



Garfield v Glass-Garfield
Royal Court
28th September 2018

JUDGMENT
40/2018

Application by the plaintiff to recover amount of a contractual loan.

IN THE ROYAL COURT OF GUERNSEY

Civil No 2098

BETWEEN

JOHN STUART GODWIN GARFIELD

Plaintiff

-and-

JUDITH SUSAN GLASS GARFIELD

Defendant

Hearing dates: 4th, 5th, 6th September 2018

Judgment handed down: 28th September 2018

**Before: Her Hon Hazel Marshall QC, Lieutenant Bailiff,
Ms Claire Le Pelley, David Mortimer and Alan Boyle Esquires, Jurats**

**Counsel for Mr Garfield
Mrs Glass Garfield**

**Advocate Mark Dunster
in person (by video link)**

Cases, texts and legislation referred to:

Legislation

Royal Court (Reform) (Guernsey) Law 2008, ss 14 and 16.

Cases

- (a) Guernsey
Holdright Insurance Co v Willis Corroon Management (Guernsey) Limited, [2000-02] GLR 60,
Yaddehige v Credit Suisse 2007-8 GLR 282

- (b) Jersey

Texts

Terrien: *Commentaires du Droit Civil* (1578 Ed).

Carey: *Essai sur les Institutions, Lois et Coutumes de L'Isle de Guernsey* (1889)

Poingdestre: *Les Lois et Coutumes de l'Isle de Jersey* (1928)

Dicey & Morris, *Conflict of Laws*, 11th Edition (1987), Cap 32, Rule 180

JUDGMENT

The action

1. This is a very sad case of dispute between brother and sister. By this action the Plaintiff, Mr John Garfield (“**Mr Garfield**”) seeks to recover from the Defendant, his sister Mrs Susan Glass Garfield, (“**Mrs Glass Garfield**”) the amount of a contractual loan made to her in about November 2000 by payments amounting to €475,204.22, together with contractual interest at 4.5% *per annum* compounded with six monthly rests starting in July 2001. The total claim as at July 2018 is computed in the sum of €1,012,588.48.
2. Mrs Glass Garfield resists the claim. She admits that the loan, the then equivalent in €s of about £300,000, was made to her, but she says that it was satisfied by her in full, (insofar as Mr Garfield required) by her paying him €450,000 in cash in three instalments, between 2004 and 2006. However, she also says that in any event Mr Garfield is not entitled to recover the loan because his claim to do so had been extinguished by prescription before the date of issue of these proceedings in July 2017; the term date of the loan was 30 November 2010, and this was more than six years later. She further says that, in any event, Mr Garfield waived all requirement for interest on the loan, orally, in early 2004, shortly before she in fact repaid him in cash, as he had asked.
3. In response, Mr Garfield denies (obviously) that the loan was repaid, but also denies that he waived any right to recover interest on the loan, although he agrees that, after Mrs Glass Garfield failed to pay the interest very early on, and it appeared that she did not have the resources to do so, he agreed that interest could just be accrued on the loan until it was repaid – which he understood would effectively mean the disposal of the property. With regard to Mrs Glass Garfield’s assertion that his claim to recover the loan is prescribed, Mr Garfield says that, in all the circumstances of the case, prescription did not run against him, or else it was sufficiently suspended, because he was *empêché d’agir* during the period after 30 November 2010 when time might otherwise have run, such that he was not (or should be held not to have been) out of time when he commenced this action. This last is a proposition of law to be considered later.
4. This is a decision of the Court and this written judgment has been prepared in accordance with Section 16(5) of the *Royal Court (Reform) (Guernsey) Law 2008*. Pursuant to Section 14 (2) of that Law, the Lt-Bailiff did not sum up to the Jurats in open court but retired with the Jurats.
5. She gave general directions to the Jurats, first, to remind them that their respective roles were that the Lt-Bailiff is the sole judge of matters of law and procedure and the Jurats must follow her directions on such matters, but that the Jurats are the sole judges of questions of fact. She directed the Jurats that, insofar as she might herself appear to express any views

on the facts when guiding their deliberations, the Jurats should ignore these and form their own independent judgment.

6. Where, therefore, this judgment sets out holdings of law and reasons for these they are the holdings and reasons of the Lt-Bailiff. Where it sets out findings of fact and reasons for these, they are the unanimous findings and reasons of the Jurats.

The history

7. The following history sets out facts which are non-contentious and otherwise identifies where they are materially disputed.
8. As already mentioned, Mr Garfield and Mrs Glass Garfield are brother and sister. She is aged 75, and he is seven years younger.
9. Mr Garfield has been a successful businessman, although his business ventures, and his private finances, appear to have had some ups and downs. He owned his own very successful brokerage business in London which he sold in 1997, apparently for a sufficient sum to enable him to move to Spain with his family, for a better lifestyle. However, in about 2006 he returned to the UK, where he lives now. He has been married three or four times.
10. Mrs Glass Garfield emigrated from the UK to Switzerland at the age of about 19, and married a Mr Glass. They were later divorced. She is plainly an intelligent woman, and worked as a Personal Assistant and Office Manager in Switzerland and France for some time. However, for the last 18 years or so she has lived in rural France, near to the Swiss border. Her home is a property comprising a house and about 3 hectares of land including extensive stables and a riding school, on which she runs an equestrian business and also breeds dogs. She has lived there with her domestic partner of some 32 years, whose name is Bernard, and who is, or was, a Professor of Mathematics at the University of Paris. She speaks fluent French.
11. Mr Garfield and Mrs Glass Garfield were not particularly close as brother and sister, and indeed, the amount of contact between them, especially since about 2006, is a matter in dispute. However, this is jumping ahead.
12. In mid-2000 Mrs Glass Garfield came across the property in which she now lives. She was very eager to purchase it. She has a love of animals, and this property would apparently provide her with her “dream” home and livelihood. However, she needed to borrow the money required to make the purchase. It appears from the evidence that sales of designated agricultural property in France are subject to regulation by an authority which is charged with the protection of rural France, and is conveniently known as SAFER. Such regulation may apparently take the form of approving sales, or particular purchasers, and may involve SAFER having pre-emption rights, although the precise details do not matter for the purposes of this action. In order to be considered as a candidate for the purchase of the property, Mrs Glass Garfield apparently needed to demonstrate to SAFER her ability to purchase it, and she needed to put down a deposit of 20%.
13. The property was for sale at FF 3 million, which was roughly £300,000, or €450,000 at that time. Mrs Glass Garfield needed to borrow the whole of the purchase price and purchase costs. In the event she took a loan, effectively from her brother, but in fact provided by a Guernsey Trust of which Mr Garfield was the settlor and principal beneficiary. The Trustees of this trust were R&H Trust Co (Guernsey) Ltd, a trust management company operated by the well-known accountancy firm, Rawlinson & Hunter. They had established the trust for Mr Garfield, and he provided further funds to the trust at this point, in the sum of £300,000, to enable the trustees to make the loan.

14. Some of the circumstances surrounding the making of the loan are in dispute. Mrs Glass Garfield has told the court that she had an offer of funds and a mortgage from Credit Agricole in Geneva, at an interest rate of either 1.5% or 1.7% (she cannot now remember which) but that when Mr Garfield learned of her intention to borrow from a bank, he warned her against it and “lulled”, or persuaded, her into taking a loan from him (his trust) instead, at the considerably higher rate of 4.5%. She says she paid no attention to this disparity because she did not, really, read the details of the proposed loan, and she totally trusted her brother.
15. Mr Garfield says that, on the contrary, it was Mrs Glass Garfield who telephoned him urgently in 2000 (one of the few occasions, if not the only one, on which she initiated contact) to ask him to lend money to help her to make the purchase she so badly wanted. He knew nothing of the supposed offer from Credit Agricole, and the interest rate of 4.5% at which he was willing to procure the loan from his trust was generous in the context of Bank of England base rate then being 6% (of which he produced official records as evidence). He said that his reason for charging interest to his sister was that he wanted to preserve the value of his assets for the benefit of his children, and the rate of interest was designed to do that. When Mrs Glass Garfield pointed out that she would not have been taking the loan from the bank in sterling, Mr Garfield also produced official evidence of French lending rates in 2000 being at about 6.7%. When she pointed out that she was referring to Credit Agricole in Geneva, he produced evidence of Swiss rates on mortgages in 2000 for residential construction and agricultural properties, although these showed a rate in the range of 4.30% to 4.46%. He submits, however, that this still casts doubt on the plausibility of Mrs Glass Garfield’s assertion that she forwent an offer of a mortgage of 100% of funds required to buy a rural property with buildings admittedly in need of repair at an interest rate of 1.5%, even if from a Swiss-based bank.
16. The disclosed documents show that, with the loan offer agreed in principle, Mrs Glass Garfield faxed a very business-like and forceful letter dated 27 October 2000 to the trustees regarding the necessary provision of funds for the deposit, and providing confirmation of the availability to her of the purchase monies. She then did become the preferred purchaser of the property, and the funds were duly lent under the loan agreement, although the actual figures suggest that some money for further fees or costs may have been lent as well. The loan was secured by a mortgage over the property, executed and registered in France. The details of this last are not of concern in this action.

The Loan

17. The loan itself was formally documented in a letter agreement type-dated 1 November 2000 and countersigned later. It was for “*the equivalent in Euros of £300,000*”. It was stated to be repayable on demand but otherwise to be repayable on 30 November 2010, in effect, a 10 year term. It provided for interest to be payable at six monthly intervals at 4.5%, compound, but also for early repayment without penalty. The loan was to be secured by a mortgage or first charge over the property being purchased, but up to £60,000 was to be made available to pay the required deposit. The document included warranties from Mrs Glass Garfield that she understood the agreement, that she had either taken independent legal advice or had been advised to do so and declined, that she was freely entering into the agreement and was not relying on anything done or said by the trustees, and that she understood the effects of the property being used as security. The letter was signed by the trustees, and Mrs Glass Garfield countersigned that the “*terms and conditions [were] accepted*” on 8th November 2000.
18. Mrs Glass Garfield, who is plainly accustomed to dealing with documents prepared under Swiss or French law, sees the “on demand” term as an oppressive “sword of Damocles” hanging over the borrower. However, it is a perfectly commonplace provision in term loans governed by English, and by extension Guernsey, law. The contemporaneous written evidence shows that the trustees viewed the 4.5% interest rate as a “*reasonable/commercial*” rate with regard to Euros.

