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GUERNSEY LAW JOURNAL

TWENTIETH ISSUE

Introduction

This edition covers the six month period from 1st July, 1995 to 31st December, 1995.

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 in future issues will be cited using the figure and letters 20.GLJ. followed by the paragraph number.

As subscribers will be aware, full reports of judgments of the Guernsey Court of Appeal have been printed in the Law Journal as an appendix to the issue covering the period in which they were delivered since Issue 15 (January to June, 1993). Until 1989, such judgments were printed separately by the Greffe. To date, judgments delivered in the intervening period of 1989 to 1992 have not been published in full although a note of each has been digested in the relevant issue of the Law Journal. Included in this issue, therefore, is the first instalment of significant Court of Appeal decisions previously unpublished. Further instalments will be included in future issues.

Editorial Committee

The Deputy Bailiff (de V. G. Carey, Esq.), Advocate J. N. van Leuven, Advocate V. C. Ogier, Advocate C. M. Fooks, H.M. Greffier (K. H. Tough, Esq.).

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 July to December 1995.

31st October, 1996.

Address of the Editorial Committee:
St. James Chambers,
GUERNSEY.

Tel: 01481 723355; Fax: 01481 725439

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GUERNSEY

AGENCY

Powers of attorney

1. Order in Council: The Powers of Attorney and Affidavits (Bailiwick of Guernsey) Law, 1995. - See 19.GLJ.1.

Registered and in force 11.7.95. (No. V of 1995).

AGRICULTURE AND ANIMALS

Control of poisonous substances

2. Ordinance: The Poisonous Substances (Commencement) Ordinance, 1995. - Brings the Poisonous Substances (Guernsey) Law, 1994 (see 16.GLJ.3 and 18.GLJ.2) into force on 1st November, 1995.

In force 25.10.95. (No. XXVIII of 1995).

APPEALS

Appeal from the Magistrate's Court - appeal against conviction notwithstanding guilty plea - meaning of exceptional circumstances

3. A had been convicted by the Court of Alderney, upon his guilty plea, of conduct likely to cause a breach of the peace. He applied pursuant to the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 for leave to appeal against his conviction, notwithstanding the guilty plea, on the grounds that the facts were such that there was a real doubt whether the conviction would have been upheld had there been a not guilty plea; and that there had been undue pressure on him to plead guilty. HELD by the Deputy Bailiff, dismissing the application, such applications, according to the 1988 Law, were only to be allowed in exceptional circumstances and should only be allowed where later evidence showed clearly that the basis on which a guilty plea had been tendered was wrong or that there had been some other exceptional matter. Following R. v. Forde (1923) 2 KB 400, where a plea of guilty had been recorded, a plea against conviction could only be entertained if it appeared that the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it, or that upon the admitted facts he could not in law have been convicted of the offence charged.

[Law Officers of the Crown v. Townsend - Requête and Appeals to the Royal Court 1.11.95 (NLeP/JRF)].

AVIATION AND AIRPORTS

4. Order in Council: The Air Transport Licensing (Guernsey) Law, 1995. - Imposes, for flights to which the Law applies, a requirement for the

operator or charterer to hold a Guernsey air transport licence granted by the States Transport Board ("the Board"). The Law applies to any flight beginning or ending in Guernsey other than one beginning or ending in a place outside the British Islands. The Board has power to prevent unlicensed flights.

Applications for licences by operators or charterers of aircraft must be made to the Board. Applications should normally be presented 6 months before the date on which the licence is to come into operation. In determining licence applications, the Board must take certain matters into account, including the provisions of the policy statement (which is the Board's published policy in relation to the licensing of Guernsey's air transport services as approved by the States) and any public representations. The applicant must also hold a Civil Aviation Authority licence (or its equivalent granted by the Secretary of State for Transport) for the flights in question.

Licences can be revoked (if, for example, the holder acts in a manner inconsistent with the operation in accordance with the conditions of the licence of the air transport service to which the licence relates). Licence applications are to be published in La Gazette Officielle. Use of an aircraft on an unlicensed flight is an offence.

Approved by the States 27.9.95. Royal Sanction 23.11.95. Registered 12.12.95. In force on a day to be appointed. (No. XV of 1995).

BANKING, INSURANCE AND FINANCE INDUSTRIES

Royal Bank of Scotland

5. Order in Council: The Royal Bank of Scotland (Bailiwick of Guernsey) Law, 1995. - See 19.GLJ.3.

Approved by the Chief Pleas of Sark 4.10.95. Royal Sanction 23.11.95. Registered 12.12.95. In force on a day to be appointed. (No. XIV of 1995).

COMPANIES

Legislation

6. Ordinance: The Companies (Guernsey) Law, 1994 (Commencement) (No. 2) Ordinance, 1995. - Brings into force on 1st December, 1995 section 63(6) of the Companies (Guernsey) Law, 1994 (which provides that a company may appoint as its auditor an individual, partnership or body corporate). Empowers the Financial Services Commission to make regulations prescribing the qualifications and conditions subject to which a partnership or body corporate may be auditor of a company.

In force 29.11.95. (No. XXXII of 1995).

Liquidation - power of liquidator to request information from former directors - interpretation of sections 110 and 106 of the Companies (Guernsey) Law, 1994

7. The liquidator of a company wished to obtain further information about certain financial transactions with which that company had been involved, all records of the company having been disposed of, and applied to the Court for permission to examine a former director thereof. The question arose whether section 110 of the 1994 Law permitted the Court to give directions to a former director to answer questions directed to him by the liquidator. HELD by the Deputy Bailiff, allowing the application, the Court had always accepted that the liquidator was an officer of the Court who was entitled to the advice and direction of the Court on matters that arose in the liquidation. The Court had a wide discretion to consider such applications and to make such orders as it thought fit in accordance with the terms of section 110. The Deputy Bailiff also commented that it would have been open to the liquidator to have proceeded under section 106 of the 1994 Law which enabled a liquidator to apply to the Court for an order under that section where it appeared that any past or present officer of the company had appropriated or otherwise misapplied any of the company's assets. This covered not only deliberate misapplications but also inadvertent misapplications where payments were made without the authority of all those who could expect to participate in the decision to make them.

[In re Med Vineyards Limited (in liquidation) - Plaids de Meubles 25.7.95 (JPG/JMW)].

CONSTITUTIONAL LAW

Elections

8. Projet de Loi: The Reform (Amendment) (Guernsey) Law, 1995.- Removes the restriction on "aliens" being inscribed on the electoral role and replaces it with a requirement for a minimum period of ordinary residence; replaces the rules whereby "undergoing imprisonment for felony" is a legal disability debarring inscription on the electoral role, with new provisions governing voting by prisoners; debars people who have been sentenced to imprisonment for six months or more during the previous five years from standing for, or holding, elected States or Parish offices; effects a number of minor reforms to electoral law concerning multiple nominations, the timing of nominations, the date from which candidates may obtain copies of the electoral role, and the place where any recount is to be held.

Approved by the States 25.10.95. Awaiting Royal Sanction.

CRIMINAL LAW AND PROCEDURE

Assault - doctrine of transferred malice

9. A confessed to hitting his wife in a violent manner as she was holding her baby and that this had caused her to drop the baby. He appealed against his conviction by the Magistrate's Court of assault. HELD by the Bailiff, the Magistrate was entitled to take the view, on the evidence before the Court, that the hitting of the wife and the dropping of the baby were cause and effect which satisfied the requirements of the doctrine of transferred malice. The appeal would be dismissed.

[Law Officers of the Crown v. Millar - Criminal Appeals from the Magistrate's Court 14.9.95 (JRF/AJA)].

Insider dealing

10. Projet de Loi: The Company Securities (Insider Dealing) (Bailiwick of Guernsey) Law, 1995. - Provides that an individual who has information as an insider is guilty of insider dealing if he deals in securities which are price affected securities in relation to the information. He is also guilty of insider dealing if he encourages another person to deal in such securities or if he discloses the information, otherwise than in the proper performance of his employment, to another person. In each case the acquisition or disposal in question must occur on a regulated market or through a professional intermediary. The Law provides various defences (for example, if the individual shows that he did not at the time expect the dealing to result in a profit attributable to the fact that the information in question was price sensitive information or that he believed on reasonable grounds that the information had been widely disclosed). The Law applies to any security which falls within Schedule 2 and satisfies any conditions prescribed by order of the Advisory and Finance Committee.

H.M Procureur is empowered, if there are circumstances suggesting that an offence of insider dealing may have been committed under this Law (or the laws of another country where a person in the Bailiwick may have been concerned in, or may have information or documents relating to, the offence), to appoint inspectors to carry out investigations. The inspectors may require persons to attend before them, produce documents and reply to questions. They may also take copies or extracts of documents, retain them for the purposes of the investigation and require any person to provide an explanation of them or to state their whereabouts. They may examine persons on oath. On the conclusion of the investigation the inspectors must report to the Procureur.

H.M. Procureur may apply to the Bailiff, where there are reasonable grounds for suspecting that there are on any premises documents likely to be of relevance to such an investigation, for the grant of a search warrant. The Procureur may, if satisfied that any material produced under the Law will be of relevance to criminal proceedings in a country outside the Bailiwick in respect of insider dealing, make an ex parte application to the Bailiff for permission to transmit that material to the prosecuting authorities of the country. Under section 13 documents produced or seized

pursuant to the Law may be retained for 3 months (or such longer period as the Bailiff may determine) or, if proceedings are instituted within that period, or if the Bailiff grants permission under section 12 to transmit the documents to another country, until the conclusion of proceedings.

The Law also contains provisions as to the penalties and prosecutions for insider dealing; the territorial scope of the offence of insider dealing; offences in relation to investigations and warrants (e.g. offences of obstruction or false statements); and the power of the Royal Court to direct the Financial Services Commission to take account of an offender's conduct in exercising any of its statutory functions.

Approved 6.10.95. Awaiting Royal Sanction.

Misuse of drugs

11. Order in Council: The Misuse of Drugs (Amendment) (Bailiwick of Guernsey) Law, 1995. - See 18.GLJ.11 and 19.GLJ.8.

Royal Sanction 23.11.95. Registered 12.12.95. In force 9.1.96. (No. XVI of 1995).

Money laundering

12. Order in Council: The Money Laundering (Disclosure of Information) (Guernsey) Law, 1995. - See 19.GLJ.9.

Registered and in force 11.7.95. (No. IV of 1995).

Sentence - assault on a police officer

13. A, who had been sentenced by the Royal Court to 18 months' imprisonment for assault on a member of the public, was also sentenced to 18 months' imprisonment for a serious assault on a police officer who had been trying to arrest him for that assault, the second sentence to run concurrently. The second assault comprised hitting the officer about the head at least six times such that his head, albeit in a crash helmet, hit a solid wall. On his appeal against the second sentence, HELD by the Court of Appeal, offences of that nature merited a sentence of imprisonment. However, in view of previous sentences for similar offences, it appeared that the sentence would not have been one of 18 months' had the Royal Court not already sentenced A to such a sentence for the other offence. The appropriate sentence would have been one of 12 months' imprisonment, to run concurrently, and the appeal would be allowed to that extent.

[Law Officers of the Crown v. Harris - Court of Appeal 16.10.95 (HMC/ADL)]. For full report of judgment of Court of Appeal see paragraph 87.

Sentence - misuse of drugs - importation of Class B drug

14. A was convicted in the Royal Court of being concerned in the importation of £20,000 worth of cannabis resin and was sentenced to 10 years' imprisonment. The drug had been stuffed into the tyres of a bicycle which had been imported by a Miss B at A's instance, A having deceived Miss B as

to the likely consequences of such importation being discovered. It was clear that A, who was 41 years of age, was a professional drug trafficker and that on this occasion his target was a beach party attended by hundreds of young people. He had a bad record of drugs offences. He applied for leave to appeal against the sentence. HELD by the Court of Appeal, the guidelines in Oren (see 18.GLJ.13) stated that offenders who were involved in the organisation of importation and distribution of drugs without necessarily exposing themselves to the dangers of actual physical possession could expect very much more substantial sentences. The Deputy Bailiff and Jurats in the present case had rightly considered that the circumstances warranted a sentence of particular severity for the protection of vulnerable young people and to deter other such criminals. He had recently been released from prison and had immediately turned his attentions to the Guernsey market. Further, A had no right to feel aggrieved by the fact that Miss B had received a lesser sentence. She had pleaded guilty and had co-operated with the authorities, giving evidence against A, and she had no previous convictions. The application would be dismissed.

[Law Officers of the Crown v. Paul - Court of Appeal 21.12.95 (HMP/NLeP)]. For full report of judgment of Court of Appeal, see paragraph 86.

Sentence - misuse of drugs - importation of Class B drug

15. A1 and A2, who both pleaded guilty to importing cannabis resin, were sentenced in the Royal Court to 2½ and 2 years' imprisonment respectively. A1 had imported 6.8 ounces (street value between £1,160 and £1,548) and A2 had imported 2.4 ounces (street value between £411 and £548) as part of a joint enterprise. Both had swallowed the drugs. A1 had no relevant previous offences; A2 had one previous serious drug offence. The Crown accepted that neither appellant had the intention to supply at the time of the importation and that A2 had imported the drug for his own use. In A1's case, however, the Crown argued that as it was a commercial amount he might have subsequently been tempted to sell some. On appeal against sentence, the Court of Appeal examined the principles set out in Oren (see 18.GLJ.13) and concluded that they did not address the position where, as in the case of A1, there was an amount of drugs which could have a commercial value if sold but there was no intention to sell it at the time of the importation. In such a case, if the Royal Court was minded to infer a subsequent temptation to deal with the drugs, a Newton enquiry should be held and if there was any doubt the interpretation most favourable to A1 should have prevailed. HELD, the sentence imposed on A2 was not so excessive as to justify interference with the Royal Court's decision; however, the difference between the amount of cannabis imported by A1 and that imported by A2 did not warrant an increased sentence and the sentence imposed on A1 would be reduced to 2 years.

[Law Officers of the Crown v. Le Poidevin and Watkin - Court of Appeal 17.10.95 (HMC/ADNH/DGLem)]. For full report of judgment of Court of Appeal see paragraph 88.

Sentence - misuse of drugs - importation of Class B drug

16. A, who pleaded guilty to importing 5 ounces of cannabis resin with a street value of between £843 and £1,124, was sentenced in the Royal Court to 18 months' imprisonment. She had carried the drug internally in five separate packages, alleging that one was for her personal use while the other was for a friend for his personal use. She at first denied having any cannabis and then attempted to prevent customs officers from recovering any after the initial package. However, A had assisted customs in providing information about others concerned in the importation. On appeal against sentence, HELD by the Court of Appeal, the case fell outside the principles set out in Oren (see 18.GLJ.13) and must be adjudged on ordinary sentencing principles. Where the import fell short of a commercial enterprise but was designed to supply third parties with illicit drugs the Court would still take a serious view of the deliberate act of spreading the use of controlled drugs among the population. The amount imported was relatively small and therefore the sentence should reflect the lower sentences reserved for cases where there were guilty pleas and the quantity of the drug was in the lower end of the range, around the market value below £1,000. On the face of it, the sentence was not excessive. However, A was a single mother with a child of nearly three years old and separation from her mother would be detrimental to the development of the child. The sentence would be suspended for 2 years and a suspended sentence supervision order imposed.

[Law Officers of the Crown v. McDonald - Court of Appeal 17.10.95 (HMC/EAGP)]. For full report of judgment of Court of Appeal see paragraph 89.

Sentence - misuse of drugs - importation of Class B drug

17. A, who pleaded guilty to importing 9 ounces (street value between £1,454 and £1,939) of cannabis resin, was sentenced to 2 years' imprisonment in the Royal Court. He travelled to the UK for the purpose of obtaining the drug and concealed it in his clothes. He lied to customs officers. He had a good work record and no criminal convictions for 20 years. On appeal against sentence, HELD by the Court of Appeal, for the reasons set out in Le Poidevin (see paragraph 15), the case should not be treated as a trafficking case. A had intended the drug to be for his personal use and the sentence was an appropriate one. The appeal would be dismissed.

[Law Officer of the Crown v. Caldwell - Court of Appeal 17.10.95 (HMC/ADNH)]. For full judgment of Court of Appeal, see paragraph 91.

Sentence - misuse of drugs - importation and exportation, and being concerned in the supply, of Class B drug

18. A and W, his wife, pleaded guilty in the Royal Court to two offences of jointly importing cannabis resin (½ kilo and 2.6 kilos), together with their son, D. W also pleaded guilty to exporting the first quantity of cannabis and A pleaded guilty to two counts of being concerned in the supply of cannabis. A was sentenced to 4 years and 6½ years' imprisonment respectively for the two counts of importation, to be served concurrently, and to sentences of 4 years and 6½ years, also concurrent, for being concerned in the supply. W was sentenced to 4 years and 5 years

concurrent on the two charges of importation and to 4 years concurrent for the exportation. D, who had no previous convictions, was sentenced to 3 years concurrent on each of four counts and did not appeal. A, aged 48, had 8 previous convictions for drug offences since 1973 and W, aged 43, had 3 previous convictions for possession and supply of cannabis in 1977. The evidence was that A and W, who also had a 10 year old daughter, were carrying on a family business in the importation and supply of cannabis. On their appeal to the Court of Appeal on the grounds that their sentences were inconsistent with each other and with the sentences imposed on their son, and that they were in any event too long, HELD, having regard to the guidelines laid down in the case of Oren (see 18.GLJ.13), and to the facts that A and W pleaded guilty, that they co-operated with the authorities and also volunteered additional information, the sentence of each of them would be reduced from 4 years to 3 years on the first count of importation and from 6½ to 4 years (A) and 5 to 4 years (W) on the second such count. W's sentence in relation to exportation would be reduced from 4 to 3 years and A's sentences in relation to supply would be reduced from 4 years to 3 years and 6½ to 4 years, all sentences to be served concurrently. The effect of the reductions was to bring the sentences into line as between A and W and as between them and their son. The fact that the sentences would entail a separation of mother and 10 year old daughter was regrettable but could not deter the Court from doing its duty.

[Law Officers of the Crown v. Lees and Lees - Court of Appeal 21.12.95 (HMC/MJR/AJA)]. For full report of judgment of Court of Appeal, see paragraph 90.

Sentence - misuse of drugs - possession of Class A drug with intent to supply

19. A, aged 24 and with no previous convictions, pleaded guilty to being in possession of Ecstasy with intent to supply. He told a succession of lies to the police when interviewed which was rejected by the Royal Court which also concluded that he came to the island to act as principal. He appealed against his sentence of 6 years' imprisonment. HELD by the Court of Appeal, the policy of the Royal Court as set out in Oren (see 18.GLJ.13) stated that the starting point for sentencing in cases involving larger quantities where the inference was to be drawn that the offender was engaged in trafficking was, in the case of Class A drugs, four years after the entry of a plea of guilty and for a quantity of drugs in the lower end of the range. The street value of the ecstasy was significant and he entered the island for the purpose of dealing with the drug. However, although the sentence of 6 years was consistent with the guidelines in Oren, insufficient weight was placed on A's age, his background and his plea of guilty. A sentence of 5 years' imprisonment would be substituted.

[Law Officers of the Crown v. Warmisham - Court of Appeal 31.7.95 (HMP/ADNH)]. For full report of judgment of Court of Appeal see paragraph 84.

Sentence - offences of dishonesty

20. A, who was aged 22 and who had a long record of offences of dishonesty, pleaded guilty in the Royal Court to six offences of dishonesty, including

theft of £600 from his employer; obtaining cash by deception from a bank by altering a cheque; attempting to obtain 117 diazepam tablets by altering a prescription; purporting to be the owner of, and to sell, a car which he had borrowed from a friend; and theft of a leather jacket from a shop. He was sentenced to a total of 14 months' imprisonment to commence on the date of sentence, already having served 3 months on remand pending trial. On his appeal against sentence, HELD by the Court of Appeal, having regard to the seriousness of the crimes and A's record in the absence of strong mitigating factors, the sentences imposed were entirely appropriate. The question was whether the mitigating factors warranted a reduction in any of the sentences. These included depression leading to illegal drug-taking, the death of a former girlfriend from an overdose of A's sleeping pills and attempts upon his own life. However, no substantial alteration in the sentences imposed was justified: having regard to the Court's duty to protect the public and the fact that many people suffer traumatic problems of a more serious nature and continue to conduct themselves as responsible citizens, the sentences were justified. However, no reason had been given for starting the sentence at the date when it was imposed, nor could the Court see any good reason for it, and the sentences would be ordered to be served from the date when A was first detained in custody.

[Law Officers of the Crown v. Noyon - Court of Appeal 31.7.95 (HMP/MJR)].
For full report of judgment of Court of Appeal see paragraph 85.

DIVORCE AND MATRIMONIAL CAUSES

Domestic violence injunction - meaning of molestation

21. D was charged with the breach of an injunction ordering him not to molest his wife, W, the evidence being that he had made threatening gestures to her and placed himself in such a position as to confine her without actually touching her. The question arose whether this amounted to molestation within the meaning of the Law. HELD by the Magistrate, finding the charge proved, following the case of Horner v. Horner (1982) 2 All ER 495, the word "molesting" did not imply necessarily either violence or threats of violence. Although the order did not prohibit D from speaking to W and speech by itself did not constitute molestation, the word applied to any conduct which could properly be regarded as such a degree of harassment as to call for the intervention of the Court, the word harassment including an element of intent to cause distress or harm.

[Law Officers of the Crown v. Almonte - Magistrate's Court 22.9.95 (AMM)].

DOCUMENT DUTY

22. Ordinance: The Document Duty (Amendment) Ordinance, 1995. - Amends the First Schedule to the Document Duty (Guernsey) Law, 1973 by specifying the amount of document duty payable on the registration in the Alderney Companies Register of the memorandum of a company limited by guarantee or a company which can issue shares of no par value.

In force 27.9.95. (No. XXV of 1995).

EUROPEAN COMMUNITIES

European Economic Area

23. Projet de Loi: The European Economic Area (Bailiwick of Guernsey) Law, 1994. - See 18.GLJ.19.

Approved by the Chief Pleas of Sark 4.10.95. Awaiting Royal Sanction.

FOOD

Food and drugs legislation

24. Order in Council: The Food and Drugs (Amendment) (Guernsey) Law, 1995. - See 19.GLJ.22.

Royal Sanction 18.10.95. Registered 14.11.95. In force on a day to be appointed. (No. X of 1995).

GAMBLING

Betting

25. Ordinance: The Gambling (Betting) (Amendment) Ordinance, 1995. - Amends the Gambling (Betting) Ordinance, 1973 by requiring the Gambling Control Committee to refuse to grant or renew a licence where the applicant or any employee of his has received or negotiated a bet on the outcome of a lottery (including the National Lottery).

In force 26.7.95. (No. XIV of 1995).

HEALTH AND MEDICINE

Medical benefit

26. Ordinance: The Health Service (Benefit) (Qualification Period) Ordinance, 1995. - Reduces the qualification period for benefit under the Health Service (Benefit) (Guernsey) Law, 1990 from 26 weeks to 13 weeks.

In force 1.1.96. (No. XXXV of 1995).

27. Ordinance: The Health Service (Benefit) (Amendment) Ordinance, 1995. - Prescribes the practice premises of the Medical Specialist Group as being a location at which the £8 grant for a medical consultation under the Health Service (Benefit) (Guernsey) Law, 1990 is not payable. Consultations at the Medical Specialist Group are covered by the specialist medical benefit scheme (see paragraph 30).

In force 1.1.96. (No. XXXIII of 1995).

28. Ordinance: The Health Service (Benefit) (Amendment) (No. 2) Ordinance, 1995. - Prescribes the practice premises of the Ophthalmic Group as being a location at which the £8 grant for a medical consultation under the Health Service (Benefit) (Guernsey) Law, 1990 is not payable. Consultations at the Ophthalmic Group are covered by the specialist medical benefit scheme (see paragraph 30).

In force 1.1.96. (No. XLII of 1995).

29. Ordinance: The Health Service (Benefit) (Annual Grant) Ordinance, 1995. - Amends the Health Service (Benefit) (Guernsey) Law, 1990 by changing the amount of the States grant (the Health Service Annual Grant) paid into the Guernsey Health Service Fund (which pays for pharmaceutical benefit and medical benefit for Guernsey and Alderney residents) from 57% to 36% of the Guernsey Health Service Fund Allocation.

In force 1.1.96. (No. XXXIV of 1995).

30. Ordinance: The Health Service (Specialist Medical Benefit) Ordinance, 1995. - Modifies the Health Service (Benefit) (Guernsey) Law, 1990 by providing a further category of benefit known as specialist medical benefit. Persons who satisfy the conditions as to residence and presence specified in section 3(1) of the Law (basically, 13 weeks' residence in aggregate) are entitled to specialist medical benefit which comprises the provision of all such specialist consultations, treatment and procedures as may be prescribed by regulations of the Authority and as may be requisite in the case of any patient for the diagnosis, treatment, management, prevention or control of disease. Certain conditions of entitlement are laid down - for example, that the treatment is provided only by an authorised supplier pursuant to the terms of the contract between the Authority and the partners of the Medical Specialist Group.

In force 1.1.95. (No. XXXVI of 1995).

31. Ordinance: The Health Service (Ophthalmic Benefit) Ordinance, 1995. - Modifies the Health Service (Benefit) (Guernsey) Law, 1990 by providing a further category of benefit known as ophthalmic benefit. Persons who satisfy the conditions as to residence and presence specified in section 3(1) of the Law (basically, 13 weeks residence in aggregate) are entitled to ophthalmic benefit which comprises the provision of all such ophthalmic consultations and treatment as may be prescribed by regulations of the Authority and as may be requisite in the case of any patient for the diagnosis and treatment of ophthalmic disease. Certain conditions of entitlement are laid down - for example, that the treatment is provided only by an authorised supplier pursuant to the terms of the contract between the Authority and the partners of the Ophthalmic Group.

In force 1.1.96. (No. XL of 1995).

32. Ordinance: The Health Service (Physiotherapy Benefit) Ordinance, 1995. - Modifies the Health Service (Benefit) (Guernsey) Law, 1990 by providing a further category of benefit known as physiotherapy benefit. Persons who satisfy the conditions as to residence and presence specified in section 3(1) of the Law (basically, 13 weeks' residence in aggregate) are entitled

to physiotherapy benefit which comprises the provision of all such physiotherapy as may be prescribed by regulations of the Authority and as may be requisite in the case of any patient for the treatment of disease or otherwise by reason of his condition. Certain conditions of entitlement are laid down - for example, that the treatment is provided only by an authorised supplier.

In force 1.1.96. (No. XLI of 1995).

