



## Introduction

1. Proceedings were commenced by the Plaintiff, Graham Hindle, against the Defendant, Ian Kitching, when application was made for leave to serve the Defendant out of the jurisdiction. That application was granted on 6 May 2016. As a result, the Cause was first tabled on 10 June 2016. Although the Defendant originally indicated he might contest the order granting leave to serve out of the jurisdiction, by 24 June 2016 he was consenting to the action being placed on the Rôle des Causes à Plaider. Les Defenses were duly tabled on 21 July 2016. They include Exceptions de Forme, to which replies were given on 25 July 2016.
2. This action concerns a Jaguar XK 150 motor car with registration mark 68 EAL. The Plaintiff contends that this is his motor car and that, although he delivered it to Sidonio Freitas in Guernsey as long ago as 2008 so that repairs could be undertaken to the vehicle, he has never parted with ownership of it. Because the Defendant now has this car, the Plaintiff claims that it has been converted by the Defendant to his own use. The Plaintiff's claim is for the return of the car or damages for conversion. The Defendant denies that the Jaguar has been converted. He purchased the car from a Craig Goldie, who has told him that he purchased the car from a Steven Day.
3. By an Application dated 26 August 2016, the Plaintiff seeks summary judgment on the issue of his ownership of the Jaguar. Paragraph 1 of the Application, which is the only issue with which I am concerned, seeks an order:

*“That the Court give summary judgment on the Plaintiffs claim, to declare him the owner of a Jaguar motor car, registration number ‘68 EAL’ on the ground that the Defendant has no real prospect of defending the claim, there being no other compelling reason why this claim should be disposed of at trial.”*

4. This is an unusual step to take because, despite the references in the Application to “*the claim*”, it will not dispose of the entirety of the proceedings, but it is, in my view, a permissible step for the Plaintiff to take. This is because rule 19 of the Royal Court Civil Rules, 2007 provides:

*“(1) The Court may, at any time after inscription of the action on the Rôle des Causes à Plaider, on the application of a party to the action, give summary judgment against any other party on the whole of the claim or on a particular issue.*

*(2) The grounds of the application for summary judgment shall be that-*

*(a) the plaintiff has no real prospect of succeeding on the claim or issue, or*

*(b) the defendant has no real prospect of successfully defending the claim or issue,*

*and there is no other compelling reason why the claim or issue should be disposed of at a trial.” (emphasis added)*

5. The issue that the Plaintiff says can be resolved by this Application is his ownership of the Jaguar. It is a constituent part of his Cause that he owns the Jaguar and he needs to prove

ownership before he can properly argue that the Defendant has converted the Plaintiff's car to his own use, following which what relief to grant becomes an issue. In effect, the Plaintiff is carving out the discrete issue of his ownership and submitting that the Defendant has no real prospect of successfully defending that discrete issue and further that there is no compelling reason for that issue to be left to the trial, which can then concentrate on the question of conversion and remedy. This is not a case where the application for summary judgment potentially concludes matters between the parties because the Plaintiff recognises that there will still be a trial, but he argues that its ambit can be reduced through the making and granting of this Application.

6. Advocate Mark Ferbrache acts for the Plaintiff and Advocate Alison Ozanne opposes the Application on behalf of the Defendant on a number of bases to which I will turn in due course. The hearing had to be adjourned part-heard because I was no longer able to sit into the afternoon on 20 December 2016 and so I apologise to everyone for any inconvenience caused.

## Evidence

7. Robin Cowling swore a Second Affidavit in these proceedings on 26 August 2016. (His First Affidavit was in support of the application for leave to serve the Summons on the Defendant out of the jurisdiction.) He exhibits a copy of a receipted invoice dated 3 June 2003 of Baron's Auctioneers in Southampton showing that the Plaintiff had paid in full the amount owing in respect of the purchase price of £17,889.10 for the Jaguar, which amount includes seller's premium, the cost of an HPI check and value added tax. A Form V5C issued by the Driver and Vehicle Licensing Agency in Swansea, Wales ("the DVLA") records that there were 5 previous registered keepers, the last of whom was a Gary Willis, who apparently had acquired the vehicle on 21 June 2002. The address given for the Plaintiff is a Scottish one. I understand that the DVLA will not register a vehicle to a person using an address outside of Great Britain.
8. Mr Cowling explains what subsequently happened to the vehicle as far as the Plaintiff is concerned. It must have been brought to Guernsey at some time, although when is not clarified by him. The Plaintiff agreed with Mr Freitas, who operated a business known as "Autoclean", that the car would be left with him in the summer of 2008 for repairs to be carried out. The Plaintiff checked with Mr Freitas from time to time in relation to progress of the repairs and was assured that the vehicle was being stored and work was still being carried out on it. The car was not returned by Mr Freitas to the Plaintiff.
9. By a letter dated 26 April 2011, the Plaintiff was contacted by the DVLA and informed that someone had applied to be recorded as the registered keeper of the Jaguar. An enquiry was being made as to whether the Plaintiff still had the vehicle or if it had been stolen. The letter explained that if no contact was made within 14 days, the DVLA had to issue a V5C registration certificate to the person who had applied declaring that the vehicle was now kept by them.
10. The Plaintiff wrote to the DVLA on 3 May 2011. He informed the DVLA that the Jaguar had not been sold or disposed of by him and that he was still "*the registered owner*". He referred to the vehicle having been brought to Guernsey a year earlier to have some relatively minor repairs to it carried out by Mr Freitas of Autoclean. He stated that it appeared someone was trying to steal his car and that he had been in touch with the Guernsey Police, who had advised writing to the DVLA with the facts, which was what he was doing. He asked that no further steps be taken to issue a new registration certificate, confirming that he retained the original V5C.