19. On 21 June 2001 the trustees sent to Mrs Glass Garfield the first debit note in respect of payment of interest on the loan in the sum of €10,075.09. It appears that they also sent an interest schedule, although this is not in the papers before the court. However, (and as Mrs Glass Garfield accepts) the interest was not paid. Mr Garfield says that it was because Mrs Glass Garfield's business was not turning out to be as lucrative as she had anticipated. As he did not (he says) want to press her – she was his sister and he could see that she just did not have the money – he therefore told the trustees not to press for payment and that interest should simply be accrued on the loan. A letter from him, produced from the trustees' archived file, certainly shows this instruction. Although its apparent date is curious, it appears to have been written shortly before Christmas 2002. Mrs Glass Garfield accepts that she did not pay interest but says that it was agreed that she would not have to pay interest at all. She says that she did not receive demands, and that this confirmed such belief to her. However, she placed the time of the express agreement in which (she alleged) it was agreed that she was not going to be charged any interest at all as being later than this, in 2004. Mr Garfield denies that any agreement to waive interest, as contrasted with deferring and accruing it, ever took place.
20. In 2002 Mrs Glass Garfield, who says her health had been failing somewhat since 1999, became extremely ill and was diagnosed with a massive brain tumour. She underwent surgery for this in France in about October 2002 (she has produced her medical records to demonstrate the date) and, happily, she made a very good recovery, although naturally over some time. She herself says that she is, even now, only "about 75%". Mr Garfield says that he visited several times and also stayed so as to be on-hand for her when she was hospitalised, and that he was present when she eventually came round from the surgery. Mrs Glass Garfield denies this, saying that he only visited on one occasion, at the hospital in St Julien to which she was first taken, and never at the Lyons Hospital where she underwent surgery. She challenged him to describe the hospital in Lyons, the architecture of which she said was memorable, making much of the fact that he accepted that he could not give detail.

The assignment

21. In 2004, the benefit of the loan was assigned by the trustees to Mr Garfield personally. He says that this was because the trust was being wound up in connection with his move back from Spain to the UK, and bringing his financial affairs "on-shore" as he had been advised was the right thing to do. Mrs Glass Garfield sees it as the beginning of moves by Mr Garfield to obtain cash which she believes he wanted to be able to conceal in Switzerland, and which he now perceived as being possibly available from her, having learned of Bernard's advantageous sale of an apartment. She says that Mr Garfield presented the transaction, and the relevant document, to her as making the loan into a "family loan" and saving her money, ie the interest. Mr Garfield denies this and says that it was simply presented as a transfer because his trust was being wound up and its assets distributed to him.
22. The Assignment document is a simple one page document which reads:

"WHEREAS

- A [The Trust] *is entitled to an amount receivable of £300,000, plus accrued interest, from [Mrs Glass Garfield] ("the Loan").*
- B. *Mr Garfield is the Settlor and main beneficiary of [the Trust]*
- C [The Trust] *wishes to assign and Mr Garfield wishes to assume all rights title and interest in respect of the Loan*
- D. [Mrs Glass Garfield] *wishes to give her consent to the substitution of [Mr Garfield] in respect of the loan*

NOW this Agreement witnesses as follows:

- 1. *In consideration hereof, [the Trust] hereby assigns all rights title and interest in respect of the Loan to [Mr Garfield] and [Mr Garfield] hereby accepts the Loan.*
- 2. [The Trust] *warrants that the Loan hereby assigned is free of lien.*

3. [Mrs Glass Garfield] *consents to the assignment of the Loan and accepts [Mr Garfield] as the creditor in place of [the Trust]*.
4. *This assignment shall be effective on 18 December 2003.*
5. *Guernsey law applies to this agreement. Place of jurisdiction is Guernsey.*”

It was signed by Mr Garfield, the Trustees and Mrs Glass Garfield .

23. Mrs Glass Garfield says that shortly afterwards Mr Garfield told her that he had no intention to charge interest on the principal debt and he would consider the loan to be fully repaid if she paid him €450,000 in cash. She says that, as she could not pay him this sum all at once, he agreed to accept, and was in fact paid, in three tranches of €150,000, in cash, paid in the autumn of 2004, August 2005 and March 2006 respectively, and that he wanted large denomination notes. When asked in cross-examination where the funds to pay him had come from, she said that it was all in cash; the money was gathered in for her by Bernard, each instalment consisting of €50,000 provided to her by a long-time friend of hers, Jacqueline Margaux (who had done so by giving her several cash sums of €5,000 or €10,000 over a period), €30,000 provided by Bernard’s brother Arnaud,(a gentleman who had his own telecoms company), possibly some money from Bernard himself and otherwise the remaining €70,000 coming from cash payments received into her stabling, saddlery and equestrian business and (as to about €10,000 in the earlier years but not the last) her dog breeding business. She says that from 2006 the loan was then simply forgotten by both herself and Mr Garfield.
24. Mr Garfield denies the agreement to cancel interest and denies that the loan was ever repaid as suggested by Mrs Glass Garfield, or at all. He also denies that the loan was forgotten. He says that he always intended the loan and interest to be repaid, ultimately, and indeed he was reliant on its being repaid. He says that the potential repayment was regularly a topic of conversation between him and his sister, when they were in contact.

Subsequent events

25. Mrs Glass Garfield says that contact between her and her brother had never been very great; in general he would telephone her once in every two or three years in order to tell her how successful he was but to complain about pressures from the UK tax authorities, and after 2006 she virtually lost all contact with him personally until these proceedings. Mr Garfield says that this is untrue and that whilst contact had always tended to emanate from him, he had telephoned his sister regularly at Christmas and her birthday and irregularly once or twice a year, as well as making occasional visits, though perhaps rather more in the earlier years, in order to bring their mother. When challenged he described one or two such occasions, one of which being a sudden visit when he and his son had been stranded at an airport in Switzerland on their way home from a ski-ing trip, because of the volcanic ash scare which had grounded airlines.
26. Mr Garfield also denied that there have ever been any irregularities or improprieties in his tax affairs, as Mrs Glass Garfield has frequently suggested, and he has produced an affidavit from his accountant for the period from about 1999 to 2007, Mr Mark Harris, confirming this and that Mr Garfield’s tax affairs have always been “*transparent and in full compliance with the law*”. Mrs Glass Garfield’s response to this is that whilst she accepts that Mr Harris may honestly believe this to be the case, an accountant can only give evidence of what he knows. Her experience, she said, was that accountants frequently did not know, and did not want to know, the full truth.
27. Apart from noting that Bernard was apparently diagnosed with a form of cancer in 2009, from which he has happily recovered, there was no further significant event in the history before the date of 30 November 2010, when the loan fell due for repayment according to its terms. Mr Garfield says that he had always understood it to be his sister’s intention to give up the business and sell the property after 10 years; this had been discussed many times. He therefore began to press her about these intentions. He received many accounts of her financial difficulties - that her employees were stealing from her, her clients were not paying her, the business was struggling and it was costing her and Bernard their life savings - but all this was against the background that she acknowledged the existence of the loan and her

intention to repay it. She said that she would sell the property, or at least the stables, or part of them, to do so, but this was very difficult because of the involvement of SAFER, which was a hindrance and preventing any progress.

28. This situation continued over several years until 2015, when Mr Garfield was becoming more anxious to secure the repayment of the loan, he says, as a result of financial pressures at the time. Because of the difficulties which Mrs Glass Garfield was citing, Mr Garfield says that, with her agreement on the telephone, he put his own French lawyer, Maître Philippe Chemouny, in touch with her to see whether he could assist her in dealing with SAFER and progressing the sale of her property.
29. This event and conversation is recorded in two emails passing between Mr Garfield and Maitre Chemouny in June 2015, annexed to an affidavit sworn by Maitre Chemouny in November 2017 and produced as evidence in these proceedings. Mrs Glass Garfield has objected to the admissibility of this evidence, as described later. She agrees, though, that a phone call between her and Maitre Chemouny did take place, and she also agrees that at the time she had signed some form of commitment to SAFER with regard to selling the property, which she had later regretted because she thought it was under-priced. She wanted to avoid this commitment. However, if SAFER had not taken the matter up by 30th September 2015, then their rights would, apparently, expire and no longer be an impediment.
30. Mr Garfield says that the next significant event (for him) was a telephone conversation with his sister, which was taken over by Bernard. He initially placed at late October 2015, but now accepts, from the timing of other events, that it must have been in about the first week of October 2015. He says he was very ill himself at the time. He was speaking to Mrs Glass Garfield on the telephone from his London flat, about repaying the loan, when Bernard took the telephone and told him that he (Mr Garfield) was now too late to seek repayment of the loan, and his sister did not owe him anything, so “*Goodbye*”. Mrs Glass Garfield had confirmed this, put the telephone down on him, and failed to answer his subsequent calls back. He had not spoken to her, or Bernard, from that day until the trial of this action. He remembered the conversation vividly because it was the first time he had heard the term “*prescription*” used in a legal sense.
31. Mrs Glass Garfield denies that any such conversation ever took place, at all. She says, as mentioned above, that contact between her and Mr Garfield was virtually non-existent until early 2015 when Mr Garfield did start telephoning her to tell her about financial pressures he was facing for legal fees in his divorces, and leading to his asking her, in May 2015, to lend him money. She had said that she might be able to lend him €200,000 or €300,000 out of the proceeds of the sale of her stables, which she was expecting to sell, but only in September that year. She then received a telephone call from Maitre Chemouny out of the blue, offering to assist her with the sale, but having ascertained that (in her view) he knew nothing about French rural property, she declined his offer. Shortly after this, also in June 2015, she received a telephone call from Mr Garfield to tell her (she said) that matters had gone better than expected in his divorce proceedings and he had saved about £1M and did not need any loan. She then heard nothing more until August 2016, when she received a demand for repayment of the loan and interest from Maitre Chemouny on behalf of Mr Garfield, and thereafter, notice of *saisie* proceedings issued against the property in France.
32. It can be inferred, in the light of the French proceedings, that the sale of the stables, which would have been part of the registered security for the loan (which was apparently still in place notwithstanding Mrs Glass Garfield’s stated belief that the loan which it secured had been repaid) had not proceeded. The significance of this was not investigated at the trial, but neither is it especially material.
33. Mr Garfield denies Mrs Glass Garfield’s account of these matters insofar as it conflicts with his own.