33. Statutory instrument: The Health Service (Specialist Medical Benefit) Regulations, 1995. - Specifies for the purposes of the Health Service (Specialist Medical Benefit) Ordinance, 1995 (see paragraph 30) all the operations, treatment and procedures which are to be available under the specialist medical benefit scheme. The operations are only included in the scheme when provided by an authorised supplier pursuant to the terms of the contract between the Social Security Authority and the Medical Specialist Group.

In force 1.1.96. (S.I. No. 38 of 1995).

34. Statutory instrument: The Health Service (Ophthalmic Benefit) Regulations, 1995. - Specifies for the purposes of the Health Service (Ophthalmic Benefit) Ordinance, 1995 (see paragraph 31) the operations, treatment and procedures which are to be available under the ophthalmic benefit scheme. The operations are only included in the scheme when provided by an authorised supplier pursuant to the terms of the contract between the Social Security Authority and the partners of the Ophthalmic Group.

In force 1.1.96. (S.I. No. 39 of 1995).

35. Statutory instrument: The Health Service (Physiotherapy Benefit) Regulations, 1995. - Specifies for the purposes of the Health Service (Physiotherapy Benefit) Ordinance, 1995 (see paragraph 32) the treatments and procedures which are to be available under the physiotherapy benefit scheme. Treatment is only included in the scheme when provided by an authorised supplier in accordance with the provisions of the regulations.

In force 1.1.96. (S.I. No. 40 of 1995).

HOUSING

Control of occupation - application for housing licence - duties of authority - proper procedures

36. A, who was born in Alderney, lived in Guernsey from the age of 2 in 1961 until 1969 when he left the island with his parents. In 1991 he returned to Guernsey to work at a bank and was granted an essential licence for 5 years. In 1993 he was made redundant and his licence came to an end. He subsequently obtained employment with another bank which employment was not regarded as "essential to the community". He made an application under the Housing (Control of Occupation) (Guernsey) Laws, 1982 to 1990 ("the Housing Control Laws") to the Housing Authority for a "compassionate

licence" based upon his connections with the island. In its letter refusing his application, the Housing Authority stated that "in reaching this decision the Authority took account of the factors set out in section 5 of the Law....". His appeal to the Royal Court was dismissed and he appealed further to the Court of Appeal. HELD, under sections 4(b) and 5 of the Housing Control Laws, taken together, the Authority was required to make a proper statement of its reasons showing how and why, in applying the factors set out in section 5(1), it had reached the decision to reject the application. In the case of Ward v. States Housing Authority (see 8.GLJ.50 and paragraph 94), the Court of Appeal drew attention to the Authority's failure to perform this statutory duty and, apart from the general statement referred to, there was no indication that the Authority had considered these factors and no statement of reasons. The fact that the burden of proof in housing appeals had, since the decision in Ward, shifted to the appellant to show that the Authority's decision was unreasonable made it even more important that the Authority fully discharged its duty in that regard. Further, it was not open to the Authority at this stage to seek to introduce evidence as to which factors it in fact took into consideration: the Court could not take into account matters which were not set out in the letter informing A of the decision not to grant a licence. The normal process when an application was made, rejected and appealed against should be: -

(a) a decision of the Authority setting out in reasonable detail its conclusions on the various factors with reasoning;

(b) an appeal by A to the Royal Court, supported by factual evidence if necessary (by affidavit if not agreed);

(c) the Authority's response, giving evidence if it so wished, in response to A's evidence (again, by affidavit if not agreed).

The Authority had failed to take sufficient account of the requirements set out in Ward and its decision would be set aside. The application would be remitted to the Authority to reconsider in accordance with the law of Guernsey as stated by the Court of Appeal in this case and in the case of Ward.

[Perkins v. States Housing Authority - Court of Appeal 2.8.95 (PTRF/HER)].
(See also paragraph 53). For full report of judgment of Court of Appeal, see paragraph 93.

INCOME TAX

Appeal to the Royal Court - case stated defective

37. The Deputy Bailiff considered a case stated from the Guernsey Tax Tribunal which centred on whether or not a settlement created by the taxpayer was revocable or not. The case stated contained no full exposition of the findings of fact of the Tribunal. Some facts appeared to have been agreed, but the Assistant Administrator had not prepared any summary of these facts for the agreement of counsel for the taxpayer. Certain sworn evidence had been heard from witnesses but there was no record of what the

conclusions of the Tribunal were on this evidence. The Deputy Bailiff, in remitting the matter to the Tribunal for further consideration, pointed out that the Royal Court only had jurisdiction to make findings that the decision of the Tribunal had been erroneous in law. He could not interfere with findings of fact and therefore it was essential that the Tribunal clearly stated what its findings were. If there was an agreed statement of facts that should be appended to the case stated. If there was a conflict of evidence then that evidence should be summarised and the finding of primary facts of the Tribunal recorded as well as the inferences drawn by the Tribunal from those facts.

Counsel canvassed the possibility of the Deputy Bailiff determining certain questions of law at this stage but he declined to do so as the law did not in his view give him power to reach conclusions on a defectively stated case.

[Downs v. Administrator of Income Tax - Royal Court 19.10.95 (PTRF/HER)].

Computation of income

38. Ordinance: The Income Tax (Exemption of Benefits) Ordinance, 1995. - Prescribes those benefits which are to be left out of account in calculating the assessable income of any employment for the purposes of the Income Tax Law. Where expenditure incurred by an employer wholly and exclusively for the purposes of his business gives rise to a benefit to the employee which is both insignificant and wholly incidental in nature, that benefit is to be left out of account. Similarly, the first £400 in any year of all benefits to an employee, other than the use of property and those specifically exempted. Subject to specified restrictions and safeguards, the specifically exempted benefits include:

- (a) loans at preferential rates;
- (b) social insurance and approved pension scheme contributions;
- (c) employees' group health insurance, medical or life insurance in respect of duties outside of the Bailiwick, and professional negligence insurance;
- (d) medical screening;
- (e) removal expenses, and the first £4,000 of a disturbance allowance for employees recruited from outside Guernsey;
- (f) staff training;
- (g) equipment, uniform or protective clothing used only in the performance of an employee's duties;
- (h) staff catering facilities and non-transferable meal vouchers;
- (i) motor vehicles used only for work;
- (j) car parking facilities;

- (k) transport for night workers and severely disabled employees;
- (l) crèche facilities at work;
- (m) entertainment facilities for business purposes;
- (n) professional journals;
- (o) accommodation for clergy; and
- (p) non-cash long-service awards.

Approved by the States 25.10.95. In force 1.1.96. (No. XXIX of 1995).

39. Statutory Instrument : The Income Tax (Guernsey) (Valuation of Benefits in Kind) Regulations, 1995. - Prescribe the manner of calculating the value for income tax purposes of benefits arising to an employee from the use of assets without a transfer of ownership. Such benefits are differently valued according to whether they arise from the use of motor vehicles, land or accommodation, or other assets.

In force 1.1.96. (S.I. No. 34 of 1995).

International bodies

40. Order in Council: The Income Tax (International Bodies) (Guernsey) Law, 1995. - See 15.GLJ.29.

Royal Sanction 28.6.95. Registered 22.8.95. In force 4.7.93. (No. VII of 1995).

ISLAND DEVELOPMENT

Appeal to the Royal Court - developed glasshouse area - power to permit retail development

41. AA wished to appeal to the Royal Court against a decision of the Island Development Committee refusing the redevelopment of a vinery site as a garden centre with retail shop, stores etc. Part of the site was within a developed glasshouse area in the area covered by Detailed Development Plan No. 4. On a preliminary point of law as to whether the Committee was permitted under the written statement for developed glasshouse areas to permit the application, HELD by the Deputy Bailiff that the application clearly envisaged demolishing the existing glasshouses and constructing new buildings for the new business. It was not an application to change the use of the existing glasshouses to enable the retail of pot plants and garden goods. It was absurd to suggest that the Committee should have imposed a condition on the application and say that it should be allowed provided that only the existing structures were used. Neither was it an application for development ancillary to horticulture. The application in the way that it had been presented was not one which the Committee had power to grant. In this the case was not distinguishable from Le Noury v. I.D.C. (see 3.GLJ.44).

On a further issue as to whether AA had a right of appeal on the ground that the Committee should have formed an opinion as to whether or not the proposal for development would involve a departure of a minor nature not warranting specific reference to the States under the provision of section 8 of the Law, the Committee had not in this case been asked to form an opinion under section 18(1). It was totally artificial to require the Committee each time it rejected an application to have to form a view on the hypothetical issue of whether or not the application were it to be allowed would involve a departure to the plan. He did not, however, dismiss entirely the possibility of circumstances arising where the Royal Court could uphold an appeal when the Committee has refused permission on the grounds that what was proposed was contrary to the Detailed Development Plan and further that the departure was not of a minor nature not warranting reference to the States.

There was accordingly no issue upon which the Jurats could adjudicate. The appeal would be dismissed. As was made clear in the Le Noury case the proper forum for such a matter, where the States have tied the hands of the Committee, was the States.

[Blue Diamond v. I.D.C. - Royal Court 27.7.95 (PTRF/HER).]

LAND LAW

Agreement to sell interest in land - whether requirement that it be evidenced in writing

42. After negotiations for the sale of P's property to D, D gave P a post-dated cheque which was subsequently stopped before conditions of sale were signed. P brought proceedings against D for damages for breach of the contract which P alleged existed between them. D raised an Exception de Fonds that P's cause disclosed no cause of action in that an oral contract for the purchase of land was unenforceable and of no effect. HELD by the Deputy Bailiff, having reviewed certain authorities relied upon by D, in particular the Jersey case of Guiton v. de Gruchy (1870), there was no clear support in evidence given by Jeremie to the Jersey Royal Commission of 1860 for the proposition that contracts for the sale of interests in land must be in written form if their breach was to give rise to an action for damages. Although it was desirable that the law be certain it was not the law of the island that agreements for the sale of land be in writing; however, a person alleging that such a contract existed would be likely to have difficulty in proving it. Adopting the words of Hoffman JA in Cherub Investments Ltd v. The Channel Islands Aero Club (Guernsey) Limited (1982) Civil Appeal 11, the test of whether an Exception de Fonds could succeed or not was whether there were no admissible facts which might allow the plaintiff to succeed at the trial. The Exception would be rejected.

[Gauson v. Harris - Plaids de Meubles 18.9.95 (JMW/PTRF)].

PARTNERSHIP

Limited partnership

43. Order in Council: The Limited Partnerships (Guernsey) Law, 1995. - See 19.GLJ.35.

Royal Sanction 18.10.95. Registered 14.11.95. In force on a day to be appointed. (No. XII of 1995).

Partnership

44. Order in Council: The Partnership (Guernsey) Law, 1995. - See 19.GLJ.36.

Royal Sanction 28.6.95. Registered 22.8.96. (No. VIII of 1995). In force 1.11.95: The Partnership (Commencement) Ordinance 1995 (No. XXVII of 1995).

POPULATION AND MIGRATION

Census

45. Ordinance: The Census Ordinance, 1995. - Provides for the taking of a census of the population of Guernsey, Herm and Jethou on 31.3.96.

In force 26.7.95. (No. XVII of 1995).

PRACTICE AND PROCEDURE

Applications for trial - Practice Direction

46. All applications for dates for the trial of civil actions will be listed for consideration at the first sitting of the Interlocutory court after receipt.

All dates for the hearing of civil actions will be fixed in the Interlocutory court. Counsel are requested to ensure that the dates of expert and other witnesses are provided at that time. Counsel making applications are requested to ensure that Counsel for other parties are given one month's notice of such application being made.

Dates can be fixed for trial up to three terms in advance. Counsel may request that a trial date, once fixed, be reviewed by the Interlocutory Court at any time upon written application to Her Majesty's Deputy Greffier, copied to Counsel for other parties to the action.

Counsel making application for a trial date are requested to ensure that all of the provisions of Practice Direction No. 1 of 1992 have been complied with. The Court will not fix a date for trial unless it is satisfied that the matter is ready for trial.

Practice Direction No. 2 of 1992 and Practice Direction No. 5 of 1994, relating to applications for trial dates in advance, are hereby repealed.

[Practice Direction No. 4 of 1995].

Costs - full indemnity costs - power of Court of Appeal to award - circumstances in which justified

47. See Laughton v. Main, paragraph 79.

Interlocutory Court - submission of matters for consideration - Practice Direction

48. 1. As from the 1st January, 1996, the Court will sit to consider interlocutory applications each Friday at the conclusion of Ordinary Court (Bailiff's Business).

Matrimonial interlocutory applications will be considered following this Court on the last Friday of each month.

2. Applications for consideration by the Court should be submitted to the Greffe no later than 12 noon on the preceding Thursday. Two copies of a schedule of applications should be submitted with the applications - setting out clearly the names of the parties and the nature of the application to be made.

Counsel should submit two copies of the **up-to-date** pleadings and any supporting documents; together with the original and one copy of any supporting affidavit(s).

Counsel should submit one copy of any authorities.

3. Applications for trial date are now to be referred to the Interlocutory Court in accordance with Practice Direction No. 4 of 1995. Counsel submitting such applications are requested to include this in the Schedule of Applications submitted to the Greffe - but only if all documents have been lodged by all parties.

Fourteen days notice in writing of such listing should be given to the Greffe so as to enable the Deputy Bailiff to review the papers prior to considering the allocation of a trial date. Counsel are requested to ensure that the Court has before it the dates of availability of all expert and other witnesses at the time such application is tabled.

Counsel wishing to apply for Directions on the filing of expert reports, and other documents by other parties prior to a trial date being given, should lodge a cause setting out the terms of such application. This must be done in advance of an application for trial date being considered by the Court.

4. Applications for Orders by consent should be marked as such and Counsel are requested to submit three copies (or more if more than two Counsel) of the agreed Order, signed by Counsel for all parties and indicating their consent to the Order. Space should be provided for the

Bailiff or Deputy Bailiff to sign the Order. This will be presented to the Court and issued to Counsel immediately. (Counsel are advised that, other than in exceptional circumstances, the Court will not consider such consent applications at any other time).

5. Applications which are not to be by consent should be marked as such - together with an estimation by Counsel as to the length of time required for the hearing.

6. After dealing with the consent orders, the Court will assess which matters can be heard. Should there be insufficient time on the day, the Court will fix a time for the hearing.

7. Counsel are requested to assist the Court by not submitting applications which are likely to be adjourned by consent. It is hoped that by allowing Counsel until 12 noon on the day preceding the Court, an accurate assessment of the position in each case will be made by Counsel before submitting the applications and schedule to the Greffe.

8. Counsel may, by consent, adjourn matters included on the schedule from one sitting to another by notifying the Greffe no later than 9.30 a.m. on the morning of the Court. Unless Counsel have a particular reason for doing so, the Court does not wish to have to formally adjourn matters by consent in Court.

9. A list of matters to be considered at sittings of the Interlocutory Court will not be issued by the Greffe. Counsel should therefore arrange for opposing Counsel to be notified. Responsibility for this rests with Counsel for the Applicant.

10. Official notice, through Her Majesty's Sergeant, must be served on any unrepresented parties. Counsel may refer any matters involving unrepresented parties to the Greffe for directions re a special hearing date and time if this should be necessary.

11. The directions given in Practice Direction No. 6 of 1990 [see 10.GLJ.75] relating to Applications for summary judgment remain in force. Practice Directions No. 1 of 1991 and No. 4 of 1992 are hereby repealed.

[Practice Direction No. 5 of 1995].

Limitation of actions - action for personal injury - application for time limit to be overridden - factors to be taken into consideration

49. In the course of proceedings in occupier's liability (see also 19.GLJ.53) against D1, landlord of the premises, P sought to join as second and third defendants the architects employed by D1 in respect of whom a third party notice had been issued by D1 in March 1993. The accident giving rise to the cause of action took place in 1987 and therefore the question arose whether P's application fell within the limitation period for personal injury actions as set out in section 5 of the Law Reform (Tort) (Guernsey) Law, 1979. Subsection (6) provided that references to a person's date of knowledge, from which date the three year period was to run, were references to the date on which he had knowledge of, *inter alia*, the

identity of the defendant or other person whose act or omission gave rise to the cause of action and the additional facts supporting the bringing of an action against the defendant. P alleged that her date of knowledge was the date when she was notified of the third party notice but the architects argued that her advocate should have identified the existence of a claim against them at an earlier date on the basis of correspondence with the Island Development Committee and a report by another architect which highlighted the faulty design of the premises. HELD by the Deputy Bailiff, allowing the application, applying the test of reasonable discoverability, no knowledge on the part of P's advocate could be inferred. There was no reason to assume that D1 would have authorised the IDC to allow P's advocate to examine the IDC file nor that anything on that file would have revealed that the architects were liable; and the architect's report did not consider questions of liability of co-defendants. Accordingly, the date of knowledge was the date of advice of the issue of third party proceedings and P's application was in time.

[Champion (otherwise Morton) v. Paint (No. 2) - Plaid de Meubles 25.9.95 (RJC/EAGP/JMW)].

Ordinary Court - lodging of causes - Practice Direction

50. 1. The procedure for lodging causes is revised with immediate effect.
2. From Wednesday, 9th August, 1995 both copies of each cause are to be lodged at the Greffe by 12 noon; the causes are to be marked "Bailiff's Copy" or "Greffier's Copy" in the top right-hand corner.
3. Each firm's business must be headed by an agenda, drawn up as on the attached specimen [available at the Greffe]. The agenda must include items adjourned to that day.

[Practice Direction No. 3 of 1995].

Péremption d'instance - power of Court to restore to Rôle after action has become périmé

51. P, who was seriously injured in a road accident in 1986, instituted proceedings against D within the limitation period and the action was placed on the Witness List in April 1990. As P's medical condition had not stabilised, his advocates were unable to advise as to the proper quantum of compensation to be sought and no further court action was taken. In 1995 D brought to P's attention the fact that the action had become périmé in 1991 and P applied under Rule 50 of the Royal Court Civil Rules, 1989 for the cause to be restored to the Witness List. HELD by the Deputy Bailiff, the case of Rastin v. British Steel (1994) 2 AER 641 provided some guidance as to the exercise of judicial discretion in cases where actions are automatically struck out in the absence of action by the plaintiff. The Court said in that case, *inter alia*, that such measures were aimed at curbing delay, the enemy of justice; that it could not be assumed that a plaintiff's advisers could be relied upon to expedite the trial of his case; that the time limits were generous and failure to act within them would not ordinarily be explicable or excusable by forgetfulness, pressure of work etc.; and it was incumbent upon a

plaintiff seeking a retrospective extension to persuade the court to exercise its discretion in his favour. Having considered this and other English authorities, it appeared that the English Courts took a very strict line against technical lapses by solicitors who failed to apply for dates for trial. However, stricter control was perhaps called for in a larger jurisdiction and the local court could take a wider view, taking into account the relative difficulty in prosecuting personal injuries claims in the absence of legal aid and where insurers and expert witnesses were likely to be non-resident. To leave P to his remedy of suing his advocate would cause him grave injustice in that he would be forced to find fresh representation. In all the circumstances of the particular case the case would be restored to the Witness List although such indulgence might not be appropriate in future cases and it should be recognised as the norm that actions are not permitted to go périmé except where that be the clear intention of the plaintiff.

[Le Moigne v. Hargeton - Plaid de Meubles 12.10.96 (PTRF/JDL)].

Péremption d'instance - renunciation of péremption by defendant

52. P's action against D became périmé but there was subsequent correspondence between the parties ending with a letter from D's advocate concerning discovery and requesting an appointment to inspect. P applied, in so far as it might be necessary, for the action to be restored to the Rôle. HELD by the Bailiff, Gallienne's "Traité de la Renonciation par la Loi Outrée" provided that péremption could be set aside after time has run, either by an express renunciation of it on the part of the defendant or by his tacit renunciation, for example, by not furnishing a péremption exception when the plaintiff resumed his action or by taking other procedures in the action. D's letter was an active step to further litigation which had tacitly set péremption to run afresh and P's application to restore the action was not necessary.

[William Place Investments Ltd v States of Guernsey - Plaid de Meubles 20.12.95 (JDL/HER)].

Trial - function of trial judge - interruptions during submissions

53. In the course of an appeal against a decision of the Housing Authority (see paragraph 36), A appealed, *inter alia*, on the ground that at the Royal Court hearing the Deputy Bailiff had interrupted A's advocate excessively. The Court of Appeal commented that the duty of a judge of first instance was, *inter alia*, not to descend into the argument at the bar; to interrupt as infrequently as possible and only when necessary for purposes of elucidation; and to keep in mind that the person addressing the court may be talking good sense even though it may not at first hearing appear to be so.

[Perkins v. States Housing Authority - Court of Appeal 2.8.95 (PTRF/HER)].
For full judgment of Court of Appeal see paragraph 93.

PUBLIC ASSISTANCE

54. Ordinance: The Central Outdoor Assistance Board Regulations (Amendment) Ordinance, 1995. - Amends the Central Outdoor Assistance Board care allowance payable under the Attendance and Invalid Care Allowances (Guernsey) Law, 1984 shall be disregarded when calculating a claimant's net weekly earnings for the purpose of outdoor assistance. Also increases the ordinary maximum rates of outdoor assistance.

In force 10.11.95. (No. XXIV of 1995).

ROAD TRAFFIC AND PUBLIC TRANSPORT

Driving licences

55. Order in Council: The Motor Taxation and Licensing (Amendment) (Guernsey) Law, 1995. - See 19.GLJ.44.

Royal Sanction 18.10.95. Registered and in force 14.11.95. (No. XI of 1995).

Prohibited and one-way streets

56. Ordinance: The Prohibited and One-Way Streets (Amendment) Ordinance, 1995. - Amends the principal Ordinance of 1989 so as to schedule Rue Saint Germain one-way from west to east and to remove the reference to Route de la Petite Hougue being one-way.

In force 29.11.95. (No. XXXIX of 1995).

Road humps

57. Ordinance: The Road Traffic (Road Humps) (Amendment) (Guernsey) Law, 1994 (Commencement) Ordinance, 1995. - Brings into force on 1.12.95 the Road Traffic (Road Humps) (Guernsey) Law, 1994 (see 18.GLJ.44).

In force 29.11.95. (No. XXXVIII of 1995).

SAISIE

Interim vesting order - creditor holding interim vesting order having right "de se faire tenant" - procedure for payment of other claims

58. The holder of an interim vesting order having the right "d'arrêter les plaids et de se faire tenant" cannot seek to argue the quantum of any other registered claim which he is obliged to pay and which ranks behind his own registration. He must pay all other claims unconditionally.

[Moulin Huet Holdings Ltd v. Moulin Huet Hotels Ltd - Plaids d'Héritage 3.8.95 (IHB/RPO)].

SHIPPING

Passenger vessels

59. Ordinance: The Passenger Vessels (Amendment) (Bailiwick of Guernsey) Ordinance, 1995. - Amends the Passenger Vessels (Bailiwick of Guernsey) Ordinance, 1970 by empowering the Board of Administration to impose such conditions as it thinks fit when issuing passenger certificates in respect of local motor vessels. Also imposes criminal penalties for non-compliance with the conditions of passenger certificates (level 5 on the uniform scale, imprisonment not exceeding 3 months or both).

In force 27.9.95. (No. XXVI of 1995).

SOCIAL SECURITY

Attendance and invalid care allowances

60. Ordinance: The Attendance and Invalid Care Allowances Ordinance, 1995. - Increases to £47,000 the annual income above which one ceases to be entitled to an attendance allowance or invalid care allowance. Increases the weekly amounts of those allowances to £51.00 and £41.00 respectively.

In force 6.11.95. (No. XVIII of 1995).

Family allowance

61. Ordinance: The Family Allowances Ordinance, 1995. - Increases the amount of allowance under the Family Allowances (Guernsey) Law, 1950 to £9.00 a week in respect of each child in the family.

In force 2.1.96. (No. IX of 1995).

Social insurance

62. Order in Council: The Social Insurance (Amendment) (Guernsey) Law, 1995. - See 19.GLJ.51.

Registered and in force (except section 1) 11.7.95. Section 1 in force 1.1.96. (No. VI of 1995).

63. Order in Council: The Social Insurance (Amendment) (No. 2) (Guernsey) Law, 1995. - Amends the Social Insurance (Guernsey) Law, 1978 so as to remove the exemption from liability to pay social insurance contributions for persons over pensionable age. This enables contributions for the specialist medical care scheme to be levied from persons over the age of 65. The Law also removes limited medical benefit which has become otiose with the introduction of the specialist medical care scheme.

Approved by the States 27.9.95. Royal Sanction 23.11.95. Registered and in force 12.12.95. (No. XIII of 1995).

64. Ordinance: The Social Insurance (Rates of Contributions and Benefits,

etc) Ordinance, 1995. - Increases the percentage rates of primary and secondary Class 1, Class 2 and Class 3 social insurance contributions. Increases the upper weekly and upper monthly earnings limits and the lower annual income limit. Sets the rates and amounts of benefits. Fixes the amount of the Guernsey Health Service Fund Allocation (being the percentage of social insurance contributions paid into the Guernsey Health Service Fund). Increases rates of unemployment benefit, sickness benefit, invalidity benefit, industrial injury benefit, widow's allowance, widowed mother's allowance, widow's pension, guardian's allowance, old age pension, maternity allowance, child's special allowance, industrial disablement benefit, maternity grant and death grant.

In force as to part 6.11.95; as to remainder 1.1.96. (No. XXI of 1995).

Supplementary benefit

65. Ordinance: The Supplementary Benefit (Implementation) (Amendment) Ordinance, 1995. - Amends the Supplementary Benefit (Implementation) Ordinance, 1971 by increasing the limits of the weekly income above which benefits are not payable and by increasing the deemed normal weekly requirements of claimants.

In force 10.11.95. (No. XXII of 1995).

WASTE DISPOSAL

66. Ordinance: The Refuse Disposal (Amendment) Ordinance, 1995. - Redefines "refuse" for the purposes of the 1959 Ordinance; removes the prerequisite that refuse must have been deposited in such circumstances as to constitute a "refuse dump" before action can be taken by the Board of Administration; and removes the previous limit on the sum which the Board may recover in respect of the cost where an order has not been complied with.

In force 26.7.95. (No. XVI of 1995).

WATER

Charges

67. Ordinance: The Water Charges (Amendment) Ordinance, 1995. - Increases water charges.

In force 1.1.96. (No. XXXI of 1995).