11. The Plaintiff wrote again to the DVLA on 8 May 2011. He explained that he had been in touch with Mr Freitas and understood the latter was in financial difficulties and so the Plaintiff suspected Mr Freitas was illegally seeking to obtain title to his car with the aim of selling it. He added that he had been in touch with the Police and a lawyer. He indicated that he was continuing to attempt to recover his car and requested the name and address of the person who had made the application.
12. Mr Cowling says that the Plaintiff notified the Guernsey Police on 11 May 2012, although that appears to be typographic error, because that initial notification appears to have been a year earlier. A Police General Report bears the reference G-110511-015-169 and deals with the Plaintiff's attendance at the Police station on 25 September 2012. I understand that the first six digits of such a reference correspond to a date when the number was first allocated. That report explains that the Plaintiff had attended the Police station in 2012 to complain about Mr Freitas because another business of his was closed down and it had been a long time without anything being sorted out about the car. The report further indicates that a PNC vehicle check had been undertaken and showed the Jaguar had been registered to Mr Goldie on 30 January 2012. (Although Mr Cowling says that a warrant has been issued for the arrest of Mr Freitas, there is no documentary evidence that that has happened and no confirmation from anyone that that is the case. Mr Cowling does not indicate the source of this information and so I have chosen to ignore that aspect of his evidence.) Other documents exhibited by Mr Cowling taken from the disclosure pack received from the Police show various stages of correspondence between the Plaintiff and the DVLA.
13. The Plaintiff wrote to the DVLA on 19 May 2011 saying Mr Freitas had told him the car would be returned to him later that week and so requested the DVLA to do nothing further. The DVLA wrote to the Plaintiff on 24 May 2011 complaining that he had not notified them of his disposal of the vehicle and offering an out of court settlement of £55 in respect of the offence allegedly committed. Alternatively, if he was not responsible for the offence, he was required to give certain information to the DVLA. A form was provided for his response. The Plaintiff wrote to the DVLA on 30 May 2011, referring to his earlier letters. He repeated that he considered what had happened was theft and that he remained the owner and keeper of the Jaguar. He again requested information as to the person who had applied to be recorded as the registered keeper. The DVLA replied by letter dated 8 June 2011 informing the Plaintiff that he must notify the police of the theft, explaining that he would be given a crime reference number and asking him to supply the details to the DVLA so that the matter could be investigated further. A chasing letter dated 22 June 2011 was sent to him referring to the offer of an out of court settlement in respect of his failure to notify them of the change of keeper. It seems that one part of the DVLA does not know what another part had already sent. The Plaintiff made this complaint in his reply dated 29 June 2011. The DVLA acknowledged receipt of this letter on 7 July 2011 and promised a reply when their enquiries had been concluded. By letter dated 15 July 2011, the DVLA wrote as follows to the Plaintiff:

*“Thank you for your letter concerning the enforcement action taken against you for motor vehicle 68EAL.*

*The Agency is charged specifically with maintaining a register of vehicles and their keepers. We define the keeper as the person who has day to day use, possession or control of a vehicle and hold them responsible for licensing it. The keeper is also the person to whom the police and other enforcement authorities would direct any enquiries about the use of that vehicle on the roads. The keeper is not necessarily either the legal owner or indeed the normal driver of a vehicle, as the legal ownership of a vehicle is a completely different concept.*

*It is not part of our remit to record details of legal ownership and consequently, the Vehicle Registration Certificate (V5C) is not a document of legal title. As the Agency's concern is with keepers and not their owners, we cannot become involved in disputes between parties over issues of ownership. Ultimately, if they cannot be settled amicably, such disputes become the prerogative of the courts.*

*I have noted that there is currently a dispute over the ownership of this vehicle and therefore I have decided to withdraw the out of court settlement offered. The enforcement case is now closed. I understand that DVLA Vehicle Customer Services have been corresponding with you regarding this matter.”*

