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GUERNSEY LAW JOURNAL

SEVENTEENTH ISSUE

Introduction

This edition covers the six month period from 1st January, 1994 to 30th June, 1994.

The original texts of legislation and judgments digested are available at the Greffe.

Whilst care has been taken in recording the material published herein no responsibility is accepted for the contents of this issue or its accuracy.

References to this issue and future issues will be cited using the figure and letters 17.GLJ. followed by the paragraph number.

Editorial Committee

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Compiled from sources including all Orders in Council, Ordinances, Projets de Loi and subordinate legislation and selected cases and other relevant material which became available during the months January to June 1994.

30th November, 1994

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GUERNSEY

AVIATION AND AIRPORTS

1. Order in Council: The Detention of Aircraft (Guernsey and Alderney) Law, 1994. - See 16.GLJ.4.

Royal Sanction 8.2.94. Registered and in force 11.4.94. (No. I of 1994).

BANK HOLIDAYS

2. Ordinance: The Public Holidays Ordinance, 1994. - See paragraph 37.

CHILDREN AND YOUNG PERSONS

Custody dispute - wishes of child - application of Children Act 1989

3. The child, Y aged 13, had, since the breakdown of the marriage, lived with the mother and wished to have no contact with the father. The father applied for joint custody with the mother who applied for sole custody. Making an order for joint custody, as recommended by the Children Board, the Deputy Bailiff stated that:-
 - (1) the child's views, while properly regarded as paramount when considering questions of access, should not be treated as conclusive when deciding a question of custody;
 - (2) the child might wish to resume contact with his father in the future and a joint custody order would then be of assistance;
 - (3) despite the decision in Jussa v. Jussa [1972] 2 All ER 600, this was not a situation where the poor relations between the parents were going to make a joint custody order meaningless;
 - (4) although the Children Act 1989 did not apply in Guernsey, the Children Board was entitled to take on board any new thinking regarding the best way to protect the interests of children provided that it was not in conflict with the statutory provisions currently pertaining in Guernsey.

[A v. A - Matrimonial Causes Division 14.1.94 (FJH/RLeCB)].

COMPANIES

4. Projet de Loi: The Companies (Guernsey) Law, 1994. - Consolidates the Companies (Guernsey) Laws, 1908 to 1990 and the Companies (Exemption from Audit) Ordinance, 1991, whilst making a number of adjustments so as to modernise the law.

Part I of the Projet is entitled "Company formation". Any two or more persons may form a company in Guernsey in which their individual liability as members of the company will be limited. The matters required to be stated by a company's memorandum of association are specified. A company's memorandum of association must be registered under the authority of an Act of Court in the Register of Companies. The Court has power to authorise the rectification of any error or formal defect in the company's memorandum as registered. A company's articles of association prescribing regulations for the conduct of the company must also be registered under the authority of an Act of Court in the Register. The articles may be registered with the memorandum or separately within 6 months of registration of the memorandum. The Advisory and Finance Committee may by regulation prescribe a standard table of articles.

Upon the registration of a company's memorandum and articles in the Register, the company is thereupon incorporated. The memorandum and articles bind the company and its members in all respects as if comprised in an agreement duly executed by them. The liability of a member of a company for the company's debts is limited to the amount, if any, unpaid on the shares held by him. Upon registration of a company's memorandum and articles, the Greffier must give a certificate of registration in respect of the company and allocate a registration number to the company. A company must, if so requested by any member, provide the member with a copy of its memorandum and articles and special resolutions. No minor or person under legal disability may be a founder member of a company or shareholder therein except by inheritance or by operation of law.

Part II of the Projet is entitled "Corporate capacity". No act of a company is to be invalidated on the ground of lack of capacity by reason of the company's memorandum. Nevertheless, it remains the duty of a company's directors to observe any limitation on their powers imposed by the memorandum. A company may give a power of attorney. A document signed by not less than one director or by any other person duly authorised to act for the company, other than one required to be executed under seal, shall be deemed to have been validly executed for and in the name of the company. The power of the company's directors to bind it is deemed free of any limitation imposed by the company's memorandum or articles in favour of a person dealing with the company in good faith. A party to a transaction with a company is not bound to enquire as to whether the transaction is permitted by the company's memorandum or as to any limitation on the directors' powers to bind the company. A contract made by a company before the date on which it is entitled to commence business is provisional only. A company offering its shares to the public by means of a prospectus may not commence business until the minimum subscription has been allotted and the Greffier has certified that the company is entitled to commence business.

Part III of the Projet is entitled "Alteration of memorandum & articles". A company may not alter any provision of its memorandum except in the cases expressly provided for by the Law. A company may, by special resolution, alter the objects stated in its memorandum (subject to the power of the Court to annul the alteration) and alter its articles.

Part IV of the Projet is entitled "Name, office and seal". Certain restrictions in respect of company names are laid down (for example, restrictions on the use of the expressions "Imperial", "Royal", "Queen" or "Crown"). A company may by special resolution change its name. The Court has power to direct a company to change its name or refuse an application for an order confirming a change of company name if satisfied that those restrictions are breached. A company must have a registered office in the Island to which all legal process may be addressed. A company must have a common seal and may have an official seal for use abroad. A company's name must appear on all company documents.

Part V of the projet is entitled "Annual return". Every company must, in each calendar year before the 31st January, complete an annual return and deliver a copy thereof to the Greffier. The return is to contain information in relation to the company's directors, members and share capital.

Part VI of the Projet is entitled "Share capital". Restrictions are imposed on the allotment of shares by any company which has offered its shares to the public. A return of any such allotment must be made to the Greffier. A company may not (with certain exceptions) pay a commission to any person in consideration of his subscribing for shares. A company may not pay a dividend except from profits available for the purpose. A company may, if so authorised by its articles, require different amounts to be paid up on shares. A company may by special resolution establish a reserve liability which is not capable of being called up except in the event of the company being wound up. A company may, if so authorised by its articles, by resolution passed in general meeting alter its share capital. If a company issues shares at a premium, the premiums must be transferred to an account to be called the "share premium account". A company may in specified cases only issue its shares at a discount. A company may, if so authorised by its articles, issue redeemable preference shares. Where a company pays commission or allows a discount, particulars thereof must be included in its annual return. A company may, if so authorised by its articles, issue fractions of a share. Provision is made as to the nature, transfer and numbering of shares.

Part VII of the Projet is entitled "Reduction of share capital". Subject to the confirmation of the Court, a company may by special resolution reduce its share capital.

Part VIII of the Projet is entitled "Variation of shareholders' rights". Subject to specified conditions, a variation can be made of the rights attached to any class of the company's shares. A company may also, if its articles so provide, issue non-voting shares.

Part IX of the Projet is entitled "Company records and accounts". Every company must keep minute books, a register of its directors and secretaries, a Register of Members and an index of the names of its members (in certain cases only). These records are to be available for inspection. Every company must also keep accounting records. Provision is made as to the form of company records and the use of computer records. A company's registration number must be stated upon all documents required to be submitted to the Greffier.

Part X of the Projet is entitled "Audit". Every company except an unaudited company must at each annual general meeting appoint auditors. The qualifications for appointment as auditor are specified. A company's auditors are to prepare an auditors' report to be laid before the company in general meeting. An auditors' powers and duties are specified.

Part XI of the Projet is entitled "Directors". A person may not be appointed as director of a company by the articles unless, before their registration, he has signed and deposited with the Greffier a written consent to act as director and taken up his qualifying shares. Officers of a company who misrepresent the company's true position so as to induce the shareholders to declare a higher dividend than is justified are personally liable for the consequences of the misrepresentation.

Part XII of the Projet is entitled "Meetings". Every company must hold an annual general meeting of its shareholders. The directors' report is to be laid before the meeting. General regulations as to the holding of company meetings are specified. The members of a company may, by serving a members' requisition on the company, require the convening of an extraordinary general meeting. Provision is made as to voting rights, the convening of meetings and the formalities required for the passing of special resolutions.

Part XIII of the Projet is entitled "Protection for members". Any member of a company may apply to the Court for an order restraining the doing of an act which would be beyond the company's capacity or beyond the powers of the directors. In addition any member of a company may apply to the Court for an order for relief if the affairs of the company are being conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself).

Part XIV of the Projet is entitled "Striking off". The circumstances in which and conditions subject to which the Greffier may strike a company off the Register, and the company may be subsequently restored to the Register, are specified.

Part XV of the Projet is entitled "Voluntary winding up". A company may be wound up voluntarily when the period fixed by its articles for the duration of the company expires, when the event upon the occurrence of which the company is to be dissolved comes about or when the company by special resolutions so resolves. Notice of the special resolution to wind up must be given in the Gazette. From the commencement of a voluntary winding up, the company must cease to carry on business and no share transfers can be made. The company in general meeting must appoint a liquidator. Any vacancy in the office of liquidator can be filled by the court or by the company in general meeting. The functions of the liquidator are to realise the company's assets, discharge the company's liabilities and distribute any surplus amongst the members. On the expiration of a year and on each anniversary of the commencement of the winding up the liquidator must, if the winding up is not complete, summon a general meeting of the company. A final meeting is to be held prior to dissolution giving the liquidator's account of the winding up. Certain powers are capable of delegation to creditors. A liquidator or shareholder of a company which is being voluntarily wound up may apply to

the court for directions concerning any aspect of the winding up. The court has power to order the removal of a liquidator. All costs, charges and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidator, are payable in priority to all other claims.

Part XVI of the Law is entitled "Compulsory winding up". The circumstances in which the court may order the compulsory winding up of a company are laid down. One of these circumstances is where the company is "unable to pay its debts" within the meaning of the Law. On the making of an application for the compulsory winding up of a company or at any time thereafter the court may make an order restraining any action or proceeding pending against the company or appointing a provisional liquidator. In a compulsory winding up the court must appoint a liquidator, upon whose appointment all powers of the directors cease. A liquidator may resign from office or may be removed from office by the court. When the liquidator has realised the company's assets he must apply to the court for the appointment of a commissioner of the court to examine his accounts and to distribute the funds derived from the company's assets. All expenses of a compulsory winding up including the remuneration of the liquidator are payable from the company's assets in priority to all other claims.

Part XVII of the Law is entitled "Provisions of general application in winding-up". Subject to any rule of law as to preferential payments and any subordination agreement, the company's assets in a winding up are to be applied in satisfaction of the company's debts and liabilities *pari passu*. Any surplus is then distributed among the members. A company must not undertake business once wound up. Where in the course of the winding up of a company it appears that any officer of the company has appropriated, retained, misapplied or otherwise become accountable for any of the company's assets, the court may order him to repay, restore or account for the loss. The liquidator's fees are to be fixed by the court. The court is empowered to set aside fraudulent preferences. A liquidator may at any time seek the court's directions.

Part XVIII of the Projet is entitled "Miscellaneous". Part XVIII contains provisions as to penalties; as to false statements; as to the criminal liability of the officers of companies which are themselves guilty of offences; as to the manner of making applications to the Court; as to the payment to the Greffier of fees; as to the service of documents; as to the interpretation of expressions included in the Law; as to the making of Ordinances and other subordinate legislation; as to the rights reserved to the Crown and States to incorporate companies under letters patent or Royal Charter; as to the reliance by the Greffier, when registering a company's memorandum and articles in the Register, upon the Act of Court; and as to savings and transitional provisions, repeals, citation and commencement.

Approved by the States 29.6.94. Awaiting Royal Sanction.

CONSTITUTIONAL LAW

States Committees - transfer of functions

5. Ordinance : The Heritage Committee Ordinance, 1994. - Renames the Committee responsible for exercising functions under the Ancient Monuments and Protected Buildings (Guernsey) Law, 1967 and (for Guernsey) under the Wreck and Salvage (Vessels and Aircraft) Law, 1986 (formerly the "States Ancient Monuments Committee") as the "States Heritage Committee".

In force 1.6.94. (No. X of 1994).

CRIMINAL LAW AND PROCEDURE

Excess alcohol - failure to provide a specimen - reasonable excuse

6. R pleaded not guilty to a charge of failing to provide a specimen of breath, arguing that she had a "reasonable excuse" for such failure as she was too intoxicated to understand the procedure. The Acting-Magistrate accepted her submission and she was acquitted. The Law Officers appealed to the Royal Court. The Bailiff HELD that the factual situation presented to the Acting-Magistrate was not capable of amounting to a reasonable excuse on the part of R. In DPP v. Pearman [1992] RTR 407, which had been relied on by R, there had been no refusal as such to provide the specimen and the accused had been in a state of shock which had been a major factor. Those facts distinguished that case from the present appeal. In DPP v. Beech Woolf LJ said:-

"It would, in my view, defeat the object of the legislation, which is intended for the protection of the public, to hold that the fact that the defendant was too drunk to understand what was said to him could provide him with a reasonable excuse. It would also be an abuse of language so to describe it."