WILLS AND SUCCESSION

Will of personalty - person under guardianship - capacity to revoke will - burden of proof

68. T, an Alderney resident, made a will of personalty in 1989 and was placed under guardianship in 1992. She destroyed the will in 1994. Her executors, who were also named as beneficiaries in the will, applied for directions under the Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law, 1994, claiming that the purported revocation of the will by destruction was ineffective because at the time of the destruction T did not have the mental capacity to revoke it. Two questions fell to be decided: whether a person who had been placed under guardianship had the capacity to revoke a will made prior to being so placed; and whether it was for the executors to prove that the purported revocation was invalid or whether unsoundness of mind was to be presumed so that those entitled upon an intestacy had the burden of proving soundness of mind. HELD by the Deputy Bailiff, section 10 of the Law relating to wills of realty provided that the existence of an act of guardianship would not be considered conclusive proof of the incapacity of the person under guardianship to dispose of his goods by will, and he was satisfied that the same principles applied to wills of personalty. Generally, a testator must have the same mental capacity when destroying his will as when he made it. On the question of the burden of proof, the general rule concerning the burden of proof of the revocation of a will was that once a will was proved to have been duly executed, the party alleging revocation must prove his allegation. An exception to this rule, however, was that where a will was known to have been destroyed by a testator thought to have been of unsound mind at the time of destruction the burden lay on the person propounding the will to establish that the testator was of unsound mind at the time of the destruction (see In re Sabatini deceased (1969) 114 Solicitors Journal p. 35). The burden of proof was thus on the executors of the will.

[In re Estate Waterfall - Plaid de Meubles 21.12.95 (NLeP/RLeCB)].

GUERNSEY STATUTORY INSTRUMENTS

69. 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 Health Service (Pharmaceutical Benefit) (Amendment) (No. 2) Regulations, 1995	11.7.95	12.7.95	17
The Health Service (Medical Appliances) (Amendment) Regulations, 1995	11.7.95	12.7.95	18
The Health Service (Payment of Authorised Suppliers) (Amendment) Regulations, 1995	26.7.95	1.8.95	19
The Health Service (Payment of Authorised Appliance Suppliers) (Amendment) Regulations, 1995	26.7.95	1.8.95	20
The Customs and Excise (Bailiwick of Guernsey) (Personal Reliefs) Order, 1995	8.8.95	8.8.95	21
The Health Service (Payment of Authorised Suppliers) (Amendment No. 2) Regulations, 1995	17.8.95	1.9.95	22
The Health Service (Payment of Authorised Appliance Suppliers) (Amendment No. 2) Regulations, 1995	17.8.95	1.9.95	23
The Health Service (Medical Appliances) (Amendment No. 2) Regulations, 1995	17.8.95	1.1.95	24
The Parking Places (Amendment) No. 2 Order, 1995	18.9.95	24.9.95	25
The Control of Poisonous Substances Regulations, 1995	14.9.95	1.11.95	26
The Social Insurance (Residence and Persons Abroad) (Amendment No. 2) (Guernsey) Regulations, 1995	29.9.95	6.11.95	27
The Social Insurance (Married Women and Widows) (Amendment) Regulations, 1995	29.9.95	1.1.96	28
The Social Insurance (Increase of Benefit) Regulations, 1995	29.9.95	6.11.95	29

The Social Insurance (Classification) (Amendment) Regulations, 1995	29.9.95	1.1.96	30
The Social Insurance (Contributions) (Amendment) Regulations, 1995	29.9.95	1.1.96	31
The Invalid Care Allowance (Amendment) Regulations, 1995	29.9.95	6.11.95	32
The Health Service (Payment of Authorised Suppliers) (Amendment No. 3) Regulations, 1995	30.10.95	1.11.95	33
The Income Tax (Guernsey) (Valuation of Benefits in Kind) Regulations, 1995 (see paragraph 39)	8.11.95	1.1.96	34
The Financial Services Commission (Fees) Regulations, 1995	10.11.95	1.1.96	35
The Income Tax (Guernsey) (Annuity Scheme Contribution Limits) Regulations, 1995	21.12.95	1.1.96	36
The Food and Drugs (Registration of Food Premises) Order, 1995	27.12.95	1.3.96	37
The Health Service (Specialist Medical Benefit) Regulations, 1995 (see paragraph 33)	29.12.95	1.1.96	38
The Health Service (Ophthalmic Benefit) Regulations, 1995 (see paragraph 34)	29.12.95	1.1.96	39
The Health Service (Physiotherapy Benefit) Regulations, 1995 (see paragraph 35)	29.12.95	1.1.96	40
The Health Service (Payment of Authorised Appliance Suppliers) (Amendment) (No. 3) Regulations, 1995	29.12.95	1.1.96	41
The Health Service (Payment of Authorised Suppliers) (Amendment) (No. 4) Regulations, 1995	29.12.95	1.1.96	42

UNITED KINGDOM STATUTORY INSTRUMENTS

70. 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.

S.I. Number

The Wireless Telegraphy (Licence Charges) Regulations, 1995 1331

ALDERNEY

CRIMINAL LAW AND PROCEDURE

Court of Alderney - jurisdiction

71. Order in Council: The Government of Alderney (Amendment) (No. 1) Law, 1995. - See 19.GLJ.63.

Royal Sanction 26.7.95. Registered and in force 17.10.95. (No. IX of 1995).

DOCUMENT DUTY

Duty payable on registration of Alderney companies

72. Ordinance: The Document Duty (Amendment) Ordinance, 1995. - See paragraph 22.

FISHING

Parlour pots

73. Ordinance: The Fishing (Parlour Pots) (Prohibition) Ordinance, 1995. - Prohibits use in Alderney's territorial waters of a parlour pot. Also prohibits the carrying of parlour pots on a vessel in Alderney's territorial waters. Repeals the Ordinance of 1992 (see 13.GLJ.63).

Ordinance of the States of Alderney of 1.11.95.

HARBOURS AND MOORINGS

74. Ordinance: The Braye Harbour (Amendment) (Alderney) Ordinance, 1995. - Repeals and replaces section 25 of the Braye Harbour (Alderney) Ordinance, 1983 by prohibiting, without the specific permission of the Harbour Officer, the pumping or discharge, from a vessel or otherwise, of petrol or oil into the Harbour.

Ordinance of the States of Alderney of 6.12.95.

HEALTH AND MEDICINE

Medical benefit

75. Ordinance: The Alderney (Application of Legislation) (Health Service) (Benefit) (Amendment) Ordinance, 1995. - Extends specialist medical benefit under the Health Service (Benefit) (Guernsey) Law, 1990 to Alderney.

In force 1.1.96. (No. XXXVII of 1995).

76. Ordinance: The Alderney (Application of Legislation) (Health Service) (Benefit) (Amendment) (No. 2) Ordinance, 1995. - Extends ophthalmic benefit and physiotherapy benefit under the Health Service (Benefit) (Guernsey) Law, 1990 to Alderney.

In force 1.1.96. (No. XLIII of 1995).

INDIRECT TAXATION

Leasehold duty

77. Ordinance: The Duty on Long Leases (Amendment) (Alderney) Ordinance, 1995. - Amends section 14 of the Duty on Long Leases (Alderney) Law, 1994 (see 16.GLJ.77 and 17.GLJ.50) by providing for the removal of doubt that an assignment of a lease where the States is neither the assignor nor the assignee but has granted licence to assign (whether by joining in the assignment or by executing a separate document) is not an exempt dealing for the purposes of the Law.

Ordinance of the States of Alderney of 5.7.95.

MILK

78. Ordinance: - The Milk (Retail Price) (Alderney) Ordinance, 1995. - Fixes the maximum retail price of milk at 50 pence per pint or half litre.

Ordinance of the States of Alderney of 1.11.95.

PRACTICE AND PROCEDURE (CIVIL)

Costs - full indemnity costs - power of Court of Appeal to award - circumstances in which justified

79. In the course of proceedings for damages for personal injury, D claimed by way of Exception de Fonds that the action was prescribed, proceedings having been instituted more than a year and a day after the cause of action. This point was rejected by the Court of Alderney and by the Royal Court of Guernsey (see 18.GLJ.70), which was bound by the case of Smith v Harvey (1981). D proceeded to appeal to the Court of Appeal but 7 days before the hearing withdrew the appeal, apparently as a result of a commercial decision by the insurers. The delay occasioned by the Exception and appeals was 2½ years. P applied for full indemnity costs in respect of the appeal from the Royal Court to the Court of Appeal. The question arose whether the Court had power to award such costs. HELD, section 18 of the Court of Appeal (Guernsey) Law, 1961, which gave the Court a broad power to determine all questions relating to costs, enabled the Court to make an order for costs on an indemnity basis in circumstances where such an order was appropriate. The circumstances which were likely to be appropriate were those which were dealt with in Rule 48 of the Royal Court Civil Rules and included circumstances where a party had pleaded or otherwise pursued an application, an action or appeal

unreasonably or vexatiously or had abused the process of the Court. The circumstances of the present case, namely the disadvantageous position of P and the tactical benefits obtained by D's insurers in taking such an unmeritorious point up to the eleventh hour, justified the making of the order sought.

[Laughton v. Main - Court of Appeal 1.8.95 (PTRF/DGLem)]. For full report of judgment of Court of Appeal, see paragraph 92.

RATING

80. Ordinance: The Occupiers' Rate (Level for 1996) Ordinance, 1995. - Fixes the Alderney occupiers' rate for the year calendar 1996 at 194 pence in the pound of the rateable value.

Ordinance of the States of Alderney of 1.11.95.

SOCIAL SECURITY

Supplementary benefit

81. Ordinance: The Alderney (Application of Legislation) (Supplementary Benefit) (Amendment) Ordinance, 1995. - Amends the Alderney (Application of Legislation) (Supplementary Benefit) Ordinance, 1971 by providing that the Supplementary Benefit (Implementation) Ordinance, 1971 "as amended from time to time" shall apply to Alderney, thereby removing the need to apply each and every amendment of the 1971 Ordinance to Alderney.

In force 1.10.95. (No. XXIII of 1995).

WILLS AND SUCCESSION

Will of personalty - person under guardianship - capacity to revoke will - burden of proof

82. See In re Estate Waterfall, paragraph 68.

SARK

FISHING

83. Ordinance: The Fishing (Amendment) (Sark) Ordinance, 1995. - Amends section 5(2) of the Fishing (Sark) Ordinance, 1966, so as to extend the duration of the provisions relating to the close season for lobsters and crayfish to 31st October, 2000.

In force 4.10.95. (Ordinance of Chief Pleas of 4.10.95).

JUDGMENTS OF THE GUERNSEY COURT OF APPEAL

84.

[CRIMINAL DIVISION - APPEAL NO. 191]

1995 JULY 31

THE LAW OFFICERS OF THE CROWN

v.

NICHOLAS DAVID WARMISHAM

Before: COLLINS, DOREY, P. and SOUTHWELL, JJ.A.

Sentence - misuse of drugs - possession of Class A drug with intent to supply

See paragraph 19.

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

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

COLLINS, J.: Nicholas David Warmisham appeared before the Royal Court on 10th March 1995 and pleaded guilty to one offence of being in possession of a Class A drug, namely MDMA or Ecstasy, with intent to supply, and to a further offence of being in possession of a Class B drug, namely cannabis, both offences having been committed on 21st January 1995. He was sentenced to six years imprisonment in respect of the first count and one month on the second, to run concurrently.

Application for leave to appeal against sentence was made to this Court and leave was given by the Bailiff on 17th July of this year.

The appeal related only to the first count.

The Appellant who is 24 years old and has no previous convictions was living in St. Ives, Cornwall, in January 1995, when on 19th of that month he travelled by air to Guernsey. He checked into a hotel in St. Peter Port, the St. Clare Court Hotel in Brock Road, and occupied room 52.

As a result of enquiries into another matter he was found in bed with a young woman in a flat in George Place, Union Street, also in St. Peter Port, and in his shirt pocket was found a small piece of cannabis resin and in his jacket were two tablets of Ecstasy and a key with the number 52 on it, which was, of course, the key to his hotel room.

The police went to the hotel later on the same day and in room 52 found a store of 103 Ecstasy tablets and £286 in notes, including £146 in Guernsey money, he having had no previous contact with the Island.

He was interviewed on three occasions, and during the first and part of the second interviews, the Police kept silent as to their knowledge of room 52 and its contents.

In the first interview the Appellant made no mention of staying in the hotel and clearly gave a lying account of his movements. He said that he had no

knowledge of the tablets found in his jacket or the cannabis in his shirt pocket.

A

In his second interview he was asked about the key and claimed that it was the key to a friend's flat and that he had no knowledge of its being in his jacket.

Once he was told that the Police had searched room 52 and of what they had found there, the Appellant claimed that he was looking after the Ecstasy for another. He was asked about how he had come by the money in Guernsey notes and was unable to give a satisfactory account for them, the only money which he stated he had received for looking after the drugs being £50.

B

At his third interview he expanded on his story, saying that a man had proposed that he look after the Ecstasy tablets because his place was not sufficiently secure and he wanted them looking after. "He said that he'd just got them like and had needed somewhere safe to keep them, so I got a couple (that is of the tablets) and fifty quid for starters."

C

The Appellant was given the opportunity to give evidence in support of the explanation which he had given, and on its being made plain on his behalf that he would not be giving evidence, the learned Deputy Bailiff rightly declined to embark on a Newton hearing.

The succession of lies told by the Appellant in his interviews with the Police together with all the surrounding circumstances including the basic unlikelihood of a significant quantity of drugs being entrusted to him by a stranger, and of his not even being an inhabitant of the Island, amply justified the Royal Court in rejecting the Appellant's explanation in its entirety. The Court was further fully justified in concluding that he came over to the Island to act as a principal.

D

Under the Royal Court of Guernsey (Miscellaneous Provisions) Law 1950, provision is made for consideration of sentence by the Royal Court in these terms:-

E

"8(1) Where a verdict of guilty is recorded against any person, the Bailiff and Jurats of the Royal Court shall ... confer in private as to the punishment to be imposed and thereafter the Bailiff shall announce the sentence of the Court and shall sentence the accused accordingly."

It was submitted to us that it was incumbent on the learned Deputy Bailiff to give directions in open court to the Jurats as to the standard of proof to be applied in determining the truth of an explanation advanced by an advocate without the giving of evidence and in the absence of a Newton hearing. The terms of the law are such that we do not find that there is any such obligation on the Deputy Bailiff, who retires with the Jurats and forms part with them of the sentencing process "in private", to give any such direction in open court, although no doubt he will ensure when he retires with the Jurats that they deal with the matter in the right way. In August of last year the Royal Court in the case of Oren, 18 GLJ 13, took the opportunity of re-defining the guidelines which were intended to be followed in subsequent drugs cases. Guernsey is a small community and it is to be noted that importation of a significant quantity of drugs into

F

G

A such a community has a proportionately greater effect than it would have if imported into a large country with many millions of inhabitants. It is also to be noted that Guernsey has so far been spared a consistent "drugs scene" and this Court will do all that it can to maintain this situation.

In Oren the Royal Court expressed its policy in the following words:-

B "In view of the substantial increase there has been in cases involving the importation and possession with intent to supply of controlled drugs of both Classes A and Classes B, this Court now considers it appropriate to review and restate its sentencing policy. In so doing, the Court has come to the conclusion that sentences of the lengths that have hitherto been imposed are not acting as a sufficient deterrent to persons seeking to profit from the drugs trade in this Island. Therefore in future cases substantially higher sentences must be imposed.

C
Turning to cases involving larger quantities where the inference is to be drawn that the offender is engaged in trafficking, the starting point for sentencing will be, in the case of Class B drugs, two and a half years and in the case of Class A drugs, four years."

D The following passage makes it clear that these periods are in each case the sentences stated to be appropriate after the entry of a plea of guilty with its appropriate discount.

E "The lower sentences will be reserved for cases where there are guilty pleas and the quantity of drugs found in the possession of the offender is in the lower end of the range both in amount and value. As to the lower end in value, the Court would at the present time, be regarding this as £1,000 or less on the streets of Guernsey, always bearing in mind that that figure might properly be reduced downwards if the market were to be flooded and prices fell to those found elsewhere. Larger quantities of drugs for the Guernsey market will attract sentences of up to twice those indicated as starting points."

F Since the decision of the Royal Court in Oren, the Court of Appeal in Jersey in Attorney General v. Campbell et al, 4th April 1995, has, after a hearing before the full Court of five judges, reviewed the sentencing guidelines in that Island, having heard evidence as to the rapid growth of drug offences there since 1991. The Court drew no distinction between cases of importation and cases of dealing with drugs in Jersey, and proposed a tariff guideline of between seven and twelve years in the cases of being in possession with intent to supply or importation of a significant quantity of Class A drugs. These were periods expressed before any mitigation by reference to a plea of guilty. While conditions may vary between the two Islands, sentences in Guernsey must remain sufficiently severe to deter those minded to commit such offences from switching their operations from Jersey to Guernsey.

G Those who import significant quantities of Class A drugs into this Island or who deal with them here for gain must expect therefore to receive heavy sentences commensurate with the scale of their operations and the circumstances in which they have committed their offences, unless (and these cases will be

rare indeed) there are compelling and exceptional reasons for affording mercy to a particular offender.

The street value of the Ecstasy in the possession of the Appellant was significant and it is clear that he entered the Island for the purpose of dealing with this very dangerous drug. His arrest was followed by a string of lies, culminating in the lie about his having been asked to mind the drugs for another.

We consider that the sentence of six years imprisonment is consistent with the guidelines in Oren, but we are nonetheless of the view that insufficient weight was placed on the age of the Appellant, his background and his plea of guilty. Accordingly, we substitute a sentence of five years imprisonment for that imposed in the Royal Court.

Appeal allowed to the extent that the sentence was reduced from six years' to five years' imprisonment.

85. [CRIMINAL DIVISION - APPEAL NO. 192]

1995 JULY 31

THE LAW OFFICERS OF THE CROWN

v.

MARTYN ANDREW NOYON

Before: COLLINS, DOREY, P. and SOUTHWELL, JJ.A.

Sentence - offences of dishonesty

See paragraph. 20.

M.J. Riddiford, for the Applicant.

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

COLLINS, J.: On 1st May 1995, Martyn Andrew Noyon, who is 22 years of age, pleaded guilty to six offences of dishonesty. The counts and the sentences imposed by the Royal Court are as follows: First of all on count 1, for obtaining property by deception - 1 month's imprisonment. Then on count 3, attempting to obtain property by deception - 2 months' imprisonment consecutive, and then on count 5, theft of a car valued at £1,200, 6 months' imprisonment consecutive. Concurrent with that was a further 6 months' imprisonment for obtaining property by deception on count 6. In respect of count 7, he was sentenced to 4 months' imprisonment consecutive for the theft of £600 cash, and finally, on count 8, he was sentenced to a further 1 month's imprisonment consecutive for theft of a leather jacket valued at £169.95. Thus, he was sentenced to a total of 14 months imprisonment, and it was made a part of the sentence of the Court that the sentences should commence on the date of sentence, that is to say, 1st May 1995. Mr. Noyon, the Appellant, had already spent up to 3 months in prison on remand pending trial, having elected trial before the Royal Court rather than before the Magistrate's Court.

A The first offence in point of time, in respect of which the sentence of 4 months' imprisonment was imposed, was count 7, which was the count alleging theft of £600. The Applicant was employed in a menial capacity at the Strawberry Farm at St. Saviour. He served in the café and operated the till. Under the counter there was a floor safe, and it was on 25th September, after he had been employed for a week or so, that he stole a total of some £600, partly from the floor safe and partly from a bag of change kept hard by it. That money has never been recovered. The theft was discovered on 29th September and the Applicant was interviewed, and having at first denied the charge, later admitted it, and stated that he had spent the money on LSD.

B The offence which was the first of those to be committed in November, namely, the one alleged in count 1 of the Indictment, was one of obtaining £124.50 in cash from the National Westminster Bank on a false representation that a cheque which was apparently in that sum was a good and valid order; very simply, what had happened was that the Applicant had altered the cheque from one of £24.50 to one of £124.50 by altering the numbers and words. He presented it to the bank and he obtained payment on it on 14th November of last year. This being the first count in the Indictment, all other sentences save one were expressed to flow consecutively on this and the succeeding sentences one by one.

C Two days later on 16th November, the Applicant attempted to obtain 117 Diazepam tablets from a chemist by falsely pretending that a prescription ostensibly in that quantity was a good and valid prescription; again, what had happened was that he had altered the document and turned a prescription for 7 tablets into one for 117. The drug is not a controlled drug, but is a prescription drug of a kind open to abuse in the wrong hands. He presented the prescription to the chemist on 16th November, but fortunately, the chemist was suspicious and refused to dispense the drugs requested. The Applicant left the shop taking the prescription with him, and it has not been seen since.

D Eight days later, on 24th November, the Applicant, having borrowed a car from a friend, took it to a garage and without authority purported to sell it for £1,200 in cash, having obtained the necessary application for transfer of ownership from the Motor Tax office. He signed a form to the effect that he was the owner. This money was then spent taking himself and the girl with whom he was having an affair on holiday to Exeter, Torquay, and Newton Abbott. They returned when the money ran out, and he was arrested on his return to the Island, and as he was on his way to give himself up.

E Finally, in February 1995, while on bail for some or all of the previous offences, the Applicant and another man went into a shop in the Route Carré at L'Islet, and raised suspicions of the manager when trying on exclusive leather jackets. The manager's attention was distracted for a while and when he turned his attention to them again they and the two jackets had gone. The Applicant was seen by the police later in the day wearing one of the jackets.

F Application for leave to appeal was refused by the learned Bailiff on 11th July 1995, and the Applicant now applies to the full Court for leave, and we have treated the hearing of the substantive grounds for appeal as the application for leave to appeal, and heard full argument on the Applicant's behalf.

G As I have mentioned already, the Applicant is 22 years old; he has a bad previous record in that in August of 1990 he was bound over for 18 months and

there was a Probation Order for burglary, theft, obtaining property by deception and forgery of a vehicle registration form, and a few months later, in November of the same year, he was before the Court for breach of that order and theft.

A

Then in November of 1991, he was bound over for 2 years for breach of an order in August, which related to traffic offences, conduct likely to cause a breach of the peace, and possession of an offensive weapon. In April of 1992 he was sentenced to 1 month's Youth Detention suspended for 18 months for offences of burglary with intent, attempted burglary, criminal damage, theft, theft from a vehicle, and other similar offences.

B

Finally, on 19th September 1993, he was sentenced to 8 months' Youth Custody in all (including bringing in a suspended sentence for theft and obtaining property by deception), there being 7 offences. In addition he was convicted between August 1990 and February 1995 for a large number of road traffic offences. The Applicant's record of criminal conduct involving burglary, theft, and other crimes of serious dishonesty is thus an unfortunate one.

C

Having regard to the seriousness of each of the crimes to which he pleaded guilty on 1st May 1995 and also having regard to his record in the absence of strong mitigating factors, the sentences imposed by the Royal Court for each of the offences and looked at as a totality were entirely appropriate. The main question on this appeal is whether there are mitigating factors in addition to the pleas of guilty, which should lead to a reduction in any of the sentences or to more of the sentences being made concurrent.

D

The principal factors which have been put forward as grounds by way of mitigation have included the following: First, an unhappy childhood; secondly, that he has three children from earlier relationships, aged 7, 3 and 1 years. Then, and perhaps, more significantly, that he had a further relationship with a young woman in 1994 after coming out of Youth Detention, who he believes, rightly or wrongly, committed suicide by using his sleeping pills, and for whose death apparently her family have blamed him, although we should mention that the verdict at the inquest was not suicide but an open one. At any rate we take into account the fact that that particular part of the history will have had a considerable effect upon him. Further he has since had a further relationship with a girl aged 15, who lived with him until he was arrested and remanded in prison in connection with the offences now under consideration, and it is she who he took on the holiday to Exeter and other places to which I have referred.

E

Then it was urged that he suffered from depression, and became an illegal drug taker and that this was exacerbated by the death of the young woman to whom I have referred already. On at least one occasion he has attempted to commit suicide by slashing his own wrists, and he has stated that the reason why he attempted to obtain the Diazepam from the chemist, to which I have referred, and which is the subject of one of the charges, that is count 3, was in order that he could use the drugs in order to commit suicide. It is urged on his behalf also, that he has been actively trying to wean himself off all drugs, both legal and illegal, and there is support for that from a written report from a drug support group, Concern, which is with our papers, and which we accept.

F

G

A There were reports before the Royal Court from a Probation Officer and there is also a psychiatric report. Two probation reports were before the Court, of which the second followed the psychiatric report. Mr. Crisp, the Probation Officer, related a history of the Applicant's poor relationship with his family and in particular his father, and of his several bouts of depression and anxiety and drug abuse, which led him to be placed on a detoxification programme at the Castel Hospital, which he then undermined by topping up his reduced medication by drugs purchased on the street. Mr. Crisp recommended the
B obtaining of a psychiatric report and so one was obtained from Dr. Browne. His conclusion was as follows:-

"Examination of his mental state revealed no abnormalities of thought, affect, or perception ... his personality profile is that of an individual with immature and anti social traits who has led a somewhat unstructured and recidivist lifestyle."

C The doctor concluded also that the Applicant had derived little benefit from therapeutic intervention so far. No specific disposal was recommended by Dr. Browne although he offered to help on a voluntary basis. In a supplementary letter of 27th April, Dr. Browne, in searching for the likely motivation for the crimes, postulated the possibility that the offences in November were connected with an endeavour to make up to his new girlfriend for the fact that his earlier girlfriend had died after an overdose of the Applicant's medication for which he blamed himself, the circumstance to which I have referred earlier.

D Finally, in his supplementary report of 30th November 1994, Mr. Crisp stated that the Applicant had expressed a certain amount of remorse and that while he realised that the seriousness of the offences could lead the Court to impose a custodial sentence, he recommended suspension of such a custodial sentence and a supervision order. In the judgment of this Court none of the mitigating factors advanced before the Royal Court by Mrs. Allen or before us in this Court, justifies any substantial alteration in the sentences imposed by the Royal Court. Many men and women suffer traumatic problems of a much more
E serious nature and continue nevertheless to conduct themselves as responsible citizens. We furthermore have a duty to protect the public, and matters of the kind referred to in the summary of the mitigation to which I have referred, are no excuse for such irresponsibility as has been manifested in this case and, indeed, for the loss of money which has resulted from two at least of the offences, and insofar as the matters carry any weight as mitigation, we are satisfied that they were taken fully into account in the sentences imposed by the Court Royal.

F Furthermore, we have considered whether the totality of the consecutive sentences is appropriate and we have concluded that it is.

We would mention that it was not part of the Applicant's case that sentences were treated as consecutive which should have been treated concurrently. Having said all that, the sentences of imprisonment were directed by the Royal Court to be effective from the date of sentence, that is to say, 1st May 1995, although Mr. Noyon, as I have mentioned already, had already spent some 2½
G months in prison on remand. No reason was given for starting the sentences at that date and the effect of the direction was substantially to extend both the tariff sentence before reduction in respect of the plea of guilty, and more

importantly, to extend the total time which Mr. Noyon would spend in prison, and we, for our part, can see no good reason for it.