14. The final letter from the DVLA, dated 4 October 2012, is said to be a reply to an e-mail sent to them and is dated 4 October 2012. The DVLA drew attention to its earlier letter of 8 June 2011 and noted that the police had not set a marker showing the vehicle as having been stolen and reiterating that the DVLA does not get involved in ownership disputes. It concluded: “As you have confirmed that the vehicle is no longer in your possession, a V5C has been issued to the new keeper.” The letter did not say when that happened, but it transpires it was quite some time earlier.
15. The other documents exhibited by Mr Cowling include a copy of a motor insurance policy issued to the Plaintiff in respect of his Guernsey address, valid for one year from 30 June 2012, and a Production Record Trace certificate that had apparently been prepared for Gary Wills and issued on 24 June 2002. Mr Cowling further explains that the Plaintiff became aware on or about 22 March 2016 that the Jaguar was in the possession of the Defendant. Thereafter correspondence has passed between the parties’ lawyers.
16. In response, and as a means of showing cause pursuant to rule 23 of the 2007 Rules, the Defendant swore an Affidavit on 26 September 2016. Most of the content of this Affidavit is repetition of what can be extracted from the version of events to be gleaned from the content of Mr Cowling’s Affidavit with occasional comments expressing surprise at the length of time between certain stages and at the absence of any explanations from the Plaintiff about certain matters. There is very little by way of information as to what has actually happened. The Defendant does confirm that he is the current registered keeper of the Jaguar and refers to the improvement works that he has undertaken. Like Mr Cowling, the Defendant does exhibit certain documents that fill in some of the gaps.
17. There is a chronology of events that attempts to piece together some of these stages, with documents relating thereto, although the precise source of those documents has not been explained, but most of them bear the same reference number and they appear to have been provided on 28 April 2016. They are pages from records that the DVLA has. The signatures that would normally be shown on them have been blocked out. The first in time is a page which appears to me to be an application for registration of the Jaguar by a Gary Evans who states that he acquired the vehicle on 17 January 1990 but that he did not have a registration document for the vehicle because it was not given to him by the previous keeper of the vehicle. Another document is a similar page appearing to show that Gary Wills applied to be registered as the keeper on 28 June 2002, having acquired the vehicle one week previously, and he declared that the registration document could not be produced “for other reasons”. He deleted the options of declaring that it had not been given to him by the previous keeper or that it had been lost or stolen. There is a further page showing that Mr Wills appears to have become Mr Willis at a different address, but still in Hertford, by the time the Plaintiff acquired the vehicle on 3 June 2003, which then resulted in the issue to him of the V5C registration certificate to which I have already referred.

18. The Defendant also exhibits some of the documents thereafter. The first is the front page of a V5C certificate in the name of Steven Day, which refers to the Plaintiff as the previous registered keeper. There is another front page of a V5C certificate with the name of Mr Goldie on it. This refers to Mr Day having acquired the vehicle on 14 April 2011. The number of registered keepers since June 1990 increases by one each time, from which I can infer that these are the only keepers recorded by the DVLA after the Plaintiff. The next page is what appears to be a document in Mr Day's name showing the acquisition by Mr Goldie on 30 January 2012. There is a similar document, but this time completed by the Defendant when acquiring the vehicle from Mr Goldie on 1 November 2013. The V5C registration certificate in the Defendant's name corresponds to him acquiring the vehicle from Mr Goldie as the previous registered keeper on that date.
19. The Defendant also exhibits a letter dated 7 June 2016 from The Carrosserie Company (UK) Ltd in which the state of the vehicle when it was received by that company in February 2012 is set out. It appears that Mr Goldie arranged for a lot of work to be undertaken. Further, from the invoices also exhibited, it appears that the Defendant has continued to use that company for work carried out on the Jaguar and that he has been sourcing parts for it from elsewhere.
20. The Plaintiff then swore an Affidavit in reply on 7 October 2016. He provides some further explanation about what he did with the Jaguar after buying it at auction in June 2003. Sometimes the car was in the United Kingdom and sometimes it was brought to Guernsey. He used the Burntisland address, at which a relative lives, because it enabled him to retain the special number plate. He would, of course, have lost that number plate had he re-registered the Jaguar as a Guernsey-based vehicle. He offers a little more detail about the arrangement with Mr Freitas. Mr Freitas moved premises, possibly five times, without always notifying the Plaintiff and offered plausible explanations as to why the Plaintiff had not been told each time the Plaintiff made an enquiry of him. Some of the conversations the Plaintiff had with Mr Freitas took place at Café Noir, and the Plaintiff understood him to be the patron of that business. But when the Plaintiff went to those premises on 25 September 2012 to speak to Mr Freitas, the Plaintiff found it had closed down and his enquiries led him to believe that Mr Freitas had fled the Island. That was why he returned to the Police station. He was again advised to contact the DVLA and exhibits an e-mail dated 25 September 2012, which appears to be the e-mail that elicited the response from the DVLA to which I have already referred. The Plaintiff has also exhibited some e-mails from the Police in which it is confirmed that he had attended in May 2011, but that some other information requested by the Plaintiff could not be supplied by the Police because of data protection issues.
21. The Plaintiff had also undertaken some research into Steven Day, not having heard of him until he had seen reference to him in the Defendant's Defences, and he exhibited some webpages he had found. Finally, he explained that he informed his insurers about the theft of his car. He exhibited an e-mail to him dated 7 October 2013 in which it is clear that Aviva was prepared to settle his claim for loss of the car. However, as he explains, because he really wants the car returned, that claim has not been settled because, if Aviva recovered the car, even though there is an indication they would be prepared to sell it on to him again, he does not know what that would cost him.
22. That was the state of the evidence when the hearing began. Because of the adjournment, the Plaintiff swore a Second Affidavit on 22 December 2016 and Ewan Mackay swore an Affidavit on behalf of the Defendant on 5 January 2017. When the hearing resumed on 10 January 2017, I gave permission for both parties to rely on this late evidence because I considered that it was just to do so. In particular, Mr Mackay's Affidavit exhibits an Affidavit of Mr Goldie dated 20 June 2016, which I consider would potentially be helpful to the way in which both parties were putting their arguments and I took the view that it would

only be just to permit both sides to adduce their late evidence or to direct that neither of them could do so. Accordingly, the balance lay in admitting all the late evidence rather than determining the Application solely on the material originally lodged.