The case would be remitted to the Magistrate's Court with a direction to record a conviction under section 6(3) of the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1987.

[Law Officers of the Crown v. Rowe - Appeals from the Magistrate's Court 19.1.94 (JRF/FJH)].

Misuse of drugs - importation of cannabis - when actus reus is complete

7. See Law Officers of the Crown v. Blondel and Butcher, paragraph 21. For full report of Court of Appeal judgment, see paragraph 60.

Sentence - disparity between sentences imposed on co-defendants

8. A was sentenced in the Royal Court to a total of 36 months' youth detention for 6 burglaries, 2 cases of taking and driving away, 2 motoring offences and 38 offences to be taken into consideration (31 of which were burglaries). A, who pleaded guilty, appeared with another who pleaded guilty to 7 offences with 13 to be taken into consideration and was

sentenced to 12 months' youth detention suspended for 3 years. A appealed on the ground *inter alia* that the disparity between the sentences imposed upon the two defendants was too great. HELD by the Court of Appeal, dismissing the appeal, that the test, laid down in R v. Fawcett 5 Cr App Rep (S) 158, was whether right-thinking members of the public, with full knowledge of the relevant facts and circumstances, would, learning of this sentence, consider that something had gone wrong with the administration of justice. A's criminal record was such that this was a perfectly proper sentence which would have been a lenient one had it not been that the court had taken into consideration the guilty plea and the admissions relating to other offences.

[Law Officers of the Crown v. Garnham - Court of Appeal 27.4.94 (HMC/NJMT)].

Sentence - misuse of drugs - importation of cannabis - internal concealment

9. A and B were convicted by the Royal Court of the importation of cannabis resin weighing 121 grammes and 104 grammes respectively contrary to section 23 of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, as amended, having concealed the drug internally. A applied to the Court of Appeal for leave to appeal against his sentence on the ground that B had been the instigator of the offence and that A's sentence should have been suspended. HELD, dismissing the application, that although B had the cannabis resin before A came into possession of it there was no evidence that B was the instigator. The distasteful duty imposed on Customs officers in such cases added to the seriousness of the offence and this was not a case where a substantial allowance in the reduction of sentence could be expected for a plea of guilty. In view of A's previous conviction for possession of cannabis and in all the circumstances the sentence was entirely proper.

[Law Officers of the Crown v. Haupt - Court of Appeal 28.4.94 (HMC/ADNH)].

Sentence - misuse of drugs - three charges of importation of commercial quantity of Class A and Class B drugs - whether consecutive sentences appropriate

10. A, a man of previous good character, pleaded guilty to four charges of importing drugs, three of which (two relating to Class A drugs and the third to cannabis) involved a commercial quantity of drugs of which the total street value was calculated at between £7,000 and £9,600. The fourth charge, the Crown accepted, involved a small amount of cannabis for A's personal use. A had agreed to carry the drugs and knew the nature of them and their intended destination. He was sentenced to 42 months' imprisonment (to be served concurrently) on each of the two charges relating to Class A drugs, to imprisonment for 18 months (to be served consecutively to the first two sentences) for the offence relating to a commercial quantity of cannabis and to imprisonment for 2 months, to be served concurrently, on the charge relating to the small quantity of cannabis. A applied for leave to appeal against his sentence, arguing *inter alia* that it was inappropriate to impose a consecutive sentence in relation to the third count since it arose out of the same facts as counts

one and two and the fact that it related to a drug of a different class did not warrant departure from the normal principle. The Court of Appeal HELD, dismissing the application, that as a general principle consecutive terms should not be imposed for offences which arise out of the same transaction or incident, whether or not they arise out of precisely the same facts, but much is left to the discretion of the Court. The total sentence of five years could not be said to be excessive and it was not in the circumstances appropriate to interfere in relation to the mode by which it was reached.

[Law Officers of the Crown v. Delatang - Court of Appeal 28.4.94 (JRF/ADNH)].

Sentence - suspended sentence supervision orders

11. **Projet de Loi: The Criminal Justice (Suspended Sentence Supervision Orders) (Amendment) (Bailiwick of Guernsey) Law, 1994.** - Amends the Criminal Justice (Suspended Sentence Supervision Orders) (Bailiwick of Guernsey) Law, 1984, as amended, increasing the maximum penalty for contravening any instructions given under a supervision order made under that Law from level 1 on the uniform scale to level 4 or such other amount as the States may determine by Ordinance.

Approved by the States 29.6.94. Awaiting Royal Sanction.

DIVORCE AND MATRIMONIAL CAUSES

Costs and fees

12. **Ordinance: The Matrimonial Causes (Costs and Fees) (Amendment) Ordinance, 1994.** - Amends the Matrimonial Causes (Costs and Fees) Ordinance, 1981: replaces entirely the Schedule, which prescribes the fees payable to the Court, Greffier and Sergeant and for the recoverable costs of Advocates; increases the fee payable to any medical inspector; removes the limit of £50 per day as the reasonable fee to be paid to an expert witness attending the Court; allows for the payment of the board and lodgings of any witness who attends the court and who is not resident in the Island of Guernsey; and substitutes the Taxation Panel established under the Royal Court (Costs and Fees) Rules, 1990 for Her Majesty's Procureur for the purposes of taxation disputes under the Ordinance.

In force 25.5.94. (No. IX of 1994).

Divorce - custody dispute - wishes of child - application of Children Act 1989

13. See A v. A, paragraph 3.

Judicial separation by consent - mediator's report - Practice Direction

14. The Judge in Matrimonial Causes has given further consideration to the question of mediators reports in cases where parties with children are seeking judicial separation by consent. Whilst acknowledging that in some

cases the Court is being asked to sanction a long standing parting of the ways the Judge in Matrimonial Causes still feels that it is generally of assistance to have mediators' reports particularly where the break-up is of recent origin. Even if the judicial separation still proceeds the mediator is able to draw attention to any possibilities for future reconciliation and also any problems over children.

The Judge in Matrimonial Causes therefore does not wish to dispense with mediator's reports but accepts that there are cases where it will be a sterile exercise for the parties to see a mediator. In such cases the Judge in Matrimonial Causes is prepared to give a prior indication that he is prepared to deal with the application without a mediator's report if Counsel will submit to the Greffier a short report signed by both parties or their Advocates indicating the circumstances which show that any attempt at mediation will be pointless. Such reports should indicate the number and ages of children, the length of the marriage and how reason the decision to live apart has been. Copies of the report will then be returned to Counsel indicating whether or not the matter may proceed without the intervention of a mediator.

[Practice Direction No. 3 of 1994].

Magistrate's Court proceedings

15. **Projet de Loi: The Domestic Proceedings and Magistrate's Court (Amendment) (Guernsey) Law, 1994.** - Amends the Domestic Proceedings and Magistrate's Court (Guernsey) Law, 1988 by providing that appeals from the Magistrate's Court under that Law are to be dealt with by the Matrimonial Causes Division of the Royal Court rather than by the Royal Court sitting as an Ordinary Court, with transitional provisions for current appeals.

Approved by the States 25.5.94. Awaiting Royal Sanction.

EDUCATION

Teachers' pensions

16. **Statutory instrument: The Teachers' Superannuation (Guernsey) Regulations, 1994.** - Replace, with substantial amendments, the Teachers' Superannuation (Guernsey) Regulations, 1978, as amended. Amendments include, *inter alia*, the introduction of widowers' benefits for women teachers and the reduction of the qualification period for benefit from 5 to 2 years.

Deemed to have come into force on 1.11.88. (No. 1 of 1994).

EMPLOYMENT

17. **Projet de Loi: The Conditions of Employment (Amendment) (Guernsey) Law, 1994.** - Amends the Conditions of Employment (Guernsey) Law, 1985, as amended, by providing for powers of enforcement for persons authorised by the Board of Employment, Industry and Commerce. Such persons may, if they

suspect a failure to comply with the substantive provisions relating to the provision of written statements of conditions of employment, enter land and undertake investigations. An offence of obstruction or non-compliance is created.

Approved by the States 25.5.94. Awaiting Royal Sanction.

18. Ordinance: The Employers' Liability (Compulsory Insurance) (Commencement) Ordinance, 1994. - Provides that the Employers' Liability (Compulsory Insurance) (Guernsey) Law, 1993 shall come into force on the 1st March, 1994.

In force 23.2.94. (No. IV of 1994).

19. Ordinance: The Employers' Liability (Compulsory Insurance) (General Provisions) Ordinance, 1994. - Sets the amount under the Employers' Liability (Compulsory Insurance) (Guernsey) Law, 1993 for which an employer is required to insure and maintain insurance in respect of claims relating to any one or more employees arising out of any one occurrence at £2,000,000. It prohibits certain terms from policies of insurance issued or renewed for the purposes of the Law, in particular one which provides that no liability (whether generally or in respect of a particular claim) shall arise under the policy upon some specified event or omission.

In force 1.3.94. (No. V of 1994).

EUROPEAN COMMUNITIES

Implementation of Community law

20. Order in Council: The European Communities (Implementation) (Bailiwick of Guernsey) Law, 1994. - See 16.GLJ.27.

Royal Sanction 8.2.94. Registered and in force 26.4.94. (No. III of 1994).

EVIDENCE

Defendants charged jointly with third person - necessity for evidence of connection with third person

21. AA were convicted by the Royal Court of being concerned in the importation of cannabis contrary to section 23(1) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, as amended, together with a third person, X, who had pleaded guilty in the Magistrate's Court. AA argued that for a conviction under section 23(1) it was necessary to prove some participation in the actual importation of the goods, the actus reus for which was complete when the ship carrying them came within the limits of the port. AA had been in Guernsey waiting for the goods to arrive and this, they argued, was not sufficient. HELD, on appeal to the Court of Appeal, the actus reus of the importation was not necessarily complete when the ship came within the limits of the port and the charge under

section 23 would not necessarily have failed although it would have been simpler to have indicted under section 77 of the 1972 Law which was much wider in scope. However, AA had been charged with being concerned together with X in the importation. The main evidence against X had been a fingerprint on the package. While evidence was led in AA's trial that a fingerprint had been found in that place none had been led that the fingerprint belonged to X, although the trial had proceeded on the basis that it did and the Deputy Bailiff had misdirected the Jurats by stating that X's fingerprint had been found on the package. This had been of the first importance in relation to the Crown case and the appeal would be allowed.

[Law Officers of the Crown v. Blondel and Butcher - Court of Appeal 28.4.94 (HMP/AJA/ADNH)]. (For full report of judgment of Court of Appeal see paragraph 60).

GAMBLING

Gaming and lotteries

22. Ordinance: The Gambling (Channel Islands Lottery) (Amendment) (Bailiwick of Guernsey) Ordinance, 1994. - Amends the Gambling (Channel Islands Lottery) (Bailiwick of Guernsey) Ordinance, 1975 so that a lottery prize may be, and must be, claimed within a 12 month period.

In force 29.6.94. (No. XIV of 1994).

GUARDIANSHIP

Curatelle - member of Family Council appearing by Attorney - Practice Direction

23. The Court requires that where a member of the Family Council of a patient appears by Attorney, the Attorney should produce a Special Power of Attorney making specific reference to whatever the Attorney is being instructed to recommend. The practice of some Advocates to produce only a general Power of Attorney from members of Family Councils should cease.

[Practice Direction No. 1 of 1994].

HARBOURS AND MOORINGS

24. Statutory instrument: The Harbours (Prohibition of Bait Digging) (Guernsey) Regulations, 1993. - Give to the States Harbour Master the authority to control the digging of bait in either harbour.

In force 31.12.93. (No. 2 of 1994).

HEALTH AND SAFETY AT WORK

Inflammable oils

25. **Projet de Loi: The Inflammable Oils (Amendment) (Guernsey) Law, 1994.** - Amends the Law entitled "Loi relative aux Huiles ou Essences Minérales ou autres substances de la même nature, 1924" so that the function of granting licences for the storage of quantities of inflammable oils over 10,000 gallons is transferred from the Royal Court to the Board of Employment, Industry and Commerce. Increases level of fines for unlawful storage to level 5 on the uniform scale.

Approved by the States 9.2.94. Awaiting Royal Sanction.

HERITAGE

Heritage Committee

26. **Ordinance : The Heritage Committee Ordinance, 1994.** - See paragraph 5.

HOUSING

Control of occupation

27. **Order in Council: The Housing (Control of Occupation) (Guernsey) Law, 1994.** - Consolidates with amendments the Housing (Control of Occupation) (Guernsey) Laws, 1982, 1988 and 1990.