The French proceedings, the Guernsey proceedings, and the trial

(a) The French proceedings

34. There is, on any basis, a gap in the story between Autumn 2015 and August 2016. Mrs Glass Garfield does not need to explain it. Mr Garfield's explanation is that, whilst he immediately set legal processes in train in France after coming to the realisation that Mrs Glass Garfield no longer intended to repay the loan, these were beset with difficulties. The first problem was that a copy of the original loan agreement was required, but had apparently been destroyed by the trustees (although they later found it, and certain other documents, in an archived file). An effort to obtain a copy from the original notary by court order failed on the grounds that the application had not been issued in the trustees' name, and it was only in May 2016 that a second attempt succeeded.
35. Formal demand for repayment was then, it is common ground, issued to Mrs Glass Garfield in August 2016, and when she did not respond to this, *saisie* proceedings in relation to the property were commenced. However, these matters encountered confusion as to who, as between the trustees and Mr Garfield, was the correct plaintiff, the confusion arising in part from the fact that French law does not recognise the trust concept. The upshot was that Mrs Glass Garfield, being obliged to instruct lawyers to resist the *saisie* proceedings, succeeded in having these dismissed. It appears that the grounds were that they had been brought in the name of the trustees and her lawyers were able to demonstrate, on any basis, that the trustees had disposed of the relevant debt by the Assignment, but, again, the detail does not matter. The upshot of these delays and setbacks was that Mr Garfield turned his focus, instead, on enforcing the loan agreement and for that purpose commenced proceedings in Guernsey. Unfortunately, he did not get round to doing this until July 2017.

(b) These proceedings

36. This action was commenced on 17 July 2017, and permission to serve the proceedings out of the jurisdiction on Mrs Glass Garfield in France was given on 21 July 2017. On 22 September 2017 Mrs Glass Garfield, at that time represented by Collas Crill, applied to have this permission set aside. That application was dismissed on 20 December 2017 by the Deputy Bailiff. A transcript of his judgment is in the papers. Crucially, for present purposes, the grounds on which he rejected the application to set aside service out of the jurisdiction rested on his carefully considered decision that the proper law of the loan agreement was Guernsey law.
37. Having indicated that Guernsey law has generally followed English law principles of private international law, he then applied the synthesised rules relating to determination of the proper law of a contract as set out in Dicey & Morris, *Conflict of Laws* 11th Edition (1987), Chapter 32 Rule 180. This was because it was common ground that those rules still represent the law of Guernsey, albeit that English domestic law in this respect has since changed as a result of the dictates of European Law.
38. The Deputy Bailiff rejected the argument that the express choice of law clause in the later assignment document of 2004 governed the original loan document of 2000, but held nonetheless that the proper law of the loan agreement was Guernsey law, and not French law (as argued on behalf of Mrs Glass Garfield). He reached this conclusion as a result of applying either Rule 180 sub-rule (2) in Dicey & Morris (*supra*), on the grounds that he inferred as a fact that Mrs Glass Garfield would have agreed at the time that Guernsey law applied to the loan (it being made by a Guernsey trust company with Guernsey funds), or alternatively Rule 180 sub-rule (3), on the grounds that Guernsey was the jurisdiction with which the loan transaction itself had its "closest and most real connection", citing the above factors and also, amongst others, that the loan was made by reference to sterling, and documented in English. Mrs Glass Garfield did not appeal this decision.
39. Mrs Glass Garfield was therefore required to table Defences, which she did on 19 January 2018 and raised the defences which have been outlined at the start of this judgment.

40. An important plank of Advocate Dunster’s argument, on behalf of Mr Garfield, is that it was only in these Defences that the assertion that the loan had been repaid, as contrasted with the argument that the claim for repayment was prescribed, was first raised or communicated by Mrs Glass Garfield. He points out that it was not made in response to the first formal demand for repayment, made (albeit in the name of the trustees) in August 2016, nor when a later demand was made in Mr Garfield’s own name. The French proceedings were never defended on the basis that the loan had been repaid, but only on the grounds, as Mrs Glass Garfield herself asserted, that the claim was made in the wrong name, or that it had been prescribed. The first letter of response to the Guernsey proceedings, which was from Collas Crill acting for Mrs Glass Garfield and sent on 5th September 2017, did not riposte that the debt claimed had already been repaid, but only expressly referred to its being prescribed (albeit, it is fair to note, “*amongst other things*”). The application to set aside service out of the jurisdiction relied on asserted lack of merit in the claim only on the grounds that it was prescribed; it did not mention repayment. Mrs Glass Garfield’s affidavit sworn in support of that application on 26th October 2017 did not assert that she had repaid Mr Garfield, but only that he had said that he would accept €450,000 in full settlement and that the loan had later been “forgotten”. The conclusion which Advocate Dunster, on behalf of Mr Garfield, invited the Jurats to draw was that the assertion of actual repayment having been made in 2004 – 2006 was a late invention.
41. Mrs Glass Garfield denied all this. She said that she had always asserted, and told her advisers, that she had repaid the loan as she now claimed, but that as a result of her being unable to produce any supporting documentary evidence of this they had advised her not to make mention of it, and that it was not necessary to rely on it because the loan was prescribed in any event. She said that she had always respected and acted on her lawyers’ advice. She provided a document, her “Rebuttal”, which she said had been sent to her lawyers on 4th October 2017 (and thus before the drafting of her affidavit) in which she did assert that repayment had actually been made. On its being pointed out to her that her affidavit did not actually say that, she said that she had read it as implicitly doing so, and she had relied on her lawyers’ assistance with the drafting. She had insisted, however, that the point should be clearly and expressly made in her actual Defences, which it had been. She denied, therefore, that it had been a recent fabrication.
42. Returning to the history of the proceedings, a Replique was served on 9th February 2018 and a Duplique on 23rd February 2018 and various directions were given, in particular at a case management conference on 2nd March, to bring the matter to an anticipated trial on 6th – 8th June, with a pre-trial review set for 1st June.
43. On 13th April 2018, after completing the process of disclosure, Collas Crill gave notice that they were no longer acting for Mrs Glass Garfield. She has apparently been either unable or unwilling to pay their fees.
44. On 2nd May, Carey Olsen, for Mr Garfield, served a hearsay notice of their intention to adduce, as evidence at the trial, the affidavit of Maitre Chemouny sworn on 16th November 2017 in opposition to Mrs Glass Garfield’s application to set aside service out of the jurisdiction. On 3rd May formal witness statements from Mr Garfield and Mr Harris were filed and served. Mrs Glass Garfield herself filed no further evidence.
45. At the pre-trial review on 1st June before the Deputy Bailiff, Mrs Glass Garfield attended by telephone from France. She requested an adjournment of the imminent trial owing to alleged ill-health and her lack of representation. She also requested to be allowed to “appear” at the trial by video link, citing her health and the expense and difficulty of travelling from France. Very exceptionally and reluctantly, the Deputy Bailiff granted that request and adjourned the trial date until September.

(c) The trial and procedural matters

46. The trial has ultimately come on before this court, therefore, on 4th, 5th and 6th September 2018, and Mrs Glass Garfield has appeared by Skype relay connection. Cameras in the court have directed the picture for her to comprise, as appropriate, either the bench, Advocate Dunster, or Mr Garfield when giving evidence, and the Court was able to see Mrs Glass Garfield at her home office desk. Being aware that Bernard was present in the room the court also requested that he should place himself so as to be visible on the screen. Bernard has not been called as a witness in these proceedings, but plainly, and as she could do in any courtroom, Mrs Glass Garfield was entitled to have the moral support of her partner, and to receive assistance in managing documents and presenting her case, as distinguished from any kind of prompting as to what her evidence “ought” to be. It is always extremely difficult for a self-represented litigant to observe these rules, but Mrs Glass Garfield, by and large, conducted her case with notable and commendable efficiency, clarity, and focus on material points.

Mr Garfield’s evidence

47. It will be apparent that the central disputes in this case are matters of fact, on which the parties’ accounts differ radically. In view of this, Advocate Dunster proposed, and the court agreed, that evidence in chief was more appropriately given in the “old-fashioned” way, namely in oral examination in chief, rather than by taking written witness statements as read. Mr Garfield therefore gave his evidence in this way, whilst also confirming, under oath, that the contents of his previous two affidavits and his witness statement had been believed by him to be true at the time he had made them (he recognised that he had been wrong about the timing of certain events, such as the cancer treatments undergone by Mrs Glass Garfield and Bernard, and the date at which he placed the telephone conversation in which prescription was first alleged) such that they also could and should be taken to constitute his evidence. He was cross-examined by Mrs Glass Garfield.
48. Mr Garfield also relied on the evidence of his accountant, Mr Harris. Mrs Glass Garfield had previously confirmed that she did not wish to contest the truth of this evidence, on the basis that she could and would (as she is indeed entitled) make comment about the weight to be attached to it.

The evidence of Maitre Chemouny

49. This requires special mention. As previously mentioned Advocate Dunster also wished to rely on the evidence comprising an affidavit (with exhibits) of Maitre Chemouny made on 16th November 2017 for the purposes of the application to set aside service of the proceedings on Mrs Glass Garfield in France. It is not clear if that affidavit was actually used at the hearing of 20th December 2017, but a hearsay notice was served for the purpose of grounding its use in this trial. As already mentioned, Mrs Glass Garfield objects to the admissibility of, certainly, the affidavit itself. She appeared to admit that the exhibited emails, an exchange between Mr Garfield and Maitre Chemouny dated in June 2015, would still be admissible, but as she was unrepresented, the court has felt it right to consider also any points which might be made on her behalf in respect of the exhibits as well.
50. Mrs Glass Garfield had raised the issue of the admissibility of Maitre Chemouny’s evidence, and the objection which she took to this, at the pre-trial review held by telephone by the Lt-Bailiff, on 10th August 2018. She did so then on the grounds that the affidavit contained lies which Maitre Chemouny had not dared to state in a French court, and also that she had made a formal complaint about his conduct to the French Bar. There being no further evidence about either the nature of the complaint, its outcome, or its effects, and the affidavit having been introduced by proper procedure, the Lt-Bailiff refused to order at that stage that the affidavit be ruled inadmissible, but without prejudice to Mrs Glass Garfield’s right, if so advised, to renew her application at the trial.
51. Mrs Glass Garfield did renew that application. Unfortunately, and as has been a general feature of her evidence, she did so on the basis of reporting to the court matters which had been stated to her in otherwise undisclosed communications. In this case it was that Maitre Chemouny had “undertaken” (it was not clear to whom) to withdraw his affidavit evidence

and to do so by 15th July. Mrs Glass Garfield was apparently relying on letters written to her by her own French lawyers in making this assertion. It emerged generally that Mrs Glass Garfield had made a complaint about Maitre Chemouny to the French Bar at the end of 2017, but that this had been rejected. She had renewed this complaint in 2018, and it had not yet been adjudicated upon. It was not clear whether the basis of her complaint was that Maitre Chemouny should not have telephoned her without her prior written consent (as she asserted) or that he was lying in what he had said in his affidavit (which she also asserted) or both. Advocate Dunster submitted that, as Maitre Chemouny had not communicated a wish to withdraw his affidavit either to Carey Olsen or to the court, and there was no evidence of the basis on which he might be wishing to do so, there was therefore no evidence that its contents, which had apparently been deposed to normally and in good faith, were incorrect. The affidavit existed and remained, therefore, properly admissible. The contentious circumstances surrounding it would themselves be admissible as regards its weight, but as these circumstances did not go to the truth of its contents, he submitted that they would have no effect.