23. The Plaintiff's Second Affidavit explains that Mr Cowling, on his behalf, attempted to speak with Mr Day on the telephone, but Mr Day would provide no information. Thereafter a letter dated 20 December 2016 was sent to Mr Day by post and by e-mail, but no response had been received. The Plaintiff also produced an insurance certificate in respect of the Jaguar for the year from 30 June 2011, ie, the period immediately before the insurance cover which had been mentioned before. He then explains that he did not insure the car from June 2013 because he knew by then that it had been stolen. He suggests that the steps he took to insure the car in 2011 and 2012 support his contention that he had not sold the car, whether on or about 14 April 2011, the date Mr Day says he acquired the car, or at any other time.
24. Mr Goldie's Affidavit fills in some more gaps. I still do not fully understand why the Defendant did not refer to it in his own Affidavit. He explains that he purchased the Jaguar in good faith from Mr Day on or around 30 January 2012. He paid £22,000 for the car. He refers to various discussions he had with Mr Day before buying the car, having first made contact after seeing the car advertised for sale on the website. He had been told that Mr Day had purchased the car, which at the time was incomplete, from Guernsey and taken the vehicle to his premises in or around September 2011, after which remedial work was undertaken. (This date is obviously different from the time at which Mr Day apparently sought to have the Jaguar registered in his name by the DVLA.) He described it as a restoration project that the owner had decided not to complete. The vehicle was still missing chrome and glass. He advised that he had done an HPI check which showed a clear result. During a second conversation, Mr Goldie agreed a price for the vehicle to be paid on delivery; no deposit was required by Mr Day. The vehicle was then delivered to The Carrosserie Car Company because that is where Mr Goldie directed it should be delivered and Mr Goldie met Mr Day face-to-face at the point of delivery. Mr Day reiterated to Mr Goldie what he had previously explained about how he came by the car and what he had done to it. Mr Goldie then spoke to Mr Day by telephone on the evening of 23 March 2016 as a result of the Defendant advising him that he had received a letter claiming the car had been stolen. Mr Goldie states that Mr Day told him this might be a scam and repeated that he had bought the car in Guernsey incomplete and that he had registered himself as the keeper. Mr Goldie had a further conversation with Mr Day on 14 June 2016. Mr Goldie asked for details of the person from whom Mr Day had purchased the car and the price paid and the approximate cost to him of making it sellable. Mr Day explained again the state of the vehicle when he purchased it, including that the doors were removed at the time, which Mr Goldie considered might explain why Carrosserie had trouble getting the doors to fit as they may have come from another vehicle. Mr Goldie had a final conversation with Mr Day on 17 June 2016 during which he repeated much of what he had said previously, adding that the only part he had added, other than fixing the doors on and painting it, was a rear windscreen bought at an auto jumble. He recalled valuing the car when he purchased it at between £10,000 and £12,000 but could not recall the exact price paid and would search his records. He repeated that it had been HPI clear. Nothing further had been forthcoming from Mr Day.
25. It is against that factual background that I have to determine whether the Plaintiff is entitled to summary judgment on the issue of whether he is the owner of the Jaguar.

## **Pleadings**

26. Advocate Ferbrache has criticised the approach adopted by the Defendant, acknowledging that if the Defendant had chosen to deny, rather than not admit, the Plaintiff's contention that he is the owner of the Jaguar, ideally also asserting a positive case as to why that denial has

merit, this Application could not have been made. Although such pleadings points are seldom hugely attractive, Advocate Ferbrache is correct to draw attention to what is alleged against the Defendant and how the Defendant has chosen to resist this action.

27. Paragraph 1 of the Cause simply pleads that *“The Plaintiff is the owner of a Jaguar XK 150 motor car, registration number EAL 68 (the “Car”).”* By para. 1 of Les Defenses, *“Paragraph 1 is not admitted.”* The Defendant then sets out what he has been told by Mr Goldie. This is the version of events that is contained in Mr Goldie’s Affidavit. The general traverse in para. 11 does not assist because the Defendant expressly does not admit the assertion of ownership. Because several of the contentions made in the Cause are not within the Defendant’s knowledge, other paragraphs are also not admitted. There is, however, a denial that the Car has been converted. There is then an averment in para. 9 of Les Defenses that:

- “9.1 *The Plaintiff purchased the Car from Barons Auctioneers on 3 June 2003 for the amount of £16,889.10;*
- 9.2 *In the report of the alleged theft to the Guernsey Police dated 29 September 2012, the Plaintiff claimed that the value of the Car was £40,000;*
- 9.3 *The Plaintiff insured the Car for the amount of £22,000 for the period 30 June 2012 – 30 June 2013;*
- 9.4 *Accordingly, the Plaintiff is put to strict proof of the value of the car at the date of the alleged conversion and to explain these significant discrepancies.”*

As is immediately apparent, because these averments respond to the Plaintiff’s contention (in para. 12 of the Cause) that *“At the date of the conversion, the car [sic] was worth approximately £90,000”*, they really address how the possible value of the vehicle has changed at different moments in time. The purchase price in para. 9.1 is mis-stated in any event.