Section 1 sets out the basic tenet of the Law which is that no person may occupy a dwelling in Guernsey except under the authority of a housing licence granted by the States of Guernsey Housing Authority ("the Authority"). Under Section 2, applications for housing licences must be made to the Authority. Section 2 also sets out the persons who may make such applications.

It is now provided in Section 2(2)(c) that an "in principle" application for a housing licence can be made by the prospective employer of a person who will wish to occupy a dwelling in Guernsey. The application need not name the prospective employee; thus the application is dealt with solely on the basis of employment criteria.

Section 2 sets out the powers of the Authority in respect of the grant and refusal of housing licences. A housing licence may be granted to the owner of the dwelling in question or to the person who will wish to occupy it. The housing licence must specify the period of its validity. Section 3(3) sets out the type of conditions which the Authority may impose; and 3(5) the factors to be considered in deciding whether or not to impose such conditions. Housing licence conditions may be varied or withdrawn.

Section 3(7) to (11) sets out the procedure to be followed by the Authority on receipt of an in-principle application (referred to above).

In such cases the Authority can issue a statement in principle to the prospective employer if satisfied that the employment in question is essential to the community. The statement, which can be conditional, is valid for 6 months, and is binding upon the Authority as to the question of the essentiality of the employment. Any subsequent application for a full licence will not therefore involve having to satisfy the Authority on this question.

Section 4 deals with short-term housing licences. These are 9 month or 3 year housing licences granted to temporary or seasonal workers or to those whose employment is of insufficient importance to justify the grant of a housing licence for more than 3 years.

A 9 month housing licence cannot be given to a person who has been physically present in Guernsey during the preceding 3 months. A 3 year housing licence cannot in general be given to a person who has been resident in Guernsey during the preceding 3 years. Thus the holders are unable to build up long periods of residence in the Island. Short-term housing licences may now be varied to enable the licence holder to change jobs or accommodation.

Section 5 provides that a notice must be served by the Authority where the Authority decides to refuse or revoke a housing licence or to grant a housing licence subject to conditions or that due to certain specified circumstances a housing licence has ceased to be valid. The reasons for the decision must be stated.

Section 6 sets out the new procedure for the consideration of applications for housing licences. It is to be a two-tier system under which the Authority first considers the essentiality to the community of the employment (in cases where the application is made to enable a person to work in Guernsey) or the person's connections with Guernsey and the periods of his residence here in "non-employment" cases.

The Authority can then decide to refuse a housing licence having considered the appropriate preliminary matter. Previously the Authority was bound to consider all prescribed matters even in the case of applications which were patently unfounded.

If the Authority decides the preliminary question favourably to the applicant, it then proceeds to stage two and considers the question of whether the housing stock available for occupation in the Island is sufficient for the housing needs of qualified residents and essential housing licence holders.

Section 6(5) provides that the Authority may also consider (in cases where the application is employment-based) any criminal convictions of the applicant and (in all cases) the population and other objectives of the Island's Corporate and Strategic Plan which is drawn up by the Advisory and Finance Committee and laid before the States annually.

Section 7(1) sets out the circumstances in which a housing licence shall cease to be valid. This matter was not dealt with in the previous Law, an omission which led to some uncertainty. Section 7(2) sets out the

circumstances in which a housing licence may be revoked by the Authority. Again, the object is to eliminate uncertainty in respect of these powers. The matters which must be considered in deciding any question of revocation are those specified in Section 6 and are the same as those which must be taken into account upon an application for a housing licence.

Section 8 provides that housing licences are non-assignable. Section 9 contains interpretation provisions relating to Part I.

Part II of the Law is entitled "Persons who do not require a housing licence".

Under Section 10, a "qualified resident" does not require a housing licence. Section 10(2), based on the previous section 9(2) of the 1982 Law, defines the categories of qualified resident.

Categories (a) and (b) are unchanged. Categories (c) and (d) are now closed by being limited to persons born in Guernsey before the date of commencement of the new Law. A new category (e) is added for persons born after the commencement date who achieve an aggregate of 10 years ordinary residence in the Island in any 20 year period and at least one of the parents of whom is a qualified resident and was ordinarily resident in Guernsey at the time of birth.

Category (f), which is the previous category (e), is expanded to include the children of persons described in the new category (e).

Categories (g) and (h), which are the previous categories (f) and (g), remain unchanged.

The previous category (h) is repealed, having been subsumed in the new category (g).

Category (i) is unchanged.

Category (j) has been tightened so as to exclude from the 20 year period needed to acquire residential qualifications any period of occupation in a hotel or lodging house registered on the Housing Register as well as residential and nursing homes so registered. Existing acquired rights are protected.

Category (k) has been liberalised so as to require an aggregate of 10 years ordinary residence in any 30 year period rather than a consecutive period of 20 years, a requirement which was extremely onerous for the children of open market residents.

Category (l) is liberalised so as to comprise the spouses of qualified residents falling in the new category (e).

Category (m) is similarly liberalised to comprise the children of such qualified residents.

Category (n) is repealed, having been subsumed in the new category (f)(ii).

Section 10(3) of the Law provides that persons born outside the Island during the wartime occupation years shall in specified circumstances be deemed to have been born in Guernsey, and their parents shall be deemed to have been ordinarily resident in Guernsey at the time of the birth, for the purposes of category (d) of sub-section (2).

Sections 11 and 12 permit persons to apply to the Authority for a status declaration stating whether or not they are qualified residents. Reasons for a negative decision by the Authority must be stated. Under Section 13 aggrieved persons may appeal to the Royal Court.

Sections 14 and 15 permit persons to apply to the Authority for a declaration of lawful residence stating that they are occupying a dwelling in such circumstances as not to require a housing licence. Such a declaration must identify the applicant, the dwelling and the provision of the Law by virtue of which he does not require a housing licence. Reasons for a negative decision by the Authority must be stated. Under Section 16 aggrieved persons may appeal to the Royal Court.

Section 17 empowers the States by Ordinance to suspend certain provisions of Section 10 which set out the categories of qualified residents. This repeats section 13 of the previous Law. Acquired rights are of course protected.

Under Section 18 it is provided that in proceedings for a contravention of Section 1 (unlawful occupation), certain matters within the peculiar knowledge of the defendant must be established by him rather than having to be disproved by the prosecution. In such proceedings a status declaration or declaration of lawful residence is to be evidence of the facts stated in it unless a person has been convicted of an offence of making a false statement in connection with the application for the declaration.

Part III of the Law is entitled "Circumstances in which a housing licence is not required".

Section 19 provides that a person shall not require a housing licence to occupy a dwelling inscribed in Part A of the Housing Register (that is open market private dwelling houses).

Section 20 provides that a person shall not require a housing licence to occupy a dwelling inscribed in Part B of the Housing Register (that is, open market hotels) if he is the owner or principal tenant thereof or is the manager or a full-time member of staff thereof.

Section 21 provides that a person shall not require a housing licence to occupy a dwelling inscribed in Part C or D of the Housing Register (that is, open market nursing and residential homes and open market lodging houses) if he is the owner thereof.

Sections 22 and 23 provide that a tourist shall not require a housing licence to occupy a hotel or self-catering unit (subject in the latter case to restrictions on the maximum aggregate period of occupancy in any 12 month period).

Section 24 provides that a qualified resident to whom any provision of Part V of the Law applies (as to which see below) shall not need permission to occupy accommodation as a patient in a nursing home.

Sections 25 and 26 provide that a person shall not require a housing licence to occupy a dwelling as a member of the household or as a guest of specified categories of lawful occupier (provided in the case of a guest that his presence in Guernsey does not exceed an aggregate of 90 days in any 12 month period and that he does not work).

Section 27 protects the position of certain persons previously in lawful occupation. This re-enacts section 15 of the 1982 Law and section 11 of the 1988 Law.

Section 28 deals with the burden of proof in certain proceedings and makes provision in relation to Part III of the Law similar to that described above in relation to Section 18.

Part IV of the Law is entitled "The Housing Register".

Section 29 provides that the Authority shall continue to maintain the Housing Register upon which open market dwellings are inscribed. The Housing Register is now divided into four parts (A, B, C and D, that is, private dwellings, hotels, nursing and residential homes and lodging houses).

Section 30 provides that, subject to certain exceptions (for example, the power of the States to add dwellings by Ordinance), the Housing Register, and accordingly the open market, is closed and cannot now be added to.

Section 31 sets out one of the exceptions to the principle stated in Section 30 by providing that a dwelling constructed to replace a former open market dwelling may itself be inscribed in the Housing Register subject to certain prescribed conditions. Previously this was permissible only where the former open market dwelling was destroyed or irretrievably damaged by causes beyond the owner's control.

Sections 32 and 33 permit the Authority to delete dwellings from the Housing Register where they are used wholly for purposes other than human habitation or where the owner requests the deletion to be made.

Section 34 provides that where two dwellings, one of which is a local market dwelling, are combined, the resultant single dwelling is not eligible to be inscribed in the Housing Register. The enlargement of open market dwellings by the incorporation of local market dwellings, and the resultant loss of open market housing stock, is thereby discouraged.

Section 35 provides that where an open market dwelling is divided so as to be usable as two or more dwellings, then the original dwelling shall cease to be inscribed in the Housing Register and shall therefore cease to be part of the open market. However, in such cases the Authority may permit one and only one of the new dwellings created from the division to be inscribed in the Housing Register.

Section 36 deals with the exchange of accommodation between the open market and local market and permits, notwithstanding the provisions of Section 34 above, the small-scale enlargement of open market dwellings by the incorporation within them of local market accommodation provided that prior notice of the work is given to the Authority and the Authority have consented to the work. The Authority may give such consent only if the loss of local market accommodation is insignificant and the works are being carried out merely to improve the internal arrangement of the accommodation concerned. It is an offence to carry out any works described in Section 36 without giving prior notice to the Authority.

Section 37 provides that the provisions of Section 35 as to subdivision do not apply to dwellings registered in Part B of the Housing Register (open market hotels) provided that the dwellings created by the subdivision are used for the accommodation of hotel staff.

Sections 38 to 44 deal with the transfer of open market dwellings between different parts of the Housing Register.

Under Sections 38, 40 and 42 where a private dwelling house inscribed in Part A of the Housing Register becomes a hotel, nursing or residential home or lodging house the Authority must transfer the inscription relating to the dwelling to Part B, C or D of the Housing Register, as the case may be. Transfers to Part D are subject to appeal under Section 43.

Under Sections 39, 41 and 44, if a dwelling inscribed in Part B, C or D of the Housing Register ceases to be a hotel, nursing or residential home or lodging house its inscription must be deleted from Part B, C or D and the dwelling may then be re-inscribed upon whatever Part of the Housing Register (if any) is appropriate.

Section 45 provides, for the removal of doubt, that the provisions of Sections 38 to 44 in respect of the transfer of open market dwellings between different parts of the Housing Register are subject to Sections 32 to 36 (that is, the provisions of the Law relating to the deletion of dwellings from the Housing Register in prescribed cases, for example, in cases of subdivision). Thus an open market dwelling will not be re-inscribed on any part of the Register if one of the "deletion" provisions applies.

Section 46 enables the owner of an open market dwelling to apply to the Authority for a declaration of registration stating whether or not the dwelling concerned is inscribed in the Housing Register and, if so, in what Part of the Housing Register the dwelling is inscribed. Section 47 sets out the obligations of the Authority when it receives an application under section 46. The Authority must give a declaration of registration

or a reasoned refusal. Under Section 48 an appeal lies against the refusal of a declaration of registration.

Section 49 permits open market hotels to add tourist or staff accommodation constructed within the precincts of the hotel to the inscription of the hotel in Part B of the Housing Register. This is an exception to the normal principle laid down by Section 30 that the Housing Register is closed and that no further open market accommodation is to be added.

Section 50 provides that where a purchaser takes a conveyance of an open market dwelling which, unbeknown to him, had been subdivided and was therefore liable to be struck off the Housing Register and deprived of open market status then, notwithstanding Section 35, the dwelling may be retained on the Housing Register if the new owner takes prompt steps to ensure that the dwellings are combined and that the property thereby reverts to being a single dwelling.

Sections 51 and 52 give the States power to make provision as to the Housing Register by Ordinance and, notwithstanding the closure of the Housing Register by Section 30, to add dwellings to Part A or B of the Housing Register by Ordinance.

Part V of the Housing Register is entitled "Restrictions on occupation by certain persons". Part V, comprising Sections 53 to 55, is based closely on Part V and sections 37 to 39 of the 1982 Law.