52. The Lt-Bailiff broadly agreed with Advocate Dunster, and refused to rule the affidavit inadmissible, at any rate at that juncture. However, she also ruled, at that juncture, that just in case it might be material at a later date, she would direct the Jurats, in making their findings of fact, to consider and to state whether any such findings had been critically affected by the information contained in the affidavit, such that those findings would have been different if they had not seen it.
53. The matter did not quite end there as the court then received an email direct from Mrs Glass Garfield's French lawyer, stating that Maitre Chemouny had indeed undertaken to withdraw his evidence and demanding that the Royal Court "*must dismiss*" this document. The Lt-Bailiff ruled that this communication made no difference to her previous ruling. Subsequently, following enquires made by Carey Olsen, a colleague of Maitre Chemouny confirmed that in the course of disciplinary proceedings which were being pursued at the behest of Mrs Glass Garfield, Maitre Chemouny had agreed to request that his affidavit evidence should be withdrawn from the court in Guernsey "if possible", and that request was therefore now pursued on his behalf. The Lt-Bailiff took the view, once again, that without some indication of the basis on which it was said that Maitre Chemouny's evidence should be withdrawn, the affidavit and its contents were a fact which existed, and to which the Jurats were entitled to give such weight as they thought fit in all the circumstances. Certain other letters from various officials of the French Bar were also copied to the Court over the remaining day or so of the trial, but in the Lt-Bailiff's view these did not take the matter any further. However, she repeated her ruling to the Jurats that they should consider their findings on the basis of giving this affidavit evidence such weight as they saw fit in the circumstances, but also, separately, indicate if, without it, their resulting findings would be different.
54. In the light of further thought, the Lt-Bailiff also extended this ruling to the content of the contemporaneous email from Maitre Chemouny to Mr Garfield recording the gist of the conversation which he said he had had with Mrs Glass Garfield in 2015. Advocate Dunster argued that the emails appended to Maitre Chemouny's affidavit would be admissible in any event, as they could have been retrieved from Mr Garfield's own electronic records. However, the Lt-Bailiff took the view that one possibility with regard to the basis of the complaint being made against Maitre Chemouny could be that there had been some breach of legal professional privilege as it operated in France, allegedly owed by him to Mrs Glass Garfield. If that were the case (and plainly there were several unproven factual and legal assumptions underlying this) then a court which became aware that it was receiving evidence in breach of legal privilege could, and probably would, decline to consider it, as a matter of discretion. That would, though, inevitably have entailed a finding that Mrs Glass Garfield owned privilege with regard to the conversation, and if so, the possible inadmissibility of material procured in breach of such a privilege would seem to apply just as much to an emailed report of the contents of the relevant conversation as to a sworn written account of it. In those circumstances, therefore, she repeated her earlier ruling, but extended the scope of

the materials which the Jurats should consider as to whether or not they were critical to their findings of fact also to the relevant contents of the email passing from Maitre Chemouny to Mr Garfield, ie those parts recounting what was said between him and Mrs Glass Garfield.

The evidence from Mrs Glass Garfield

55. As regards evidence from Mrs Glass Garfield herself, it was agreed that, since she was content to do so, she should take the witness's oath prior to addressing the court and presenting her case, so that there would be no problem about her relying on anything which she felt minded to tell the court at any stage being treated as her evidence in the case, and accordingly being treated as truthful as if on oath. Mrs Glass Garfield was invited to, and did, give her evidence as to what had happened in her own words, as well as confirming, as Mr Garfield had done, her belief in the truth of four documents which she had previously submitted to the court at the time she did so. These were her affidavit of 26th October 2017, her "Rebuttal" in answer to Mr Garfield's first affidavit, which she said she had provided to her advocates on 4th October 2017, her "Skeleton" provided to the court on 25th May 2018, and a further document which she had submitted to the court on 3rd September, the day before the trial, but without permission or warning.
56. Pragmatically, Advocate Dunster did not object to the admission of this last document. It emerged, however, that a large part of it was concerned with arguing that the original loan agreement of November 2000 was unlawful under French consumer law. In view of the clear finding of the Deputy Bailiff referred to earlier, that the loan agreement was governed by Guernsey law, the Lt Bailiff ruled that this was not a point which it was open to Mrs Glass Garfield to argue.
57. Mrs Glass Garfield called no other witnesses and her documentary evidence was confined to the documents previously exhibited to her affidavit.

The issues

58. Advocate Dunster divided the issues before the court into four questions, which he posed chronologically, rather than as a sequential decision tree in the case. They were as follows:
- (1) **Was the loan repaid as Mrs Glass Garfield asserted?** If so, this would, of course, dispose of the whole case. However, if it were found that the loan had not been repaid, then the remaining issues arose.
 - (2) **Was interest on the loan cancelled by Mr Garfield, or only deferred?**
 - (3) **Was there, in the events which happened, an informal oral variation of the loan agreement to extend the period for repayment until the property was sold (with the concomitant condition that Mrs Glass Garfield should take all reasonable steps to sell it)?**
 - (4) **Alternatively, (if there were no such variation) was Mr Garfield's right to recover the loan extinguished by prescription, because proceedings had been commenced more than six years after the repayment date of 30 November 2010?**
59. Advocate Dunster submitted (and the court accepts that this is correct) that with regard to the first two issues the burden of proof rests on Mrs Glass Garfield to prove these matters to the court, but with regard to the latter two issues, the burden of proof would lie upon Mr Garfield. He would have to prove to the court that there was such a variation of the loan contract or, if not, he would have to prove facts which supported a good legal argument that his cause of action had not been barred by the effluxion of time.

General observations

60. It is very apparent, first, that the issues in this case are largely issues of fact and second, that the resolution of such issues depends very much on whose evidence the Jurats find more credible.
61. The Jurats observe that the reliability of a witness's evidence depends both on the honesty or sincerity of the evidence given, and also on the apparent reliability of the recollection or impression being expressed. Applying this to their own impressions of the two witnesses and their evidence, and having considered and weighed this evidence in the light of surrounding independently verifiable facts, they are inclined to prefer the evidence of Mr Garfield to that of Mrs Glass Garfield where there is a conflict.
62. They found the evidence of Mrs Glass Garfield to be at times vague and frequently inconsistent, even allowing for the fact that lay people are not used to having to express themselves with precision and consistency in everyday life. The Jurats have considered the extent to which they ought to make allowances for Mrs Glass Garfield's poor health and previous illness, but they note that she herself considered her mental powers to have made good recovery from her serious brain surgery, and that it was more physical matters such as reading, writing and locomotion which were impaired, and indeed, Mrs Glass Garfield was firm and quite focussed in the evidence and answers which she gave to the court. The Jurats noted, however, that she apparently had no qualms about making accusations of improper and disgraceful conduct against Mr Garfield (in particular with regard to his tax affairs) without any supporting evidence and even in the context where, she admitted, she "did not know" but only believed. They also noted a repeated tendency to blame other people for difficulties or misfortunes which had beset her. They found her evidence to be, in places, implausible and, regrettably coloured by an underlying animosity towards Mr Garfield which was scarcely hidden.
63. This does not mean that the Jurats accept the evidence of Mr Garfield entirely at face value, and without any reservations. Whilst his evidence was certainly clear and business-like, they were not convinced by his professions of the depth of feeling and consideration for his elder sister which he claimed to have influenced his behaviour towards her over the years. They do accept, and they find, that he had a sense of family duty towards Mrs Glass Garfield, but they were not convinced that this extended to deep affection, even before the sudden breakdown of relations in 2015 which he described. They also formed the impression that Mr Garfield is generally quite astute to protect his own interests, as evidenced by the rate of interest charged, compound, on the loan to Mrs Glass Garfield, (which he was - they find - viewing as an investment, even if justified by reference to the interests of his own children), and by the tenor of the email which he wrote to Maitre Chemouny on 19 June 2015, in which he referred to "*in any event we will still need to proceed to protect my position and at the same time 'look after' my sister*" in a context where the response from Maitre Chemouny suggests that what was being considered was "*carry[ing] out enforcements*".
64. As regards the reliability of his recollection, his placing of the time of certain events was plainly mistaken in some cases, and whilst the Jurats fully recognise that people can easily and honestly misremember times and dates, they were somewhat struck with the enormity of his misplacing the time of Mrs Glass Garfield's brain surgery by almost 10 years, placing this in about 2011 or 2012, after the date when the loan had *prima facie* fallen due, rather than the mere two years after it had been made. This suggested either that he had never been as close to his sister's affairs as he had made out, or that he had felt the need to deploy this serious event to bolster his claim that he had felt compelled to refrain from pressing her to repay the loan at this time through compassion for her state of health. Matters such as these have, therefore, caused the Jurats to look carefully and critically at not only the parties' respective testimonies, but also the extent to which surrounding circumstances tend to support or contradict the conflicting accounts which they have put before the court.

Issue (1) Was the loan repaid?