28. In the light of these pleadings, the Plaintiff always needs to prove that he is the owner of the Jaguar as the first element of his claim. If he were unable to prove he is the owner, his claim in conversion must fail. Although in a case such as this it might have been expected that the Defendant would not only wish to meet that assertion by putting the Defendant to proof, which is the effect of not admitting it, and to assert on his part a positive case that he is the owner instead, which would be done by a denial (ie, his niance) and his own case being put as to the facts he wishes to aver (ie, his prétentions), all in the manner traditionally dealt with in Guernsey pleading practice and supported by the references in rule 16(5) of the 2007 Rules, I cannot at this stage allow as much reliance as Advocate Ferbrache sought to place on the manner in which the Defendant’s pleaded case has been put to influence the outcome of this Application. Whilst I consider that the Defendant’s position would have been improved if the case had been pleaded differently, I recognise that there is no absolute requirement for that to have been done before the Application for summary judgment on this point can properly be opposed. All it has done has been to leave open the gateway through which this Application can be pursued, which could have been robustly closed had there been a denial and counter-assertion of ownership rather than a non-admission.

29. As I have also pointed out, para. 9.1 of Les Defenses needs to be considered in context. Principally it is an averment as to the price paid for the Jaguar (albeit that it omits what had been paid initially as a deposit and only refers to the balance paid). It is also an averment that the Plaintiff acquired the Jaguar by purchase at that time. Although Advocate Ozanne

suggested that what the Plaintiff acquired may not have been legal title, and really only something akin to possession, that is not something that needs to concern me further on this Application. For present purposes, I do not regard para. 9.1 as being an admission that the Plaintiff remains the owner of the Jaguar. At best, it confirms that he became the owner when he made his purchase.

## Legal principles

30. There is common ground on the applicable basic legal principles when summary judgment is sought. The usual approach to rule 19(2) of the 2007 Rules is to refer to the principles extracted by Lewison J (as he then was) in Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch) (at para. 15) and consistently applied in this Court for a number of years. Those principles are that:

- i) *The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: Swain v Hillman [2001] 2 All ER 91;*
- ii) *A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
- iii) *In reaching its conclusion the court must not conduct a “mini-trial”: Swain v Hillman*
- iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
- v) *However, in reaching its conclusions the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
- vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
- vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim*

*against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”*

In considering these matters, I have also reminded myself of the cautionary words of Lord Hobhouse of Woodborough in Three Rivers D.C. v Bank of England (No. 3) [2003] 2 AC 1 (at para. 158) that the applicable criterion is “*not one of probability; it is absence of reality*”.

### **Defendant's primary objection**

31. Advocate Ozanne has raised an issue in her written submissions, which she developed at the hearing, that this Application should be treated as seeking summary judgment in the form of declaratory relief where particular concerns have been expressed in a number of jurisdictions about proceeding to grant such relief. In doing so, she has referred to decisions reached before the 2007 Rules entered into force, including Motorola Credit Corporation v Uzan (unreported, 25 January 2006) in which Deputy Bailiff Collas (as he then was) regarded the commentary to Order 15, rule 16 of the Rules of the Supreme Court as helpful:

*“If relief is to be granted without trial or evidence, the right course for the Court is not to make a declaration but to state on what footing the relief is to be granted (per Buckley and Scarman L.JJ. in Wallersteiner v. Moir [1974] 1 W.L.R. 92, [1974] 3 All E.R. 217). A declaration can only be made after proper argument and cannot be made merely on admissions by the parties whether in pleadings or otherwise (per Megarry V.-C. in Metzger v. Department of Health and Social Security [1978] 1 W.L.R. 1046; [1977] 3 All E.R. 444 at 451) nor in default of compliance with rules of Court.*

*On the other hand, the rule of the court that a declaration will not be granted when giving judgment by consent or in default without a trial is a rule of practice and not of law and will give way to the paramount duty of the court to do the fullest justice to the plaintiff to which he is entitled ...”*

32. Advocate Ozanne also referred to another decision of Deputy Bailiff Collas, Fidelity Management Limited v Royal Bank of Canada (Channel Islands) Limited (unreported, 20 September 2007; [2007-08] GLR N-14), in which the issue arose as to whether the Court could be properly constituted without Jurats when making positive findings of fact, as required for granting declaratory relief, which was resolved in favour of sitting alone because there were no conflicts of evidence to be resolved. The distinction made in para. 14 of that judgment between an action for a declaration and an action for damages may still remain a sensible one to draw, but, in my view, matters have moved on from the situation described here because the 2007 Rules operate differently to their predecessor Rules and the scope for sitting without Jurats has also evolved. Perhaps the most helpful aspect of this case is the reference in para. 21 to what Neuberger J (as he then was) had to say in Financial Services Authority v Rourke (unreported, 19 October 2001):

*“Of course the court has to be particularly careful before it grants a remedy which is discretionary and which can have a wide-ranging effect, at a summary stage.”*

Then, referring to the apparently unfettered power of the court to make declarations pursuant to the Civil Procedure Rules 1998, Part 40.20, His Lordship commented:

*“... it seems to me that the court can grant a declaration as to [the parties’] rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court’s satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order.”*