A

Accordingly, the sentences of imprisonment should run from 18th February 1995, the date when Mr. Noyon was first effectively detained in custody, following his arrest for the final of the offences with which he was charged. Accordingly, we give leave to appeal, but for the reasons given the appeal against the sentences of 14 months' imprisonment is dismissed. We do not think that it is in the public interest for those sentences to be suspended. Accordingly, the appeal is dismissed, but we direct in place of the direction given by the Royal Court, that the sentences should run from the date to which I have already referred, namely, 18th February 1995 in place of the order that they should commence on 1st May of that year.

B

Leave to appeal granted; appeal dismissed but sentences ordered to run from 18th February, 1995 and not 1st May, 1995 as ordered by the Royal Court.

C

86. [CRIMINAL DIVISION - APPEAL NO. 193]

1995 DECEMBER 20, 21

THE LAW OFFICERS OF THE CROWN

v.

GRAHAM EDWARD PAUL

D

Before: COLLINS, DOREY, P. and CARLISLE, JJ.A.

Sentence - misuse of drugs - importation of Class B drug

See paragraph 14.

N. Le Poidevin, for the Applicant.

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

E

COLLINS, J.: On the 16th March 1995 Graham Edward Paul was convicted by the Royal Court of being knowingly concerned in the fraudulent evasion of a prohibition on the import of drugs contrary to the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972 as amended, the particulars of that offence being that on 13th August 1994 he, together with another, in relation to a controlled class "B" drug, namely cannabis resin, was knowingly concerned in the fraudulent evasion of the prohibition on importation imposed by S.2.2(1) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended.

F

Thereafter on the 1st June he was sentenced to a period of ten years imprisonment and an order was made for the confiscation of £9,000 under the Drug Trafficking Offences (Bailiwick of Guernsey) Law 1988, in default of payment of which he is to serve a further consecutive sentence of 9 months.

G

By his amended Notice of Appeal he now applies for leave to appeal against the sentence of 10 years imprisonment.

A The prosecution case was this. It rested essentially on the allegation that the Appellant supplied a Miss Bengtsson with a bicycle stuffed with about £20,000 worth of cannabis concealed in the tyres and under the saddle and that he travelled with her for part of the train journey from Amsterdam to Paris and thence to St. Malo, from whence they journeyed to St. Peter Port. Meanwhile it was alleged that the bicycle accompanied them in a dismantled form on the journey to St. Malo, where it was put together again ready for embarkation on the ferry. It was Miss Bengtsson alone who took the bicycle onto the ferry and
B down to the car deck and she then joined the Applicant with whom she associated during the journey being observed there by an off-duty officer who later on seeing her leave the ferry on her own with the bicycle made certain observations to the authorities.

Finally it is said that Miss Bengtsson was directed by the Applicant to take the bicycle to meet a dark haired lady at a hotel in St. Peter Port. On the prosecution case therefore, there could hardly be a clearer case of being
C concerned in the importation of this £20,000 worth of cannabis resin. Miss Bengtsson's account, on which the prosecution relied, started with a suggestion from a girl working in a bar of the hotel at which she was working in Amsterdam that she could make some money taking drugs over the border to another country and it continued with her being introduced to the Applicant in Amsterdam who offered her £1,000 to take the drugs into Guernsey in the tyres of a bicycle. Although Miss Bengtsson, it is true, became a willing participant in the venture, it is right to say that on her account she was deceived by the Applicant, on her initial meeting with him in Amsterdam, into believing that
D there were almost no customs in Guernsey and that if she were caught she would get a maximum of one year in prison of which she would serve only a few months, or more probably there would be a big fine.

The prosecution called Miss Bengtsson and relied on her evidence but there were other features which they prayed in aid. First, they relied on a fingerprint which was found on the inside adhesive side of one of the wrappings in which the cannabis was contained in the inner tube of the rear wheel of the bicycle.
E The Applicant sought to explain this by reference to a repair to a puncture which he said took place in St. Malo and which he said that he performed while Miss Bengtsson bought the tickets for the ferry, and by the fact that he subsequently unwrapped the cannabis so they could each have a smoke before embarking on the ferry. Thus he accepted that he knew that Miss Bengtsson was carrying cannabis in the bicycle but he denied throughout that he had anything to do with any request to her to do so, or with the transportation or delivery of it into Guernsey.

F Secondly, the prosecution, in addition to Miss Bengtsson's evidence, relied on the Applicant's own account of his movements which they said he gave to the customs officer and indeed on his account in the witness box. To the customs officer he is said to have said that he had stayed at an address in Barcelona whereas in evidence he denied that he had done so; on either version he had on his own account travelled from Barcelona to Paris, having found nothing to do in Barcelona and having heard of a beach party in Guernsey, but not knowing where in Guernsey it was to be held. He said that after leaving Amsterdam he had followed a tortuous path via Rotterdam, Belgium, Paris, Tours, Bordeaux, Perpignan and Barcelona. Thus he attempted to distance himself from any possible meeting with Miss Bengtsson in Amsterdam of which she had spoken and
G of course from the train from Amsterdam to Paris. The prosecution also relied

on the lies which the Applicant admittedly told to the customs officer in denying that he even knew Miss Bengtsson although shown her photograph, and in denying that he knew anything about the bicycle or cannabis.

A

The Applicant's own account started with his journey around Europe, which I have summarised already, and which would have taken quite some time, two or three weeks, culminating in a decision to go to the beach party in Guernsey. Then his account continued with an apparent chance meeting of himself and Miss Bengtsson on the station at Gare du Nord, he having happened to pick up a spanner in the street on the way. He said it was by chance that he met Miss Bengtsson and that they both happened to be travelling to Guernsey. She came along with a bag and a push bike, and went to buy the tickets for both of them, and of course his case was he had known nothing about the push bike, she just appeared with it. She bought the tickets at St. Malo and they went to a cafe and he got out some hashish, he says to have a smoke.

B

The learned Deputy Bailiff in an exemplary summing up to the Jurats outlined the case both for the prosecution and the defence and reminded them in some detail of the evidence. They retired and after less than ten minutes returned with their verdict of Guilty.

C

The learned Deputy Bailiff and Jurats in sentencing the Applicant clearly took the view that this was a wholly exceptional case, taking it outside the guidelines recently expressed by the Royal Court in Oren in 1994, 18 GLJ 13, and this year approved in this Court in Warmisham, 20.GLJ.19.

D

It is clear from the Applicant's record and from the evidence which emerged in connection with the Drug Trafficking Offences (Bailiwick of Guernsey) Law, 1988 that the Applicant is a professional trafficker of drugs. It is clear too that in this instance his target was a beach party which was to be held on 13th August, the very day upon which he directed Miss Bengtsson and the bicycle on to the Island. A beach party is an assembly of some hundreds of young people and forms a ready prey for the large scale drug trafficker.

E

The Applicant is now 41 years of age and he is described in the antecedents as having travelled extensively in the past two years with visits to Bangkok, Holland, France and Spain. He has been in possession of substantial sums of money when stopped at various customs in the course of his travels.

His first conviction for a drug related offence was in 1979 when the Southampton Crown Court imposed sentences concurrent and consecutive totalling 2½ years in respect of nine offences, which offences included burglary of a chemists shop and offences of possession of Class "A", "B" and "C" drugs.

F

Convictions for dishonesty followed in July 1985 and then in November 1988 he was sentenced in France for possession of 7 kilos of cannabis and sentenced to 12 months imprisonment. Finally in February 1993 in Spain he was sentenced to 4 years imprisonment for possession of 8.4 kilos of cannabis with the option of deportation by mutual consent. He was deported in May of 1993, after which he continued his travels.

G

The offence of 13th August was a carefully planned and professional operation involving a purchase on the continent and movements involving travel from Amsterdam to Paris and then to St. Malo and thence to this Island. The offence

A was made the worse by the involvement of Miss Bengtsson no doubt with the knowledge on the part of the Applicant that he would be identified by reason of his past record himself. Furthermore, he not only deceived Miss Bengtsson, as I have already described, but also it is noticeable that he distanced himself from her both on embarking and disembarking on and from the ferry and he put himself into a position from which he could have disowned her or the bicycle had she been stopped. She was as I have said to hand the cycle over to another person.

B Even when the guidelines in Oren, the case in the Royal Court of 24th August, 1994, are applied, it is relevant in these circumstances to refer to the following passage; the Court said this:-

C "There will be occasions when persons come before this Court who are involved in the organisation of importation and distribution of drugs in this Island without necessarily exposing themselves to the dangers of actual possession or physical importation. If offenders in this category come before the Court they can expect very much more substantial sentences bearing in mind the fact that the maximum penalty for Class 'B' offences of this kind is 21 years and Class 'A' offences, life imprisonment."

Oren was followed and, as I have already said, applied by this Court in the case of Warmisham, decided on 31st July of 1995, in the course of which the Court said this:-

D "In August of last year, the Royal Court in the case of Oren took the opportunity of re-defining the guidelines which were intended to be followed in subsequent drugs cases. Guernsey is a small community and it is to be noted that importation of a significant quantity of drugs into such a community has a proportionately greater effect than it would have if imported in to a large country with many millions of inhabitants."

E At this point I should mention that Dr. Le Poidevin, who said all that could be said on behalf of his client in this and other connections, invited us to go back to the earlier case of Petit decided in 1990, 10 GLJ 24, and to find the appropriate guideline figures from that case. Not only do we note the fact that the offence was committed eleven days before the Court had expressed its new guidelines in Oren, but also as is stated in Oren there was an earlier case of Baines in 1993, 15 GLJ 20, when this Court had held that previous cases, and in particular the case of Petit, were no longer to be taken as properly applicable to current circumstances. Accordingly, we reject the submission made to us that the relevant guideline authority for us to consider is that of Petit.

F Turning then to Oren, that is of course no more than a framework which the Courts are expected to follow in cases which they consider fall within its natural scope, and it is to be observed that it is itself capable of justifying lengthy sentences, where the amounts are substantial and all the more so where the Defendant falls within the words quoted above in connection with the use of subordinates and with the distancing of the Defendant from the actual import on embarking and disembarking.

G However, it is clear in this case that the learned Deputy Bailiff and the Jurats considered that the particular circumstances of this offence required a

sentence of considerable severity appropriate for the nature of the offence and requisite for the protection of the public and in particular of vulnerable young people.

A

The learned Deputy Bailiff in expressing the view of the Jurats expressed himself thus, at p.270 D of the transcript:-

"The Court does not consider that previous cases, whether before or after that of Oren, assist in determining the sentence in this case.

B

Two matters weigh heavily with this Court.

(1) The need to prevent you personally returning to attack society by involving yourself in the drug trade. The Court considers this can only be achieved by depriving you of your liberty.

(2) The need to deter hardened criminals of a similar background and inclination to you from targeting the young people of this Island to make money by selling them drugs. In this regard on your own admission your purpose in coming here was to attend a beach party where doubtless attempts would have been made to sell drugs to teenagers who seem to be attracted to such events.

C

The sentence of the Court, which will run from the date of your arrest, is that you will go to prison for a period of ten years."

D

We consider that this was an approach which the Royal Court was justified in adopting and indeed we consider that it was right to do so in the particular circumstances of this offence.

Dr. Le Poidevin criticised the earlier reference by the learned Deputy Bailiff to the Appellant having continued to lie on oath, and also criticised the learned Deputy Bailiff's reference to the record of the Appellant. As to the first of these criticisms we accept the contention that in this instance the learned Deputy Bailiff fell into error, but we do not consider that this in any way vitiates the reasons given later, and which I have already quoted, for treating the case as one on its own. As to the reference to his record we would quote only this, at p.270 C of the transcript:-

E

"It is clear that soon after your release from your last incarceration you decided to turn your attentions to the Guernsey market, where you saw profitable pickings for minimal outlay and risk. From what it has heard the Court does not accept that you have been gainfully employed as anything but a drug trafficker in the recent past."

F

Having regard to all the evidence before us we consider that to be beyond criticism and it is clearly a highly material factor for the Court to have taken into account in imposing the sentence which it did.

Now finally, Dr. Le Poidevin submitted that the Applicant was justified in feeling aggrieved in a disparity in sentence between himself and Miss Bengtsson. Unlike the Applicant she pleaded guilty and of course was entitled to credit for that. But furthermore, she went on to give a statement to the prosecuting authorities and indeed to give the evidence to which we have

G

A referred. The strength of the prosecution case without her evidence was stressed by Dr. Le Poidevin but we do not find this a helpful approach. Although there was no doubt a prima facie case without her evidence it is pure speculation to consider what the outcome would have been without it. The fact remains that she did give the evidence, no doubt exposing herself to some risk of danger in doing so.

B Her evidence was accepted and it formed a material part of the evidence on which the Applicant was convicted. She had already, by the time she pleaded guilty and appeared for sentence, served 15 months' imprisonment, and she was then sentenced to a suspended sentence, the effect of which was that she was free to go once that sentence was passed, and she was subject to an immediate deportation order. It is material to mention too that although she had obviously been accustomed to smoking cannabis herself, she had no previous convictions.

C It may be that the Applicant feels aggrieved that she chose to give evidence against him, but in our view he has no right to feel aggrieved by her consequent treatment by the Court in the imposition of the sentence to which we have referred.

Accordingly, and for the reasons which I have given, the application for leave to appeal is refused.

D Leave to appeal refused.

87.

[CRIMINAL DIVISION - APPEAL NO. 197]

1995 OCTOBER 16

THE LAW OFFICERS OF THE CROWN

v.

PAUL IAN HARRIS

Before: CRILL, CALCUTT and BLOM-COOPER, JJ.A.

Sentence - misuse of drugs - importation of Class B drug

A.D. Laws, for the Applicant.

F G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown.

See paragraph 13.

CRILL, J.: On 21st June 1995, the Applicant was sentenced by the Royal Court to 18 months' imprisonment for assaulting a police officer.

G The facts of the assault are not in dispute. What had happened was that the Applicant, who had been drinking that night, and who had to put it mildly "an antipathy" towards the police, assaulted an innocent bystander with whom we are not concerned. The police were called and followed the Applicant, who had run away from the scene of his assault on the innocent bystander. PC Naftel was wearing a crash helmet, and attempted to apprehend the Applicant.

The Applicant, who was screaming and shouting and in a highly excited state, punched the officer around the head several times, according to the evidence at least six times, and his head inside the helmet made contact with a solid wall behind, and this Court has little doubt that but for the fortuitous circumstance of the helmet, the officer might well have suffered serious injury. Therefore, the Court views, as the Royal Court did, an assault of this nature on a police officer as a serious matter, which Mr. Laws for the Applicant has conceded.

However, the application before us is in respect of three matters. First, the Applicant seeks leave to appeal, his application to the learned Bailiff, as a single judge, having been rejected, likewise his application for legal aid; second, he seeks an order for legal aid from us; and third, he seeks leave to amend his grounds.

The general policy of the Royal Court of this Island, with which we concur, is that offences of this nature merit a sentence of imprisonment. However, it is essential in our opinion that there should be a measure of consistency running through the sentences in respect of these sorts of offences; and looking at the list of offences, which are not entirely comparable, it is true, we find that there is only one sentence of 18 months previously, that of Lyndon Butcher, Royal Court 14th October, 1985.

However, we think the Royal Court approached it in this way; it first of all sentenced the Applicant to 18 months for the assault on the innocent bystander, then applied its mind as to whether it should then make the sentence in respect of the assault on the police officer concurrent or consecutive. It decided that it would make it concurrent, and it then decided that the appropriate sentence would be the same as the 18 months for the innocent bystander.

In the opinion of this Court, there should have been a distinction, and we are not satisfied in our own minds that had the Applicant been charged only with the assault on the police, had that been the only offence committed by him that night, the Royal Court would have in fact imposed a sentence of 18 months. Accordingly, we have come to the conclusion that the appropriate sentence is one of 12 months, and accordingly we allow the appeal. We grant legal aid and we give leave, of course, to amend the grounds. We substitute a sentence of 12 months for that imposed by the Royal Court.

ADVOCATE LAWS: Thank you sir, and that is concurrent to the second count?

CRILL, J.: Yes.

ADVOCATE LAWS: Thank you. I'm obliged to the Court.

Leave to appeal, legal aid and leave to amend grounds of appeal granted; appeal allowed to the extent that the sentence subject of the appeal was reduced from eighteen months' to twelve months' imprisonment.

A 88.

[CRIMINAL DIVISION - APPEALS NO. 198, 199]

1995 OCTOBER 16, 17

THE LAW OFFICERS OF THE CROWN

v.

WAYNE CONRAD LE POIDEVIN

and

JASON LEE WATKIN

B

Before: CRILL, CALCUTT and BLOM-COOPER, JJ.A.

Sentence - misuse of drugs - importation of Class B drug

See paragraph. 15.

C

A.D.N. Havard, for the Appellant Le Poidevin.

D.G. Le Marquand, for the Appellant Watkin.

G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown.

CRILL, J.: The judgment that I am about to give in the appeal by Wayne Conrad Le Poidevin and Jason Lee Watkin, is the judgment of the Court.

D

On 22nd August 1995, the appellants, Wayne Conrad Le Poidevin and Jason Lee Watkin, were sentenced by the Royal Court to 2½ and 2 years imprisonment respectively for importing cannabis resin contrary to SS. 23(1) and 23(1)(a) of the Customs and Excise (General Provisions)(Bailiwick of Guernsey) Law, 1972, as amended.

E

Le Poidevin had imported 6.8 ounces (193.482 grams) and Watkin 2.4 ounces (68.582 grams). The appellants had travelled to England together as part of a joint enterprise with the intention to acquire the drugs. Nevertheless, the Crown did not claim that the cannabis resin was imported other than for their own use. Nor could it say whether the drugs had been bought separately or together, or whether there was more than one transaction. The Crown also were unable to say that either of the appellants intended to sell the drugs, although because of the level of debts each had there was the possibility that they might have been tempted to do so. Both pleaded guilty.

F

Both applicants had wrapped the drugs in cling film and swallowed them, so that they were recovered from the appellants' faeces. Both suffered some discomfort over a period of days.

G

Le Poidevin had paid £600 or so for his drugs and Watkin had paid some £300 for his. The street value of Le Poidevin's was between £1,160 and £1,548, and Watkin's between £411 and £548. The Royal Court accepted that neither had benefited from drug trafficking.

Le Poidevin has a long record, mostly for traffic offences, but no drug offences. Watkin has an even worse record with many traffic offences and public disorder offences, a considerable number of which were drink related, and one previous offence for possessing amphetamine in 1990.

For Mr. Le Poidevin, Mr. Havard stressed that he had been frank and open with the authorities. The amount, even though it might be thought to be within the commercial range, had been entirely for his own use. That claim had been supported by Dr. Browne, a psychiatrist, whose short report was before the Royal Court. That report was amplified in a letter before us, it had not been available to the Royal Court because Dr. Browne had been called upon at short notice having been out of the Island previously.

Mr. Havard cited the cases of Wayne David Leggett who, on 13th September 1995, was sentenced by the Royal Court to 2½ years' Youth Detention for possession with intent to supply 20 ounces (574.41 grams) of cannabis resin, and that of Dagan Lees who, on the same occasion, was sentenced to 3 years for importing 396.88 grams of cannabis resin.

As regards the aggravating circumstances of hiding the drug, Mr. Havard cited the cases of Church, 14 GLJ 16, and Campbell, 13 GLJ 20, who had been charged with impeding the customs by concealing drugs, and had been given small sentences of 2 and 3 months' imprisonment respectively. The Royal Court, he said, had placed too great an emphasis on this aspect of the case. His family difficulties were considerable and he worried that his child might be put into care if his wife could not cope during his absence. He was worried about the effect a substantial sentence would have on his own health, and this matter again had not come out fully in the previous reports.

For Watkin, Mr. Le Marquand stressed the smaller quantity of cannabis. It was clearly not for sale but for his own use. It had been an individual importation. Again, the Court below had placed too much emphasis on the aggravating factor. The concealment had been very amateurish. He cited the case of Firth, 19 GLJ 79, who had imported amphetamine. That defendant had swallowed the amphetamine which amounted to some 47 packages, as against Watkin's 13. Firth had also imported the drug in order to make a profit. H.M. Comptroller distinguished Campbell and Church because in those cases each had reswallowed the drugs.

H.M. Comptroller said that both Le Poidevin and Watkin had been concerned in a joint enterprise. The Crown accepted that Watkin had imported the drug for his own use but queried whether the same could be said for Le Poidevin. The Royal Court, he said, was entitled to take a strict view of what was a serious offence, and we do not dissent from the Royal Court's right to take that view. Since cannabis was neither manufactured or grown in Guernsey every importation added to the amount in the Island, which at present did not have a drug problem as such, and the Royal Court was determined to keep it that way.

The Comptroller accepted that neither appellant had the intention to supply at the time of the importation, but as regards Le Poidevin, it had been a commercial amount and he might have been tempted at a later date to sell some. The Royal Court had laid down sentencing guidelines in relation to drug offences in the case of Oren, 18 GLJ 13, on 24th August 1994. The principles of Oren had been followed in Firth and the case of Warmisham. In the opinion of the Comptroller, neither sentence on the appellants was excessive.

We have looked at Oren very carefully and it seems to us that that case examines a number of situations that fall to be considered by a sentencing

A court in drug cases. These are:-

1. Whether the drug is class A or B;
2. whether the quantity is great or small;
3. whether the drug was for the personal use of the defendant or was intended for commercial sale;
4. whether there were any aggravating circumstances; and
5. whether there was a guilty plea or not.

B

What Oren does not address is the position we have here in the case of Le Poidevin; an amount of drugs that could have a commercial value if sold, but without the intention to do so at the time of the importation. It seems to us that if the Royal Court was minded to infer that Le Poidevin might be tempted to deal with the drugs commercially, amongst those matters which I have mentioned to be taken into account, as the Crown indeed implied, then before doing so it would have been preferable to hold a Newton enquiry. In any case, if the Royal Court was in any doubt then the construction of the facts most favourable to Le Poidevin should have prevailed.

C

Accordingly, we do not think it is necessary to examine the principles of Oren in detail. We cannot find that the sentence of 2 years' imprisonment imposed on Watkin was excessive so as to justify interfering with the Royal Court's decision. It was after all his second serious drug offence.

D

As regards Le Poidevin, we do not consider that the difference between the amount of cannabis which he imported and that imported by Watkin justifies an increase of 6 months. It was a joint exercise carried out together with identical methods of concealment.

Accordingly, we dismiss Watkin's appeal but allow that of Le Poidevin and substitute a sentence of 2 years' for that of 2½ years' imprisonment.

Appeal by Watkin dismissed.

E

Appeal by Le Poidevin allowed to the extent that the sentence of 2½ years' imprisonment was reduced to 2 years' imprisonment.

F

G

1995 OCTOBER 16, 17

THE LAW OFFICERS OF THE CROWN

v.

LOUISE McDONALD

B

Before: CRILL, CALCUTT and BLOM-COOPER, JJ.A.

Sentence - misuse of drugs - importation of Class B drug

See paragraph 16.

E.A.G. Prentice, for the Applicant.

G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown.

C

BLOM-COOPER, J.: The judgment that I am about to read is the Judgment of the Court.

Miss Louise McDonald is a 24 year old single parent, with a child of nearly 3 years old. She was born in Guernsey and apart from a period of 15 months when she lived in Bournemouth, she has grown up and worked in the Island. Her parents live here and they are said to be very supportive of their daughter and have helped her to deal with a difficult domestic situation of the last few months, particularly those whilst she has been in prison for the last 5 weeks, and previously when she was on bail.

D

On 11th September 1995, she pleaded guilty to a single offence under SS. 23(1) and 23(1)(a) of the Customs and Excise (General Provisions)(Bailiwick of Guernsey) Law, 1972, of fraudulent evasion of the prohibition on the import of a controlled drug of Class B. The amount of cannabis resin illegally imported by Miss McDonald on 12th July 1995, on her arrival from Weymouth on the Condor ferry, was 5 ounces, or under metrication 140.503 grams, with a Guernsey street market price of somewhere between £843 and £1,124.

E

She was sentenced to an immediate term of imprisonment of 18 months. Leave to appeal to this Court was refused by the Bailiff, but her application is renewed in this Court. The Royal Court (the Deputy Bailiff and Jurats) had, on 11th September 1995, considered whether the applicant's case could be disposed of otherwise than by a sentence of immediate imprisonment. It concluded that it could not.

F

Before us Mr. Prentice, on behalf of the applicant, has succinctly argued that her personal circumstances should lead us either to reduce the length of the prison sentence or, alternatively, to substitute a Suspended Sentence Supervision Order, pursuant to the Criminal Justice (Suspended Sentence Supervision Orders)(Bailiwick of Guernsey) Law, 1984. In the Social Inquiry report of 8th September 1995, Mr. Stuart Crisp, a probation officer, respectfully suggested to the Royal Court that any custodial sentence be suspended and that Miss McDonald be made the subject of a 1 year Supervision Order, and I quote:-

G

A "... and the Supervision Order will give her the opportunity to examine and change her lifestyle appropriately."

We shall return to the question of a Suspended Sentence Supervision Order, but we must first deal with the imposition of a term of imprisonment and its appropriate length.

Facts of the offence

B Miss McDonald was stopped and searched on 12th July, 1995, by a customs officer, on suspicion that she was carrying drugs concealed within her body. Initially she denied having any cannabis and said that she had not used drugs for 2½ years. When challenged and told that she was to have a urine test, she admitted the use of cannabis at the weekend. After the urine test proved positive she admitted having 1 ounce of cannabis resin secreted in her vaginal passage. It was only after self withdrawal of that one package, and being told that an internal examination would be carried out, that Miss McDonald admitted to carrying four more packages of 1 ounce a piece. She said that the 1 ounce was for her personal use, while the remaining four were for a friend for his personal use. That was what she believed to be the case. The whole episode was an unattractive, if unavailing attempt by her to evade detection, an aggravating feature to an offence which she was ultimately bound to plead guilty to.

C
D By way of mitigation the Deputy Bailiff, in his judgment on sentence, took note of the fact that Miss McDonald had provided some information about the person who had put the money up for her trip and to whom she was to hand over the other four packages. We have been provided with information to the effect that Miss McDonald, in fact, provided assistance to customs officers over and above the acknowledged information which the Royal Court took note of. We have taken that into account in assessing the propriety or otherwise of the sentence of 18 months' imprisonment. The Deputy Bailiff concluded, and I quote:-

E "Following the Oren guidelines the Court will be considering a sentence of around 2½ years and would be imposing a sentence of that length without hesitation, were it not for the interests of your daughter aged 2½ years..."