65. Taking all the parties' evidence and the surrounding facts into account, the Jurats are perfectly satisfied that the loan was not repaid between 2004 and 2006 as Mrs Glass Garfield now asserts.
66. The Jurats first note that the loan itself was fully and professionally documented in 2000, as was the assignment in 2004. They note, on the other hand, that there is absolutely no documentation of any kind relating to the alleged repayment of the loan in three tranches of cash in 2004, 2005 and 2006. Whilst not impossible, they find this remarkable.
67. Mrs Glass Garfield explains this by asserting that Mr Garfield insisted that he wanted the repayment in cash, and that she understood that he was doing so for nefarious reasons - in particular to facilitate tax evasion. The Jurats reject this as an entirely unsupported accusation. Whilst recognising Mrs Glass Garfield's point that an accountant can only give evidence of that which he knows, they have examined the affidavit of Mr Harris, whose evidence Mrs Glass Garfield did not choose to challenge or even probe, and they note that he is himself satisfied that Mr Garfield has not only been fully compliant in his tax affairs, but "...has provided all support requested in a transparent and open manner". They also accept the cogency of the point that as the loan was a legitimate and documented loan, there would be no potential tax to evade by getting the repayment in cash, such that demanding this would have no logic. They are unable, therefore, to attach any weight to Mrs Glass Garfield's assertions as to the supposed reason for Mr Garfield seeking repayment in cash and surrounding it with secrecy.
68. Likewise, there has been no evidence adduced by Mrs Glass Garfield from those who she says contributed the monies used to make these repayments, whether her friend Jacqueline Margaux, or Bernard's brother Arnaud, or indeed Bernard himself. This has been despite Mrs Glass Garfield's stating that she "could" provide testimonies from such persons, and her own point that, from an early stage, her advisers were supposedly reluctant to advance the case that the loan had been repaid because of lack of any supporting factual evidence, which one would have expected to prompt her to produce what she could.
69. Neither is there any indirect evidence of such repayments. The Jurats note that Mrs Glass Garfield asserts that she kept a diary, and also that she kept it thoroughly, to the extent, for example, that Bernard had kept it for her whilst she was incapable of doing so in hospital. They note that this diary has not been produced in evidence by her, despite the fact that it would have been expected to reveal records of at least some material events supporting her version of events, such as, firstly, the actual making of the payments to her brother which she now alleges and which were plainly events of some significance, and also, though perhaps of less moment, receiving sums of money from her friends and acquaintances which were being assembled to make those payments, and the later repayments to these friends, made (she said) over the following two or three years up to about 2008.
70. The Jurats have also considered the sequence of events by which the assertion of repayment came to be raised. They find that, as listed by Advocate Dunster, there have been several occasions early on when, had Mrs Glass Garfield been acting in the belief that the loan had been repaid, it would have been natural to assert this, but this was not done. They note in particular that it was not immediately mentioned as an answer to Mr Garfield's claim, either in Collas Crill's initial response on Mrs Glass Garfield's behalf, or in the application to set aside service of the proceedings, nor at the outset, in the defences raised by her French lawyers in the proceedings in France. In all these instances, only the defence of prescription (and lack of *locus standi* in the French proceedings) was mentioned or relied upon. The first intimation of a defence of repayment appears only in Mrs Glass Garfield's Defences in the action, tabled in January 2018.
71. The Jurats weigh this against Mrs Glass Garfield's evidence that she had, in fact, informed her advisers that the loan had been repaid and her assertion that the reason for its not having been mentioned earlier was that her lawyers advised against doing so, because of the lack of

any available supporting evidence and the strength of the prescription defence, and that she accepted that advice. The Jurats note that this means that the same advice would have come from two different lawyers independently, a fact which they find remarkable. They note that Mrs Glass Garfield says that the information that she had repaid the loan was conveyed to Collas Crill in a document handed to them on 4th October 2017, before the swearing of her affidavit in support of the application to set aside service on 21st October 2017, but on any basis this document was only produced in these proceedings on 25th May 2018.

72. The Jurats note that Mrs Glass Garfield says that in her affidavit of 21st October 2017 it is implicit in her reference to Mr Garfield telling her that “*he would consider the debt fully paid if [she] paid him €450,000 in cash*” that she had in fact gone on to make such payment. However, having seen Mrs Glass Garfield give evidence, and as a matter of simple common sense, the Jurats find it inconceivable that Mrs Glass Garfield would not have said in clear words that she had made the payment, if that had been the case. They are unconvinced that she would have expressed her evidence in the words which she chose, or apparently accepted as accurate, if she knew that she had in fact repaid the loan, as she now asserts.
73. The Jurats find that Mr Garfield’s conduct has always remained consistent with a belief that the loan remained due and was unpaid, even if he was not currently pressing for interest or proceeding to enforce it. They accept that it is implausible that he would have included reference to the loan as an asset (even if only, as he explained, as to his belief as to the amount of the capital sum outstanding, and not accrued interest) in his statement of assets in divorce proceedings in 2016, if he had not believed that the loan did remain outstanding and unpaid. It was clearly not to his advantage to do so.
74. The evidence above suffices in itself to convince the Jurats that the loan has not been repaid to Mr Garfield by Mrs Glass Garfield in the manner in which she has claimed or at all, but they note that the disputed evidence of Maitre Chemouny is in accordance with the general thrust of the documentation and further supports the above conclusion.
75. Maitre Chemouny’s affidavit principally recounts the telephone call which he had with Mrs Glass Garfield in June 2015; she admits to a telephone call, but denies his account of the conversation and labels it “lies”. Materially, Maitre Chemouny states that during his telephone call with Mrs Glass Garfield she had never contested the debt or the loan, was fully aware of the monies which she owed to Mr Garfield and appeared to intend to repay him. He says that they discussed the potential sale of the property and the involvement with SAFER, and that Mrs Glass Garfield confirmed (as she had already done to Mr Garfield, and as he had told Maitre Chamouny) that she had signed a commitment to sell part of the stables to SAFER which she now regretted because she believed it was an undervalue, and wished to get out of, but she expected that they would not take up this commitment, and that it would expire on 30th September 2015, and she would then be free to sell the property herself, and would be doing so.
76. Whilst accepting that a telephone conversation took place, Mrs Glass Garfield denies that the loan was mentioned or discussed, or that she acknowledged it. As previously mentioned, she has sought to have Maitre Chemouny’s affidavit (and possibly at least the email report of his telephone conversation with her) ruled inadmissible. As also previously mentioned, Maitre Chemouny had conveyed to the court a request to have his evidence removed from the proceedings “if this were possible”, but the Lt-Bailiff instructed the Jurats that in the circumstances, they could consider the evidence of Maitre Chemouny, and it was a matter for them what weight they would attach to it as a hearsay statement (he not being present to give evidence in person), and also whether this was affected by the further evidence of Mrs Glass Garfield’s complaint to the French Bar about him, and such evidence as there was regarding that complaint and its progress or effects, and the fact of his conveyed request that his affidavit be withdrawn if possible.

77. The Jurats place reliance on the evidence of Maitre Chemouny as adding support to their finding that the loan had not been repaid and that Mrs Glass Garfield understood this. They can see no reason, in the circumstances surrounding the case, to doubt the contents of his affidavit and of the contemporaneous email recording the conversation. However, they also make it clear that, as instructed by the Lt-Bailiff, they have considered what their conclusions would be as to whether Mrs Glass Garfield had repaid the loan or not if they had not taken into account the evidence of Maitre Chemouny, and they are satisfied that their conclusion would be no different.

Issue (2) Was interest on the loan cancelled by Mr Garfield, or only deferred and accrued?

78. This, once again is an issue of fact, as to which the basic conflict is between the oral testimony of the parties.

79. Effectively, Mr Garfield argues that there was never any change in the terms of the loan, which provided for the payment of interest at the rate of 4.5% per annum, with 6 monthly rests; all that happened was that from an early time when it was apparent that Mrs Glass Garfield was not able to keep down the interest, he decided to let it accrue, to be paid when the loan was itself repaid, which effectively and realistically meant when the property was sold. He said that it had been anticipated that Mrs Glass Garfield would be retiring and selling by about the time the loan had been fixed to expire, ie in 10 years. He believed that he had conveyed to his sister his intention to allow deferral of interest, but not total cancellation, again from an early time in the course of their general communications, although he could not be clear as to exactly when. He said that in the course of their later communications, when he had latterly – since about 2010 – begun to raise, and press, the question of selling the property, she had repeatedly said that she was trying to do so, and that when she did, she would repay the loan *and interest*.

80. Mrs Glass Garfield's evidence was that notwithstanding what was written in the agreement, Mr Garfield had agreed that she would not have to pay interest. However, her evidence as to when and in what context this occurred was neither particularly clear nor consistent. In her submissions to the court, she associated this with her assertion that Mr Garfield had told her that he would consider the debt repaid in full if she merely paid him the capital, calculated as €450,000, in cash. Her evidence was then, of course, that she had set about doing this, and that from 2006 onwards the loan (and by natural extension the interest) had simply not been mentioned. At other points in her evidence, however, she appeared to claim that the agreement to cancel interest had been made earlier. She said, in cross examination, that Mr Garfield had said to her "Don't worry about the interest". She cited the fact that she had not received any demands for current interest on the loan as reinforcing her belief that the interest obligation had been cancelled, although it is clear (see below) that at least one such demand was in fact sent.

81. As regards the surrounding circumstances, the Jurats note the following matters in chronological order. First, the original loan agreement clearly refers to the payment of interest at 4.5% compounded at six monthly rests, and Mrs Glass Garfield signed this document. Mrs Glass Garfield accepts this, although, as mentioned, she has complained that the interest rate was higher than she could have obtained from a bank and that Mr Garfield induced her to take this (less advantageous) loan from him. She also says that she did not really read the particulars in the loan documentation and that she signed it all whilst Bernard was away in the United States.

82. The trustees' archived documents show that a written demand for interest was made on 20th June 2001, although it is common ground that this was not paid.

83. There is then a note from Mr Garfield to "Stephen" of the trustees, stating "*Following your letter 31.10.02.....I confirm that it is in order to accrue charges for my sister's mortgage.*" Whilst this appears to be dated 14/02/12, in view of its content and the fact that the salutation is "*Happy Xmas*", it was probably dated 14th December 2002. It can be observed that this was not long after Mrs Glass Garfield underwent her extremely serious brain surgery.