33. By reference to the recent decision of Master Clark in *San Juan v Allen* [2016] EWHC 1502 (Ch), Advocate Ozanne submits that the approach taken to ordering declaratory relief on a summary judgment application in England and Wales involves consideration of whether the declaration sought would serve a useful purpose, whether the issues to be resolved are sufficiently defined to be justiciable and whether the claim is a premature one. So far as they go, I am prepared to accept that they are all valid considerations when deciding whether to grant declaratory relief before a full trial of a claim. She has also referred to some authorities from Jersey, but I do not think that they add any further relevant principles.
34. Although I have rehearsed the submissions of Advocate Ozanne as briefly as I feel I properly can, I am not persuaded that her argument has any merit. She has concentrated on the words used in the Application rather than the substance of it. The action here is one in conversion. There is, as she correctly points out, no prayer for any declaratory relief at all. The Application seeks to try, on a summary judgment basis, the question of the Plaintiff’s ownership of the Jaguar. Whilst it invites the Court to declare the Plaintiff as the owner of the Jaguar, in the context of this action this is really inviting the Court to reach a conclusion on one issue in the claim that the Plaintiff will need to establish come what may. Any declaration of ownership is in reality no more than a conclusion based on the facts found as a necessary step before considering the real relief that the Plaintiff seeks. Indeed, anything in the nature of a declaration cannot, in my view, be regarded as any form of relief at all because the mere declaration of ownership in itself as between these two people will not provide any satisfaction to the Plaintiff.
35. For these reasons, I reject the first basis on which the Defendant resists the Application. As I stated at the outset, it is permissible under rule 19 of the 2007 Rules for the Plaintiff to seek summary judgment on the issue of ownership and the usual test for whether or not that should be granted is, in my view, applicable without further qualification derived from the cases on declarations to which I have referred. The first question for determination is whether or not the Defendant has a real, as opposed to fanciful, prospect of persuading the Court that the Plaintiff is not the owner of the Jaguar.

## **Discussion**

36. Although Advocate Ozanne has attempted to argue that the question of the Plaintiff’s title to the Jaguar remains unresolved, on the material placed before me I am satisfied that he became the owner of the vehicle when he purchased it at auction on 3 June 2003. Although I appreciate that a V5C is not a certificate of ownership, but evidence of who the DVLA regards as the keeper of the vehicle and so entitled to be recorded as the registered keeper, there has been no suggestion supported by any evidence that the Plaintiff’s acknowledged purchase of the Jaguar on that date led to him acquiring anything other than legal ownership

of it. Accordingly, I can readily find that he was the owner of the Jaguar at the time of purchase and, without doubt, for some time thereafter.

37. The documentation from the DVLA shows equally that the Plaintiff is no longer the registered keeper of the vehicle but that the registered keepers have been Mr Day, Mr Goldie and now the Defendant. However, being the registered keeper does not in itself mean that the Plaintiff is no longer the legal owner. Indeed, the correspondence from the DVLA confirms that position. In those circumstances, the Plaintiff argues that no ownership has passed to any possessor of the Jaguar after him because it has been stolen by Mr Freitas. Further, because it has been stolen by him, the principles accepted by the Royal Court of Jersey in *Mendonca v Le Boutillier* 1997 JLR 142 should be found to apply equally in Guernsey law with the consequence that title to the vehicle has not been lost by the Plaintiff.
38. That case arose from a car being purchased under a hire-purchase agreement in Jersey by an individual who, without having made all the payments required, sold the vehicle to the defendant, provided a receipt for the sale and the log book for the vehicle. The defendant had no idea that the purported seller of the vehicle did not have title to it because one of the terms of the hire-purchase agreement was that the car remained the sole property of the original vendor of it and conferred on the purchaser the status only of mere bailee. The defendant then sold the vehicle to the plaintiff. There was then an order of the court against the plaintiff that he deliver up the vehicle to the original seller, from which the vehicle was being purchased under the hire-purchase agreement, Equipment Rental Co. Ltd, and so the plaintiff wanted to be paid back by the defendant the price he had paid for the vehicle. The question for the Royal Court of Jersey was whether Equipment Rental Co. Ltd had retained ownership of the vehicle in the circumstances where it had passed into other persons' hands.
39. The judgment of the Court ranges over various maxims advanced on behalf the parties, recognising that the contract law of Jersey, as a customary law jurisdiction, derives from Roman law. Accordingly, the expression of principle found in the French *Code Civil* ("*en fait de meubles, possession vaut titre*") did not assist because it was not identified as part of the ancient customary law, but was of more recent invention. Instead, the law of Jersey was founded on the basic principle "*nemo plus juris ad alium transferre potest quam ipse habet*". That maxim (as described in *Hunter's Introduction to Roman Law*, 9th ed. (1934), p. 56) is taken to indicate that "*If the person who delivered a thing was really the owner, then the delivery at once operated to give the ownership to the transferee. If he was not the owner, the delivery had not that effect, because no one can transfer to another greater rights than he has himself (nemo plus juris ad alium transferre potest quam ipse habet).*" That judgment also highlights what could be found in the commentary in Goode, *Hire Purchase Law & Practice*, 2nd ed. (1970), p. 618, referring to the changes originally introduced in England and Wales by the Factors Act 1889 and the Sale of Goods Act 1893: "*These statutory provisions constitute a substantial inroad into the common law rule nemo dat quod non habet which has hitherto been the cornerstone of English hire-purchase law.*"
40. Although it is material to note that the present case does not involve any hire-purchase arrangement, for the purposes of deciding this Application I am prepared to recognise that, in the absence of any statutory intervention, the Roman law maxim *nemo plus juris ad alium transferre potest quam ipse habet* forms part of Guernsey law for the same reasons as were given in Jersey in the *Mendonca* case. Applying that maxim to the Plaintiff, it is apparent from his evidence that he has not transferred legal ownership of the Jaguar to anyone. Accordingly, on the basis that Mr Freitas had physical possession of the vehicle, but no apparent right to seek to confer title to the Jaguar on anyone else, looking solely at what happened in Guernsey, whoever acquired possession of the vehicle did not do so with the benefit of legal title to the Jaguar. It was in reliance on this position that Advocate Ferbrache sought summary judgment on the issue of ownership.