We have already indicated that in cases where there is no evidence to refute a defendant's plea that the illegal importation, that the drugs were not brought in for any commercial purpose, the principles of sentencing as set out in the Oren, 18 GLJ 13, case do not apply. In particular, as we have said in Le Poidevin and Watkin, in the judgment read by Sir Peter Crill, the Oren judgment must be confined within its own circumstances of a commercial trafficking.

F The "starting point" for Class B drugs is, therefore, not 2½ years but must be adjudged on ordinary sentencing principles. We are content to echo, with one important qualification, what the five judge Court of Appeal for Jersey said in Attorney General v. Campbell et al, 4th April 1995, at page 7 of the transcript:-

G "The Courts cannot by themselves provide a solution to the problem..." [and I interpolate] of controlling the abuse of drugs "... but they can play their part by adopting a sentencing policy which marks the gravity of

A
the crime. We desire therefore to make absolutely clear what is the policy of the Courts in this jurisdiction in relation to the sentencing of offenders who import or deal in drugs on a commercial basis. That policy is that offenders will receive condign punishment to mark the peculiarly heinous and anti social nature of the crime of drug trafficking."

B
The one qualification that we would make is that where the import falls short of a commercial enterprise, but is designed to supply third parties with illicit drugs, the Courts will still take a serious view of the deliberate act of spreading the use of controlled drugs among the populace of the territory, in this case, the Island of Guernsey. Given that the applicant imported a relatively small amount, probably below the threshold of commerciality, the sentence should reflect the lower sentences reserved for cases where there are guilty pleas and the quantity of the drug is in the lower end of the range, around the market value below £1,000.

C
There is, however, in this case the aggravating factor, as we have indicated, of internal concealment and an abortive attempt to deflect the customs officers from recovering the four additional packages, and an initial reticence to assist the customs in their criminal investigation. Leaving on one side for the moment the applicant's personal domestic circumstances, which led the Royal Court to reduce the sentence length from the starting point of 2½ years, we do not think, in the result, the sentence of 18 months is excessive, such that this Court would interfere.

D
We turn, therefore, to the difficult question of whether the prison sentence, properly imposed to mark the gravity of the offence, should, nevertheless, not be immediately executed. At this juncture it would be helpful to recite the relevant statutory provisions, and I read first SS. 1(1) and 1(2) of the Criminal Justice (Power to Suspend Sentence)(Bailiwick of Guernsey) Law, 1972:-

E
"1(1) Any Court which passes a sentence of imprisonment for a term not exceeding 2 years for an offence may, at the time of passing such sentence, order that the sentence shall not take effect unless, during the period of 3 years from the date of the order or such lesser period as may be specified in the order, the offender commits another offence punishable with imprisonment and thereafter the Court by which the offender is convicted of that subsequent offence orders, under the provisions of the next succeeding section, that the original sentence shall take effect.

F
(2) The Court shall, on passing a suspended sentence, explain to the offender in ordinary language his liability if during the period of suspension he commits an offence punishable with imprisonment."

G
We note three things about that piece of legislation. First, the sentence of imprisonment to be suspended must not exceed 2 years' imprisonment. The applicant's sentence, therefore, qualifies. Second, there is no provision for partial suspension; it is an all or nothing situation. Third, the maximum period of suspension is three years. A practice in England has been to make supervision last for not more than 2 years.

The suspended sentence was given increase in the Criminal Justice (Suspended Sentence Supervision Orders)(Bailiwick of Guernsey) Law, 1984. S. 1(1) of that law provides that:-

A "1(1) Where a Court passes on an offender a suspended sentence under the provisions of the Criminal Justice (Power to Suspend Sentence)(Bailiwick of Guernsey) Law, 1972 (hereinafter referred to as 'the principal law'), the Court may make a suspended sentence supervision order (in this Law referred to as a 'supervision order') placing the offender under the supervision of a probation officer, or of some other person appointed for the purpose by the Court, for a period specified in the order, being a period not exceeding the period of suspension of the suspended sentence.

B (2) An offender in respect of whom a supervision order is in force shall keep in touch with the person under whose supervision he has been placed in accordance with such instructions as he may from time to time be given by that person and shall notify him of any change of address.

C (3) The Court by which a supervision order is made shall forthwith give copies of the order to the offender and to the person under whose supervision he has been placed."

I leave out subsections (4), (5) and (6). Subsection (7):-

"(7) On making a supervision order the Court shall in ordinary language explain its effect to the offender."

D ought this applicant to be so treated now? We stress, now, because the applicant has experienced the impact of incarceration sufficient to understand the gravity of the offence for which she has been dealt with by the Royal Court. We think she should be so treated. Our main reason is that any continued loss of liberty will seriously impair her ability to get herself back on the right track, and to spare her young daughter the potentially lasting adverse effects on the child's development.

E The Deputy Bailiff accepted that the applicant's daughter was of an age, and I quote: "... when she will miss you if you are incarcerated." We think that that was to place too little emphasis on the effect of a mother's daily absence from looking after a young child, and particularly a single parent. A paediatric specialist, Dr. Philip Simpson, from the Guernsey Health Care Group, submitted a report to the Royal Court which read as follows:-

F "If mother and child are separated I am concerned that this will be detrimental to Claire's development..." Claire being the daughter. "... Most paediatric experts will agree that separating a child from its mother at this age is harmful in many ways. For a single parent family, as in this instance, I believe that the effect would be compounded."

G Where, as here, the aims and purposes of a penal sanction are amply fulfilled by not imposing any further period of custody, the Court of sentence should look to the alternative of a suspended sentence supervision order as an appropriate disposal of the case. The Social Enquiry report reveals the need for just such an alternative. We think that the sentence of 18 months imprisonment should be suspended for 2 years and that contemporaneously with that, there should be a supervision order for 2 years.

Will you stand up Miss McDonald.

A

There are two things that the Court has to explain to you. First, with regard to the suspension of the sentence. If you commit any offence at all at any time within the next 2 years you can be brought back and the Court can then order that the sentence of 18 months imprisonment or that part of it which is left unserved can take effect, or some lesser period could be imposed. So you understand, if you keep out of trouble you won't serve any more of that sentence.

B

The second matter that I have to explain to you is the effect of the supervision order, and that is that you must keep in touch with the Probation Officer throughout the period of the 2 years, and you must obey any instructions that he gives you; in particular you must notify him of any change of address. Do you understand that?

APPLICANT: Yes, sir.

C

BLOM-COOPER, J.: Very well then. The application for leave to appeal will be granted and the appeal will be allowed to the extent that the sentence of 18 months imprisonment shall be subject to a suspended sentence supervision order for 2 years.

Leave to appeal granted; appeal allowed to the extent that the sentence of 18 months' imprisonment was suspended for 2 years and a suspended sentence supervision order was made.

D

90. [CRIMINAL DIVISION - APPEAL NO. 201 and 202]

1995 DECEMBER 20, 21

THE LAW OFFICERS OF THE CROWN
v.
ANTHONY REX LEES
and
WANDA MARY BRIDGET LEES

E

Before: COLLINS, DOREY, P., and CARLISLE, JJ.A.

Sentence - importation and exportation, and being concerned in the supply, of Class B drug

F

See paragraph 18.

M.J. Riddiford, for the Applicant Anthony Lees.
A.J. Ayres, for the Applicant Wanda Lees.
G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown.

G

COLLINS, J.: These Applicants, Anthony Lees and Wanda Lees, appeared before the Royal Court on 13th September 1995, when they (together with other defendants) pleaded guilty to a number of offences against the Misuse of Drugs and Customs and Excise Laws.

They have applied in each case to this Court for leave to appeal and we have

A treated the application for leave as the hearing of the substantive appeal.

B Anthony Lees and Wanda Lees pleaded guilty to two offences of being concerned in the fraudulent evasion of the prohibition of importation of cannabis resin, one offence being committed on 13th January 1995, and the other between 12th and 17th April 1995. With them there pleaded their son, Dagan Lees, who has not appealed to this Court, and who pleaded also to another charge. Wanda Lees pleaded guilty to an offence of fraudulent evasion of the prohibition on exportation, again of cannabis, in early 1995. In addition, Anthony Lees pleaded guilty to an offence of being concerned in the supply of cannabis between 12th and 25th January 1995, and again, being concerned in a supply on 15th April 1995.

C Anthony Lees was sentenced to 4 years' and 6½ years' imprisonment respectively for the two counts of importation, these sentences being concurrent, as also were the sentences of 4 years for being concerned in the supply of cannabis on the first occasion, and 6½ years on the second occasion. Wanda Lees was sentenced to 4 years and 5 years concurrent on the two counts of importation where she was jointly charged with Anthony Lees, and 4 years also concurrent on the count alleging exportation.

D Dagan Lees had no previous convictions and he was sentenced to 3 years' imprisonment on each of four counts, the sentences to run concurrently. He has not appealed from those sentences. The influence of his upbringing was taken into account by the Court in passing a lower sentence than otherwise might have been the case, and he, furthermore, had no previous convictions, as I have mentioned.

E Anthony and Wanda Lees at least have quite clearly been carrying on a family business in the importation and supply of cannabis resin, and in so doing have travelled between Spain, where cannabis is apparently available at a cheaper price than elsewhere, Portugal, England and Guernsey. A vividly illustrative map of their journeyings is to be found in the statement prepared by the Customs and Excise Department, pursuant to S.3(1) of the Drug Trafficking Offences (Bailiwick of Guernsey) Law, 1988.

F Anthony Lees is a 48 year old man, who married Wanda Lees in 1971, before which time he had been convicted of a number of offences of dishonesty which we disregard for the purposes of this appeal. From 1973 onwards however he has been before the Courts on eight occasions in England and Portugal for offences concerning the possession, exportation, cultivation and supply of cannabis. The most recent of these convictions was the Portuguese conviction of 1st July 1992, when he was sentenced to 4 years' imprisonment for drug trafficking and deported to the United Kingdom.

Wanda Lees is 43 years of age, and she has convictions of some age in June of 1977 for three offences before the Guernsey Magistrate's Court, when for an offence of importation of cannabis she was sentenced to 6 months' imprisonment, with 4 and 6 month sentences concurrent for possession and supply respectively.

G The arrest of these and other defendants was the result of skilful and prolonged surveillance of their movements by customs officers, which culminated in the observation of a sale by Dagan Lees on 15th April 1995 of 20 ounces of cannabis for £3,400 in cash on the beach at Petit Bot. Anthony Lees had been

in his presence on the way, and having become aware of Dagan's arrest he went back to the Atlantique Hotel, where he and his wife took the greater part of their holding of cannabis and hid it near to the reservoir at St. Saviour's.

Count 1 of the Indictment related to the importation of approximately $\frac{1}{2}$ a kilo of cannabis from Spain by Anthony and Wanda Lees. They used a false name and were able to evade or pass through the customs without apprehension, whilst Dagan Lees arrived separately, and he was stopped- he being the person then under surveillance- but he had no drugs on him and was not detained. It was Anthony Lees who was carrying the cannabis on this occasion, probably in his leggings or cycling shorts, and among their possessions after arrest there was a photograph apparently of Dagan Lees, which was admitted to have been taken by Anthony Lees, showing him with packages strapped to his legs, but it is not at all clear how that photograph came to be taken or to what particular moment in time it related.

They left the Island in late January, burying their hoard of cannabis at L'Ancrese Common. Wanda Lees then returned a fortnight later and it was then that she committed the offence of exporting the cannabis resin which is the subject of count 4 to which I have referred. That took them back to the United Kingdom again.

The second case of importation took place the day before the arrest of the Appellants. On Good Friday, 14th April, Anthony and Wanda Lees, with two daughters and two grandchildren, thus giving the impression of a family party, arrived from Weymouth on the night ferry. They travelled under an assumed name. Dagan Lees travelled separately by Condor Seacat. The others presented themselves at the Atlantique Hotel as a family group, visiting Guernsey for seven days. Between them the three Defendants on this occasion imported a total of 2.6 kilos of cannabis resin, sewn into their clothes. This is the subject of the charge laid in count 5 of the Indictment.

The following day, 15th April, Dagan and Anthony Lees left the Atlantique Hotel and following an arrangement with Wayne Leggett, one of the other defendants before the Court who had pleaded guilty and been sentenced, agreed to meet him on the shore at Petit Bot. Anthony Lees may have carried the cannabis some way, but in any event, he then placed himself in the distance and it is not clear what, if any, part he continued to play. On the beach Dagan Lees met Wayne Leggett and handed over 20 ounces of cannabis, receiving in return £3,430 in cash. Leggett then left the beach and Dagan Lees likewise, and Dagan Lees was then seen by police officers, and after a short chase he was caught and arrested. He was carrying the £3,430 in cash and a small lump of cannabis resin. This incident is the basis of count 6, which charged Dagan Lees with an offence of supplying and count 7, which charged his father, Anthony Lees, with being concerned in that supply. Incidentally, I mention of course, that by count 9, Wayne Leggett was charged with possession with intent to supply, to which he pleaded guilty.

In addition to the offences already described, statements made by the Defendants led in the case of Anthony Lees to a charge of being concerned in the supply of cannabis resin between 12th and 25th January 1995, this being the subject of count 3 to which I have already referred, and in the case of Wanda Lees to the charge of exporting cannabis, this being the subject of count 4. The amount concerned in count 3 appears to have been quite small and possibly

A was supplied by way of sample.

The picture presented by the Social Inquiry reports and indeed by the documents put before the Royal Court by way of mitigation on behalf of the Applicants, is one of an unsettled and somewhat unusual family holding strong views as to the ecology and as to the need to decriminalise cannabis. While they have previous convictions for drug related offences, to which I have referred, their appearance as observed in this Court, as well as the documentary evidence to which I have referred, lead us to the view that they do not present the sinister criminal picture which otherwise might be formed of them. That is not to say that the views expressed in those documents entitle them to break the law in any way and certainly not to commit such offences as those for which they have been sentenced.

The learned Deputy Bailiff went so far as to say that the Royal Court felt that the Applicants had, through the chronic use of cannabis, reached the stage where their mental faculties might be impaired. Although it is true to say that Mr. Lees has been taking cannabis regularly for over 20 years, it is right to point out that there was no medical evidence before the Court to the effect of which the learned Deputy Bailiff spoke, nor is it suggested anywhere in the Social Inquiry reports. Furthermore, reference was made in the Royal Court to it being in the best interests of the Applicants' 10 year old daughter, Penny, that she had no contact with her mother or father for some time. If that was intended to justify a longer sentence than otherwise would be appropriate for the offences, it would be wrong in principle, and in any event the Social Inquiry report speaks well of Mrs. Lees' relationship with Penny. I shall revert to Penny's situation later.

I turn then to the sentences imposed on the Applicants which were criticised as inconsistent as between themselves and inconsistent with the sentences of 3 years passed on Dagan, and in any event, the case for the two Applicants was that the sentences were too long having regard to the guidelines laid down in Oren, 18 GLJ 13. In the case of Oren, the Royal Court said this:-

"Turning to cases involving larger quantities where the inference is to be drawn that the offender is engaged in trafficking, the starting point for sentencing will be in the case of Class B drugs 2½ years, and in the case of Class A drugs 4 years. The lower sentences will be reserved for cases where there are guilty pleas and the quantities of the drug found in the possession of the offender is in the lower end of the range both in amount and value. As to the lower end in value, the Court would at the present time be regarding this as £1,000 or less on the streets of Guernsey, always bearing in mind that that figure might properly be reduced downwards if the market were to be flooded and prices fell to those found elsewhere."

We now turn to consider the sentences in the light of those guidelines. First, I would make clear that we pay full account to the fact that each of these Applicants pleaded guilty. Furthermore, as I shall mention in relation to some specific offences, not only did they co-operate with the authorities, but they gave them details of what had occurred which they otherwise would not have known, and most importantly, took them to the store of cannabis which they had buried on the Island, and revealed it to them, so that it was able to be taken up and put into proper custody. We see no reason to distinguish between the

two Applicants who are very much a family, and clearly have a strong relationship.

Turning first to count 1, each Applicant was sentenced to 4 years' imprisonment and in the light of the guidelines in Oren we reduce this to 3 years in each case. In this respect we take into account, in relation to this count, the fact that the details at least of this offence became known to the authorities by reason of statements which had been volunteered by the Applicants after their arrest.

As to count 3, the amount in question was a small one, it may have been by way of sample in which case it was, of course, passed in a commercial transaction in the hope of some larger transaction and again this was a matter which became known because of the statement of the Appellant, Mr. Lees, and we consider that this offence justifies a sentence of 3 years' imprisonment concurrent with count 1.

Count 4, which alleged export of the greater part of the cannabis which had been the subject of count 1, related only to Mrs. Lees and we consider in that connection that a sentence of 3 years' imprisonment concurrent with the other sentences is appropriate.

Count 5 is the most serious of the offences to which the Applicants have pleaded guilty, in that it concerns the importation of 2.7 kilogrammes. Mr. Lees was sentenced to 6½ years' imprisonment and Mrs. Lees to 5 years. We see no reason to differentiate between them and bearing in mind the guidelines in Oren and the mitigation attributable to their having led the relevant authorities to where the cannabis had been hidden, we consider that 4 years' imprisonment is appropriate in the case of each Applicant in relation to count 5. In relation to count 7 we reduce the sentence to one of 4 years' imprisonment, again to run concurrently with all other sentences.

Some criticism was advanced as to the inconsistency of the sentences as between Mr. and Mrs. Lees, and it will be seen that we have brought their sentences into line. It was also urged upon us that there was an inconsistency between their sentences as they stood in the Royal Court and the sentence on Dagan Lees. We have some sympathy with that contention, so far as the sentences which were passed in the Royal Court were concerned; however, we have ourselves reduced sentences to the extent which has become clear already in the course of this judgment, and thereby have narrowed the gap between his parents and Dagan Lees and accordingly we do not consider that any reasonable person could think that there was any unjustifiable discrepancy between the sentences imposed on these Applicants as distinct from their son, Dagan.

A final word about the Applicants' daughter, Penny; it is a sad feature of such a case as this that mother and daughter have to be separated, but I fear that that cannot deter the Court from doing its duty. Fortunately, Penny has a stable and secure home with her elder sister which is spoken to in the Social Inquiry report, and we were informed on enquiry yesterday that the arrangement there described remains the same today.

Accordingly, we grant the application in each case for leave to appeal and we set aside the sentences imposed in the Royal Court to the extent which we have ordered and substitute the sentences in relation to the different counts which

A appear earlier in this judgment, and each of those sentences, of course, runs concurrently.

Applications for leave to appeal granted; appeals allowed to the following extent:-

(i) Anthony Rex Lees: Sentences of imprisonment reduced as follows:-

B
Count 1 : From 4 years to 3 years.
Count 3 : From 4 years to 3 years, concurrent.
Count 5 : From 6½ years to 4 years, concurrent.
Count 7 : From 6½ years to 4 years, concurrent.

(ii) Wanda Mary Bridget Lees: Sentences of imprisonment reduced as follows:-

C
Count 1 : From 4 years to 3 years.
Count 4 : From 4 years to 3 years, concurrent.
Count 5 : From 5 years to 4 years, concurrent.

91. [CRIMINAL DIVISION - APPEAL NO. 204]

1995 OCTOBER 16, 17

D
THE LAW OFFICERS OF THE CROWN
v.
WILLIAM JOHN HARPER CALDWELL

Before: CRILL, CALCUTT and BLOM-COOPER, JJ.A.

Sentence - misuse of drugs - importation of Class B drug

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see paragraph 17.

A.D.N. Havard, for the Applicant.
G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown.

CALCUTT, J.: The judgment which I am about to read is the judgment of the Court.

F
On 11th September 1995, this Applicant, having previously pleaded guilty to a charge of the improper importation of goods, namely, cannabis resin, was sentenced by the Royal Court to a term of 2 years' imprisonment. His application to a single judge of this Court for leave to appeal against Court.

G
The facts immediately surrounding the commission of this offence can be summarised briefly. The Applicant, who is aged 41 years, and who has resided here for the last 20 years or so, was, in July 1995 employed on the Island of Brecqhou as a stonemason's labourer. In this capacity he was earning good money.

On Tuesday 4th July, the Applicant with about £900 in his pocket, took an early

evening flight from Guernsey to Heathrow. His ticket, which included a return ticket for the following day, cost him £175.

A

The Applicant later told a customs officer in Guernsey that his purpose in going to London was to go to a stag party, but, as he later admitted, he also planned from the outset to use the trip as an opportunity to purchase cannabis. He was himself, as he also admitted, a user of cannabis.

Whilst in London the Applicant purchased a block of cannabis and he apparently paid £775 for it. The cannabis weighed 242.47 grams (about 9 ounces).

B

On Wednesday 5th July, he caught a midday return flight from Heathrow to Guernsey, and, as he came through the airport in Guernsey, he had concealed on him the block. He concealed it in his underpants.

He was stopped by customs officers and questioned, and denied having any controlled drugs. He was, however, taken to the customs interview room. The customs officer had to leave the interview room briefly and on his return the Applicant was seen to be holding a block of cannabis. The Applicant said that he had found it on the floor. That was plainly untrue.

C

Three interviews followed. The Applicant insisted throughout that his intention was not to sell the cannabis on to anyone else; and the prosecution accept that they have no evidence to set against that. The Applicant insisted that the cannabis was for his own personal use, though he accepted that he would probably have shared the cannabis with others.

D

What then in these circumstances was the appropriate sentence?

The commission of the offence was admittedly planned, and it was aggravated to some extent by the manner of concealment, as I have described it, and by the untruths which he told the customs officers.

Factors which told in his favour were his good work record, his absence of any previous criminal convictions for the last 20 years, and his plea of guilty.

E

The Deputy Bailiff, in passing sentence, referred to the guidelines set out by the Royal Court in the case of Oren, 18 GLJ 13; and the Court said that it approached this case on the basis that the appropriate starting point was 2½ years imprisonment (which was the starting point suggested in Oren for an offender who was engaged in drug trafficking).

F

For the same reasons as those given by Sir Peter Crill, in giving the judgment of the Court in Le Poidevin, we do not regard this case as one which is to be approached as a trafficking case. The facts of this case give rise to a situation not covered in Oren.

Although the quantity of cannabis involved in the present case could not properly be described as small, it having an estimated Guernsey street value of £1,454 to £1,939, the Applicant's intention was that it should be for his personal use. It was not his intention to pass on the whole or any part of the package to others, although he accepted, as I have indicated, that he might well have shared it.

G

A In our view a sentence of 2 years' imprisonment was an appropriate sentence having regard to all the circumstances of the case. Accordingly, we dismiss this application.

Application dismissed.

92.

[CIVIL DIVISION - APPEAL NO. 215]

B

1995 JULY 31, AUGUST 1

J.S.W. MAIN Defendant/
(Trading as Jackie Main) Appellant

v.

NICHOLAS MORGAN LAUGHTON Plaintiff/
Respondent

C

Before: COLLINS, DOREY, P., and SOUTHWELL, JJ.A.

Practice and procedure (civil) - costs - full indemnity costs - power of Court of Appeal to award - circumstances in which justified

See paragraph 79.

D

D.G. Le Marquand, for the Defendant/Appellant.
P.T.R. Ferbrache, for the Plaintiff/Respondent.

DOREY, P.: These proceedings arise as a result of a serious accident suffered by the Plaintiff/Respondent on 16th January 1990, while working for the Defendant/Appellant in Alderney on a building site. For convenience we refer now to the parties simply as Plaintiff and Defendant.

E

The Plaintiff's claim as estimated at the time the summons was issued amounted to some £430,000. The consequences of the serious injury he suffered are that the Plaintiff is unlikely to be able to work again, and his wife has to look after him, and as a consequence she cannot work, so they have to live on Social Security.

F

It is alleged in the summons that the accident was caused by a breach of the implied terms of the Contract of Employment and/or negligence on the part of the Defendant, his servants, or agents. The summons was issued on 6th January 1993, that is just a few days short of three years from the date of the accident. The Defendant then filed his Défenses which included Exceptions de Fond alleging that the Plaintiff's claim is prescribed in these terms: "The Plaintiff's alleged cause of action herein and the date of his knowledge of the same occurred more than a year and a day before the commencement of the action."

G

The prescription point was taken to the Court of Alderney, which gave a careful and well reasoned judgment on 24th February 1994, in which the Court found in favour of the Plaintiff. The Plaintiff's solicitors had previously told the Defendant's solicitors that the prescription point was bad. The Defendant's solicitors had nevertheless said that they had instructions to take it as far

as the Privy Council. Doubtless, the instructions to the Defendant's Advocates came from the Defendant's insurers, the General Accident.

A

The Defendant appealed to the Royal Court in Guernsey and in a further careful judgment, delivered on 24th October 1994 by the Deputy Bailiff, the Defendant's argument met the same fate. It is appropriate to mention at this stage that the argument being so vigorously pursued by the Defendant did not touch on the claim in contract, so there was an air of unreality in the proceedings on that score alone. Furthermore the Defendant accepted that there was authority in the Court of Appeal in the case of Smith v. Harvey, 1981 Civil Rep. No. 9, which stood in their way in relation to the argument that they were pursuing.

B

The Defendant proceeded to appeal to this Court by notice dated 24th March 1995, and the Plaintiff's case was filed in due time, so that the appeal was listed for hearing on 31st July 1995.

The subject matter of the submissions traced the history of the relationship between Alderney and Guernsey from the 14th Century, and paid particular attention to an Order in Council of Elizabeth I, as well as further Orders in Council of the 19th Century. The Plaintiff's case was set out in 105 paragraphs, covering 58 pages and was accompanied by 50 authorities, and is an impressive document, the quality of which clearly justifies the extent of the research undertaken.

C

The parties were thus ready to embark on an appeal which, so far as an action in tort was concerned, would decide the fate of the Plaintiff's action for damages, leaving open the action in contract. It was in this situation that only 7 days before the hearing in the Court of Appeal was due to take place, the appeal was withdrawn by the Defendant. The sole explanation given to us for this volte face was that it was a commercial decision taken by the insurers. So it was that two and a half years had been wasted, during which the trial could have been heard and the Plaintiff's claim decided.

D

Of the considerable costs which have been incurred during this time part is the subject of the Plaintiff's present application. As the Defendant's insurers would have been well aware, the prejudice through the long delay would affect the Plaintiff much more than the Defendant. The Plaintiff has no access to legal aid, and is dependent on private charity to support his case. He is faced with the further difficulty that there is no provision in the Bailiwick for any interim payment on account of damages.

E

It is against this background that Mr. Ferbrache is applying to this Court for an order for costs on an indemnity basis in respect of the appeal from the Royal Court to the Court of Appeal. Although it was common ground that the Court of Appeal has power to award costs on an indemnity basis, the absence of previous reported authority in this Court led us to satisfy ourselves that the Court does have jurisdiction to make such an order.