Part V imposes occupation restrictions upon specified persons, including certain categories of qualified resident, for example, upon those persons and their spouses who as the owner of a dwelling have caused that dwelling to be inscribed in the Housing Register thereby depriving that dwelling of local market status and removing a dwelling from the local market housing stock. Such persons in general may not occupy local market dwellings except under the authority of a permit granted by the Authority under Section 55. They may however free themselves from restrictions by causing an open market dwelling to be deleted from the Housing Register.

Part VI of the Project deals with "Appeals, offences and legal proceedings".

Section 56 is the general appeals provision. Persons aggrieved by decisions of the Authority under the Law (other than decisions relating to status declarations, declarations of lawful residence, transfers of open market dwellings to Part D of the Housing Register and declarations of registration, which have their own specific appeal provisions) may appeal to the Royal Court on the grounds that the decision was ultra vires or unreasonable.

Section 57 is the offence provision. Unlawful occupation is punishable both on indictment and summarily. Section 58 deals with the making of false statements in connection with applications for housing licences or otherwise for purposes connected with the Law. Section 59 permits certain penalties to be prescribed by Ordinance.

Section 60 provides for the liability of directors and other officers of corporations which are guilty of offences under the Law. Section 61 empowers the Authority to apply to the Royal Court to have the possession of a dwelling in respect of which there has been an offence of unlawful occupation vested in it. Section 62 protects tenants in such cases by permitting them to recover from their landlord upon certain conditions all charges and disbursements incurred by them in the acquisition of their lease.

Section 63 empowers the Bailiff to grant search warrants in specified circumstances (for example, where unlawful occupation is suspected). Section 64 gives the Authority power of delegation to sub-committees and individual members and officers of the Authority. Section 65 exempts dwellings in the ownership or possession of the States from the restrictions imposed by the Law. The States may by Ordinance suspend this exemption (but without prejudice to the existing rights of persons in lawful occupation at the date of commencement of any such Ordinance).

Section 66 contains general provisions as to Ordinances under the Law. Section 67 deals with the service of notices. Sections 68 and 69 preserve Ordinances, housing licences and declarations made under the Laws of 1982 to 1990.

Section 70 protects the position of persons in lawful occupation of a dwelling at the date of commencement of the new Law whose position might otherwise have been adversely affected by the new provisions. Existing rights are thereby preserved.

Section 71 is the interpretation provision. Of particular note are the new definitions of the expressions "householder", "member of the household" and "tourist". Subsections (3) and (4) deal with the expression "ordinarily resident". Sub-sections (5) and (6) deal with the concepts of "owner" and "principal tenant" for the purposes of Part III of the Law, pursuant to which the "owner" and "principal tenant" of an open market dwelling inscribed in Part B of the Housing Register, and the "owner" of an open market dwelling inscribed in Part C or D, can occupy the dwelling without a housing licence. The effect of sub-sections (5) and (6) is that (for the purposes of Part III) no more than four persons may be treated as being the "owner" or "principal tenant" of the dwelling in question.

Approved by the States 11.8.93. Royal Sanction 15.3.94. Registered 26.4.94. In force on 1.7.94: the Housing (Control of Occupation) (Commencement) Ordinance, 1994 (No. XV of 1994).

28. Ordinance: The Housing (Control of Occupation) (Variation of Schedules) Ordinance, 1994. - Adds certain dwellings to the First Schedule to the Housing (Control of Occupation) (Guernsey) Law 1982, as amended, and adds the Peninsula Hotel, the L'Horizon Bleu Hotel and The Cottage at the Ambassador Hotel to the Second Schedule.

In force 9.2.94. (No. II of 1994).

INTERNATIONAL LAW

International organisations

29. Order in Council: The Vienna Document (Privileges and Immunities) (Guernsey and Alderney) Law, 1994. - See 14.GLJ.39.
- Royal Sanction 15.3.94. Registered and in force 26.4.94. (No. VI of 1994). (The original projet was disapproved by the Chief Pleas of Sark on 20.1.93).
- 30 Order in Council: The European Bank for Reconstruction and Development (Guernsey and Alderney) Law, 1994. - See 14.GLJ.38.
- Royal sanction 13.4.94. Registered and in force 7.6.94. (No. X of 1994). (The original projet was disapproved by the Chief Pleas of Sark on 20.1.93 - see now SARK).
31. Order in Council: The Organisation for Economic Co-operation and Development (Guernsey and Alderney) Law, 1994. - See 14.GLJ.37.
- Royal Sanction 13.4.94. Registered and in force 7.6.94. (No. XI of 1994). (The original projet was disapproved by the Chief Pleas of Sark on 20.1.94 - see now SARK).

PRACTICE AND PROCEDURE (CIVIL)

Arrêt or injunction - lifting of order - notification of Court - application for release of security for costs - Practice Direction

32. The following procedure should be adopted when Counsel, acting for a Plaintiff, wish to inform the Court of the lifting of an Arrêt or Injunction; or when Counsel wish to make application for the release of Security for Costs lodged in accordance with the terms of an Arrêt or Injunction:-

Notification of the Lifting of an Arrêt or Injunction

Notification by the Plaintiff of the total lifting of an Arrêt or Injunction may be made by way of letter addressed to Her Majesty's Sheriff; such letter must be signed by a Member of the Bar and a copy thereof shall be sent to Her Majesty's Greffier for placing with the Court Records.

Application for the release of Security for Costs lodged in accordance with the terms of an Arrêt or Injunction

1. Counsel wishing to make application for the release of Security for Costs lodged in accordance with the terms of an Arrêt or Injunction should do so by letter addressed to Her Majesty's Greffier; such letter must be signed by a Member of the Bar.

- 2, The letter must contain an undertaking that all costs arising from the Arrêt or Injunction have been satisfied or will be satisfied forthwith out of the monies being returned.

[Practice Direction No. 2 of 1994].

Costs - necessity for cause to refer to application - full indemnity costs

33. See Belair v. Brouard, paragraph 35.

Discovery - order made before commencement of action - whether Royal Court has jurisdiction

34. In an order authorising the arrest of AA's assets in Guernsey, the then Deputy Bailiff also ordered the production of supporting financial information and ordered that proceedings be commenced by RR by a certain date. Notwithstanding RR's failure to commence proceedings the Royal Court subsequently granted to RR an order for the disclosure of various documents. AA appealed against that order on the ground that the Royal Court had no power to make such an order when there was no action in existence. HELD by the Court of Appeal, allowing the appeal, that the order, as a typical order for discovery:-
- (a) was not an injunction within the meaning of section 1(1) of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987;
 - (b) was not supported by Rule 39 of the Royal Court Civil Rules 1989 which applied only after a cause had been tabled; and
 - (c) could not have been made under the Ordonnance relative à la Production des Pièces of 1860, which did not deal with discovery but with the production of documents at a trial, despite the ruling in Le Marquand v. L.C. Holdings (1985) 2.GLJ.53, when the Deputy Bailiff stated that that Ordonnance gave the Court a wide power to order the production of documents of its own motion: in fact, it merely preserved any such power already possessed by the Court to order such production and did not confer any such power.

The Royal Court had no general power to order discovery before any action had been instituted.

[International Technology Limited et al v. Silver Falcon Enterprises Limited - Court of Appeal 14.6.94 (PTRF/JPG)]. (For full report of judgment of Court of Appeal see paragraph 61).

Injunction - ex parte - burden on applicant to give accurate affidavit evidence - application to lift - order for full indemnity costs

35. P, the owner of a field, alleged that D his neighbour had harassed him and his family and had obstructed the entrance thereto. He obtained an ex parte injunction directing D to remove obstructions and stop harassing P and his family. D applied to Court for the injunction to be lifted, which was not resisted but D went on to make application for costs on a full

indemnity basis although in this application to lift the injunction there had been no mention of a claim for costs. In the circumstances the Deputy Bailiff adjourned the matter for P's advocate to take instructions, observing that it was desirable that in all cases where costs were sought the cause should expressly refer to such application. At the resumed hearing the Deputy Bailiff heard evidence from P and his mother, who appeared to have been the driving force in the complaint against D and the instigator of the allegations contained in the affidavit supporting the application for the original injunction. The Deputy Bailiff concluded that there had been a number of inaccuracies in the affidavit and that the main complaints against D had not been substantiated. In awarding D full indemnity costs the Deputy Bailiff pointed out that there was a heavy burden on persons seeking ex parte injunctions, and their counsel, to see that the affidavit evidence was correct. Had the true facts been known to him he would not have been likely to grant the injunction in the first place.

[Belair v. Brouard - Plaids de Meubles 28.1.94 (JJLM/JEL)].

Judgments - reciprocal enforcement

36. Order in Council: The Judgments (Reciprocal Enforcement) (Amendment) (Guernsey) Law, 1994. - See 16.GLJ.48.

Royal Sanction 13.4.94. Registered and in force 7.6.94. (No. IX of 1994).

PUBLIC HOLIDAYS

37. Ordinance: The Public Holidays Ordinance, 1994. - Makes new provision for the dates of public holidays (which now replace "bank holidays") in Guernsey, Herm and Jethou, repealing earlier ordinances.

In force 9.2.94. (No. I of 1994).

SHIPPING

Third-party insurance

38. Projet de Loi: The Vessels and Speedboats (Compulsory Third-Party Insurance) (Amendment) (Guernsey) Law, 1994. - Amends the Vessels and Speedboats (Compulsory Third-Party Insurance, Mooring Charges and Removal of Boats) (Guernsey) Law, 1972, as amended, by extending the compulsory insurance requirements of that Law so as to cover "personal water craft" (an expression including jet skis) as well as speedboats.

Approved by the States 29.6.94. Awaiting Royal Sanction.

39. Ordinance: The Vessels and Speedboats (Variation of Insurance Cover) Ordinance, 1994. - Provides for an increase in the levels of compulsory insurance set in the Vessels and Speedboats (Compulsory Third-Party

Insurance, Mooring Charges and Removal of Boats) (Guernsey) Law, 1972 from £100,000 to £500,000.

In force 1.10.94. (No. XIII of 1994).

SOCIAL SECURITY

Social insurance - Guernsey insurance fund

40. Order in Council: The Social Insurance (Permitted Investments Amendment) (Guernsey) Law, 1994. - See 16.GLJ.62.

Royal Sanction 8.2.94. Registered 26.4.94. In force 15.7.94. (No. V of 1994).

TELECOMMUNICATIONS

Board - Chief Executive

41. Ordinance: The Telecommunications Board (Chief Executive) Ordinance, 1994. - Provides that the "States Director of Telecommunications" shall be called the "Chief Executive of the States Telecommunications Board" and makes transitional provisions to take account of this change.

In force 30.3.94. (No. VI of 1994).

Wireless telegraphy apparatus

42. Order in Council: The Wireless Telegraphy Apparatus (Bailiwick of Guernsey) Law, 1994. - See 9.GLJ.72.

Approved by Chief Pleas of Sark 3.10.90. Royal Sanction 13.4.94. Registered 7.6.94. In force 1.6.94. (No. VIII of 1994).

TORTS

Nuisance - presence on land of liquified petroleum gas plant - consequent restriction on development of neighbouring site - whether actionable

43. P carried on a business on a site adjacent to that of D. On D's land there was a plant for processing liquified petroleum gas ("LPG"). For safety reasons the Island Development Committee recommended the re-zoning of P's land so that no development could occur there until the LPG plant had been removed. P brought an action against D in nuisance. D raised two Exceptions de Fonds, alleging, first, that the matters complained of were not capable of amounting to an actionable nuisance entitling P to relief and, secondly, that as the Island Development Authority had in the past given permission for two LPG storage vessels to be erected on D's site, even if D were guilty of nuisance it was not liable to P because its activities had been authorised by statute. The Deputy Bailiff sat alone to consider the Exceptions. HELD:-

1. The first question was whether D was guilty of a public nuisance. A person was guilty of a public nuisance if he did an act not warranted by law or if he omitted to discharge a legal duty if the effect of the act or omission was to endanger the life, health, property, morals or comfort of the public or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects. As there was nothing in the pleadings to the effect that D had been negligent in its stewardship of the LPG plant it could not be said that D had omitted to discharge a legal duty. The relevant authorities, namely, Crowder v Tinkler (1816) 19 Vesey 620 and R v. Lister (1857) 26 LJMC 48, required the activity to be attended with extreme probability of irreparable injury to P's property and a real danger to life and property. However, it was a question of fact for the Jurats whether the activities did amount to such a danger and was not a question of law for the Deputy Bailiff.
2. The second question in relation to the first Exception was whether, if the activities complained of did constitute a public nuisance, P was entitled to sue. Public nuisance was only a civil wrong and actionable as such when a private individual had suffered particular damage other than and beyond the general inconvenience and injury suffered by the public. The damage complained of by P was the refusal of the Island Development Committee to allow P to develop the site as it wished with consequent loss of profits. However, the action of that Committee was a new intervening force involving a full and free choice by a third party and the damage could not be said to have been caused by D's actions. Accordingly, even if there had been a public nuisance P had not pleaded that it had suffered special damage of the kind that entitled it to sue.
3. On the question whether the presence of the plant amounted to a private nuisance, a private nuisance was usually caused by a person doing something on his own land the consequences of which, inter alia, unduly interfered with his neighbour in the comfortable and convenient enjoyment of his land. The imposition of planning controls could not amount to a private nuisance actionable in law.
4. In relation to the second Exception, even if a nuisance had existed, a planning authority had no jurisdiction to authorise nuisance and the mere fact that planning consent had been given did not give a licence to commit a nuisance. D could not therefore claim to be able to defend P's action on the ground of statutory authority.