84. The Assignment of the Loan, executed in March 2004, contains a clear statement of an assignment of “*an amount receivable of £300,000, plus accrued interest...*”. It was signed on behalf of the Trustees on 20th February, by Mr Garfield on 2nd March and by Mrs Glass Garfield on 5th March 2004.
85. The demand made on Mrs Glass Garfield on behalf of Mr Garfield in August 2016 claims repayment of the loan “*and contractual interest*”.
86. The Cause itself asserts an obligation to repay the capital of the loan “*and interest due*”, and the denial of liability in the Defences is confined to denial on the basis that the claim is barred by prescription or that the loan has been repaid, and does not assert any partial defence in relation to cancellation of the interest. (In the light of this last point, it might have been argued that it was not open to Mrs Glass Garfield, on her pleadings, to argue that there had been a cancellation of interest, but Advocate Dunster did not seek to do so, and instead dealt with the point on the merits.)
87. As against this, the only evidence in the other direction is that Mr Garfield did record the loan due from his sister as an asset of his in mid-2016 in a sum (£317,750) which clearly did not include accrued compound interest. The discrepancy of £17,750 is unexplained, corresponding neither to the interest in the only documented demand, nor to any other identifiable item in the evidence. There is, however, evidence that the sums advanced in €s which are recorded, may have included legal costs and thereby exceeded the basic £300,000. Mr Garfield in oral evidence explained the figure he gave in his divorce proceedings as arising from the fact that, in turning his attention to a list of his assets for the purpose of disclosure in his divorce, he had simply thought of what he understood to be the capital figure, and had not considered interest. The Jurats accept this explanation as plausible.
88. Considering all the evidence, the Jurats are satisfied that Mr Garfield himself never intended to cancel Mrs Glass Garfield’s obligation to pay interest entirely, but only to allow this to roll up, to be paid off when the loan was ultimately discharged. They are also satisfied, consistently with this intention and also their impression of Mr Garfield and his entrepreneurial nature, that his communications with Mrs Glass Garfield were intended only to convey this latter intention.
89. The Lt-Bailiff therefore directed the Jurats that in order to take forward the question whether there had been any effective cancellation of the obligation to pay interest, they should next consider whether Mrs Glass Garfield had understood Mr Garfield’s communications to mean that he was cancelling the interest obligation entirely, and if so, whether that had been a reasonable understanding of his communications. In the light of their findings she would then consider whether further findings were required. The Lt-Bailiff further directed the Jurats that since Mrs Glass Garfield’s own case was that from 2006 until the commencement of proceedings there had been no conversations regarding the loan because it had been repaid or “forgotten”, she could not be relying on any express or implicit agreement after this time, and they therefore need make findings only about the state of communications between Mr Garfield and Mrs Glass Garfield on the topic of loan interest with regard to the period from 2000 to 2006.
90. With regard to this period, the Jurats find that, and certainly in the context of his sister’s major illness, Mr Garfield will have made informal remarks such as “Don’t worry about the interest” in reference to relieving Mrs Glass Garfield of the obligations to make immediate interest payments, but they also find that Mrs Glass Garfield, either at the time or in hindsight, has wishfully interpreted or latched on to these as meaning that interest was to be cancelled entirely. The Jurats also find that if she did so interpret these remarks at the time, it was not reasonable for her to do so, as they could only have been ambiguous at best, and, in particular, she was reasonably alerted to any misconception of hers by the terms of

the Assignment Document, which were clear and unequivocal, and which she signed, separately from Mr Garfield and three days later.

91. The Jurats are satisfied that there was never, therefore, any agreement between Mr Garfield and Mrs Glass Garfield that interest on the loan should be cancelled. As they have also found that there was never any representation made by Mr Garfield to Mrs Glass Garfield which she could reasonably have interpreted as agreeing this, it is unnecessary for the Lt-Bailiff to consider the effect if any such representation had been found.
92. For the avoidance of doubt, the Jurats also reject Mrs Glass Garfield's evidence that Mr Garfield offered, in 2004, to accept immediate payment of the principal of the loan without interest in full and final settlement of the total debt. They are not satisfied that any such offer from Mr Garfield was ever made. The legal consequences of any such offer, had it been made, therefore do not require to be considered.

Issue (3) Was there an oral variation of the written loan agreement, in particular to vary the repayment date?

Observations

93. The importance of this issue lies in its effect on Mrs Glass Garfield's argument that Mr Garfield's claim to recover the loan and interest has been extinguished by prescription, ie by the effluxion of time.
94. Under Guernsey law, a right to recover a debt is extinguished six years after the payment obligation falls due. The position is apparently not the same under French law. French law evidence adduced in the application to set aside service suggests that the relevant period may be five years; Mrs Glass Garfield asserted confidently that it was two years. This does not matter, however, as this loan has been held to be governed by Guernsey law.
95. Under the loan agreement, in the absence of a prior demand, the obligation to repay fell due on 30 November 2010. The effect of the law of prescription is therefore that, *prima facie*, Mr Garfield's right to recover the debt and interest was extinguished on 30 November 2016, but he did not commence this action in Guernsey until 17 July 2017, some 7 ½ months too late.
96. Unless, therefore, Mr Garfield can raise a successful argument that time did not run against him in the circumstances of this case, his claim must fail. He makes such an argument on two different bases. The first of these seeks to avoid the effects of the law of prescription completely, by arguing that the obligation on which he is now, in fact, suing is not the obligation to repay recorded in the loan agreement, but a second replacement obligation, arising from a subsequent oral agreement between himself and Mrs Glass Garfield to vary the loan agreement. This variation agreement, he says, was to the effect that he would not seek to enforce the repayment of principal and interest under the loan agreement until the property (or a sufficient part of it) had been sold to realise the necessary funds, but on the basis (effectively therefore the condition) that Mrs Glass Garfield would take all the reasonable steps she could to get on and sell the property and realise such funds.
97. The first question is therefore whether any such agreement was made. Although this is basically a question of fact, it becomes a mixed question of fact and law, in that it is for the Jurats to make findings of fact as to what happened, and if necessary it is then for the Lt-Bailiff to decide whether the facts as found by the Jurats amounted to an agreement in law. The burden of proving that there was a variation agreement as claimed rests on Mr Garfield.
98. The Lt-Bailiff also observes that, for the purposes for which this argument is deployed, if such an agreement was made, then it does not matter exactly when it was made. If it was made before 30 November 2010, then it would operate to vary the terms of the loan agreement and the due payment date prospectively. If it was made after 30 November 2010, then so long as it was made prior to 30 November 2016, when Mr Garfield's accrued right to

enforce payment would have been extinguished (the “**prescription date**”), it would operate as a fresh agreement, substituting the agreed respective rights and obligations of the parties for the crystallised right of Mr Garfield to receive payment and the crystallised obligation of Mrs Glass Garfield’s to pay. Since, on any account, the dispute between the parties came to a head either in October 2015 or August 2016, any agreement must have been made before the prescription date if it was made at all.

Was such an agreement made?

99. The Jurats note that Mr Garfield’s case is that this variation was the effect of conversations which he had with Mrs Glass Garfield over time, but particularly after about November 2010 and before the alleged “*Goodbye*” conversation of October 2015. These conversations were to the effect that he would not take enforcement proceedings against her to recover the loan, on the basis that she would seek to sell “the property” and repay him as soon as she had done so, and that she would do, and was doing, all she could to sell “the property”. He says that the substance of this agreement was raised and it was effectively confirmed by Mrs Glass Garfield on numerous occasions.
100. Whilst this alleged agreement was described by Mr Garfield in the above relatively simple terms, the Jurats noted that, on further elaboration in his evidence, it became apparent that what was being referred to was not a sale of the entire property, but a sale of some or all of the accompanying land comprising the stables, with the proceeds of this to be then used to pay him. Insofar as there might then be a shortfall in the payment, he said, in evidence that he would not have gone so far as to throw Mrs Glass Garfield out of her house, but would then have reviewed the way forward, and that they could then have entered into a “*viager*” arrangement. He claimed that he had made this point also to Mrs Glass Garfield .
101. It was explained to the court by Mr Garfield that “*viager*” is an arrangement known to French law whereby, in simple terms, a person can purchase a house from its owner-occupier to provide the latter with cash, the owner-occupier remains in residence, and the house ultimately accrues to the ownership of the survivor of the purchaser and the owner-occupier/vendor. Mrs Glass Garfield agreed with this description, but said that no such arrangement had ever been suggested in the course of any conversations, and that she would have remembered if it had been, because Mr Garfield did not know the correct pronunciation of the word “*viager*”, and she would have corrected him. There was no further investigation in the trial of how it was anticipated that such an arrangement would have been constructed.
102. Mrs Glass Garfield’s case is that no such variation agreement was ever made, and no such conversations occurred. This is not surprising, of course, because her case has been that the loan was repaid by her by 2006, and thereafter there was simply no mention of it. Any talk about her selling the property only arose (she says) in May 2015 in connection, rather, with Mr Garfield asking her for a loan (and not for repayment of a debt to him), and a possible sale of the property was indeed in contemplation by her at the time (she did not elaborate on why this should have been the case), but with the expectation that it would only take place in September. She had rejected Maitre Chemouny’s offer of “assistance” in this regard, but she appeared to accept in evidence that she had indeed entered into a commitment to SAFER which she had later regretted, although it had not in the event been taken up. Beyond hearing from Mr Garfield that he was no longer in need of a loan, she heard nothing more until the commencement of the French proceedings.
103. Evaluating the competing accounts of the parties, the Jurats have found Mr Garfield to be more credible as a witness than Mrs Glass Garfield, and they also find his account of what occurred to be the more plausible, both on its own and also examined in the context of the known independent facts. However, this does not mean that they accept Mr Garfield’s evidence without reservation.
104. The Jurats accept and find that Mr Garfield did remain in communication with Mrs Glass Garfield over the years after 2006 as he claimed, rather than there being virtually no contact between them between 2006 and 2015, as she asserts. They also accept, because it accords

with likelihood and with their impressions of Mr Garfield, that after the repayment date for the loan in November 2010, he began to press more and more strongly for the loan to be repaid. They accept that Mr Garfield was reluctant to take formal legal proceedings against Mrs Glass Garfield but they find that this was because she was his sister, and because he perceived it to be rather pointless to do so when she apparently did not have the resources to repay him without selling the property. In the light of his mistake about the dates of her brain surgery and of Bernard's illness with cancer, the Jurats do not accept that his reluctance was caused to any material degree by compassion provoked by her (or Bernard's) state of health. They are satisfied that Mrs Glass Garfield reacted to Mr Garfield's pressures by seeking to fend him off, by promising efforts to satisfy him. The Jurats find, as Mr Garfield himself appeared to accept, that his pressure with regard to selling "the property" did not, at this point, extend to pressing her to sell the house which was her home, but only the stables with the unprofitable business. The Jurats do not accept that Mr Garfield ever referred, in conversations with Mrs Glass Garfield at the time, to the possibility of a subsequent "viager" agreement between them with regard to the house, if the proceeds of the stables produced insufficient funds to satisfy the loan and interest. They find that this possibility was simply not discussed. They find that the suggestion that such an arrangement was mentioned is a late suggestion by Mr Garfield, designed to rationalise the course which he had taken, which was to seek to get at least some money back, in the first place, by getting his sister to sell the stables. That does not, however, detract from their acceptance of the main thrust of his evidence.