F

We observe that there is express provision for the making of such an order in the Royal Court in Rule 48 of the Royal Court Civil Rules 1989. I refer to sub rules 48 (1), (3) and (4):-

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"(1) The Court may in any action:-

- A
- (a) Make such order as to the cost of the proceedings, or of any stage of or application in the proceedings;
 - (b) order any party to give security for costs in such amount on such terms and in such manner;

as the Court thinks just.

- B
- (2)
 - (3) Notwithstanding the provisions of the Royal Court (Costs and Fees) Rules 1981, or of any other Rule of Court or enactment, the Court may in circumstances mentioned in paragraph (4), order that costs or security for costs shall be paid on a full or partial indemnity basis.

- C
- (4) The circumstances referred to in paragraph (3) are as follows-
 - (a) Where, in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than on the basis provided by the Royal Court (Costs and Fees) Rules, 1981; or,
 - (b) where any party has pleaded or otherwise pursued or defended an action, claim or counterclaim, unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court."

In the case of the Court of Appeal the relevant statutory provision is contained in the Court of Appeal (Guernsey) Law 1961, S.18, subsections (1) and (2), which I quote:-

- E
- "(1) The costs of and incidental to all proceedings in the Court of Appeal under this Part of this law shall be in the discretion of the Court, and the Court shall have power to determine by whom and to what extent the costs are to be paid.
 - (2) The Bailiff may, from time to time, by rules made under this subsection, prescribe the fees payable to that Court and to the Officers of that Court in respect of proceedings in and in relation to that Court and the fees and expenses recoverable by a party in any case where the costs are awarded to that party under subsection 1 of this section."
- F

Under S.18 (2) rules were made in 1964, namely the Court of Appeal (Civil Division) (Costs and Fees) (Guernsey) Rules, 1964. In these rules, Rule 3 lays down the maximum fees for advocates as set out in the Schedule, recoverable by a party to whom costs have been awarded by the Court, subject to any direction of the Court as to the extent to which the costs are to be paid to that party. The Schedule has been updated by amendment in 1991.

G

The fees set out in that schedule would not, in the present case, reflect the extent of the work which has been done in the appeal by the Advocates for the Plaintiff. S.18 of the 1961 Law makes no express provision for indemnity

costs, but gives the Court of Appeal a broad general power to determine all questions relating to costs.

A

A similar provision in England in the Supreme Court of Judicature (Consolidation) Act 1925, giving the English Supreme Court a general power to determine matters of costs, was interpreted in a number of cases as giving power to make an order for indemnity costs in an application appropriate in the circumstances. The case cited to us, EMI Records Limited v. Ian Cameron Wallace Limited and Another [1983] 1 Ch. 59, is one of these authorities. The English court could make an award of costs on an indemnity basis in circumstances where the Court considered that such a special order should be made. The Court was not restricted to the particular bases which were expressly mentioned in the Rules of the Supreme Court. Indeed, it has been not uncommon for indemnity costs orders to be made in the English Supreme Court where the conduct of a party in relation to civil litigation was unreasonable or worse.

B

In our judgment, the broad power given to this Court by S.18 of the Court of Appeal (Guernsey) Law 1961, is also a power which enables the Court of Appeal to make orders for costs on an indemnity basis in circumstances where such an order is appropriate. The circumstances which are likely to be appropriate are those which are dealt with in Rule 48 of the Royal Court Civil Rules and include circumstances where a party has pleaded or otherwise pursued an application, an action, or appeal, unreasonably or vexatiously or has abused the process of the Court.

C

In the light of these principles, the circumstances presented to the Court in this case are sufficiently exceptional to justify the making of the order sought. In this connection we have regard to the history of the proceedings already outlined, to the position of the Plaintiff, and to the tactical benefits which the Defendant's insurers have sought to obtain by maintaining this appeal up to the eleventh hour, against the background of an overall delay caused by the taking of this wholly unmeritorious point. The conduct of the Defendant might be stated to be vexatious, but it is only necessary for us to say that we find the defence conduct wholly unreasonable. Accordingly, this Court orders the costs of all the proceedings in this Court are to be paid on a full indemnity basis by the Defendant. Such costs (if not agreed) are to be taxed and paid forthwith.

D

In view of all the circumstances it is essential that this case comes on for trial at the earliest opportunity.

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Ordered that the costs of all the proceedings in this Court be paid by the Defendant on a full indemnity basis.

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93.

[CIVIL DIVISION - APPEAL NO. 216]

1995 AUGUST 1, 2

RICHARD FREDERICK FRANCIS PERKINS

Appellant

v.

THE STATES HOUSING AUTHORITY

Respondent

B

Before: SOUTHWELL, DOREY, P. and COLLINS, JJ.A.

Housing - control of occupation - application for housing licence - duties of authority - proper procedures - trial - function of trial judge - interruptions during submissions

See paragraph 37.

C

P.T.R. Ferbrache, for the Appellant.

H.E. Roberts, for the Respondent.

SOUTHWELL, J.: This is a case concerning the exercise of the Housing Authority's powers under the Housing (Control of Occupation) (Guernsey) Laws, 1982 to 1990, which I will refer to as "the Housing Control Laws". These have now been replaced by the Housing (Control of Occupation) (Guernsey) Law, 1994, but the 1994 Law came into force after the application of Mr. Perkins was considered by the Authority.

D

The Housing Control Laws give the Authority draconian powers to control the occupation of premises in Guernsey. These powers were considered by the European Commission and Court of Human Rights in Gillow (1987) A.109. The European Court upheld the existence of these powers as being appropriate in the particular circumstances of Guernsey, but held that in the exercise of such powers in the particular circumstances relating to the Gillows there had been a violation of their rights under Art. 8 of the European Convention on Human Rights. The existence of powers such as these is unusual in a democratic society and must be exercised with care and sensitivity to avoid any abuse of those powers.

E

The relevant provisions of the Housing Control Laws are set out below. I do not cite provisions of marginal relevance, including those in Part II concerning persons who do not require a housing licence, in Part III concerning circumstances in which a housing licence is not required, in Part IV relating to the Housing Register, and in Part V as to certain restrictions on the occupation of dwellings by certain persons.

F

The main relevant provisions are SS.1, 2, 3, 4, 5, 6, 7 and 8 which provide as follows:-

- "1. Subject to the succeeding provisions of this Law, a person shall not occupy, or cause or permit any other person to occupy, a dwelling in this Island otherwise than under and in accordance with a licence granted by the Authority under the provisions of section three of this Law.

G

2. (1) Subject to the provisions of subsection (2) of this section, any person desirous of obtaining the grant of a licence under the provisions of section three of this Law shall make application in that behalf to the Authority and such application shall be in such form and accompanied by such information as the Authority may, from time to time, require.

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(2). An application under the provisions of the last preceding subsection may be made:-

B

(a) by the owner of the dwelling to which the application relates, or

(b) by a person who is not the owner of the dwelling to which the application relates but who is desirous of occupying that dwelling.

C

3. (1) The Authority may, upon receipt of an application under the provisions of the last preceding section, grant a licence (hereinafter referred to as a "housing licence") in respect of a dwelling:-

(a) to the owner thereof, for the occupation of that dwelling-

(i) by persons generally, or

D

(ii) by a person or persons named in the licence, who would, by virtue of the provisions of this Law, be otherwise precluded from occupying that dwelling;

(b) to a person who is not the owner thereof for the occupation of that dwelling by that person who would, by virtue of the provisions of this Law, be otherwise precluded from occupying that dwelling.

E

(1A)

(1B)

(1C)

F

(2) The Authority shall attach to the grant of a housing licence a condition specifying the maximum continuous period during which the dwelling in respect of which the housing licence is granted may be occupied by any person and the Authority may attach to the grant of a housing licence such other conditions as it may deem necessary or expedient to impose by reason of any shortage of housing accommodation in this Island at the time of the grant of the housing licence.

G

(3) The Authority may, upon receipt of an application under the provisions of the last preceding section, refuse to grant a housing licence in respect of the dwelling to which the application

A

relates.

- 4. If the Authority decides to refuse to grant a housing licence under the provisions of the last preceding section or to grant such a housing licence subject to conditions a notice signed by a person authorised in that behalf by the Authority, and in such form as the Authority may from time to time determine, shall, as soon as may be after the Authority so decides, be served by the Authority on the Appellant for the housing licence concerned and such notice shall be in such form as the Authority may, from time to time, determine and shall contain-

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- (a) a statement of the fact of such refusal or the terms of such conditions, as the case may be, and the date of the meeting of the Authority at which the decision to refuse the housing licence concerned or to grant it subject to such conditions was taken, and

C

- (b) a statement of the reasons why the Authority refused to grant the housing licence concerned.

- 5. (1) In deciding whether or not, in the exercise of its powers under the provisions of section three of this Law, to grant a housing licence or to grant a housing licence subject to conditions the Authority shall take into account the following factors:-

D

- (a) whether the employment of the person by whom or on whose behalf the application for the housing licence is made is by reason of his qualifications, skill or experience essential to the community;

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- (b) whether the number of dwellings, similar by reason of size or rateable value as inscribed in the Cadastre to the dwelling in respect of which the application is made, which are available for occupation at the time of the application is, in the opinion of the Authority, sufficient to meet the housing requirements of qualified residents and other persons who by reason of their qualifications, skill or experience are essential to the community;

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- (c)

- (d)

- (e) where the application is for a housing licence in order to enable a person to occupy a dwelling whilst he is in employment-

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- (i) the number of people appearing to the Authority to be resident in Guernsey and lawfully available to undertake employment of the type concerned; and

- (ii) the number of people for the time being entitled to occupy a dwelling under a housing licence of the type concerned.

(2) Nothing in the last preceding subsection contained shall be taken to preclude the Authority in deciding whether or not, in the exercise of its powers under the provisions of section three of this Law, to grant a housing licence or to grant a housing licence subject to conditions from taking into account such other factors as the Authority may, from time to time, deem necessary or expedient. A

6. Upon receipt of an application under the provisions of section two of this Law, or at any time thereafter, the Authority may require the Appellant concerned to supply the Authority with such information, in addition to any information supplied in accordance with the provisions of the said section two, as the Authority may require. B

7. A housing licence shall be personal to the holder thereof and shall not be assignable.

8. In this Part of this Law the expression "owner" in relation to a dwelling includes a lessee for the time being of that dwelling." C

In practice the Authority has tended to divide applications into two categories:-

(1) those where the employment of the occupier or proposed occupier is said to be essential to the community (S.5(1)(a) ("essential licences"). D

(2) all other cases: This category is apparently referred to, inaccurately, as "compassionate licences", a phrase which does not properly summarise the many cases falling within the Law but not involving any essential licence. There will be many applications made and granted or refused which have nothing to do with "compassionate" grounds. This is a misnomer which it would be wiser not to use in future. Further, this classification leaves out of account applications falling within S.5(1)(e) which applies in employment cases where such employment is not "essential to the community." It might be better to refer to them as "general licences." E

The exercise of these powers by the Authority was considered fully by this Court in Ward v. Housing Authority (8.GLJ.50). The facts in Ward were different and some of the questions of law were also different. But on the principles of law central to the determination of the present case Ward is a directly applicable authority. These principles are as follows:- F

(1) The Authority is under a statutory duty pursuant to S.4(b) to give a statement of the reasons why the Authority refused to grant the housing licence concerned (Ward, para. 22).

(2) The Authority is under a statutory duty to explain what view it took of the factors set out in S.5 in reaching its decision to refuse to grant the licence, both by reason of S.5 itself, and by reason of its duty to state its reasons under S.4(b) (Ward, paras. 22-27). G

The Deputy Bailiff in the present case appears to have misdirected himself and

A the Jurats in determining that the expression of these principles was obiter. Having analysed the terms of the judgment I am satisfied that the passages referred to were essential to the decision and grounded the Order of the Court whereby the application was referred back to the Housing Authority.

B At the time of the decision in Ward the burden of proof was on the Authority to show that it had reached a reasonable decision. Subsequent amendment of S.40 concerning appeals has shifted the burden to the Appellant to establish that the Authority's decision was unreasonable or for other reasons ought to be set aside. That is why this Court in Ward referred to the need for the Authority to give evidence before the Royal Court to show that the views which the Authority had reached concerning the factors in S.5 were reasonable. But the shifting of the burden of proof on to the Appellant has made it even more important that the Authority fully discharges both the statutory duties in (1) and (2) above which this Court emphasised in Ward. In relation to the first principle (the duty to give reasons) this Court said in paras. 25 and 26 of the Ward judgment:-

C "25.... This is not a merely formal or technical matter. An applicant who is refused a licence is entitled under S.40(1) to appeal to the Royal Court 'on the grounds that the decision of the Authority was ultra vires or was an unreasonable exercise of its powers.' An applicant who is not told the full reasons for the refusal of the application cannot exercise this right of appeal effectively.

D 26. This case is a good example of the importance of this point. If Mrs. Ward had known the views of the Housing Authority on the number of dwellings similar to Les Clercs du Campère available for occupation and their sufficiency to meet housing requirements, she might have been able to submit to the Royal Court that these were unreasonable views. Mr. Greenfield, in fact, suggested to us that Les Clercs du Campère was in point of value at the very top of the local market, while it was for houses at the lower end of the market that there was unsatisfied demand. Again, if Mrs. Ward had known of the view of the Housing Authority, that hers was a very frequent case, she might have been able to submit to the Royal Court that this was an unreasonable view to take of the particular combination of circumstances constituting her case."

E In Ward this Court held that the decision of the Authority was vitiated in point of law by (amongst other defects) its failure to provide to Mrs. Ward a proper statement of its reasons for refusing to grant her licence, in breach of its statutory duty under S.4(b), para. 30 of the Ward judgment.

F Finally, in paras. 33 and 34 of the Ward judgment, this Court made some general observations on the Authority's powers which are material to the consideration of the present case:-

G "33. Before parting with this case we wish to make some general observations. We have referred already to the formidable character of the Housing Law. It places great and unusual power in the hands of the Housing Authority. Outside the limited class of qualified residents and the limited circumstances in which a housing licence is not required, nobody can lawfully occupy any dwelling in this Island without the Housing Authority's licence. Subject only to the requirement to act reasonably,

the Housing Authority can prevent the owner of a house, who does not belong to that class or fall within those circumstances, from occupying his own property. Subject only to the same requirement, the Housing Authority can even evict from property owners whose occupation has been rendered unlawful not by anything they have done but simply by the act of third parties. A

34. The existence of such power has been judged necessary by the States, and Her Majesty in Council has confirmed this view. It is not the province of the Court to suggest anything to the contrary, and certainly we have no intention of doing so. We wish to emphasise, however, that such a drastic power calls for meticulous care in its exercise and scrupulous balancing of the conflicting interests which it affects." B

While these passages may rightly be classified as obiter, I would be surprised if the Housing Authority would entertain an approach which did not fall within the ambit of the words of this Court. Likewise, I would expect the Royal Court to place due weight on the observations of this Court, as well as loyally applying the binding principles of law to which we have already referred. In the light of the judgment in Ward I turn now to consider the present case. C

Mr. Perkins, who is 36 years of age, was born in Alderney in 1959.

When he was 2 years old he was brought by his parents (with his sister) in 1961 to live in Guernsey. He was educated to begin with at Guernsey schools. His parents left with him for England in 1969. His parents retired to live in Alderney. His sister lived and continues to live in Guernsey with her husband and family. After school he obtained employment in banking in England. He married and had two children. D

He first applied to the Authority in 1988 seeking the grant of a general licence on the ground that his elderly widowed mother was living alone in Alderney and was increasingly unable to care for herself. That application appears not to have been successful; in any event the application was not made as it had to be in relation to a specific dwelling. E

In 1989 he started work with the TSB Bank Channel Islands Limited in Alderney. His mother died in 1991. The same year he was transferred by TSB to work in Guernsey. The Authority granted him an essential licence for 5 years, provided that he continued to be fully employed by TSB in Guernsey, there being no other suitable applicants with residential qualifications available to fill his post. He purchased a family home in Guernsey called "Cavalaire" at that time (to which the essential licence granted on 19 March 1991 related) and continues to live there with his family. His children are at school in Guernsey. In October 1993 he was made redundant by TSB and his employment was terminated. Accordingly his essential licence came to an end. F

He obtained temporary employment at NM Rothschild & Sons (C.I.) Limited in November 1993, and subsequently from 1 March 1994 permanent full-time employment with Rothschild Asset Management (C.I.) Limited in a responsible position, though his employment is not regarded by Rothschilds as being "essential to the community." His wife, Rosemary Perkins, is on the financial staff of the Board of Health, also holding a responsible position though not an G

A "essential" one.

B Well before he was made redundant Mr. Perkins had applied on 10 February 1993 for a housing licence for himself and his family on what he described as "compassionate grounds." The application of 10 February 1993 was rejected by the Authority by a letter dated merely "February 1993", but sent on or after 18 February 1993, because reference is made to a meeting of the Authority on that date. The application was renewed by a letter from Mr. Ferbrache on Mr. Perkins's behalf dated 12 May 1993. This further application was rejected by the Authority by letter dated 8 June 1993. On 16 July 1993 Mr. Perkins appealed to the Royal Court in respect of the decision of 8 June 1993. That appeal was overtaken by Mr. Perkins's loss of his employment with TSB, and was not pursued. However, we note that in each of the decision letters dated February 1993 and 8 June 1993, the Authority failed to have regard to the decision of this Court in Ward and failed to comply with the legal requirements laid down by this Court in Ward.

C By letter dated 3 March 1994, Mr. Ferbrache made a further application to the Authority on Mr. Perkins's behalf. By that time Mr. Perkins had obtained his permanent employment with Rothschild Asset Management (C.I.) Limited, to which (inter alia) Mr. Ferbrache made detailed reference. By further letter of 18 March 1994, Mr. Ferbrache confirmed that it was not being suggested that Mr. Perkins's employment with Rothschilds was "essential."

D By letter dated 30 March 1994, the Authority conveyed to Mr. Ferbrache its decision which is the subject of this appeal. The letter stated:-

"I refer to your letters dated 3 and 18 March 1994 and to earlier correspondence concerning Mr. Perkins and your application for a licence under the provisions of the Housing (Control of Occupation)(Guernsey) Laws 1982 to 1990 to enable Mr. Perkins to occupy the dwelling known as Cavalaire, Route de Picquerel, St. Sampson's, on the basis of his connections with Guernsey.

E On 24 March 1994 the Housing Authority reviewed this case and gave very careful consideration to your application. The Authority resolved, with regret, not to grant the licence requested.

F In reaching this decision the Authority took account of the factors set out in S.5 of the Law, a copy of which is attached. The Authority does not consider that Mr. Perkins's connections with Guernsey for the purposes of the Housing Control Laws are strong enough to justify the issue of a housing licence to enable him to occupy a controlled dwelling. His connections comprise eight years residence from the age of two to the age of ten plus three years residence from the age of thirty-one until now. In the Authority's view the twenty-one years absence is very significant.

G Your attention is drawn to the fact that under S.40 of the Law, a person who is aggrieved by a decision of the Authority to reject an application for a licence for a specific dwelling may appeal to the Royal Court on the grounds that the decision of the Authority was ultra vires or an unreasonable exercise of its powers.

An appeal under this section shall be instituted by way of summons which shall set out the material facts upon which the appellant relies, and which shall be served upon the President of the Authority within two months of the date of the notice giving the decision of the Authority." A

s.40 of the Housing Control Laws provided as follows:-

"40(1) Subject to the provisions of Section 12 and Section 12A(4) of this Law and Section 9 of the Law of 1988, any person aggrieved by any decision of the Authority under any of the provisions of this Law may appeal therefrom to the Royal Court on the grounds that the decision of the Authority was ultra vires or was an unreasonable exercise of its powers. B

(2) Any appeal under this section shall be instituted by way of summons which shall set out the material facts upon which the appellant relies and which shall be served upon the President of the Authority within two months of the date of the notice giving the decision of the Authority. C

(3) In any appeal under this section the appellant shall have the burden of proof and the final right of reply.

(4) An appeal on any question of law shall lie to the Court of Appeal from any decision in first instance of the Royal Court under this section within such period and in such manner as may be prescribed by Order of the Royal Court." D

What this means is that the appeal to the Royal Court has effectively to be based on matters of law, so that it will interfere in cases:-

(a) Where the Authority has acted outside its powers as laid down in the Housing Control Laws; E

(b) where in any other respects the Authority has erred in law; including cases in which:-

(i) The Authority has taken into account irrelevant factors or failed to take into account relevant factors;

(ii) the process by which the Authority has reached its decision is vitiated by wrong procedures or by failure to be fair (sometimes described as acting contrary to natural justice); or F

(iii) the Authority has reached a decision on the facts which no body acting reasonably and correctly directed as to the law could have reached.

The appeal to the Royal Court is accordingly one on lines similar to an application for judicial review in the English High Court. G

The appeal to the Court of Appeal is similarly limited to questions of law. Accordingly, it is not for the Royal Court or this Court to substitute its

A views for those of the Authority acting within the scope of its powers.

B The main issues in this case turn on the application of ss.4 and 5 of the Housing Control Law. I have already cited s.4 and the relevant parts of s.5, and have set out the relevant conclusions of this Court in Ward. Under s.4(b) the Authority is required to make a proper statement of its reasons. Under s.5(1) the Authority is required to take into account the factors set out in paras. (a)-(e) (the compulsory factors). Under these sections taken together, the Authority is required to give reasons showing how and why, in applying those factors, it has reached the decision to reject the application. Paras. (a), (c) and (d) of s.5(1) are not relevant for present purposes. Paras. (b) and (e) are potentially relevant.

C Under para. (b) the Authority had to consider whether the number of dwellings similar to Cavalaire and available for occupation in 1994 was, in its opinion, sufficient to meet the housing requirements of qualified residents and other persons who are essential to the community. In Ward the Court of Appeal drew specific attention to the failure of the Authority to perform this statutory duty in that case. In the present case, apart from a general statement in the decision letter to the effect that the Authority had had regard to the s.5 factors, there is no indication that the Authority actually considered at all the matters arising under this factor, and no statement of reasons.

D Mr. Roberts for the Authority sought to remedy this serious omission by introducing into his case, at paras. 15 and following, evidence as to what the Authority considered and what facts it took into account. Such an attempt to introduce evidence in this way is not permissible. Evidence which is relevant and admissible is placed before the Courts of Guernsey in civil matters (a) by agreement of parties; (b) by written evidence sworn to by affidavit; or (c) by oral sworn evidence if so ordered.

E It is not permissible for Counsel to seek to give evidence himself, in his oral address to the Court, or in his written submissions, as distinct from commenting on matters which are already in evidence.

In any event, the matters which Mr. Roberts sought to give in evidence were matters which, if and insofar as relevant, ought to have formed part of the statement of reasons which the Authority had a statutory duty to give under s.4(b).

F This Court cannot take account of matters which found no mention in the decision letter of 30 March 1994, and as to which no evidence was adduced before the Royal Court. Even if there were exceptional circumstances giving rise to the possibility that evidence extraneous to the decision letter might be admitted (there appearing to be no such circumstances in the present case) such matter would have had to be sworn to, on affidavit, by a responsible officer of the Authority with the necessary knowledge. It is unfortunate that in this respect the Authority has failed to take into account what this Court said in Ward.

G The other relevant factor in addition to s.5(1)(b) which the Authority was under a statutory duty to consider, and to give reasons in relation thereto, was the one in s.5(1)(e). It appears that this factor was also not taken properly into account, and no statement of reasons in relation to this factor

appears in the decision letter. Contrary to the views expressed in the Royal Court, S.5(1)(e) is not concerned with "essential" employment, but with employment which falls short of being "essential", as is the case with Mr. Perkins's present employment. A

Because (1) neither of these factors was properly dealt with by the Authority and (2) no statement of reasons was given in relation to them, contrary to the Authority's statutory duties, the Authority's decision in its letter of 30 March 1994 cannot stand and must be set aside. A reference to S.5 in general terms is not sufficient, nor would be a mere recital of its terms. B

At the start of his address to this Court Mr. Ferbrache asked for leave to put in further evidence consisting of an affidavit of Mr. Perkins and numerous exhibits. We refused leave. By the Court of Appeal (Housing Appeals) Rules, 1987, the power of this Court on appeals generally to receive further evidence is omitted in the case of housing appeals. This is not to say that the Court would have to be blind as to developments which have occurred since the decision of the Royal Court under appeal in circumstances in which those developments were relevant. C

Insofar as the evidence sought to be introduced by Mr. Ferbrache, related to matters since 30 March 1994, and particularly since the Royal Court's decision of 29 November 1994, such evidence was not material to the question of whether the Housing Authority's decision of 30 March 1994 could stand. Insofar as the evidence related to other matters, it could have been placed before the Royal Court in November 1994 and anyway it would not be permissible for this Court to admit such evidence under its general rules. D

Mr. Roberts, in his careful and restrained submission on behalf of the Housing Authority, submitted that for the Authority to consider fully the matters set out in S.5(1)(b) and (e) would be difficult if not impossible. I have every sympathy for the Housing Authority in their onerous task which involves balancing the interests of the individual applicant with the interests of the Guernsey community as a whole. The difficulties of which Mr. Roberts spoke consisted of obtaining the necessary body of information relevant to the S.5(1)(b) and (e) factors so as to be able to form the necessary judgments in relation to those factors in dealing with each application. This Court accepts that the view it has set out already as to the extent of the Housing Authority's statutory duties makes it necessary for the Authority to do substantially more work in relation to most applications than the more superficial considerations described by Mr. Roberts as the Authority's continuing approach. E
F

The Authority has known since this Court's decision in Ward on 28 November 1989, over five and a half years ago, that such further work was required. The rule of law requires that every citizen and every institution complies with the relevant judgments of the Courts of Guernsey. It is the duty of the Authority to exercise its powers within the law, however demanding this may be. The Housing Authority's decision of 30 March 1994 is quashed and must be remitted to the Authority for reconsideration under the law as it stood when the relevant application was made in March 1994. Mr. Perkins will then be able to put in further submissions or evidence in support of his existing March 1994 application. G

A At the time of Ward, as I have already indicated, the Housing Authority had the burden of proving that their decision was a reasonable one. That is why in paras.23 and 24 of the Ward judgment this Court stated that the Authority should have given evidence to show that its views were reasonable.

