delay of the Viscount. Pickersgill & Le Cornu are not responsible for any delay of which the second charge was not the cause. 43. Secondly, whilst it is probable that, if the second charge had not existed, the delivery of possession of the certificate and transfer form to Michael Voisin & Co. and the dating of the share transfer would have taken place earlier than 5 th July, 1974, it is, in my judgment, wholly unproven that the Viscount would, then, have taken no point upon the validity of the security. The point that he took was not dependent on there being a mere two or three day gap between the taking of possession of the certificate and transfer form by Advocate Voisin and the dating of the latter, on the one hand, and the Langdons' declaring themselves en désastre on the other. It is noticeable that the Viscount did not refer to, or appear to rely upon, Article 6(1) of the Security Interests Law which provides that: "Upon the debtor becoming bankrupt a security interest created within the period of 10 days immediately preceding his becoming bankrupt shall be void." Instead he relied upon Article 17 of the Bankruptcy Law, which deals with a preference within, so far as presently relevant, the year before the désastre . An argument about preference arising from the date of the instrument or the date when the shares came into the possession of Advocate Voisin would have been available if the events on which the argument was based occurred within a year prior to the désastre . The argument was a bad one since the security was created well over a year before the désastre but there is no reason to suppose that the Viscount would not have taken the same bad point if the transfer of the certificate and transfer form had come a little earlier in the year. 44. Thirdly, the Viscount's concern was not limited to the question of the validity of the security agreement. His expressed view was that Article 6(5) of the Securities Law gave him the power to sell the securities and his later correspondence proceeded upon the basis that, depending upon the valuation of the premises, he might seek an order vesting the collateral in him under Article 6(5) of the Securities Law. That point would have arisen even if no second charge had ever been created, and it delayed the disposal of the property whilst it remained unresolved. Indeed, if the second charge had never existed, the likelihood of the Viscount wishing to take over the sale of the property would have increased, since the amount left over for the unsecured creditors would rise as the value of the debts secured upon the shares fell and the interest of the Viscount in ensuring that the price was right would correspondingly increase. 45. For these reasons, the delay in progressing matters between 13 th July and 5 th September, 1994, is not, in my judgment, fairly attributable to the existence of the second charge. 46. The upshot of the correspondence between Advocate Renouf on behalf of the Viscount, the Viscount, himself, and Advocate Voisin on behalf of Mr. Bass between 13 th July, 1994, and 5 th September, 1994, was that the Viscount expressed himself satisfied that Mr. Pickersgill had possession of the Langdons' share certificates on behalf of the secured creditors pursuant to their respective security agreements. That confirmation meant that there was no longer any question as to the validity of the security agreements. From then onwards the fact that there was not only a first but also a second charge could not have made and did not make any contribution whatever to the delay in disposing of the garage premises. Thereafter the Viscount's proposals for a joint marketing of the property contained in his letter of 13 th July, 1994, were accepted and put into effect until, in March, 1995, the Viscount agreed, at the behest of Advocate Voisin, that the marketing effort should stop and

that the shares should be returned to Advocate Voisin on behalf of Mr. Bass. 47. In my judgment the delay in disposing of the property after 5 th September, 1994, cannot in any way be regarded as the responsibility of Mr. Pickersgill. By this stage the Midland Bank no longer required the shares to be held to its order and the Viscount no longer disputed Mr. Bass's title as chargee. The existence of the second charge did not in any way prevent Mr. Bass from exercising his power of sale, nor did it compel him to enter into the agreement jointly to market the garage. What did prevent him from exercising his power of sale was the stance taken by the Viscount, which by now had nothing to do with the existence of either charge. Mr. Bass's decision to enter into a joint marketing arrangement with the Viscount may well have been a sensible method of proceeding in circumstances where the Viscount could apply to the Court to have the security interest vested in him. It cannot, however, be characterised as something that was required in order for Mr. Bass to extract himself from the consequences of Mr. Pickersgill's breach of contract. 48. In short I am not persuaded that the existence of the second charge caused Mr. Bass to lose any rental income from the property, which, absent that charge, he would have earned. For these reasons, the decision of the Royal Court to award £74,746.13 by way of special damages cannot stand. 49. Even if that award was in the main part sound, there are three elements of it that are unsustainable. The first is the amount of £1,885.26 described as a "payment towards maintenance costs of the company." That sum is in fact the amount that had to be paid in order to pay off the lien upon the shares in Nodol before Mr. Bass could be registered as their owner. If Mr. Bass was to be registered as owner, that sum would have been payable even if there was no second charge. The second is an amount of £4,5000, described as "Estate Agents' Fees re Lease of garage." Such fees would have been incurred whether the garage was let in April, 1994, or March, 1995. The third is an item of £7,538.95 for Legal Fees. The only evidence that has been drawn to our attention that relates to those fees is a four or five word reference in Mr. Bass's evidence at page 28 of the transcript. There, in the portion of his evidence dealing with the loss that he had incurred, he refers to "the costs I've incurred." That evidence is, in my view, wholly inadequate to support a claim for loss attributable to the existence of the second charge, not least because the work done is wholly unparticularised. 50. That conclusion is enough to dispose of the special damages award. A number of other submissions and points have, however, been made to this Court and it is appropriate that I should say something about some of them. Advocate O'Connell, to the quality of whose submissions I should like to pay tribute, submitted that the loss claimed was too remote a consequence of Mr. Pickersgill's breach even if the effect of such a breach was to prevent Mr. Bass from earning rental, which he could and would otherwise have obtained. He said that it was extremely rare, in circumstances comparable to the present, for a chargee to attempt to rent the property, and that a solicitor in the position of his clients could not reasonably have contemplated at the time when the retainer was agreed that Mr. Bass would want to turn himself into a Landlord. 51. I cannot accept this submission. In my judgment a solicitor, in the position of Mr. Pickersgill, who drafts a security agreement and agrees to hold the share certificate and transfer form to his client's order so as to create a valid security, ought reasonably to contemplate that his client may wish to avail himself of any of the rights and remedies that the security thus constituted gives him; and that his client may well suffer loss if, because of his solicitor's fault, he is prevented from exercising those rights or remedies as promptly as he