The first Exception would be upheld and P's claim dismissed.

[Fruit Export Company Limited v. Guernsey Gas Light Company Limited -
Plaid de Meubles 3.5.94 (PTRF/JMW)].

GUERNSEY STATUTORY INSTRUMENTS

44. The following Statutory Instruments were made during the period covered by this issue. Except where otherwise indicated they have not been digested in detail. A reference copy of each is held at the Greffe and copies may be obtained from the relevant Committee.

Title	Date Made	Coming into force	No.
The Teachers' Superannuation (Guernsey) Regulations, 1994 (see paragraph 16)	4.1.94	1.11.88	1
The Harbours (Prohibition of Bait Digging) (Guernsey) Regulations, 1993 (see paragraph 23)	31.12.93	31.12.93	2
The Post Office (Overseas Letter Post) (Amendment) Order, 1994	17.3.94	5.4.94	3
The Post Office (Overseas Parcel Post) (Amendment) Order, 1994	17.3.94	5.4.94	4
The Rent Control (Variation) Order, 1994	7.4.94	1.7.94	5

UNITED KINGDOM STATUTORY INSTRUMENTS

45. The following is a list of Statutory Instruments made in the United Kingdom which are specifically applicable to Guernsey and which were registered here during the period covered by this issue. Unless otherwise indicated they are not digested in detail elsewhere in the Journal.

	<u>S.I. Number</u>
The Wireless Telegraphy (Television Licence Fees) (Amendment) Regulations, 1994	595
The Northern Ireland (Emergency Provisions) Act 1991 (Guernsey) Order, 1994	764
The Wireless Telegraphy (Guernsey) Order, 1994	1064
The Haiti (United Nations Sanctions) (Channel Islands) Order, 1994	1325

ALDERNEY

CONSTITUTIONAL LAW

Hawkers

46. **Projet de Loi: The Hawkets (Amendment) (Alderney) Law, 1994.** - Amends the "Loi relative au Colportage", 1930, as amended, so as to transfer the responsibility for granting hawkers' licences from the Court of Alderney to the Finance Committee.

Approved by the States 1.6.94. Awaiting Royal Sanction.

FEES

47. **Ordinance: The Fees (Amendment) (Alderney) Ordinance, 1994.** - Prescribes fees for hotel licences, restaurant licences, public house licences and club licences for the purposes of the Alderney Liquor Licensing Ordinance, 1994 (see paragraph 52).

Ordinance of the States of Alderney of 6.4.94.

GAMBLING

48. **Ordinance: The Gambling (Exempted Lotteries) (Alderney) Ordinance, 1994.** - Renders lawful (subject to specified conditions) gambling in the form of lotteries, draws and raffles promoted by charities and clubs.

Ordinance of the States of Alderney of 6.4.94.

HARBOURS AND MOORINGS

49. **Ordinance: The Braye Harbour (Amendment) (Alderney) Ordinance, 1994** - Controls parking in vicinity of harbour. The Harbour Officer can move vehicles causing obstruction.

Ordinance of the States of Alderney of 1.6.94).

INDIRECT TAXATION

Leasehold Duty

50. **Order in Council: The Duty on Long Leases (Alderney) Law, 1994.** - See 16.GLJ.77.

Royal Sanction 15.3.94. Registered 26.4.94. (No. VII of 1994). In force on 1.6.94: The Duty on Long Leases (Commencement) (Alderney) Ordinance, 1994 (Ordinance of the States of Alderney of 1.1.94).

Transfer Duty

51. Order in Council: The Duty on Share Transfers (Alderney) Law, 1994. - See 16.GLJ.78.

Royal Sanction 8.2.94. Registered 11.4.94. (No. II of 1994). In force on 1.6.94: The Duty on Share Transfers (Commencement) (Alderney) Ordinance, 1994 (Ordinance of the States of Alderney of 1.6.94).

LIQUOR LICENSING

52. Ordinance: The Alderney Liquor Licensing Ordinance, 1994. - Repeals the Alderney Liquor Licensing Ordinances 1966 to 1990 and provides new procedures for the grant, renewal and exercise of liquor licences.

The principal change is a simplification in the procedure for obtaining the grant and renewal of liquor licences and in the types of liquor licences and the conditions under which they are exercised.

The Ordinance is divided into six Parts with two Schedules.

Part I (section 1) is the interpretation section.

Part II (sections 2 to 19) deals with the grant, renewal and issue of liquor licences. The procedures for obtaining and renewing such licences are set out, together with the duties of the Clerk of the Court of Alderney and the Court itself. This Part of the Ordinance also deals with the conditions of Restaurant and Hotel licences and fees. Provision is made for obtaining permission for additional hours.

Part III (sections 20 to 42) deals with permitted hours and conditions of liquor licences. Various provisions regarding licensees are included together with the prohibition of noise (section 35) and powers of entry (section 37). Section 42 introduces a prohibition on the "public consumption" of intoxicating liquor on a public highway unless permitted by the Tourist Committee under that section.

Part IV (sections 43 to 46) deals with clubs.

Part V (sections 47 to 52) deals with miscellaneous matters, including off-licences (section 47), alterations and extensions to licensed premises (section 48) and drinking-up time (section 49). Section 52 provides that aiders and abettors of offences under the Ordinance are punishable as principal offenders.

Part VI (section 53 to 56) covers repeals, savings, the citation of the Ordinance and commencement.

There are two Schedules. The First Schedule lists permitted hours. The Second Schedule provides for notices to be displayed on licensed premises.

Ordinance of the States of Alderney of 6.4.94.

OFFICIAL GAZETTE

53. **Projet de Loi: The Official Gazette (Alderney) Law, 1994.** - Establishes a publication to be called the Alderney Official Gazette. The Gazette is to be a public document and is to replace, in Alderney, La Gazette Officielle. Any enactment having effect in Alderney which requires any notice to be published in La Gazette Officielle is amended so as to require publication in the Alderney Gazette instead. The Finance Committee is empowered to make such arrangements in relation to the publication, printing, production, circulation and sale of the Gazette.

Approved by the States 6.4.94. Awaiting Royal Sanction.

PUBLIC HEALTH

Slaughterhouses

54. **Ordinance: The Slaughterhouses (Amendment) (Alderney) Ordinance, 1994:** - Permits the slaughter of cattle otherwise than at the states slaughterhouse if authorised in writing by States Veterinary Officer.

Ordinance of the States of Alderney of 6.4.94.

ROAD TRAFFIC

Speed trials

55. **Ordinance: The Speed Trials (Alderney) Ordinance, 1994** - Closes roads temporarily at Tourgis Hill and Mannez Lighthouse for the purposes of speed trials.

Ordinance of the States of Alderney of 6.4.94.

WATER

56. **Order in Council: The Water (Control) (Alderney) Law, 1994.** - See 16.GLJ.82.

Royal Sanction 13.4.94. Registered and in force 7.6.94. (No. XII of 1994).

SARK

INTERNATIONAL LAW

International Organisations

57. Projet de Loi: The Organisation for Economic Co-operation and Development (Sark) Law, 1994. - Affords legal personality to the Organisation for Economic Co-Operation and Development; recognises its status; and affords privileges, immunities, exemptions and reliefs in relation to the OECD and its officers, to its members' representatives to its organs, and to experts performing missions for it.

(A Bailiwick Projet (see 14.GLJ.37) had previously been disapproved by the Chief Pleas of Sark on 20.1.93).

Approved by the Chief Pleas of Sark 6.4.94. Awaiting Royal Sanction.

58. Projet de Loi : The European Bank for Reconstruction and Development (Sark) Law, 1994. - Affords legal personality to the European Bank for Reconstruction and Development; recognises its status; and affords privileges, immunities, exemptions and reliefs in relation to the ERBD and its Governors, Directors, Alternate Governors, Alternate Directors, officers and employees, and to experts performing missions for it.

(A Bailiwick Projet (see 14.GLJ.38) had previously been disapproved by the Chief Pleas of Sark on 20.1.93).

Approved by the Chief Pleas of Sark 6.4.94. Awaiting Royal Sanction.

LIQUOR LICENSING

59. Ordinance: The Liquor Licensing (Amendment) (Sark) Ordinance, 1994. - Amends the Liquor Licensing (General Provisions) (Sark) Ordinance, 1979 by imposing conditions of exercise of guest house licences (in particular only a resident of the premises or his guests may be served liquor) and by setting down fees and permitted hours for guest house licences. The Ordinance also increases fines and liquor licensing fees generally.

In force 6.4.94.

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60.

[CRIMINAL DIVISION - APPEALS NOS. 173, 174]

1994 APRIL 26, 27, 28

THE LAW OFFICERS OF THE CROWN

v.

IVAN FREDERICK BLONDEL

AND

LYNDON REUBEN BUTCHER

B

Before: HARMAN, DOREY, P., and HAMILTON, JJ.A.

Evidence - defendants charged jointly with another - necessity for evidence of connection with third person

C

Misuse of drugs - importation of cannabis - when actus reus is complete

See paragraph 21.

A.J. Ayres for the Appellant Blondel.

A.D.N. Havard for the Appellant Butcher.

A.C.K. Day, Q.C. (H.M. Procureur) for the Crown.

D

R.D. HARMAN ESQUIRE, QC:- These two appellants appeared before the Royal Court on the 25th November, 1993 and pleaded not guilty to count one of an indictment charging improper importation of goods contrary to sections 23 (1) and 23 (1A) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972 as amended. The particulars alleged that the appellants and a third man named Sturdy, between the 8th and 14th of August, 1993, were concerned together in the importation of cannabis, a controlled drug of class B, contrary to the prohibition on importation imposed by section 2 (1) of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 as amended, with intent to evade such prohibition. To this count, Sturdy pleaded guilty. An offence is committed under section 23 (1)-

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"if any person imports or is concerned in importing any goods contrary to any such prohibition or restriction as aforesaid, whether or not the goods are unloaded, if he does so with intent to evade any such prohibition or restriction"

F

The indictment contained two further counts charging Blondel with possession of cannabis and amphetamine to which he pleaded guilty.

The trial of the appellants lasted four days before the Deputy Bailiff and Jurats, at the end of which they were both convicted. After other matters had been considered which are not relevant to this Appeal, both men, together with Sturdy, were sentenced on the 17th December, 1993.

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The grounds of Appeal as advanced for Blondel, and with which Butcher through Advocate Havard associated himself, were that the learned Deputy

A Bailiff made a wrong decision in law when he rejected the submission of no case to answer made in respect of Blondel and left the case to the Jurats when there was no evidence against either man relating to the charge of importation at the close of the prosecution case. It was further said that the Deputy Bailiff was wrong to treat as irrelevant the provisions of section 43 (1) and (2) of the Customs and Excise Law of 1972 and that the prosecution did not lead any evidence that the appellants were anywhere near the vessel containing the imported cannabis at the time of the importation. The relevant words of section 43 are:

B "(2) The time of importation of any goods shall be deemed to be -

(a) where the goods are brought by sea in a ship, the time when the ship carrying them comes within the limits of a port.

(b)

C There is a similar provision under United Kingdom Law by virtue of section 5, subsections (1) and (2)(a) of the Customs and Excise Management Act 1979.

Put shortly, Advocate Ayres contended that the prosecution charged the wrong offence which was not supported by the evidence. He said that the correct charge would have been under section 77(1)(a) or (b) of the 1972 Law which he argued casts the net far wider. Indeed it does. It is in these terms and I read from the relevant passages in that section.

D "77(1) Without prejudice to any other provision of this law, if any person -

E a) knowingly and with intent to evade any prohibition or restriction for the time being in force under or by virtue of any enactment with respect thereto, acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid, or

F b) is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any such prohibition or restriction as aforesaid or of any provision of this Law or of any other enactment relating to Customs and Excise applicable to those goods

he may be detained...."

I need read no more.