41. Switching to the other end of the chain of possessors, it is also apparent from the Defendant's evidence that his purchase from Mr Goldie was not in suspicious circumstances. It appears to have been an arm's length transaction. At present, it is unclear whether the Defendant purchased in Scotland or in England, but that does not matter for the purposes of this judgment. Section 23 of the Sale of Goods Act 1979 provides:

*“When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title.”*

42. If that provision has effect in relation to the Defendant's acquisition of the Jaguar, then there are a number of questions that arise. The first is whether Mr Goldie had a voidable title or not. One possibility is that he had already acquired a good title from Mr Day by virtue of this same section. If so, Mr Goldie was able to pass good title, as a matter of English or Scottish law, to the Defendant. But if not, then the Defendant would need to establish that his purchase from Mr Goldie was in good faith and without notice of any defect in Mr Goldie's title.
43. A similar approach would need to be taken in relation to the acquisition of the Jaguar by Mr Goldie from Mr Day. On the information before me, it is also possible that section 21(1) of the 1979 Act (*“Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell”*) is engaged.
44. It seems to me that these provisions potentially raise fact-sensitive issues that I am unable to resolve on this Application. The position of the Plaintiff in and around 2003 seems clear enough, despite Advocate Ozanne's attempt to suggest that the Plaintiff has not shown that he became the owner of the Jaguar. The position of the Defendant, subject to an enquiry as to whether he can properly rely on section 23 of the 1979 Act, is also reasonably clear (and for the purposes of a summary judgment application, the level of showing cause required is necessarily at a low threshold). The problem the Plaintiff faces is what happened between those times. There is less certainty about what happened from the Jaguar being left with Mr Freitas to it being registered by Mr Day at the DVLA and then sold on by him. I do not have the benefit of any evidence given by Mr Day or by Mr Freitas as to what both of them did. The best evidence of how Mr Day acquired the Jaguar comes from what Mr Goldie sets out in his Affidavit. (I would not, of course, have been aware of that evidence if the hearing had not had to be adjourned part-heard.) The attempts by Mr Goldie and by the Plaintiff's Advocates to engage with Mr Day have not been productive. Whilst there is some suspicion that Mr Day's acquisition of the Jaguar results from criminal activity and, if undertaken in accordance with Guernsey law (and possibly even if under English law) made him possession of the vehicle anything but as the legal owner of it, the events between the Plaintiff parting with possession of the Jaguar when he left it with Mr Freitas and its re-appearance for sale with Mr Day remain shrouded in some mystery.
45. The steps the Plaintiff took to report his concerns to the Police and his correspondence with the DVLA point towards him being correct to suspect that Mr Freitas has dealt unlawfully with the Jaguar. However, on this Application, I feel unable to conclude that the vehicle must have been stolen because the Defendant may take steps to obtain evidence that suggests otherwise. Accordingly, this is not a case where fraud overrides all other considerations. Advocate Ozanne has suggested that more information needs to be gathered, which will only come out after disclosure and the preparation of witness statements, about the terms on which the vehicle was left with Mr Freitas. Were I simply deciding this issue on the balance of probabilities, I would be inclined to find that the Plaintiff has proved his case, at least in

accordance with the law of Guernsey, to be found as continuing to be the legal owner of the Jaguar. That outcome would be clearer still if there were a conviction of Mr Freitas for theft of the vehicle, but that is not the position and appears to be unlikely to happen. The outcome would also probably be clearer if Mr Day were more co-operative and clarified the true basis on which he came to possess the Jaguar. I believe that there is a higher possibility that something further from Mr Day could be achieved if this issue were to be dealt with at trial. Put another way, although the Defendant has not articulated it quite in this fashion, if there is a trial, some evidence from Mr Day might be capable of being adduced, whether voluntarily or (perhaps more likely) through compulsion. This is a factor that I take into account on the basis of the fifth and sixth principles set out from the *Easyair* decision.