otherwise could. Even if, which I doubt, such loss is not to be regarded, for these purposes, as arising in the natural course of things, it is loss, which, by reason of facts known to the solicitor, ought to have been in his contemplation. The draftsman of security arrangements cannot be heard to say that loss suffered by his client's inability promptly to exercise the remedies for which his draftsmanship provided is too remote for him to be responsible for it if such inability is caused by his breach. 52. Advocate O'Connell, also, submitted that no damages could start until 14 days after the notice of default given on 8 th June, 1994, because it was only at that time that the power of sale arose. I do not think this is correct. There is no reason, to my mind, why Mr. Bass could not, in the absence of a second charge, have had himself registered as the owner of the shares, and, then if he wished to and could do so, let out the garage. To do this, he did not need to exercise a power of sale, to which the giving of a notice of default is, under the Securities Law, a necessary precursor. Nor am I persuaded that the Securities Law does not contemplate the holder of a security interest taking the revenue stream from his collateral, whether it be in the form of interest, dividend, or licence fee. Since collateral under the Law can be in the form of money in a bank account or securities it would be strange if the revenue from such collateral were not part of the security. 53. The Royal Court, also, made an award of general damages in the sum of £5,000. The judgment of the Court does not indicate the matters in respect of which that award was made. But Advocate Hoy, with the advantage of his recollection of the proceedings below, told us that it was probably a sum to represent the fact that Mr. Bass had lost the opportunity to probe into the position of the Langdons in 1993, and the possibility that, had he been told about the proposal to create a second charge, he might have invested in the business, or arranged to be taken out by the Midland Bank. Although Advocate Hoy did not formally abandon any claim to such a sum he recognized that the award was difficult for him to support and did not seek to do so by any sustained argument. In my judgment he was entirely correct in taking this stance. If Mr. Bass was to be awarded any sum under this head it was incumbent upon him to plead and prove - as he did not - exactly what financial loss he had suffered. That loss might, in appropriate circumstances, be the loss of a chance, but an award of general damages in what seems an entirely arbitrary sum is not supportable. It appears that an award of £5,000 on a similarly general basis was made by the same Commissioner as heard the present case in *Hotel Savoy (1993) Limited -v- Destination Specialists Ltd* (4 th December, 1997) Jersey Unreported in which Advocate Hoy also appeared. In my judgement that case was, to that extent, wrongly decided and should no longer be followed. 54. Accordingly, for my part, I would allow the appeal and set aside the judgment in Mr Bass's favour. THE PRESIDENT: For the reasons given in Mr. Clarke's judgment, I agree. THE BAILIFF OF GUERNSEY: I, also, agree. *Authorities Security Interests (Jersey) Law, 1983, as amended. Bass -v- Pickersgill & Le Cornu* (21 st May, 1999) Jersey Unreported CofA. *Dixon -v- Jefferson Seal Limited* (13 th January, 1998) Jersey Unreported CofA. *Viberts -v- Golder*

(1995) JLR 223 . *Stanton Limited -v- Mourant du Feu and Jeune*

(1994) JLR 82 . *Golder -v- Viberts*

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- [1996] 4 All ER 698 . South Australian Asset Management Corp -v- York Montague Ltd
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- (1919) 2 KB 581. The Soholt
- (1983) 1 Lloyd's LR 605. McGregor on Damages (16 th Ed'n) pp.203-206. Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: [https://www.bailii.org/je/cases/UR/2000/2000\\_135.html](https://www.bailii.org/je/cases/UR/2000/2000_135.html)

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