G Advocate Ayres conceded that there was ample evidence of an offence under section 77 and that a conviction would have been sound.

However, he argued that for an offence under section 23, it was necessary to prove some participation in the actual importation of the goods, the

actus reus for which is complete when the ship carrying them comes within the limits of the port. Therefore, he said, it was not sufficient if the role assigned to the appellants was to retrieve or pick up goods once they had arrived upon the Island unless that role involved action which furthered the enterprise and assisted others to import the goods. If there was a joint enterprise, the acting in concert must be in direct relation to the actus reus when merely waiting for a car which had not yet arrived was not sufficient. Once the ship came within the limits of the port, he argued, everything which happened thereafter could only fall under section 77.

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On behalf of Butcher, an additional ground was submitted, that the weight of the evidence was against a conviction for the offence of importation and no reasonable court could have convicted him on the evidence presented.

B

In our judgment the interpretation advanced to us by Advocate Ayres in relation to the moment of importation was unduly narrow. We do not accept that the actus reus was necessarily complete when the ship carrying the goods crossed an invisible line to bring it within the limits of a port. In any event, section 23, as has already been observed, is concerned with any person who imports or is concerned in importing and the section specifically refers to a place of importation. These appellants were indicted for being concerned together with Sturdy in importing the goods. We do not think that the charge under section 23 would necessarily have failed on the evidence originally relied upon. It would no doubt have been simpler and more straightforward to have indicted under section 77 or even to have laid two counts in the alternative. We have been referred to a commentary in paragraph 25-338 of Archbold, 1994 edition, under the heading 'Indicting "Smuggling" Offences'. It reads:

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"In respect of what may be loosely termed "smuggling offences" it will be seen that the CEMA 1979 [that is the English Act] creates offences in connection with the improper importation of goods (s. 50) as well as specified offences in relation to the exportation of goods (S. 68). However, it is not the usual practice for the prosecution to indict under either of these two sections. This is because offences under section 170 are so all embracing that it is difficult to see when it would be necessary, or tactically advantageous, to rely on section 50 or section 68."

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It is not necessary to comment further on these matters because of other developments which occurred during the trial. It is however necessary to refer in some detail to the evidence which was before the Court. It is to this effect.

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On the morning of Tuesday 10th August, 1993, the vessel Beauport arrived at St. Peter Port Harbour from Poole. The passengers disembarked at about 6.00 a.m. On board was a steward, Howard Alec Sturdy, who later pleaded guilty to being concerned in importation under section 23. Also travelling were a Mr. and Mrs. Green with their two children who brought with them their motor car, a Mazda 626, the registered number of which was E777 HRT. This had been broken into at Poole on the Monday evening prior to departure. Some of the luggage had been disturbed and a rear passenger

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A window had been smashed. Unbeknown to the Greens, somebody at some stage had affixed to this vehicle underneath the rear bumper a package said to be originally about eighteen inches to two feet in length and about nine inches wide. This contained cannabis. A quantity weighing 576 grams was later recovered but there was evidence which suggested that this represented only part of the original amount.

The Greens then drove off to the car park at St. Martin's Point to as Mr. Green himself said in evidence "rest until the Island woke up." Shortly after their arrival, a motor cycle appeared and was parked about ten yards from the Mazda.

There were two men on it. One of them looked over the cliff and shortly afterwards they left. Neither man was subsequently identified. The Greens later proceeded to the west coast where they spent part of the morning.

On the way, they made enquiries for a Mazda dealer on the Island and were referred to the Forest Road Garage, there they arranged for a replacement window to be flown over and for the work to be carried out the following day, Wednesday the 11th August. Later when on the west coast they were careful not to leave the car unoccupied. Mrs. Green remained in it while the others went for a walk. During this time Mr. Green observed a motor cycle, similar in description to the previous one but with one person on it which made two visits to the car park before it drove off. Again there was no subsequent identification. Later the Greens went to the camp site where they were to spend their holiday. The next day they went back to the garage in the afternoon with the car where they learned that the window had not yet arrived. They made arrangements to return the next day.

On Thursday the 12th August therefore, at about 2.15 in the afternoon, Mr. Green did return with the car to the garage. He was there met by a Customs officer, Mr. Prow, who advised him that he had reason to believe that drugs had been put onto his car and that someone was trying to pick them up. Both men then inspected the car and found what appeared to be one package up to two feet long and about nine inches wide concealed in the space between the square wheel and the rear bumper.

Earlier that day at about 9.30 a.m., a woman had telephoned the garage giving an account that there had been an argument on the Tuesday ferry, in the course of which a car window had been smashed. She said she now realised that it was her fault and she wished to contact the owner of the Mazda to send some flowers and to apologise. She declined to give a telephone number where she could be contacted. Shortly afterwards, Mr. Butcher had arrived at the garage and was seen to look through the showroom window. He did not stay.

At about 10.50 a.m. a woman giving the same name telephoned and spoke to another person at the garage who told her that the car was expected back for repair at about 4.30 p.m. and might be kept there overnight. We now return to the events of the afternoon following the discovery of the package.

At about 4.40 p.m. Mr. Prow while keeping the garage under surveillance observed the arrival of Mr. Butcher, Mr. Blondel and two small children at the entrance to the workshop where the Mazda was being kept. Butcher had arrived by motor cycle, the others by car. An employee at the garage, Mr. Dorey, and Mr. Prow gave evidence to the effect that both approached the rear of the Mazda. The evidence perhaps is not altogether clear but it was said that Butcher bent down by the car, hastily stood up when Mr. Dorey approached and appeared to put something in his pocket. Butcher said "I'm having that" or words to that effect. He then moved away towards the lavatory. According to Mr. Prow, he observed Blondel kneeling by the rear bumper and tugging at the package. Prow left the observation point and came out unrecognised. He then had a conversation with Butcher, who had now returned, about a motor cycle in which he claimed to be interested. Butcher, Blondel and the children then left.

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At this stage the concealed package was examined by Mr. Prow who discovered that the outside tape had disappeared. He retrieved the packet and found that it was now about half the size he had previously estimated. The prosecution later suggested that Butcher had made off with one of two packages which had originally been taped together.

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The following day, Friday the 13th August at about 9.25 a.m., Blondel returned to the garage. The Mazda car was now in a car park at the back of the premises. A Mr. De Garis, another Customs officer, saw Blondel go to the car park and walk to within about ten yards of the Mazda. He then lost sight of him. Later the same day, Blondel and Butcher were separately arrested at their respective addresses. A small quantity of cannabis and some amphetamine, the subject of counts two and three, were found in the garden at Blondel's home where he had been seen to secrete it earlier.

D

The prosecution were to suggest Butcher had visited Blondel after leaving the garage and that there was an inference to be drawn that he had supplied Blondel with this small quantity. There was evidence that at some time over the preceding six months, the cannabis may have come from the same originating source and formed part of the same batch. The two appellants were interviewed and in the course of those interviews, they made independent denials which it is unnecessary to refer to because in our judgment they are no longer relevant to the merits of this appeal.

E

As we have stated, the present appellants were charged together with Sturdy with the offence of having been concerned in the importation of cannabis. It was an important element in the prosecution case at the trial that the appellants were associates of Sturdy and that Sturdy had been the person responsible for attaching the cannabis to the Greens' car. This connection was vital to the prosecution case that, prior to any importation, there had been an arrangement between Sturdy and the appellants that the latter would retrieve the cannabis once it had passed concealed in the Greens' car into the island.

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In the course of the hearing of this appeal, it emerged that the prosecution faced a serious difficulty in maintaining the connection between the appellants and the person responsible for attaching the cannabis to the car. The primary material against Sturdy was a

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A fingerprint found on the tape used to attach the package. While evidence was led in the trial against the appellants that a fingerprint had been found in that place, no evidence was led at the trial that the fingerprint was Sturdy's. Provision is made in the Administration of Justice (Bailiwick of Guernsey) Law, 1991 by section 2 for the admission of facts in criminal trials. Before us however, the Procureur felt bound to concede that no admission of fact in accordance with that section had been made at the trial in relation to the fingerprint being that of Sturdy.

B The trial appears to have proceeded on the basis that this matter of fact was common ground. In the course of the trial the Procureur stated that the fingerprint was that of Sturdy. Neither advocate at the trial took any objection to that statement and neither relied on the absence of evidence or admission of the matter when addressing the Deputy Bailiff in support of an argument that there was no case to answer. Neither raised the matter when the Deputy Bailiff, having completed his summing-up, asked whether they had any comment to make on the summing up.

C In the summing up, the Deputy Bailiff had dealt with the fingerprint matter and the Sturdy connection in two important passages. The first is between Page 206 (G) and 207 (G). He said:

D "Now, part of the Crown's case, a strong part of the case, is the involvement of these two in the importation - coming back to the being concerned in the importation - is the links which the Crown say exist between the accused and their co-accused Sturdy. The first area of evidence in this regard is the evidence of Customs Officer Crawford, who was deputed to search Sturdy's cabin on the Beauport. In the course of her search she found a little Post-it chit with Butcher's telephone number on it, or more precisely the telephone number of the house where the - I think it was Caroline Bull was his girlfriend - live, but this was the place where the customs had gone in and found all - him and his clothes and his money and everything else so I think the inference is that he was living there. He may not have - he may have chosen to have an address somewhere else for reasons that are of no concern to you. So that number was on the Post-it. Then you have the address book which seems a perfectly genuine address book of Mr. Sturdy who seems to keep a proper address book and in that he had - and I - this is - I remark on it although we don't know what the significance is - under 'I' there was Ivan's telephone number and I think under M there was 'LB' was the telephone number, I think that was what the book - I haven't got the book in front of me, I think that is what the book showed - and again we had the number of Miss Meadowcroft who is the lady I think in the pictures, the mother of Butcher's children - Blondel's children - and the number of Caroline Bull who is Butcher's friend. So those numbers were in his address book on the ferry. Of course when you have evidence of telephone numbers being found in the possession of another accused, you've got to look at that a little carefully. You must be sure that this was not Sturdy keeping those numbers as part of a setting up operation for these two accused in order to shield the real persons involved with him in importing these drugs. He could be keeping their numbers down in his book to deflect attention from his partners in crime in the event of his being detected, but

that's a matter - he was detected, I think some - as there been reference Mr. Procureur in this case at some stage to certain evidence against Mr. Sturdy or not, I wasn't quite sure as to what else was found in his cabin. Has there been reference to the Jurats?
H.M. PROCUREUR: Yes, didn't it mention his fingerprint on the tape at the bottom of the car?

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THE DEPUTY BAILIFF: Yes, yes, tape on the bottom of the car. So I mean he did - he did -

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H.M. PROCUREUR: Yes, I think it was probably a brief reference to similar brown tape being in his cabin.

THE DEPUTY BAILIFF: Yes that's it. I thought we'd heard that but I wasn't absolutely certain. Well if those two things - Mr. Sturdy was a man who kept the same tape as he stuck onto it and also had his fingerprint on the tape, I think that - you must look at the whole of what you've heard about Mr. Sturdy. Certainly if we get - for all purposes that he'd actually pleaded guilty, that's no help to you but just you've got a little bit about his style of operation, so that he had his fingerprints on the tape and he also kept the reel of tape which was there and he'd also got the telephone numbers of Butcher and Blondel, but do look at that. It's always something you should need to feel caution on when telephone numbers are found in possession of a third party about whom you really know nothing at all and what their involvement is."

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He had also earlier in his summing up said this between pages 195 (D) to 196 (C).

"The Crown's case is put quite simply; that Blondel and Butcher jointly committed this offence with Sturdy and were concerned with him in the importation of these prohibited drugs. Wherever an offence is committed jointly by two or more persons, each of them may play a different part but each is guilty of the offence. Before you can convict either Blondel or Butcher you must be sure that he committed the offence himself and that he did an act or acts as part of a joint plan with one or both of his co-accused to commit it. Put simply, are you sure that they or any one or other of the accused were in the smuggling enterprise.

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The offence which is being charged is that of being concerned with a single word "importation" - single activity "importation". The Crown must prove that the accused participated in the actual importation if not by actually carrying the drug then by being in a position to assist in the smuggling operation. The offence of being concerned in importation is not what we call a continuing offence and therefore persons who subsequently handle prohibited goods albeit that they are aware that they have been smuggled in, but who are not parties to the original importation, would not be guilty of the offence of being concerned with importation. It follows therefore from this that there are two questions - primary questions - for you to consider:-

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- A
1. are you sure that one or both of the accused were involved in retrieving or endeavouring to retrieve the concealment on the car; and
 2. are you sure that their actions form part of a pre-arranged plan to import this drug into Guernsey.