105. The upshot, therefore, is that the Jurats accept and find that, in the course of the conversations which took place over the period after about 2006 and before the June 2015 telephone call between Mrs Glass Garfield and Maitre Chemouny (the fact of which Mrs Glass Garfield admits), these conversations had, in fact, crystallised into an express understanding between Mrs Glass Garfield and Mr Garfield, that Mrs Glass Garfield would start taking all reasonable steps to sell the stables, and on the basis that she would now get on and do so, and use the proceeds of the sale in repayment of the loan. In return, by obvious and understood implication if not stated in so many express words, Mr Garfield agreed that he would not take any hostile steps to recover the loan (ie, legal or enforcement proceedings) pending the conclusion of such sale.
106. For themselves, the Jurats state that they consider that this amounted to an agreed alteration to the terms of the loan, to the effect that the capital and interest should be repayable on the sale of the property by Mrs Glass Garfield. The Lt-Bailiff has therefore considered the above findings of the Jurats, to determine whether they do amount, in law, to a contractual variation, or substitute agreement. She has concluded that they do.
107. Seeking to ensure that all possible legal arguments which might be made on behalf of Mrs Glass Garfield as a self-represented litigant, the Lt-Bailiff raised with Advocate Dunster the question whether the alleged agreement was sufficiently certain in its terms to amount to an enforceable contract, in the light of (i) the more elaborate evidence of Mr Garfield that it was only some part of the property, apparently not precisely identified, which Mrs Glass Garfield was supposed to be selling, and (ii) the fact that the agreement had been described by him in terms of the debt being repaid upon such sale and out of its proceeds, when it appeared more than likely that the proceeds would be insufficient to satisfy the debt. On analysis, however, the Lt-Bailiff is satisfied that the suggested agreement was sufficiently certain, and that it is correctly analysed as an agreement that Mrs Glass Garfield would make reasonable and prompt efforts to raise money by selling the property (albeit this could be piecemeal) in return for Mr Garfield's agreement not to take any proceedings in respect of the debt as a whole if and so long as she did so - specifically, to start with, in respect of the part of the property comprising the stables. The forbearance from suit effectively offered in return for taking immediate steps to sell the stables and pay over the realised proceeds is, in the judgment of the Lt-Bailiff, sufficient to constitute a good contract in law to alter or amend the previously agreed fixed date for repayment.

108. The result of this conclusion is that Mr Garfield's suit was not brought out of time, because the terms concerning the time for repayment were modified or superseded. The Lt-Bailiff is satisfied that the effect of this substitution, as implicitly agreed by the parties, was that Mr Garfield's forbearance from suit would operate "if", in the sense of "so long as", Mrs Glass Garfield kept her side of the bargain and took reasonable steps to sell the stables. However, upon her failing to do so, the obligation to make immediate payment to him in full would revive.
109. Mr Garfield says that he became aware that Mrs Glass Garfield had no intention of repaying his loan, on any basis, in the "Goodbye" telephone conversation. The Jurats accept his evidence that this conversation took place. They are satisfied that it took place at the beginning of October 2015, because Mr Garfield instructed his French lawyers a day or two later and the first French proceedings were issued urgently on 9th October 2015. The timing of this conversation also fits convincingly with the fact that Mrs Glass Garfield had told Mr Garfield that SAFER's interests in the property sale would expire on 30th September 2015.
110. On that basis, the Lt-Bailiff holds that the agreement to forbear from suit terminated on a date around the beginning of October, 2015 with the obligation to make full and immediate repayment reviving at that time, such that the six year prescription period began to run against Mr Garfield on the revived obligation only at that time. The loan together with interest was consequently a recoverable debt at the time when these proceedings were issued, and Mr Garfield's claim is not prescribed.

Issue (4) Did time fail or cease to run under the doctrine of *empêchement d'agir*?

111. The finding that the repayment terms of the loan agreement were contractually varied or replaced means that it is unnecessary for Mr Garfield to rely on the doctrine of *empêchement* to resist the effects of prescription on his claim. However, since the point was argued and the facts were gone into, the court will deal with this issue, albeit briefly. The following discussion is therefore predicated on the assumption that the facts as found by the Jurats did not amount to a binding contractual variation, such that Mr Garfield's only right to recover his loan depends upon his right to enforce the repayment obligation contained in the original loan agreement, and was therefore potentially extinguished on 30 November 2016.

Legal framework

112. *Empêchement d'agir* is a doctrine which has been held to have long been part of the customary law of Guernsey, although it has not been codified, and is still developing. In the leading case of *Yaddehige v Credit Suisse* 2007-8 GLR 282 it was reviewed by the Court of Appeal which indicated that its principle in Guernsey law on this doctrine would operate similarly to its development in Jersey law, owing to the parallel origins of the doctrine. The doctrine was developed as

"an equitable remedy tempering the way in which the strict rules of prescription of the Common Law are to be applied."

per Carey JA in *Yaddehige*, (*supra*). In essence it is a doctrine by which time is held not to run, or alternatively to be suspended, where there is held to be a sufficient legal or practical impediment preventing the potential plaintiff from bringing an action to enforce his rights. It is expressed in the maxim "*A qui est empêché d'agir la prescription ne court point*".

113. The obvious and clear instance of such an impediment is one going to lack of legal capacity to sue, such as minority or want of sufficient mental capacity. However, *empêchement* can also arise as a practical matter, because of the existence of a

"practical impossibility of the Plaintiff being able to exercise his rights [sc.to commence legal proceedings]"

see *Public Services Committee v Maynard* [1996] JLR 343 at p 354, l. 26 and p. 355, l.44 . What constitutes such a "practical impossibility" is a matter which is fact specific, and the

law is to be regarded as still developing. The term is used to contrast with a “theoretical impossibility”, and the adjective “practical” softens the black letter tenor of the word “impossibility” (see *Boyd v Pickersgill* [1999] JLR 284 at p.291, l. 16.), and shows that common sense rather than conceptual legal theory has to be applied.

114. The area in which the doctrine has mostly been considered is that of ignorance. That is not in issue in this case, but illustrates the doctrine. Contrasts have been drawn between cases where a plaintiff is ignorant of his cause of action in the sense that he is ignorant of some fact which constitutes the cause of action, and cases where the plaintiff is ignorant of his cause of action because of ignorance that facts of which he is fully aware afford him a cause of action at all. No hard and fast rule has been laid down in such cases, it being emphasised that the principle is that the real question is whether the particular ignorance alleged is found by the court to have been reasonable in all the circumstances (see *Boyd v Pickersgill, supra*). Another form of ignorance would be ignorance simply of the principle of prescription, but as that would be an allegation of ignorance of the law, that would probably be unlikely to found a successful plea of *empêchement*.
115. In *Holdright Insurance Co v Willis Corroon Management (Guernsey) Limited*, [2000-02] GLR 60, Day DB appeared to define the principle in extremely general terms, saying at [37]

“In the small minority of such cases any “wholly unreasonable result”can be, if it is appropriate to do so, avoided by the empêchement principle. The maxim provides for a judicial solution to potential travesties of justice..... In my view it accords with the flexibility which is a marked feature of our customary law.”

However, this decision preceded *Yaddehige (supra)*.

116. Lastly, it will be observed that Mr Garfield can make out the operation of the doctrine of *empêchement* on one of two approaches. He can either show that the running of time did not commence against him until a date after 17 July 2011, or he can show that, even though it commenced on 30 November 2010, it was thereafter, at some point, suspended for a period exceeding 7 months and 18 days, such that it had not expired by the time he came to commence his action.

The arguments

117. Relying on this background, Advocate Dunster invokes the doctrine of *empêchement* on Mr Garfield’s behalf in two different ways. The first is that he relies on certain facts as constituting a “practical impossibility” of Mr Garfield’s having brought his action before 30 November 2016. The second is the rather more general basis that an overview of the situation justifies the court invoking the doctrine of *empêchement* on the facts of this case, in order to prevent an injustice.

(a) Practical impossibility

118. The facts relied on by Advocate Dunster under this head are:
- (i) Mrs Glass Garfield told Mr Garfield that she was doing all that was practically possible to raise the funds to meet the payment obligation under the loan agreement.
 - (ii) It was reasonable not to take legal action because even if he had done so and obtained a judgment, he would be faced with the same practical difficulties about enforcing payment as he was already in, in that his sister would have to raise the funds and the property would have to be sold, whether by him or by her.
 - (iii) This was not purely a commercial situation, as he would have been having to take legal action against his sister for repossession of her property, and in a situation where it was not being disputed that the debt was owed and everything possible was being done to sell the property and repay the loan.

- (iv) Mr Garfield did not know until the “*Goodbye*” telephone conversation in October 2015 that he had been deceived as to his sister’s intention to repay him, and he then took action promptly, albeit at the outset with frustrating lack of effect in France.

He submits that the above factors constituted a “practical impossibility” in the way of Mr Garfield’s commencing proceedings before he in fact did, and that the prescription period in respect of his claim was suspended during the period when he was relying on Mrs Glass Garfield’s promises or representations that she was trying to repay the loan. He did not make any submissions going to the time during which he submitted that time did not run, or was suspended, based on the facts; by implication he relied on this situation as pertaining at all material times until October 2015.

119. Specifically, and in addition, Advocate Dunster submits that the court will take into account the motivation, sincerity and in particular the bad faith of the defendant. In *Maynard (supra)* there was much discussion as to whether the old texts citing “*l’ignorance innocente*” as grounds for finding a sufficient *empêchement* to engage the doctrine (such as Terrien: *Commentaires du Droit Civil 1578 Ed*, Poingdestre: *Les Lois et Coûtumes de l’Isle de Jersey* (1928) and Carey: *Essai sur les Institutions, Lois et Coûtumes de L’Isle de Guernsey* (1889)) referred only to ignorance occasioned by the deception or bad faith of the defendant, or extended to general innocent ignorance. The court there rejected a submission that *empêchement de fait* was confined to cases where the defendant had acted in bad faith to mislead the plaintiff or to conceal the cause of action, and had held that the doctrine was flexible enough to extend even to cases of “mere” ignorance which was innocent and not caused by the plaintiff himself, depending always, though, on the facts of the case. Advocate Dunster submitted, however, that this case was not a question of mere innocent ignorance. Mrs Glass Garfield had been guilty of deliberately misleading Mr Garfield as to the genuineness of her intentions to sell the property and pay him without his needing to resort to proceedings against her. She had “led him up the garden path” with the intention of delaying him until she could assert prescription against him. This was bad faith, and the court would deploy the doctrine of *empêchement* to prevent a defendant in such a situation from profiting from his/her own wrongdoing.

Discussion

120. The general findings of fact made by the Jurats have been referred to when considering Issue (3) and the question of a contractual variation. However, assuming that these facts did not give rise to a contract, and in the light of circumstances which are material to the application of the doctrine of *empêchement* in the alternative, the Jurats have considered factors going to the reasonableness of Mr Garfield’s not having taken proceedings.
121. They find that he did so partly out of a sense of family loyalty and decency and because he believed that his sister could not repay the loan without selling the property, but also because he believed her promises that she would do so, and was trying to do so, in order to pay him back, and his belief that this intention was genuine. They find, however, and with regret, that Mrs Glass Garfield knowingly and deliberately made such statements to Mr Garfield with the intention of delaying his pressing his actual claim, until she believed – possibly because of a mistaken belief by her and those such as Bernard with whom she was obviously discussing the situation – that the prescription period for recovery of the loan had passed. They find that Mr Garfield was being deceived as to her intentions in this respect, and that his mistaken belief in her genuine intentions inhibited him from actively pursuing the debt; they find this to be supported by the evidence of his immediate change of course after the “*Goodbye*” telephone conversation. Insofar as it were a matter for the Jurats, therefore, they would think it unjust for prescription to be enforced against Mr Garfield in all the circumstances of this case, and that the doctrine of *empêchement* ought to apply to assist him.
122. The application of the doctrine of *empêchement* is, of course, ultimately a point of law, to be determined in the light of the Jurats’ findings of fact as to what happened. As to this the Lt-Bailiff holds as follows.