B The position was different when Mr. Perkins's application was considered in March 1994. The burden was then on Mr. Perkins to show that the Authority's decision was unreasonable or otherwise contrary to law. The normal process when an application is made and rejected and the decision to reject is appealed against should be:-

- C
- (1) First, a decision of the Authority setting out in reasonable detail its conclusions on the various factors (both the compulsory factors and any others which it regards as relevant) with sufficient reasoning to show how its conclusions have been arrived at.
 - (2) Secondly, an appeal by the applicant to the Royal Court. This might be based simply on the Authority's decision and reasoning, or it might be supported by factual evidence. If evidence is relied on and not agreed it must be by affidavit.
 - (3) Thirdly, the Authority may respond to the appeal by simply relying on its decision or it may wish to reply to the evidence of the applicant by its own evidence. If so, such evidence must be by affidavit, unless agreed.

D It will be rare that cross-examination on the affidavits will be necessary or appropriate, but it may be where, for example, there are rival experts' opinions, which can only be tested by cross-examination. It will be rare that the giving of discovery, or at all events extensive discovery, by the Housing Authority will be necessary or appropriate, but there may be cases in which some discovery will be appropriate.

E In the course of his submissions Mr. Roberts drew attention to the new Housing Control Law of 1994, under S.6 of which he considered that the same problems would not arise for the Authority. In this appeal we are not concerned with the 1994 Law, and anything I say about it is not part of our decision. I merely indicate here that I am doubtful whether the 1994 Law is to be interpreted as Mr. Roberts has suggested, and in my view similar problems (insofar as they are problems) may well arise for the Authority under the 1994 Law.

F Two other grounds were relied on by Mr. Ferbrache for allowing the appeal from the Royal Court:-

- G
- (1) that the directions given by the Deputy Bailiff to the Jurats were deficient;
 - (2) that the conduct of the hearing by the Deputy Bailiff was, by reason of the number and nature of his interruptions of Mr. Ferbrache's attempts to spell out Mr. Perkins's case, unfair, and would have given a wrong impression of that case to the Jurats.

I deal first with the directions to the Jurats. A

In my judgment the directions given to the Jurats were deficient.

Because the decision of the Authority is in any event being set aside, I will confine myself to a summary of the principal reasons for my conclusion:-

- (1) The failure to recognise the authority of the Court of Appeal decision in Ward, which I will consider later; B
- (2) the failure to give the Jurats any sufficiently clear direction as to the governing legal principles arising under the Housing Control Laws;
- (3) errors of fact which it is not necessary to enumerate;
- (4) a number of statements which were inappropriately hostile to Mr. Perkins on the facts and the law; and C
- (5) statements in relation to matters irrelevant to the issues before the Royal Court.

In my judgment the issues for the Jurats to determine, the legal framework within which such issues were to be determined, and the central points in Mr. Perkins's case, were not adequately stated for the benefit of the Jurats. The appeal from the judgment of the Royal Court would in any event have to be allowed on this ground. D

Before turning to the conduct of the hearing in the Royal Court, I must refer briefly to the Deputy Bailiff's observations in relation to the Court of Appeal's decision in Ward. At various stages during the hearing (the transcript, pp. 20 and 24-28), and in his directions to the Jurats (see pp. 7-8 and 8-9 of the directions), the Deputy Bailiff appeared to be telling the Jurats, in effect, that they could ignore the Ward decision. These observations were, in fact, misconceived. The Deputy Bailiff appeared to think that this Court had reached conclusions in Ward on the facts which were or might be ill-founded because this Court did not have an adequate knowledge of circumstances in Guernsey. If that was the Deputy Bailiff's thinking, it was erroneous. In Ward this Court was laying down the principles of law within which the Authority has to act and reach its decisions, and the Royal Court and the Court of Appeal have to act in hearing appeals from such decisions. This court did not reach any conclusions on the facts in Ward which it expressly recognised were a matter for the Authority. E F

It was wholly inappropriate to suggest to the Jurats that they could ignore this Court's decision in Ward. The rule of law requires that every person whether an individual or a legal person, and however high in status, is subject to the law. The law of Guernsey includes the judgments of the Courts of Guernsey. In the hierarchy of these Courts it is incumbent on the Royal Court loyally to give effect to the judgments of the Court of Appeal, and on both the Royal Court and the Court of Appeal loyally to give effect to the judgments of Her Majesty's Privy Council. G

I turn to the conduct of the hearing before the Royal Court.

A The final ground on which the decision of the Royal Court was questioned by Mr. Ferbrache is that, in the course of the hearing, the Deputy Bailiff interrupted Mr. Ferbrache on so many occasions that, looking at the interruptions cumulatively, and having regard to the hostile nature of many of the interruptions,

(a) first Mr. Ferbrache did not have a proper opportunity to present his client's case; and

B (b) secondly, the Jurats were likely, because of the nature of the interruptions, to be misled as to the correct approach they were to adopt on the appeal.

The task of a judge of first instance in the Guernsey Courts is not always an easy one. But it is his duty (inter alia):

C (1) not to descend into the argument at the bar;

(2) to interrupt as infrequently as possible, and to do so only when necessary for the elucidation of the advocate's submissions (or the witness's evidence);

D (3) to keep clearly in mind that, whatever his current view of the abilities of the advocate, litigant in person, or witness, or the strength of a party's case, they may be talking good sense, even though at first hearing it may appear to him not to be so.

The question here is whether the Deputy Bailiff overstepped the mark.

In my judgment the extent of the interruptions was excessive, and the the tenor of them was unduly and too regularly hostile to Mr. Perkins.

E The interruptions appear on the transcript, and they are analysed in detail by Mr. Ferbrache in his skeleton argument. I do not lengthen this judgment further by my own detailed analysis. In my judgment the interruptions would have been liable to give the impression that Mr. Perkins and his advocate were not being given a fair hearing. In my judgment the appeal from the judgment of the Royal Court must be allowed on this ground also.

It follows that in my judgment the appeal from the Royal Court should be allowed. The decision of the Housing Authority of 30 March 1994 should be quashed. Mr. Perkins's application of March 1994 should be remitted to the Authority to consider again in accordance with the law of Guernsey as stated by this Court in the present case, and by this Court in the case of Ward.

F DOREY, P.: I agree.

COLLINS, J.: I also agree.

ADVOCATE FERBRACHE: Sir, could I ask for the costs of this appeal and could I also ask for the costs of the appeal- or the hearing- in the Royal Court?

G SOUTHWELL, J.: I think that must follow in any event, yes.

ADVOCATE FERBRACHE: Thank you, sir.

A

Appeal allowed from the decision of the Royal Court, the decision of the Authority quashed and the application remitted to the Authority for reconsideration; costs awarded to the Appellant both in this Court and in the Royal Court.

JUDGMENTS OF THE GUERNSEY COURT OF APPEAL 1989 - 1992

B

The following judgments of the Court of Appeal have not previously been published in the Law Journal or elsewhere.

94. [CIVIL DIVISION - APPEAL NO. 135]

1989 SEPTEMBER 25, 26 AND NOVEMBER 28

C

JULIE ANN WARD Appellant
v.
THE STATES HOUSING AUTHORITY Respondents

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

Housing - control of occupation - application for housing licence - duties of Housing Authority

D

See 8.GLJ.50.

J.P. Greenfield, for the Appellant.

A.C.K. Day, Q.C. (H.M. Comptroller), for the Respondents.

LE QUESNE, V.-P.: On 29th April, 1988, Mrs. Julie Ann Ward applied to the Housing Authority for a licence to occupy a house called Les Clercs du Campère in St. Pierre-du-Bois. The application was made under the Housing (Control of Occupation)(Guernsey) Law, 1982, to which we shall refer as "the Housing Law". The Authority finally rejected this application on 5th July, 1988. Mrs. Ward appealed against this decision to the Royal Court, under S.40 of the Housing Law. The Royal Court dismissed her appeal on 13th December 1988. Mrs. Ward now appeals against that decision.

E

2. The Housing Law is a very formidable enactment. Under its provisions the Housing Authority wield unusually extensive powers of control over the rights of many ordinary people. This is plain from S.1:-

F

"Subject to the succeeding provisions of this Law, a person shall not occupy, or cause or permit any other person to occupy, a dwelling in this Island otherwise than under and in accordance with a licence granted by the Authority under the provisions of section 3 of this Law."

Application for a licence may be made to the Authority under Part 1 of the Law. In deciding whether to grant or refuse it, the Authority must take into account certain matters, to one of which we shall refer later, but this is not to

G

A preclude them:-

"...from taking into account such other factors as the Authority may, from time to time, deem necessary or expedient." (S.5(2)).

B Under Part II, qualified residents, who are defined in great detail, do not need a licence to occupy a dwelling. Part III is entitled "Circumstances in which a housing licence is not required." Its most important provision is that no licence is required for occupation of a dwelling inscribed in the Housing Register. Part IV provides for the compilation of this Register. The dwellings inscribed in it are in fact the more valuable and more expensive dwellings in the Island.

C 3. Mr. and Mrs. Ward came to Guernsey in July, 1985, Mr. Ward having obtained a post as a Trust Manager with Rothschilds Bank. With them they brought their daughter, who was born on 2nd August, 1982. Mr. and Mrs. Ward were both born in England, and had always lived there before they came to Guernsey. They bought Les Clercs du Campère jointly and Mr. Ward was granted a licence to occupy it. This licence was granted on the basis that Mr. Ward's employment was "by reason of his qualifications, skill or experience essential to the community" under S.5(1) of the Housing Law. By virtue of S.20(1) this meant that Mrs. Ward and the daughter were both entitled to live in the house without a licence.

D 4. At the end of 1987, or the beginning of 1988, Mr. Ward left Les Clercs du Campère and went to live elsewhere in the Island. He has never returned. Mrs. Ward began divorce proceedings in the Royal Court, and on 19th February 1988, applied to the Court for maintenance and custody of the daughter pending suit. On 14th April, 1988, the Royal Court made by consent an order providing for custody, access and maintenance. Under that order, Mr. and Mrs. Ward were to have joint custody of the daughter; Mrs. Ward was to have day to day care and control; and neither of them was to remove the daughter from the Bailiwick without the written permission of the other or the leave of the Court. The marriage was dissolved by a final order made on 15th June, 1988.

E 5. After Mr. Ward's departure, Mrs. Ward and her daughter remained in Les Clercs du Campère. Mrs. Ward was still joint owner of the house. She did not want to leave Guernsey, and was naturally anxious about her position under the Housing Law. On 29th April, 1988, Mr. Greenfield of Messrs. Carey Langlois & Co., applied to the Housing Authority on her behalf for what he called a "Compassionate Licence". The following is the text of the letter:-

F "I act for Mrs. Julie Ann Ward of Les Clercs du Campère, Rue du Campère, St. Peter's. Mr. and Mrs. Ward originally purchased a property in Guernsey in July, 1985, when Mr. Christopher Ward had obtained employment with Rothschilds Bank as a Trust Manager. Both Mr. and Mrs. Ward came over from England and purchased and occupied their matrimonial home under the provisions of an Essential Employment Licence granted to Mr. Ward.

G Regrettably, the marriage has now broken down in that Mr. Ward has left the matrimonial home and Mrs. Ward has commenced divorce proceedings on the grounds of Mr. Ward's unreasonable behaviour. This divorce petition is due to be heard in May, and assuming it is not defended, we would expect it to be made a Final Order in June, 1988.

Application is now made, therefore, on Mrs. Ward's behalf for a "Compassionate Licence" under the provisions of the Housing (Control of Occupation)(Guernsey) Law, 1982. A

Mrs. Ward is 39 years old, and the parties have one child of the marriage, Zoë Ann Ward, born on 2nd August, 1982. Both Mr. and Mrs. Ward were born and have always lived in England until they came to the Island in 1985.

They purchased their current property for £87,000, with a mortgage of £69,000, of which most is still outstanding. Although there will have been some increase in the value of their property since 1985, in view of market trends they clearly have no possible hope of purchasing an Open Market property. B

As previously stated, Mr. Ward has left the matrimonial home. Mrs. Ward is still living in the home with their five year old child Zoë. Application has been made to the Royal Court of Guernsey for an interim order in relation to custody, access and maintenance and I enclose for your records a copy of an order made by the Royal Court on 14th April, 1988. C

Mrs. Ward's current financial position is that she is entirely dependent upon the maintenance made under the terms of the order together with benefits received from the States Insurance Authority in the terms of Child Allowance and Coal Allowance. Mrs. Ward has no other income or savings whatsoever. She does have some experience in the past as a part-time book keeper and if she is permitted to remain in the Island, she will endeavour to obtain employment subject to the constraints placed upon her in looking after the child. D

I would be grateful therefore if you would treat this letter as formal application on Mrs. Ward's behalf and look forward to hearing from you when the Authority has had an opportunity of considering it. Please let me know if any further information is required." E

On 20th May, 1988, the President of the Housing Authority replied in the following terms:-

"I refer to your letter of 29th April, 1988, and to your application in principle for a licence under the provisions of the Housing (Control of Occupation)(Guernsey) Law, 1982, to enable Mrs. Ward to occupy a controlled "Local Market" dwelling in this Island. F

On 12th May, 1988, the Housing Authority gave very careful consideration to your application and took into account the factors contained in Section 5 of the Law, a copy of which is attached.

The Authority noted that Mrs. Ward has lived in Guernsey only since July 1985, and that she came to Guernsey by virtue of her husband being granted a licence as his employment with Rothschilds Bank is essential to the community. G

The Authority resolved that Mrs. Ward's connections with Guernsey are not strong enough to enable it to justify granting her a licence in the

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current housing situation.

Your attention is drawn to the fact that under Section 40 of the Law, a person who is aggrieved by a decision of the Authority to reject an application for a licence for a specific dwelling may appeal to the Royal Court, on the grounds that the decision of the Authority was ultra vires or an unreasonable exercise of its powers."

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On 15th June, Mr. Greenfield wrote as follows, asking for a review of the decision:-

"I refer to your letter dated 20th May, 1988, refusing to grant Mrs. Ward a licence to occupy a controlled "Local Market" dwelling in the Island. I would ask that you review this decision bearing in mind there is one matter raised in the original application and not referred to in your response. When Mr. Ward initially left Mrs. Ward, he declined to advise her of his address and failed to provide any maintenance for herself and their child. As a result, Mrs. Ward initiated divorce proceedings and immediately thereafter commenced an application for maintenance pending suit for herself and the child. A copy of that application dated 19th February, 1988, is enclosed. This matter eventually came before the Royal Court on 14th April, 1988, by which time the level of maintenance had been agreed between the parties but the Advocate for Mr. Ward made representations for an order that the child should not be removed from the jurisdiction of the Island of Guernsey without either the permission in writing of the other parent or the leave of the Court. This application was granted, and I refer you to the enclosed copy of the Royal Court Order and in particular para. 3 thereof.

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D

The refusal contained in your letter dated 20th May, 1988, therefore puts Mrs. Ward in a totally impossible position. In the light of the financial circumstances contained in the letter of application dated 29th April, 1988, I would submit on Mrs. Ward's behalf that it is quite impossible for her to either purchase or rent property inscribed on the Housing Register. Unless she is able to occupy a controlled "Local market" dwelling therefore she has no alternative but to leave the Island. Under the matrimonial proceedings however, the Royal Court had ordered that their child should not be removed from the jurisdiction. In the light of this predicament we would formally ask that the Housing Authority review its decision of 20th May, 1988.

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In the meantime, may it also be confirmed that Mrs. Ward may remain with her child in the matrimonial home pending the outcome of the review and any appeal subsequent thereon."

The President replied on 5th July, 1988, refusing this request:-

"Thank you for your letter dated 15th June, 1988.

The contents of your letter have been noted but there is no new information therein which was not available to and taken into account by the Authority when Mrs. Ward's application was considered on 12th May, 1988.

G

In these circumstances I regret to inform you that the Authority is not ^A prepared to consider any variation in its decision.

I have noted your request that Mrs. Ward be permitted to remain in the marital home pending the outcome of any appeal.

The Authority will consider this request when it is known whether or not your client intends to pursue an appeal.

I assume you will advise your client to make an early decision on this point, bearing in mind that her occupation of the dwelling without a licence is unlawful." ^B

6. From this decision of the Housing Authority Mrs. Ward appealed to the Royal Court. The following were the grounds of her appeal:-

"The Appellant at the hearing of this matter will refer to the ^C following:-

(a) that she was originally entitled to occupy her home under the terms of a licence granted to her husband;

(b) that it is her husband who has left the home leaving the Appellant and her young child in a financially difficult situation;

(c) that because of her financial predicament the Appellant is not in a position to own or rent property inscribed on the Housing Register; ^D

(d) that as a result of the order of the Royal Court dated 14th April, 1988, she cannot leave the Island of Guernsey without leaving her five year old child;

(e) that the refusal of the Authority would impose a great injustice on the Appellant and her family. ^E

That in all the foregoing circumstances the decision of the Authority is an unreasonable exercise of its powers and the Appellant claims costs."

7. The appeal came before the Royal Court on 13th December, 1988. At the ^F conclusion of the argument the Bailiff summed the case up to the Jurats. He told them that the burden of satisfying the Court that the decision was reasonable was on the Authority, and the standard of proof was that of a balance of probabilities. He then summarised the facts and the contentions on either side and finished by saying that Counsel for Mrs. Ward had submitted that, while the ground of the refusal was that she had very little connection with Guernsey:-

"There is this connection of three years and she has custody of the ^G child and the child has a connection with Guernsey in that it has been here since 1985, started schooling here and its connection will remain because the father will remain in Guernsey to continue his

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employment, and if a housing licence was not granted the consequences would follow that there would be a forced sale of the matrimonial home. If she was successful in her appeal for reconsideration either to the Royal Court Matrimonial Causes Division or to the Court of Appeal, then regrettably she and her child will have to leave the Island and the child would lose some contact with its father, and the Housing Authority is mistaken and unreasonable in that it only regards a licence in isolation and does not consider a wife and daughter."

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8. Thereupon the Jurats, without retiring, immediately gave their opinions. When the Bailiff asked the senior Jurat what he said, the following exchange took place:-

"JURAT JOY: My feeling is that I would adjourn the matter until the provisions of Section 3 of the Matrimonial Causes Division of 14th day of April, 1988, have been decided, until those provisions do not then apply to the ...

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THE BAILIFF: You are waiting until the Appellant applies to the Court for a variation of that Order.

JURAT JOY: Yes, and then, at that time I would then dismiss the appeal."

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All the other Jurats said they agreed with this, except Jurat Spensley, who would have allowed the appeal. There then ensued a discussion between the Bailiff and Counsel which we set out in full:-

"THE BAILIFF: Right, so it is- the Court orders that the matter should be adjourned pending an application to the Matrimonial Division of the Royal Court for a variation of clause- of paragraph 3 of the order of 14th April. I think there must be a time- and in default the appeal is dismissed. I think we must put a time limit.

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H.M. COMPTROLLER: Yes.

THE BAILIFF: It doesn't take all that long to get it to the Matrimonial Causes Division.

ADVOCATE GREENFIELD: Should the time limit be on the hearing or be on the actual...

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THE BAILIFF: Pardon?

ADVOCATE GREENFIELD: Should the time limit be on the hearing or be on the actual application?

THE BAILIFF: I think it has got to be on the application because the hearing date is not within the Appellant's ...

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ADVOCATE GREENFIELD: That is exactly my point of view.

THE BAILIFF: 15th of January?

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ADVOCATE GREENFIELD: Sir, with the Christmas intervening period I would consider that is quite reasonable.

THE BAILIFF: 15th January.

H.M. COMPTROLLER: That's a month sir, yes. That's reasonable.

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THE BAILIFF: And then we can see what happens from there, and of course, I suppose the temporary licence will continue, won't it?

H.M. COMPTROLLER: Well, strictly ...

THE BAILIFF: Because they did issue a temporary licence pending an appeal, didn't they?

C

H.M. COMPTROLLER: It's not a temporary licence. The Authority do not issue temporary licences ...

THE BAILIFF: I see.

H.M. COMPTROLLER: ... because status can then possibly be achieved. The position is that no action will be taken- has been taken in respect of her illegal occupation and I am sure that that will continue until 15th January or whatever date the...

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THE BAILIFF: The action of illegal occupation is in the hands of the Law Officers, isn't it?

H.M. COMPTROLLER: It is indeed, sir.

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THE BAILIFF: Right, perhaps you had better review this- no, we don't have to review this if- because the- I mean it- what the Court is really saying is that we will give you time to go to the Matrimonial Causes Division and then the appeal is dismissed. So you don't come back here at all, do you?

ADVOCATE GREENFIELD: Well, what happens if the application to the Matrimonial Causes Division is turned down by the Court?

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THE BAILIFF: Well, the appeal is dismissed, isn't it, I think. Yes, the appeal has been- it's adjourned pending appeal but in any event this application is turned down. It's really giving you time to go to the Matrimonial Causes Division under the, what I call temporary licence which the Comptroller doesn't like.

H.M. COMPTROLLER: Yes.

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THE BAILIFF: That's it I think, Mr. Greenfield.

A ADVOCATE GREENFIELD: Sir, I hadn't appreciated that was the...

THE BAILIFF: Yes, I think it must be. It can't be anything else, can it?

H.M. COMPTROLLER: That is right, sir. The position is, as I am seeing it, that in sense a time will be allowed. Of course, no prosecution will take place provided that the Appellant gets on with varying the Matrimonial Order.

B THE BAILIFF: What the Court has said, "We dismiss the appeal but we suggest that she should be allowed to continue to remain there pending seeking a variation of the order of the Matrimonial Causes Division." Is that right?

H.M. COMPTROLLER: Yes, sir.

C THE BAILIFF: That's it, I think. So you don't come back here at all.

H.M. COMPTROLLER: No."

The judgment as ultimately drawn up recorded that the Court:-

D "Dismissed the appeal by a majority of 11 votes to 1, but suggested that no action be taken against the Appellant in respect of her occupation of the former matrimonial home pending application to the Matrimonial Causes Division of the Royal Court for variation of the said order made on 14th April, 1988, insofar as it related to the non-removal of the said child from the said jurisdiction, on condition that such application is filed not later than 15th January, 1989."

10. Mrs. Ward appealed to this Court by a Notice dated 13th January, 1989.

E 11. The whole of the proceedings up to this point appear to have been conducted on the assumption that Mrs. Ward's occupation of Les Clercs du Campère ceased to be authorised under the Housing Law when Mr. Ward left the house. Indeed, in his letter of 5th July, 1988, which we have set out, the President of the Housing Authority stated categorically that "her occupation of the dwelling without a licence is unlawful"; and in the Royal Court on 13th December, 1988, the learned Comptroller referred to "her illegal occupation". On the first day of the hearing in this Court we drew the Comptroller's attention to S.20(1) of the Housing Law, which provides that a person does not require a licence to occupy a dwelling "as the spouse ... of a person who is ... for the time being the holder of a housing licence to occupy that dwelling." S.52(1) provided that "spouse" includes ... a person whose marriage has been terminated by divorce or has been annulled and who has not remarried." We asked the Comptroller whether Mr. Ward was still the holder of a licence to occupy Les Clercs du Campère.

F 12. The Comptroller produced the following letter written by the President of the Housing Authority to Mr. Ward on 10th June, 1988:-

"I refer to your application dated 6th June, 1988, for a licence under the provisions of the Housing (Control of Occupation)(Guernsey) Law, 1982, to enable you to occupy the dwelling known as Greenwood, Rohais, St. Peter Port, while employed as Assistant Manager by NM Rothschild and Sons (C.I.) Limited in Guernsey. A

The Housing Authority has given very careful consideration to your application and took into account the factors contained in Section 5 of the Law, a copy of which is attached. B

The Authority would regard as suitable for your occupation under "essential" licence tied to you above post, the following:-

Any self-contained dwelling with a Rateable Value of £50 or over, 1982 figures, whether or not that dwelling is separately inscribed in the Cadastre which you would rent or purchase.

The Authority has resolved, with regret, that in the present housing situation it is unable to justify the granting of the licence requested in connection with your present employment in Guernsey. C

However, the Authority noted the contents of Miss Brook's application dated 6th June, 1988, for a licence to enable her to accommodate you as a member of her household at No. 1 Greenwood, Rohais, St. Peter Port, and has resolved in all the circumstances that it will be prepared in principle to grant the licence requested, upon receipt of the following:- D

- (a) notification that the dwelling is ready for your occupation;
- (b) the date on which Miss Brook proposes to take up residence;
- (c) your current licence No. 1985/377 for cancellation. E

The licence when issued will not be transferable, and will remain valid until one year from its date of issue provided that you continue to occupy the dwelling with Miss Brook as a member of her household. At the end of this period the Authority will give due consideration to the renewal of this licence, if requested.

If you and Miss Brook wish to move from the dwelling specified on the licence, a new licence will be required. Similarly, should you wish to occupy the dwelling other than with Miss Brook as a member of her household, you would need a new licence. In the current housing situation it is unlikely that you would be granted a licence other than as specified in the previous paragraph. F

In the event, you would be advised to make application to the Authority for such a licence in principle well in advance of any change and before committing yourself in any way. G

The Authority wishes you and Miss Brook to know that this letter does not constitute a licence, and that your occupation of a controlled

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dwelling without a licence would be unlawful.

I look forward to hearing from you in due course.

Your attention is drawn to the fact that under Section 40 of the Law, a person who is aggrieved by a decision of the Authority to reject an application for a licence for a specific dwelling may appeal to the Royal Court, on the grounds that the decision of the Authority was ultra vires or an unreasonable exercise in its powers."

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The Comptroller told us that, in consequence of this letter, Mr. Ward would have surrendered his licence and it would have been cancelled; the cancellation would have been effected by striking out Mr. Ward's name from a list of holders of such licences. Since the Comptroller was unable to tell us when, and by whom, this had actually been done, we adjourned the hearing overnight to enable him to get proper instructions.

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13. The next morning, the Comptroller told us that there was no official record of cancellation of Mr. Ward's licence, and the Authority had to accept that Mr. Ward still held it.

14. It thus emerged that the Housing Authority and the Royal Court had both laboured under a misapprehension. They supposed that Mrs. Ward's occupation of Les Clercs du Campère became unlawful when Mr. Ward left. In fact it did not. The combined effect of S.20(1) of the Housing Law and the definition of "spouse" in S.52(1) was that her occupation continued to be lawful. The definition of "spouse" was repealed by S.10(o) of the Housing (Control of Occupation)(Amendment)(Guernsey) Law, 1988, which came into force on 21st July, 1988. Mrs. Ward's marriage was dissolved on 15th June, 1988, so it might be suggested that on the repeal of the definition on 21st July, 1988, she ceased to be a "spouse" for the purposes of the Housing Law and so ceased to be protected by S.20(1). We have not heard argument on the point, but it does not seem to us at all certain that the repeal should be interpreted as changing in this way the position of anyone who was already occupying a dwelling as a spouse at the date of the repeal.