B

C

The latter is the important point. You must be sure that the accused knew that the drugs were coming in this way albeit that they did not know until after the boat docked which particular car they were concealed on and that therefore in this way they were directly concerned with the importation. In order to convict you must be sure that you can dismiss from your mind the possibility that Sturdy - either himself or with others - decided to put the drugs on this car and that these two particular accused came into the matter after the event and were not actually parties to the arrangements for the importation. They may, if they had handled the goods after the importation in circumstances where they had no knowledge of the fact that the goods had been imported, be guilty of some other offence under the law, but they would not be guilty under this section.

D

Now, the Crown ask you to infer their active participation in the act of importation from the surrounding circumstances; from the visits to the harbour and the meetings between Sturdy and Blondel, from what both accused said about these matters when they were questioned by the customs, and also the other evidence linking Sturdy, Blondel and Butcher in the form of telephone numbers found in their houses and in the case of Mr. Sturdy in his cabin."

It is evident that the Crown case as placed before the Jurats was heavily dependent on establishing the appellants' participation in an enterprise to import cannabis to the island by showing:

- E
1. that Sturdy had attached the package to the car; and
 2. that the appellants were closely associated with Sturdy.

F

In the course of the hearing before us, the Procureur felt constrained to accept that he could not support the convictions on the basis of a proved connection between Sturdy and the package. He invited us to dismiss the appeal on the basis of other evidence, namely the appellants' action on Thursday 12th August and subsequently. He acknowledged that in the light of circumstances as they now appeared, the Deputy Bailiff in an otherwise excellent summing up had been led to give the Jurats a misdirection, namely that Sturdy's fingerprints had been found on the package. That misdirection, as is obvious, was of the first importance in relation to the Crown case as then presented.

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We now come to the Court of Appeal Guernsey Law 1961, section 25 (1). It reads:

"The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having

regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

A

PROVIDED that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

B

In this case it has been acknowledged by the prosecution that, due to an oversight, there had been a clear misdirection to the Jurats in relation to the fingerprint. In these circumstances, a conviction under section 23 of the Law of 1972 cannot be supported having regard to the evidence unless the proviso to section 25 subsection (1) of the Law of 1961 can be applied. This situation is irrespective of the undoubted evidence available to be considered for an offence under section 77. The Court may apply the proviso and dismiss the appeal if they are satisfied on the whole of the facts and with a correct direction that the only proper verdict would have been one of guilty. Put another way, the question is, would reasonable Jurats properly directed undoubtedly have convicted. It is impossible for this Court to say that this would have been so. We therefore quash the convictions and direct a judgment and verdicts of acquittal to be entered.

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Appeals allowed, convictions quashed and verdicts of acquittal ordered to be entered.

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61.

[CIVIL DIVISION - APPEAL NO. 148]

A

1993 DECEMBER 6, 7, 8, 9 and 1994 JUNE 14

INTERNATIONAL TECHNOLOGY OPERATIONS LIMITED

T.P. ENTERPRISES LIMITED

B

JOHN ROBERT COLLEY COCHRANE

and

EDWARD DENZIL DUNDONALD COCHRANE

The Appellants
(Second to Fifth
Defendants in
the Principal
Action)

C

v.

SILVER FALCON ENTERPRISES LIMITED

The Respondents
(First Plaintiff
in the Principal
Action)

D

Before: LE QUESNE, V.-P., HAMILTON and MACHIN, JJ.A.

See paragraph 34.

P.T.R. Ferbrache for the Appellants.

J.P. Greenfield for the Respondents.

The following Judgment was issued on 14th June, 1994:-

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At the conclusion of the hearing of this appeal we announced that it would be allowed, and our reasons would be stated later. Those reasons we now proceed to give.

On the 7th February, 1989, the Royal Court made an order on the application of Mr. Saffouri (the Second Respondent) in favour of Silver Falcon Enterprises Ltd (the First Respondents). This order

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(i) authorised the First Respondents to arrest such sum, not exceeding US\$495,000,000 and £11,000, as might be held in Guernsey by Barclays Bank on behalf of a number of corporations and individuals, including all the original Defendants in the action subsequently instituted in January 1991 except the Ninth and Tenth Defendants:

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(ii) restrained these corporations and individuals from causing or permitting any of their assets at any time within the jurisdiction to be removed from it or dealt with within the jurisdiction in any manner;

(iii) ordered Barclays Bank to give to H.M. Sheriff for the information of the First Respondents particulars of all assets and documents in their possession, custody and power relating to any assets now or formerly held by Barclays Bank in the name of those corporations and individuals;

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(iv) ordered Barclays bank to include in the information and documents given to H.M. Sheriff extensive particulars of any transfer, assignment or disposition of any of the assets of these corporations and individuals;

B

(v) ordered Peat Marwick and Stonehage Limited to disclose in accordance with paragraphs (iii) and (iv) above information relating to certain of these corporations (and, in the case of Peat Marwick, one additional organisation).

This order was made by the then Deputy Bailiff, who is now the Bailiff. We shall refer to him in this Judgment as the Deputy Bailiff, as that was the office which he held at the time of the orders from which this appeal arises.

C

The Second Respondent's application for this order was supported by an affidavit sworn by him. In it he said the First and Second Defendants owned and marketed armaments patents and military and industrial equipment. In 1982 he had negotiated an agreement with the First and Second Defendants whereby he became their agent for sale in Iraq, Saudi Arabia and Jordan of goods manufactured to their own patents and also for sale of 'patents for local manufacture, sale of componentry, raw materials, research and development, technical assistance contracts or personal secondment contracts and so forth.' Similar agreements had been made for Cyprus and Greece. The agreements provided for payment of commission on all contract sums to the Second Respondent or his nominee. In 1984 he had (as permitted by the agreements) assigned all his rights and obligations under the agreements to the First Respondents. He had negotiated substantial contracts with the Iraqi Government leading to the supply of a considerable volume of manufactured products and a wide range of services. He was informed that, as a result of his introductions, the First and Second Defendants had concluded contracts worth several billion U.S. Dollars, particularly with Iraq and Greece. The First Respondents had received only £72,202 in commission. Despite repeated requests and promises, the First and Second Defendants had failed to supply accounts or other information to enable the Respondents to calculate the commission due.

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On the 7th April, 1989, the Deputy Bailiff dismissed an application by the Second Defendants to set aside his order of the 7th February, 1989. Some documents were disclosed under this order in the course of 1989, and the disclosure has been supplemented as recently as August, 1993. The Respondents contend, however, that the Defendants still have not complied with the order fully.

The application of the 7th April, 1989 was supported by two affidavits, each sworn by the Fourth, Fifth and Sixth Defendants (Mr. E.D.D. Cochrane, Mr. J.R.C. Cochrane and Mr. W.T. Cochrane). In addition to dismissing

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A this application, the Deputy Bailiff's order directed that the Second Respondent should institute his contemplated proceedings no later than the 7th July, 1989.

B On the 13th September, 1989, no proceedings having been instituted, the First Respondents applied to the Royal Court for an order for disclosure by the Second, Third, Fourth, Fifth and Sixth Defendants of a considerable quantity of documents, some specified and some described by class. The application was adjourned, and the Second Respondent's time for instituting proceedings was extended to the day six weeks after the adjourned hearing.

The adjourned hearing took place on the 8th November, 1989, when the Deputy Bailiff made the following order:

C "1. That International Technology Operations Limited, T.P. Enterprises Limited, John Robert Colley Cochrane, Edward Denzil Dundonald Cochrane and William Thomas Cochrane ("the Defendants") do disclose to H.M. Sheriff upon the terms as to undertakings in damages ordered on the 7th day of February, 1989, as varied by subsequent Orders, for the information of Silver Falcon Enterprises Limited and its advocates and advisers, particulars of all monies, assets, documents, accounts, correspondence and memoranda presently or formerly in the possession, custody and control (directly or indirectly) of the Defendants relating to:-

D (1) the Agreements and addenda ("the Agreements") referred to in the second paragraph of paragraph four and paragraph seven of the affidavit of Walid Saffouri of the 7th February,

E (2) all negotiations, agreements and contracts entered upon, continued or concluded consequent upon the Agreements by or on behalf of the Defendants whether or not in the name of the Defendants or in the name of any other person, company or organisation.

F 2. That, without prejudice to the generality of the foregoing, the Defendants do disclose to H.M. Sheriff (upon the same provisions as Clause 1 above) the following documents and information, certain of which are referred to in the two affidavits sworn by E.D.D. Cochrane, J.R.C. Cochrane and W.T. Cochrane dated respectively by J.R.C. Cochrane 2nd of March, 1989 ("the First Affidavit") and 31st of March, 1989 ("the Second Affidavit"), namely

G (a) the contract for the payment of a "royalty" referred to in the final paragraph of paragraph 7.1 of the First Affidavit, the names of the contracting parties and all ancillary documentation and correspondence, whether this contract was concluded with Arm Scor, Nimrod or some other contracting party and including all other agreements or details of arrangements concluded between the Defendants and such other contracting party;

(b) the contract referred to in paragraph 7.2 of the First Affidavit in the sentence : "It became, however, a bigger enterprise than

was originally envisaged so the contract was passed to another contractor", together with all correspondence, agreements and ancillary documents, bank accounts, documentation transferring the contract to another "contractor" relating to such "contract";

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(c) the contract referred to in paragraph 2(iv)(c) of the affidavit of Walid Saffouri dated 14th March, 1989 and acknowledged by the Defendants in paragraph 5.1 of the Second Affidavit; together with all related letters of credit, consequential or ancillary contracts with other parties and shipping documents;

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(d) each and every contract between International Technology Operations Limited and, inter alia, Iraq referred to in paragraph 7.8 of the Second Affidavit, so far as such contracts fall within the scope of paragraph 1 of this Order;

(e) accounts (whether audited or not) of International Technology Operations Limited hereunder for the year 1985 and 1988;

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(f) the Protocol mentioned in paragraph 4 of the Second Affidavit; and

(g) all invoices and ancillary documentation and correspondence relating to the receipt by I.T.O. or their servants or agents of sums of money or other assets upon which were calculated and by reference to which were paid the commissions referred to in paragraph 13.1 of the First Affidavit, including the full identity of the paying party and its bank or other paying agent.

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3. That all such information and documentation referred to above be made available to Her Majesty's Sheriff for the information of the Plaintiff and its advisers upon the same provisions as Paragraph 1 of this Order within one month of the date of this Order."

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We now have before us an appeal against this Order by the Second, Third, Fourth and Fifth Defendants. The Sixth Defendant originally joined in the appeal, but on the 26th November, 1992 the Royal Court stayed proceedings against him and the Ninth Defendants in the action on the ground that an action between the same parties involving the same subject matter and seeking the same relief was pending in the Supreme Court of South Africa.

We have referred to proceedings against the Sixth and Ninth Defendants 'in the action'. We therefore anticipate matters to say that the First and Second Respondents and the Third Respondent (Mr. Piitarides) did eventually start an action based on the allegations made in the Second Respondent's affidavit (cf. para. 3 above), but not until the 21st January, 1991. The First Defendants applied to the Royal Court to strike out the cause as disclosing no reasonable cause of action, prejudicing the fair trial of the action, and being scandalous, frivolous, vexatious and otherwise an abuse of the process of the Court. The Bailiff (as the Deputy Bailiff had by now become) dismissed this application in January, 1993, and an appeal against his decision is pending.

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A Substantially the order of the 8th November, 1989 is an order for discovery. Para. 1 of the Order requires the five Defendants to whom it applies (we shall refer to them as "the Appellants") to provide the Sheriff with particulars (in other words, a list) of monies, assets, documents, accounts, correspondence and memoranda presently or formerly in their possession, custody or control relating to the Iraq, Cyprus and Greece agreements or to negotiations, agreements or contracts consequent upon the Iraq, Cyprus and Greece agreements. Para. 2 requires the Appellants to disclose to the Sheriff certain documents specifically mentioned in the two Affidavits of Mr. E.D.D. Cochrane, Mr. J.R.C. Cochrane and Mr. W.T. Cochrane (cf. para. 5 above). All these documents and information were to be made available to the Sheriff for the information of the First Respondents.

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The Order is therefore a typical order for discovery. It was made at a time when no action had been started. The Appellants contend that the Royal Court has no power to make such an order when there is no action in existence.

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The procedure of discovery of documents was introduced here by the Royal Court Civil Rules, 1989 (to which we refer as "the Rules"). Before then it was unknown. An Ordinance of 1860 (to which we shall refer more fully) empowered a party to an action to call upon another party to produce a document at the trial, and, if it were not then produced, to give secondary evidence of its contents; but that is quite distinct from pre-trial discovery. When exercising its power to order the arrest of assets of a debtor, the Royal Court has regularly ordered the person holding the assets to give to the creditor information and documents relating to assets held for the debtor. That too is to be distinguished from pre-trial discovery of documents relating, not to the assets of a debtor, but to the existence of a cause of action.