123. The facts that Mr Garfield (a) was reluctant to launch proceedings against his own sister, and/or (b) considered it wasteful of resources to do so because she had no available money and obtaining a judgment would simply leave him in the same practical position as he was in already, are not, in the judgment of the Lt-Bailiff, in themselves, either alone or in combination, sufficient to engage the doctrine of *empêchement*. They amount to no more than saying that he had personal reasons for choosing not to take proceedings to establish or enforce his rights at the time. They fall far short of any impediment amounting to a “practical impossibility” of his doing so.
124. With regard to Advocate Dunster’s submission that Mr Garfield’s conduct should be viewed benevolently in this context, on the grounds that, as a transaction between brother and sister, it is reasonably to be judged by more lenient standards than a purely commercial transaction, the Lt-Bailiff rejects this, certainly in the circumstances of this case. The imposition of compound interest at a quasi-commercial rate in the original loan agreement, and the Jurats’ finding of fact that Mr Garfield regarded the transaction as something of an investment, deprive this argument of any weight. The Jurats have also found as a fact that Mr Garfield was not seriously motivated in his forbearing from taking steps to recover his loan by considerations of Mrs Glass Garfield’s supposed serious ill-health. It may be that such a consideration could amount to a “practical impossibility” in appropriate circumstances, but in the Lt-Bailiff’s judgment this could only be in a very extreme case, and it is not this case on any basis.
125. However, the Jurats have also found that Mr Garfield was induced to delay taking enforcement steps by continued promises or assurances by Mrs Glass Garfield that she was taking steps to sell the property as quickly as she reasonably could and his belief that this was genuinely her intention, but that she in fact persisted in these assurances to “string him along” until she believed that the prescription period had passed. The Lt-Bailiff holds that this finding, amounting as it does to a finding of bad faith by Mrs Glass Garfield and an intention to mislead Mr Garfield to her own advantage, is sufficient to engage the doctrine of *empêchement*.
126. The only matter then needing consideration is whether Mr Garfield’s being misled in this respect extended over a period of at least 7 months and 18 days during the period from 30th November 2010 up to the beginning of October 2015, when he was, on his own account, disabused of any such mistaken belief. Evidence going to the precise period during which Mr Garfield had been actively misled in this way was necessarily limited. His own evidence was, unsurprisingly, simply general as to what he was continually being told, and Mrs Glass Garfield gave no material evidence as it was entirely inconsistent with her case.
127. The Lt-Bailiff therefore directed the Jurats that as they had found as a fact that Mrs Glass Garfield had deliberately attempted to deceive Mr Garfield into relying on her professed intention to pay him until after she believed the prescription period in relation to the debt had expired, the burden would be on Mrs Glass Garfield to satisfy them that her intentions had not, in practice, deceived Mr Garfield for a sufficiently long period (ie at least 7 months and 18 days) so as to extend the prescription period beyond 17th July 2017. Insofar as they might not find the answer to that question clear as a matter of probability on an overview of the evidence generally, then Mr Garfield would be entitled to the benefit of any doubt.
128. Having considered the matter, the Jurats find that they are satisfied on balance of probability, by the evidence of Mr Garfield and their view of the evidence generally, that Mr Garfield was actively misled by Mrs Glass Garfield for a period which exceeded the delay between the presumptive prescription date of 30th November 2016 and the commencement of these proceedings on 17th July 2017.
129. The upshot is, therefore, that the Lt-Bailiff rules that, if Mr Garfield’s claim that the facts amounted to an effective contractual variation of the loan agreement failed, his claim would nonetheless succeed on the grounds that he was entitled, in the particular circumstances, to invoke the doctrine of *empêchement d’agir* to resist the defence that his claim had been prescribed.

130. In the circumstances it is not necessary to consider Advocate Dunster's second way of putting his *empêchement* argument, namely that the court can invoke the doctrine simply on the basis that it is necessary to prevent a defendant from invoking the law of prescription in any case where this is necessary to "prevent an injustice". The Lt-Bailiff would, however, have rejected that argument as too wide. The doctrine is certainly invoked to prevent injustices, but the injustices in question arise out of an evaluation of the facts of the case by reference to the injustice of holding a party to be time-barred when he had been subject to a practical impossibility of being able to sue. The citation from *Holdright (supra)* is appropriately viewed, in her judgment, as describing the policy behind the doctrine, and is not a definition of the conditions for its application.

Judgment

131. The court will therefore give judgment for Mr Garfield upon his claim, but this requires some further comment.
132. Following correction of the interest calculation attached to the original claim, the amount of the claim together with interest at 4.5% per annum compounded at six monthly intervals commencing in July 2001 and up to July 2018 amounts to the sum of €1,012,588.48. There has been no objection to this calculation from Mrs Glass Garfield as a matter simply of arithmetic, and the claimed amount of the judgment was not the subject of any argument at the trial
133. The Jurats, however, have expressed concern at this extremely high sum, amounting, as it now does, to close on £1 million. Even allowing for the fact that Mrs Glass Garfield has had the benefit of occupying and using the property by use of the loan for some 17 years, the Jurats feel some misgivings as to its magnitude.
134. In view of the Jurats' concerns, the Lt-Bailiff has considered the composition of the sum claimed, in order to ascertain whether there might be any arguments that it was excessive in law which could be advanced on Mrs Glass Garfield's behalf, in which case she would anticipate inviting further submissions from Advocate Dunster.
135. She finds that there are two factors which have given rise to the apparently remarkable size (at any rate to the Guernsey eye) of the judgment to which Mrs Glass Garfield will now be subject.
136. The first is the effect of compound interest at 4.5% over a period of 17 years. This becomes particularly notable in the context of several recent years where interest rates have generally been at much lower levels. However, the interest rate applied in this case is contractual. The Lt-Bailiff has considered whether Mrs Glass Garfield might argue that interest on the contractual compound basis should apply only until the due date of 30th November 2010, and that thereafter some lower rate, or simple interest only, should be awarded in the discretion of the court, but she has concluded that no such argument is reasonably available to Mrs Glass Garfield. First, on the face of it, the agreed rate of interest would continue to apply to any unpaid balances due under the loan agreement after 30 November 2010 as a matter of the construction of the loan agreement itself. Second, and in any event, where a claim is upheld in relation to a debt bearing interest on an agreed contractual basis, even if an award of interest were then to lie in the discretion of the court, the court would generally regard the contractual rate as being the appropriate rate to award.
137. The second factor giving rise to the notable amount of the judgment is the fact that the exchange rate between the € and the £ has moved against the £ in the intervening 17 years, such that whilst a € was worth about 67p in 2000, it is now worth about 89p, an increase of about 33% in its relative value. It follows that if Mrs Glass Garfield is entitled to repay the loan as if it were a loan in sterling, ie to repay to Mr Garfield £300,000 or the sterling sum actually used to purchase the €s which were lent to her, together with interest at the

contractual rate on that sterling sum, then even though she might have to find the resources to do that in €s, the current amount of the Euro equivalent of that repayment sum is likely to be significantly less than the €1,012,588.48.

138. This is a point which was not considered or argued in the trial. It is correct that the loan made by the trustees to Mrs Glass Garfield was paid in €s (by reference to “*the Euro equivalent of up to £300,000*”) as stated in the Loan Agreement, and it is also apparent that the trustees were viewing it as a loan in €s, since they considered the reasonableness of the proposed interest rate in that context. The Assignment document, however, refers to the assignment of “*an amount receivable of £300,000 plus accrued interest*”. Whilst the Lt-Bailiff would incline to the view that, appearing in the recitals to the Assignment Document, this phrase would be viewed merely as a means of identifying the subject of the assignment (as to which a misdescription would be immaterial) and would not be treated as denominating the loan, or converting a factual loan in €s into a loan agreed to be treated as made in sterling, she is aware that no arguments as to this point have been advanced or considered on Mrs Glass Garfield’s behalf.
139. As presently advised, it does not appear to the Lt-Bailiff that there is likely to be a potentially well-founded legal argument available to Mrs Glass Garfield with regard either to the currency of the loan being £ rather than €s, or as to her having the right to repay the loan in sterling, as if it had been made and accrued in sterling. Whilst the parties apparently never discussed or considered the possible effects of large changes in the exchange rate over the duration of the loan, it is also the case that, at the time of the loan, the exchange rate might have moved either way. It just happens to have moved to Mrs Glass Garfield’s disadvantage rather than to Mr Garfield’s disadvantage, as it could quite easily have done. The risk of any change in the exchange rate therefore seems to have been borne equally by both parties, so that there was no imbalance in that regard.
140. The Lt-Bailiff therefore concludes that it is right in principle to give judgment for Mr Garfield in €s, and in the sum including interest in accordance with the revised schedule produced by Mr Garfield on the first day of the trial. However, bearing in mind the significantly advantageous effect which the right to repay the loan as if it had been made in sterling could have for Mrs Glass Garfield, and that this has not been considered or argued, the Lt-Bailiff thinks it right to afford her the opportunity to make such an argument if, on legal advice, she considers that she is able to do so. The Lt-Bailiff emphasises, however, that the point is a matter of legal argument and principle, and it is not a point which could be supported just by an appeal to the court’s discretion (it has none), or to its sympathies.
141. The court will therefore give judgment for Mr Garfield in the sums which he claims in €s, but it will give leave to Mrs Glass Garfield to apply by making submissions on this point and to have the point determined, provided she so notifies the court and Mr Garfield and makes such an application within 28 days of the date of this judgment. This is to enable her to seek legal advice, and the judgment is therefore not to be enforced within that 28 day period (subject to liberty to Mr Garfield to apply). If Mrs Glass Garfield makes such an application within the 28 day period, then the judgment is not to be enforced pending determination of that application, again without further order of the court and subject to liberty to Mr Garfield to apply.

Costs

142. Mr Garfield is clearly entitled to his judgment together with costs. The court will therefore order that Mrs Glass Garfield do pay his costs on the recoverable basis, but with liberty to either party to apply for a different order, if so advised.

Her Hon Hazel Marshall QC, Lt Bailiff

Claire Le Pelley, David Mortimer, Alan Boyle, Jurats