46. The difficulty for the Defendant, however, arises from the way in which his Defenses are structured. As Advocate Ferbrache was quick to point out, the types of issue I have covered are, in this Court, questions of foreign law. There is an obligation on a party to plead such matters as facts that are material to his defence. He has not done so and Advocate Ozanne declined the invitation from me towards the end of the hearing to apply to amend Les Defenses. As matters stand, I am left in the position of balancing the way that I understand the Defendant wishes to resist the Plaintiff's claim still to be the owner with the way in which that defence is currently pleaded, which is merely to put the Plaintiff to proof.
47. Ultimately, my decision results from having regard to the overriding objective in rule 1 of the 2007 Rules, namely "*to deal with cases justly*". Without in any way diminishing the importance of parties properly pleading their cases, which is an element of rule 1(4), I find I cannot ignore the way the Defendant's case should be presented. To do so would give an unreasonable advantage to the Plaintiff at this stage of the proceedings. I recognise that there is always going to be a trial of some aspects of this action. I also think it is inevitable that a considerable amount of the evidence that will in any event need to be called at that trial will be the same, whether or not ownership remains in issue. I have considered what the position might have been had the application been to tackle ownership as a preliminary issue rather than by way of an application for summary judgment (and I hasten to add that there is no guarantee that the Court would have acceded to an application for the determination of such a preliminary issue) and the likelihood that more evidence than has been presented by the Defendant would have been adduced. That is the difference between trying an element of a case as a preliminary issue and the higher hurdle an applicant for summary judgment has to surmount or, reversing the focus, the comparatively low threshold that a respondent to an application for summary judgment has to meet to demonstrate that there is some prospect of success. Equally, the standard of proof on a preliminary issue is the usual balance of probabilities and, as I have indicated, were the material before the Court restricted to what has been adduced on this Application, the probable outcome, as the pleadings currently stand, would have been that the Plaintiff had discharged that burden.
48. Whilst I have considerable sympathy with the position the Plaintiff finds himself in, which has not been assisted by the stance adopted by the Defendant and Advocate Ozanne, I find that the justice of this action lies in permitting the whole case to proceed to trial. In a clear case, the question of ownership could properly be resolved summarily. This is not, in my opinion, as clear a case as it would be if the facts were different. The position is more complicated than the situation in the *Mendonca* case because the Jaguar has been dealt with in Great Britain. The consequences of that may not be as straightforward as Advocate Ferbrache might wish. Those consequences also mean that the Defendant has to nail his colours more firmly to the mast than he has done to date. If, as I understand to be his case, he wishes to assert that the Plaintiff lost ownership so that the Jaguar has not been converted by the Defendant, his Defenses really do need to be amended. If they stay as they are, the Defendant will be precluded from raising any question of the effect of the 1979 Act or any other arguments about title he may wish to raise that are not already dealt with in his Defenses.

49. I have had regard to rule 22 of the 2007 Rules, which provides:

*“On the hearing of any application under Rules 19, the Court may-*

*(a) dismiss the application, or*

*(b) give judgment on the whole of the claim or on one or more particular issues,*

*and may make any other order, including the stay of execution of any judgment and the attachment of conditions, as the Court considers just.”*

I have decided that I should not give judgment in favour of the Plaintiff on the issue of ownership of the Jaguar because I am not persuaded that the Defendant has no real prospect of successfully defending that issue. Whilst the Defendant’s case as it currently stands verges on being fanciful, I do realise that, by standing back a moment from the non-admission and considering what it is the Defendant really wishes to argue, there has to be more than a fanciful prospect that the Jaguar is not owned by the Plaintiff. That is why it is just not to grant this Application and leave that issue to be resolved, along with everything else, at the trial. I am, however, minded to impose a condition on the leave to defend being afforded to the Defendant requiring him to apply to amend his Defenses within 21 days of the date of this judgment so as to refer to any positive case about his ownership that he wishes to advance, in particular setting out the basis under the law of Great Britain, if that is what he wishes to do, as to how that arises. I take the view that it is just to require him to perfect the case he really wishes to argue within a short period of time so that both parties know that the pleadings have fully crystallised (and the Plaintiff may wish to file a réplique) before the action falls to be case managed towards a trial. Should the Defendant fail to comply with that condition and also fail to be able to adduce evidence to fill the gaps in the chain of ownership, the Plaintiff is likely to have an easy route to establishing this aspect of his claim.

50. It would have been possible for me to reach the conclusion to dismiss this Application on the basis that, although the value of the claim is not high, it raises some potentially difficult issues of law that I understand are novel in this Court. When there are areas of the law that have not previously been addressed domestically, it will often be the case that the Court will refrain from proceeding to a summary determination because it is usually better to have the benefit of a full version of the facts to enable the law to be developed against that background. I may, therefore, have regarded this as a compelling reason why the issue of ownership should be disposed of at trial rather than on this Application.

## **Conclusion**

51. For the reasons I have given, the Plaintiff’s Application is dismissed. However, the obvious intention of the Defendant to present argument that he has acquired a good title to the Jaguar, rather than simply putting the Plaintiff to proof on that issue is something that I consider needs to be addressed quickly and that is why, in accordance with rule 22 of the 2007 Rules, the dismissal of the Application is accompanied by a condition that the Defendant must within 21 days of this judgment apply to amend Les Defenses (unless the amendments proposed are consented to before then on behalf of the Plaintiff), in default of which he will be precluded thereafter from arguing any matters that could have been introduced by way of such amendments.

52. I propose to reserve the costs of the Application. If the parties can agree the appropriate order for cost, that can be dealt with by way of a Consent Order. However, if the parties cannot

agree, the question of the costs can be raised when the matter is next before the Court for a case management conference.

### **Postscript**

53. Although this paragraph will most likely be removed between the draft of this judgment and it being handed down, I can indicate that my provisional view on costs is to depart from the frequent order that costs should follow the event. I will take some persuasion that the Defendant should receive his costs from the Plaintiff in respect of this Application. In the circumstances that have arisen, there is an argument that the Plaintiff, even though his Application has been dismissed, should receive his costs from the Defendant. Another option would be to leave the costs in the cause, recognising that the final outcome will show where the justice of this case really lies. I suspect that that is the most generous outcome that the Defendant can realistically expect.