D

The Respondents do rely upon the Rules, but their primary argument in support of their application in the Royal Court was based on s.1 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987. This argument the Respondents repeated in this Court. The following are the relevant provisions of the Law:

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"1.(1) If proceedings have been or are to be instituted before the Court, the Court may by order, at any time before it makes a final judgment in the proceedings or before the proceedings are otherwise concluded, on the application of any person who is, or as the case may be will be, a party to the proceedings (such person being referred to in this Part of this Law as "the applicant"), grant an injunction addressed to another person (such other person being referred to in this Part of this Law as "the respondent") requiring the respondent to do or not to do any thing.

F

(2) The injunction -

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- (a) may be granted ex parte;
- (b) shall remain in force until -

(i) it is discharged under section 2 of this Law;

(ii) the Court makes a final judgment in the proceedings or the proceedings are otherwise concluded; or

A

(iii) such other time or the happening of such other event as may be specified; and

(c) may be granted subject to such conditions as may be specified.

(3) The Court may require the applicant to enter into such undertakings on such terms as may be specified including, where the injunction is to be granted before proceedings are instituted, an undertaking to institute proceedings within such period as may be specified.

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(4) A person who contravenes or fails to comply with -

(a) an injunction;

(b) any condition subject to which an injunction is granted;

(c) any undertaking entered into by him under subsection (3) of this section,

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is, in addition to any penalty to which he may be liable under subsection (5) of this section, guilty of a contempt of court and liable to be proceeded against and punished accordingly.

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(5) The Court may grant an injunction subject to such penalty as may be specified, and if the respondent contravenes or fails to comply with:-

(a) the injunction;

(b) any condition subject to which the injunction was granted,

the penalty shall be enforceable against him and, if it is a pecuniary penalty, payable to the applicant.

E

(6) Proceedings under subsection (4) of this section for a contempt of court or under subsection (5) of this section for the enforcement of a penalty shall be instituted by way of summons issued by the applicant, or by the respondent where the contempt is that of the applicant, and shall be dealt with by the Court.

F

(7) An injunction may in exceptional circumstances be granted notwithstanding that proceedings have not been and are not to be instituted before the Court.

2. The Court may by order, on the application of either party vary or discharge:-

(a) an injunction;

(b) any condition or penalty subject to which an injunction is granted;

G

A (c) any undertaking entered into by the applicant under section 1(3) of this Law.

3.(1) The Court may direct that an application for an injunction under section 1 of this Law or for an order under section 2 of this Law shall be heard notwithstanding that notice of the application has not been served upon the other party to the application.

B (2) Where the Court does not make a direction under subsection (1) of this section, the Court may direct that the period of time which must elapse between service upon the other party of notice of the application and the hearing of the application shall be reduced to such period as may be specified.

4. The Court shall not exercise any power conferred by section 1, 2 or 3 of this Law unless satisfied that it is just and convenient to do so.

C 5. Nothing in this Part of this Law derogates from any remedy, right or power arising otherwise than under this Law."

D Mr. Greenfield submits that the order of the 8th November, 1989 is an order 'requiring the respondent to do' something. It therefore falls within the meaning of 'injunction' in s. 1(1) of the Law, and the Royal Court had jurisdiction to make it because, as appears from the final paragraph of the order, proceedings, even if not then existing, were 'to be instituted before the Court'. Mr. Greenfield accepts that in the common parlance of lawyers an order for discovery is not generally called an injunction. He submits, however, that in the application of the Law of 1987 the word 'injunction' must be interpreted, not by reference to common usage, but in accordance with the very wide description attached to it by s.1 (1) ('requiring the respondent to do or not to do any thing').

E The power of the Court under s. 1(1) is limited by the provision of s. 4, that the Court shall not exercise the power 'unless satisfied that it is just and convenient to do so'. Nevertheless, the effect of Mr. Greenfield's argument would be to give to the Law an exceptionally wide operation. It would confer upon the Court comprehensive power to make any order it thought just and convenient if proceedings had been instituted, if they were to be instituted, or even in exceptional circumstances if they had not been instituted and were not to be instituted (s. 1(7)).

F Such a power would appear to supersede the many enactments conferring particular powers on the Court or providing how the Court's jurisdiction is to be exercised, or at least to enable the Court to override the terms and limitations of such enactments whenever it might think it just and convenient to do so. It is therefore necessary to look closely at the terms of the Law, in order to see whether so drastic an interpretation is imperatively required.

G Precise reading of s. 1(1) reveals that the power which it confers is power

"by order, at any time before it makes a final judgment in the proceedings ...[to] grant an injunction requiring the respondent to do or not to do any thing."

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It is also to be observed that Part I of the Law, which includes s.1, is headed "Interim Injunctions". The proper inference, in our judgment, is that this Part of the Law is dealing with orders for injunctions and with nothing else. 'Injunction' is a familiar term of art. It would not be easy to define all the orders of the Court to which it may be applicable, but it is certain that there are many orders, even orders requiring someone 'to do or not to do any thing', to which it is never applied. One obvious example is an order requiring a party to pay damages. Such an order is never called an injunction. A statute referring to injunctions would never be interpreted as applying to such an order. Further examples are orders for particulars or for answers to interrogatories. Yet another, of critical importance in this appeal, is an order for discovery.

B

The natural meaning of 'grant an injunction' in s. 1(1) of the Law is 'make an order of the kind known as injunctions'. In the closing words of the subsection ('requiring the respondent to do or not to do any thing'), the emphasis is upon the word 'any'. The purpose of the words is not to define what is meant by an injunction, but to make it clear that the power conferred by the sub-section extends to any order of the kind known as injunctions, whatever the act which the injunction enjoins or prohibits.

C

We have already observed that the order of the 8th November, 1989 is a typical order for discovery. An order for discovery, in our judgment, is not an injunction within the meaning of s.1 of the Law. It follows that s.1 did not give the Royal Court power to make the order under appeal.

D

The Respondents rely alternatively upon the Rules. Rule 39 (1) and (2) reads as follows:

"Discovery of documents

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39.(1) The Court may, on the application of any party to the proceedings, order any other party -

(a) to furnish the applicant with a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the proceedings;

(b) to verify the list by affidavit.

F

(2) An order for discovery under paragraph (1) may be limited to such documents or classes thereof, or to such only of the matters in question, as may be specified or described in the order."

It is plain that this rule is available only if there are proceedings in existence, and the party against whom the order is sought is a party to those proceedings. Mr. Greenfield argued that 'proceedings' were instituted by the order of the 7th February, 1989; the orders of the 1st March, 1989 (which limited the scope of the order of the 7th February,

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A 1989) and the 7th April, 1989 (dismissing an application to set the original order aside) were parts of the proceedings; and by November, 1989 the issues in the proceedings had been widened by the affidavits sworn in support of the application to set the original order aside, and included the existence of contracts between the First or Second Defendants and the Governments of Iraq, Saudi Arabia, Jordan, Cyprus or Greece and the receipt by those Defendants of funds relating to such contracts. Mr. Ferbrache, on the other hand, submitted that 'proceedings' in Rule 39 meant an action commenced by a cause, and the Rules were based on the premise that proceedings opened with the tabling of a cause.

B In our judgment, the terms of the Rules show that the Rules are intended to govern the procedure to be followed in the conduct of actions. At the very outset, rule 1, under the heading "Service of Documents", deals with documents relating to an action. Part II is headed "Commencement of Proceedings". Rule 9, which is the first rule in Part II, begins:

C "In every action a cause shall be tabled before the Court".

There are references to "the action" throughout Part II, and no indication that there is any other form of proceeding to which Part II relates. Similarly, the reference in Parts III (Summary Judgment) and IV (Counterclaims and consolidation etc) is to the action. Part V is headed "Parties to proceedings" and contains both references to "the proceedings" and references to "the action".

D Part VI deserves closer consideration. It is headed "General Conduct of Proceedings". Rule 35 provides:

"No party to an action may amend his pleadings except with the consent of all other parties or by leave of the Court."

Rule 36 empowers the Court to strike out or amend any pleading on the ground that (para. (1)(c))

E "it may prejudice, embarrass or delay the fair trial of the action or any other proceedings."

Rule 37 deals with further and better particulars of pleadings or of "the nature of the case on which [a party] relies", which may be ordered to be given by 'any party to an action'. Leave to serve interrogatories, under Rule 38, may be given to 'any party to the proceedings'. An order for discovery may be made 'on the application of any party to the proceedings' (Rule 39), and the Court may order inspection of any document to which 'a party to the proceedings' refers in his pleadings (Rule 41). The Court may give directions 'as to the hearing of any action' (Rule 43). No party may discontinue 'an action, counterclaim or any claim therein' without consent or the leave of the Court (Rule 44). Payment into Court may be made by 'a party to an action' (Rule 45).

G The Respondents' case on the Rules is that 'proceedings' is used in them as a wider term than 'action'; it includes actions, but also other forms of process. The passages to which we have referred show, in our judgment, that such a reading of the Rules is impossible. They do not specify any

form of process other than actions. Part II refers only to actions and, read with Rule 56, provides precisely how an action is to be commenced. Although headed "Commencement of Proceedings", the part does not say a word about the commencement of any form of process but an action. Part V apparently contemplates that in 'proceedings' parties may sue and be sued and judgments may be given and enforced (Rule 30), yet in the same Part it is provided specifically that a third party may be joined only in an action (Rule 33). It is hard to think of any reason why the Royal Court, when it made Part VI of the Rules, should have intended further and better particulars to be confined to an action (Rule 37), while interrogatories would be available over some wider field called "proceedings" (Rule 38).

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The true view of the Rules is that they deal, and deal only, with the conduct of actions. The word 'proceedings' is used in the Rules as a synonym of 'action', not in some wider sense. The explanation of this probably is that, as the different rules are derived from different sources, some of those sources referred to actions and others to proceedings. Whatever the meaning of 'proceedings' may have been in those sources, in the context of the Rules the word must, for the reasons we have set out, be understood in the same sense as 'action'.

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C

The only exception to this appears to be the reference in Rule 36(1)(c) to 'the fair trial of the action or any other proceedings'. The word 'proceedings' seems here to be used in the sense, which is perfectly well established, of an incident in the course of an action; e.g. the exchange of pleadings or the decision of a preliminary issue.

D

In saying that the Rules deal only with the conduct of actions we have not overlooked part VII, which is headed 'Requêtes Civiles'. A requête civile is a form of appeal rather than an originating procedure, and will normally occur in the course of an action. Part VII is somewhat distinct from the rest of the Rules, and none of the references to 'proceedings' appears to relate to a requête civile.

It follows that the powers which the Rules confer on the Royal Court can be exercised only in actions, and Rule 39 does not support the order against which this appeal is brought.

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We can deal briefly with the other grounds on which Mr. Greenfield sought to uphold the order. He relied on the Ordonnance of the Royal Court of 1860 (Recueil d'Ordonnances, Tome III, p. 424). We have already observed that that Ordonnance deals with production of documents at the trial, and proof by secondary evidence of the contents of documents demanded by one party but not produced by the other. These are matters quite different from discovery.

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The last paragraph of the Ordonnance reads:

"Cette Ordonnance ne porte point préjudice aux cas où la production d'une Pièce peut être ordonnée par la Cour".

We were referred to Le Marquand v L.C. Holdings Ltd (1985) 2 G.L.J. 17, in which the Deputy Bailiff said that this paragraph

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A "gives the Court a wide power or a wider power to order the production of documents of its own motion".

This is not quite accurate. The paragraph does not give the Court any power. It preserves powers already possessed by the Court to order production of a document. Counsel were unable to tell us what these powers are or to give us any example.

B Mr. Greenfield also placed before us orders made by the Royal Court ex parte for the arrest of property in a number of cases. The power of the Court to make such orders, and to order production of documents in support of the arrest, is not challenged, but Mr. Greenfield submitted that the examples which he produced ordered production of documents more extensive than would have been necessary to support the arrest. It does appear that the Court has been prepared on occasion to stretch this power, but the orders are still based on the Court's power to order production of documents in support of an order for arrest of assets. They give no support to the suggestion that the Court has general power to order discovery before any action has been instituted.

C For these reasons we concluded that the Royal Court had no power to make the order of the 8th November, 1989. The appeal was allowed and that order set aside. We ordered the Respondents to pay the costs of the appeal in any event.

D Appeal allowed, order under appeal set aside and Respondents ordered to pay the costs of the appeal in any event.

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