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15. Mrs. Ward's occupation was therefore lawful at the time of the Housing Authority's decision. Unless its character was changed by the repeal discussed in the preceding paragraph, it was lawful at the time of the Royal Court's judgment and remained lawful at the time of the hearing before us. It follows that the Housing Authority exercised its discretion on a mistaken view of the circumstances, and the Royal Court acted under a similar mistake in dismissing Mrs. Ward's appeal.

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16. It might be argued that this mistake had little significance, because the Housing Authority, if they had realised that Mrs. Ward's occupation was lawful under S.20(1) of the Housing Law, could at once have made it unlawful by cancelling Mr. Ward's licence. Whether the Housing Authority could have cancelled the licence without Mr. Ward's agreement is not clear. The Housing Law contains no provision for cancellation of licences. It was apparently intended that the Housing Authority should rely upon the power under S.3(2) to attach conditions to the grant of a licence, and the power to get possession under S.35 for breach of a

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condition. The conditions inserted in Mr. Ward's licence related only to the period of its validity and his continued employment by NM Rothschild and Sons (C.I.) Limited, so it could never have been suggested that he was in breach. A

17. Mr. Ward could have surrendered his licence, and the Housing Authority could have tried to oblige him to do this by making the surrender a condition of allowing him to live anywhere else. (This is the line which was, in fact, adopted in the President's letter of 10th June, 1988). It is possible, therefore, that the Housing Authority, if they had realised that Mrs. Ward's occupation of Les Clercs du Campère was lawful, could without much trouble have rendered it unlawful. It is also possible that they might have come to the same decision upon her application even if they had understood that her occupation would remain lawful so long as Mr. Ward continued to hold his original licence. These, however, are matters of speculation. What appears to be certain is that, as we have said, the Housing Authority and the Royal Court both acted on a mistaken view of the circumstances. B C

18. The President's letter of 10th June, 1988, also reveals another relevant circumstance. This is that the Housing Authority had decided to issue a licence to a certain Miss Brook to authorise her to accommodate Mr. Ward as a member of her household. The Comptroller told us that Miss Brook was a qualified resident, having obtained a status declaration to that effect earlier in 1988. He also told us that this licence had been issued, and Miss Brook was accommodating Mr. Ward. The significance of this is that Mr. Ward's departure from Les Clercs du Campère had not led to any increased demand upon the Island's housing stock, except to the extent that Miss Brook may have acquired a larger dwelling than she would have needed for herself alone. D

19. The following passage in the transcript shows that this circumstance was not known to the Royal Court or to Mrs. Ward:-

"ADVOCATE GREENFIELD: ... The father's position remains that he is entitled, he does still live in the Island, he is entitled to live here presumably under the same licence which has already been granted to him. Equally, presumably, he will continue to live in the Island for the foreseeable future. E

THE BAILIFF: He still has a licence as far as we know?

ADVOCATE GREENFIELD: As far as I know, sir." F

The President of the Housing Authority clearly knew of the plan for Mr. Ward to live with Miss Brook in her dwelling when he wrote his letter of 10th June, 1988. There is nothing, however, to suggest that anyone in the Housing Authority appreciated the relevance of this to Mrs. Ward's application, or that it was taken into account when her application was being considered. Had they done so, it is impossible to suppose that they would not have informed the Court of the fact. G

20. It was originally part of Mrs. Ward's case put to the Housing Authority, and remained part of her case in the Royal Court, that refusal of her

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application would put her in a very difficult position, because it would oblige her to leave Guernsey, while under clause 3 of the order made by the Matrimonial Causes Division on 14th April, 1988, she could not remove her daughter from the Bailiwick without either Mr. Ward's permission or the leave of the Court (see para. 4 of this judgment). This difficulty- if difficulty indeed it was- has now been removed. On 26th May, 1989, the Matrimonial Causes Division, on Mrs. Ward's application and with Mr. Ward's consent, rescinded clause 3 of the order of 14th April, 1988.

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21. In this Court Mr. Greenfield took three points on behalf of Mrs. Ward. He said first that the Housing Authority, when giving notice to Mrs. Ward of the refusal of her application, had not given a statement of their reasons as required by S.4(b) of the Housing Law, nor had they given evidence in the Royal Court of matters which S.5(1)(b) of the Law obliged them to take into account. Mr. Greenfield's second point was that the Housing Authority knew at all relevant times that Mr. Ward was going to live with a qualified resident and so would not increase the demand on the Island's housing stock, but this was not disclosed in the Royal Court. Thirdly, Mr. Greenfield submitted that the Bailiff had not directed the Jurats adequately about the burden of proof, particularly in relation to S.5(1)(b).

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22. S.4(b) of the Housing Law requires the Housing Authority, when it refuses an application for a licence, to give the Applicant "a statement of the reasons why the Authority refused to grant the housing licence concerned." The President wrote, in his letter of 20th May, 1988, that the Housing Authority "took into account the factors contained in Section 5 of the Law." He went on:-

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"The Authority noted that Mrs. Ward has lived in Guernsey only since July 1985, and that she came to Guernsey by virtue of her husband being granted a licence as his employment with Rothschilds Bank is essential to the community.

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The Authority resolved that Mrs. Ward's connections with Guernsey are not strong enough to enable it to justify granting her a licence in the current housing situation."

This explains what the Authority regarded as constituting Mrs. Ward's connections with Guernsey, and also says that they did not consider them strong enough to justify a licence "in the current housing situation." It does not explain what the features of the current housing situation were which, in the Authority's opinion, made the grant of a licence to Mrs. Ward unjustifiable; nor does it explain what view the Authority took of the relevant factors of S.5 of the Housing Law.

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23. S.5(1)(b) of the Housing Law requires the Housing Authority to take into account:-

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"Whether the number of dwellings similar by reason of size or rateable value as inscribed in the Cadastre to the dwelling in respect of which the application is made, which are available for occupation at the time of the application is, in the opinion of the Authority, sufficient to meet the housing requirements of qualified residents and other persons why by

reason of their qualifications, skill or experience are essential to the community." A

The Housing Authority, according to their President, took this factor into account. They must therefore have formed some view about the number of dwellings available similar in size and rateable value to Les Clercs du Campère, and some view about the sufficiency of that number to meet housing requirements. To comply with S.4(b) they should have told Mrs. Ward what those views were. In order to support their decision before the Royal Court, they should have given evidence to show that those views were reasonable. B

24. In his argument before us, the Comptroller expanded a little the statement that "Mrs. Ward's connections with Guernsey are not strong enough to enable [the Authority] to justify granting her a licence in the current housing situation." He conceded that, if Mrs. Ward's case had stood alone, the Housing Authority's decision would have displayed no compassion; but, he said, it was in fact a very frequent case, and the Authority had to have this in mind in reaching their decision. It thus appears that the Housing Authority based their decision not simply on Mrs. Ward's circumstances, but also upon their belief that these were circumstances of very frequent occurrence (the apprehension being, presumably, that if a licence were granted to Mrs. Ward the grant of many more licences would be inevitable). This being so, it was the duty of the Housing Authority under S.4(b) of the Housing Law to tell Mrs. Ward this, and also to tell her what were the particular features of her circumstances which they believed to be of a very frequent occurrence. On these matters too they should also have given evidence to the Royal Court to show that their views were reasonable. C D

25. In two respects, therefore (set out respectively in paras. 23 and 24 above), the Housing Authority failed to comply with S.4(b) of the Law. This is not a merely formal or technical matter. An Applicant who is refused a licence is entitled, under S.40(1) to appeal to the Royal Court "on the grounds that the decision of the Authority was ultra vires or was an unreasonable exercise of its powers." An Applicant who is not told the full reasons for the refusal of the application cannot exercise this right of appeal effectively. E

26. This case is a good example of the importance of this point. If Mrs. Ward had known the views of the Housing Authority on the number of dwellings similar to Les Clercs du Campère available for occupation and their sufficiency to meet housing requirements, she might have been able to submit to the Royal Court that these were unreasonable views. Mr. Greenfield in fact suggested to us that Les Clercs du Campère was in point of value at the very top of the local market, while it was for houses at the lower end of the market that there was unsatisfied demand. Again, if Mrs. Ward had known of the view of the Housing Authority, that hers was a very frequent case, she might have been able to submit to the Royal Court that this was an unreasonable view to take of the particular combination of circumstances constituting her case. F

27. The final decision of the Housing Authority to reject Mrs. Ward's application was conveyed by the President's letter of 5th July, 1988. At that time, as we have said, the Housing Authority knew that Mr. Ward was to be accommodated by a qualified resident, so would not himself be requiring a new licence nor making any separate demand upon the housing stock. These facts were unknown to Mrs. Ward and to the Royal Court, (see paras. 18 and 19 above). G

A We do not suppose for a moment that they were deliberately suppressed by the Housing Authority, so the only possible explanation of the failure to make them known to the Royal Court is that the Authority did not appreciate their relevance. It thus appears that both the Housing Authority and the Royal Court came to their decisions without considering a relevant matter of fact.

28. The learned Bailiff started his address to the Jurats by summarising S.40 of the Housing Law. In the course of this summary he said:-

B "... on any appeal the burden of satisfying the Royal Court that the decision of the Authority was reasonable shall be discharged by the Authority, that is say the burden of proof is on the Authority and this being a civil matter, the standard of proof is that of a balance of probabilities."

C This was a perfectly accurate direction. Mr. Greenfield's complaint about it was that the Bailiff had not reiterated it later in his address, nor related it particularly to the Housing Authority's obligation under S.5(1)(b). In our judgment there was no need for him to do either of these things. His direction followed the language of the Housing Law. This language meant that the Authority had to satisfy the Court upon all the evidence, and the Jurats must have understood it in this sense. The whole address of the Bailiff was not long, and there was no reason for him to repeat himself.

D 29. S.40 of the Housing Law was repealed and a new section substituted, by the Housing (Control of Occupation)(Amendment)(Guernsey) Law, 1988. The provision of the old section placing upon the Housing Authority the burden of satisfying the Court that the decision was intra vires or reasonable, does not appear in the new section, and the final right of reply is given to the Appellant instead of the Authority. On the other hand, an appeal is instituted under the new section as under the old, by a summons to the President of the Authority:-

E "To show cause why the decision appealed from should not be set aside or varied."

We do not have to consider in this case to what extent the new section has changed the procedure on an appeal, because before us both sides agreed that the appeal to the Royal Court was governed by the old S.40.

F 30. The upshot of all this is that the proceedings in this case have been vitiated by two defects in point of law. First, the Housing Authority did not provide Mrs. Ward with a proper statement of their reasons for refusing to grant her a licence; this was a breach of S.4(b) of the Housing Law (cf. paras. 22 to 26 above). Secondly, the Housing Authority failed to take into consideration some relevant circumstances, and failed to make these circumstances known to the Royal Court (cf. paras. 17 and 27 above). The decisions of the Authority and the Court must for these reasons be set aside.

G 31. During the hearing in this Court we raised the question whether there was any evidence to support the finding of the Royal Court that the Housing Authority's decision was reasonable. Since the decision of the Court has to be set aside on other grounds, it is not necessary to reach a decision about this. We do, however, emphasise what the position in the Royal Court was. The evidence showed that Mrs. Ward had come lawfully to Guernsey as a member of her

husband's household, giving up her home in England, to enable Mr. Ward to take up employment considered essential to the Guernsey community. Mr. and Mrs. Ward bought a house jointly and lived in it with their small daughter. Mr. Ward left his wife and daughter. The question was whether in these circumstances it was reasonable to compel Mrs. Ward to get out of the home of which she was part owner, it being clear that this would in fact compel her and the child to leave Guernsey altogether. We express our surprise that all but one of the Jurats thought this so obviously reasonable that it was not necessary even to retire to discuss the question.

32. We may add that if the Jurats had retired another misunderstanding might have been avoided. In para. 8 above we have set out what followed after the Bailiff asked for the Jurats' opinions. Jurat Joy said he would adjourn the matter until application was made to the Matrimonial Causes Division, and clause 3 of the order of 14th April, 1988, ceased to apply; then he would dismiss the appeal. All but one of the other Jurats agreed with him. Yet the order made, after discussion between the Bailiff and Counsel, at the end of which Mr. Greenfield expressed some misgiving, was that the appeal be dismissed there and then, the Court merely suggesting that no action be taken against Mrs. Ward pending application to the Matrimonial Causes Division for variation of the order of 14th April, 1988. If the Jurats had formulated their opinion more precisely, as they probably would have done if they had retired, it is likely that this variation between their expressed opinion and the ultimate order would have been avoided. In the event the variation caused no difficulty, but it might well have done so if for any reason the Matrimonial Causes Division had not made the desired variation of its order of 14th April, 1988.

33. Before parting with this case we wish to make some general observations. We have referred already to the formidable character of the Housing Law. It places great and unusual power in the hands of the Housing Authority. Outside the limited class of qualified residents and the limited circumstances in which a housing licence is not required, nobody can lawfully occupy any dwelling in this Island without the Housing Authority's licence. Subject only to the requirement to act reasonably, the Housing Authority can prevent the owner of a house, who does not belong to that class or fall within those circumstances, from occupying his own property. Subject only to the same requirements, the Housing Authority can even evict from property owners whose occupation has been rendered unlawful, not by anything they have done but simply by the act of third parties.

34. The existence of such power has been judged necessary by the States, and Her Majesty in Council has confirmed this view. It is not the province of the Court to suggest anything to the contrary, and certainly we have no intention of doing so. We wish to emphasise, however, that such drastic power calls for meticulous care in its exercise and scrupulous balancing of the conflicting interests which it affects.

35. This case has revealed slackness in the administration of the Housing Law which we can only regard as highly reprehensible. The President of the Housing Authority in an official letter, described Mrs. Ward's occupation of her home as unlawful when it was not. Either the Authority's records, or their attention to them, were so defective that, after telling us through Counsel that Mr. Ward's licence had been cancelled, they had subsequently to accept

A that he still held it. Facts possibly relevant to Mrs. Ward's application, although known to the Housing Authority, were neither considered by them when they were disposing of the application nor made known by them to the Royal Court. The Authority's reasons for rejecting Mrs. Ward's application were not communicated to her fully, and evidence which the Authority should have put before the Court was not given.

B 36. We hope it will not be necessary again for any Court to draw attention to such a catalogue of shortcomings on the part of the Housing Authority.

37. For reasons which we have given, the appeal must be allowed. The decision of the Housing Authority and the Order of the Royal Court will be set aside. This will leave Mrs. Ward's position to be determined by the proper operation of the Housing Law. The Housing Authority must pay Mrs. Ward's costs in the Royal Court and in this court.

C Appeal allowed and the decision of the Housing Authority and the Order of the Royal Court set aside; costs awarded to the Respondent in this Court and in the Royal Court.

95. [CRIMINAL DIVISION - APPEAL NO. 131]

1991 OCTOBER 23, NOVEMBER 26

D THE LAW OFFICERS OF THE CROWN

v.

FRANK EDWARD HELP

Before: NEILL, HAMILTON and MACHIN, JJ.A.

Driving under the influence of drink or drugs - driving with excess alcohol - Lion Intoximeter - evidence to be adduced by prosecution - statutory instrument - judicial notice - whether proof necessary

E see paragraphs 12.GLJ.16, 31, 32.

N.J. Barnes, for the Appellant.

De V.G. Carey, Q.C. (H.M. Procureur), for the Crown.

F NEILL, J.: - This is an application for leave to appeal against a decision of the learned Deputy Bailiff (sitting alone) given on 11th December 1990, whereby he dismissed an appeal from the Acting Magistrate, Jurat Herbert Nicolle Machon (to whom we will refer as the Magistrate) given on 24th August 1990. He (the Magistrate) had found the appellant, Frank Edward Help, guilty of an offence under Section 2 (2)(a) of the Road Traffic (Drink Driving)(Guernsey) Law, 1989. This provision makes it an offence for a person to drive a motor vehicle on a road after consuming so much alcohol that the proportion of it in his breath exceeds the prescribed limit. This limit is 35 microgrammes of alcohol in 100 millilitres of breath. Mr. Help was fined £400 and his licence was suspended for 3 years.

G The case for the prosecution was that at an early hour on Sunday 13th May 1990, at around 4.15 a.m. to be precise, Mr. Help had driven his car to his home in

St. Peter Port at a time when he had consumed so much alcohol that the proportion of it in his breath exceeded the prescribed limit. He was observed by one police officer driving in an erratic manner. He was followed to his home where, on getting out of his car, he was arrested on suspicion that he was over the limit. Mr. Help was taken to the police station where he was breathalysed. This appeal involves a number of points arising out of the evidence adduced by the prosecution in order to establish the fact that Mr. Help was over the limit. A

Before turning to the facts it is convenient to comment on the provisions of the Road Traffic (Drink Driving)(Guernsey) Law, 1989. We will refer to this as "the Law". The scheme of the Law is to create offences and then to provide for how they can be proved. So far as concerns this case the relevant offence is that created by Section 2(2) of the Law. Omitting immaterial words this provides: B

"(2) If a person- C

(a) drives...a motor vehicle on a road;

after consuming so much alcohol that the proportion of it in his breath...exceeds the prescribed limit he shall be guilty of an offence."

Section 2(1) provides that in Section 2 "the prescribed limit" means (so far as relevant to this case) "35 microgrammes of alcohol in 100 millilitres of breath". Section 3(1) of the Law provides that in the course of an investigation whether a person has committed an offence under Section 2 an officer of police may require that person "to provide two specimens of breath for analysis by means of a device approved by the Island Police Committee". By Statutory Instrument No.3 of 1990 - The Road Traffic (Drink Driving)(Approved Device)(Guernsey) Order, 1990 - the Island Police Committee approved Lion Intoximeter 3000 as a device for the provision of specimens of breath for analysis. This Order came into operation on 6th March 1990. D

Section 3(3) of the Law states that a requirement under Section 3 to provide specimens of breath can only be made at a police station. Section 3(8) provides: E

"(8) Of any two specimens of breath provided by any person in pursuance of this section that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded." F

It is an offence, without reasonable excuse, to fail to provide a specimen when required to do so in pursuance of the Section (Section 3 (9)). It is provided by Section 10(2) of the Law as follows:

"(2) A person does not provide a specimen of breath...for analysis unless the specimen is sufficient to enable the analysis to be carried out, and provided in such a way as to enable the objective of the analysis to be satisfactorily achieved." G

The Law contains an important provision (Section 5) which deals with evidence in court proceedings for an offence under Section 1 or Section 2. It will be

A necessary to quote the text of some of the provisions in Section 5. Subsection (1) states that the following provisions apply to proceedings for an offence under Section 1 or Section 2. It is then provided:

B "(2) Evidence of the proportion of alcohol or any drug or a specimen of breath, provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused's breath,.....at the time of the alleged offence was not less than in the specimen;...

(3) Evidence of the proportion of alcohol or a drug in a specimen of breath, may, subject to subsections (5) and (6) below, be given by the production of a document purporting to be whichever of the following is appropriate-

C (a) a statement (including any test record document) automatically produced by the device by which the proportion of alcohol in a specimen of breath was measured and a certificate signed by an officer of police (which may but need not be contained in the same document as the statement) that the statement relates to a specimen provided by the accused at the date and time shown in the statement; and

D (b) a certificate signed by an authorised analyst as to the proportion of alcohol or any drug found in a specimen of blood or urine identified in the certificate.

E (5) A document purporting to be such a certificate, or both, as is mentioned in subsection (3)(a) above is admissible in evidence under this section only if a copy of it either has been handed to the accused when the document was produced or has been served on him not less than 7 days before the hearing, and any other document is so admissible only if a copy of it has been served on the accused not later than 7 days before the hearing; but no document is admissible if the accused not later than 3 days before the hearing, or within such time as the court may in exceptional circumstances allow, has served notice on Her Majesty's Procureur requiring the attendance at the hearing of the purported signatory of the document."

F Similar legislation has been in force in the United Kingdom for many years. The current provisions are contained in the Road Traffic Act, 1988 (Sections 4 and 5 of which create the offences, while Section 7 gives the police power to insist on breath tests) and the Road Traffic Offenders Act, 1988 (Sections 15 and 16 of which deal with evidence in court proceedings). It seems clear that the draftsman of the Guernsey Law (who conveniently aimed to put together into one enactment the relevant provisions) had those Acts, or the earlier source from which they were derived, under his eyes when he drafted the Law. It is equally clear that in certain respects the draftsman departed from these precedents. Nevertheless, reference to the United Kingdom legislation throws light on two textual errors in the Guernsey Law. In Section 5(2) of the Guernsey Law, which has been quoted above, the opening words are "Evidence of the proportion of alcohol or any drug or a specimen of breath...". The corresponding language in Section 15(2) of the United Kingdom Road Traffic Offenders Act, 1988, reads "Evidence of the proportion of alcohol or a drug in

a specimen of breath...". It would appear that in Section 5(2) of the Guernsey Law the word "or" where it appears on the second occasion is an error for "in". (Compare the opening words of Section 5(3) of the Guernsey Law where "in" is used correctly). A

A further problem with the text of Section 5 of the Guernsey Law arises in subsection (5). The opening words of this subsection are "A document purporting to be such a certificate, or both, as is mentioned in subsection 3(a) above is admissible in evidence....". The words "or both" are almost impossible to construe as they stand in that subsection. The corresponding provision in Section 16(3) of the Road Traffic Offenders Act is as follows: B

"(3) Subject to subsection (4) below-

- (a) a document purporting to be such a statement or such a certificate (or both such a statement and such a certificate) as is mentioned in subsection (1)(a) above is admissible in evidence....." C

In the case of the Section 16(3) of the Road Traffic Offenders Act the words "or both" are readily intelligible because they have been preceded by the words "a document purporting to be such a statement or such a certificate". It seems likely that the intention of the Guernsey draftsman may have been to achieve the same result. In other words, he wanted to make it a condition of admissibility both for the statement and for the certificate that a copy had been provided to the accused. (The fact that the draftsman had the statement in mind is supported by the language in subsection (5)"... is admissible in evidence ... only if a copy of it either has been handed to the accused when the document was produced...". The underlined words echo the language in subsection (3)(a) "a statement...automatically produced by the device ..."). It is, however, clear that subsection (5) fails to give effect to any such intention. There is no reference at all in the subsection to the statement automatically produced by the breathalyser device (unless this is somehow to be understood as coming within the vague general words "and any other document is so admissible..."). D

In these circumstances one has to ask the question: What is the effect under the subsection when the accused serves notice on Her Majesty's Procureur pursuant to the language which begins with the words "but no document is admissible if the accused ... has served notice... requiring the attendance at the hearing of the purported signatory of the document"? The final words ("the document") must refer to the signed certificate. It, therefore, seems reasonable to construe the earlier words "but no document is admissible.." as if they also referred exclusively to a signed certificate (this being the "document" also specifically referred to in the first eight words of the subsection). It would be an odd result if the words "but no document is admissible" were interpreted as covering the automatic statement (no express reference to this very important document having been made earlier in the subsection). The net effect is that under the Guernsey Law as drafted when a notice is duly given by the accused it is still open to the prosecution to tender the statement which is automatically produced by the breathalyser device. This result is, in fact, the same as that for which the United Kingdom Act provides expressly in Section 16(4) in these terms: E

A

(4) A document purporting to be a certificate (or so much of a document as purports to be a certificate) is not so admissible if the accused, not later than three days before the hearing or within such further time as the court may in special circumstances allow, has served notice on the prosecutor requiring the attendance at the hearing of the person by whom the document purports to be signed.

B

It has been held in England that although the certificate is rendered inadmissible if notice is duly given the automatic printout remains admissible and can be put in evidence by the operator (Temple v. Botha(1985) Crim LR 517).

C

It is now necessary to turn to the facts of this case. After the evidence of the arresting policeman had been given, Sergeant La Farge was called as a witness. He had been Duty Sergeant at the Police Station in the early morning hours of Sunday 13th May 1990 and he had carried out the breath test on the accused. He had been warned by the arresting officer of the accused's impending arrival at the Police Station. At the beginning of his evidence some document or documents were handed to him. They were not identified at that stage. The prosecutor asked him:

"Q. Sergeant, are those the records made at the time?

A. They are sir, yes, in the presence of the accused person."

D

Sergeant La Farge's interview with the accused began with certain formalities during which the Sergeant told him that he had been arrested for a suspected offence under Section 2 of the Law. The accused replied that he understood this. Sergeant La Farge did not ask any questions about the consumption of alcohol but he did ask the accused whether he was ill and he asked him about some tablets for blood poisoning which the accused had taken. The key passages in Sergeant La Farge's evidence are as follows:

E

"I then told him that I required him to provide two specimens of breath for analysis by means of an approved device. Er, the specimen with the lower proportion of alcohol in the breath will be used and the other disregarded. I told him that I had to warn him that failure to provide either of these specimens might render him liable to prosecution. I then asked him if he agreed to provide the two samples and he replied, "Yeah."

F

At this point Advocate Barnes, who represented Mr. Help before the Magistrate, interrupted to say that he intended to make a submission about the admissibility of the document produced by the breathalyser machine. It was arranged that the evidence would continue and that the legal submission would be argued at the close of the evidence. Sergeant La Farge then continued as follows:

G

"Bearing in mind sir, the Accused had said that he would take part to giving two specimens of breath for analysis. I then did the breath test. Setting up the machine. The first standard came up as 34 which means that the machine is working correctly and is able to accept samples given by the Accused. The start time was at 4.45 a.m. and the Accused gave two samples of breath. The second sample was lower which was a reading of 85. Afterwards the second standard came up which again showed that the machine was working correctly.

I then informed the Accused that he had provided two specimens of breath and the specimen of breath with the lower proportion of alcohol contained 85 microgrammes of alcohol in 100 millilitres of breath and that this exceeded the prescribed limit of 35 microgrammes in 100 millilitres of breath." A

There then followed this important exchange. The questions were being put by the prosecutor:

"Q. Sergeant, you have given evidence of the reading from the machine, can you tell the court whether you - where you wrote those readings down? B

A. They are recorded sir, on the form which I have before me.

Q. And they are notes made from your own observations off the machine.

A. Off the machine's screen, yes sir. C

Q. Perhaps you could also produce the exhibit which the machine itself also produces in these cases?

A. Sir, this is the certificate of the intoximeter print-out. At the end of the test it comes out in triplicate. These are shown to the Accused. He is invited to sign that they are in fact correct and were taken in his presence. He did in fact sign them and afterwards he retained a copy for his own use." D

There was no cross-examination. The Magistrate asked this question:

"Sergeant, just one question here. I just wish to establish the figure was 85 microgrammes."

Witness: 85, sir." E

It is unclear from this what the Magistrate was referring to when he said "just one question here". He could have been referring to what was recorded on the print-out, but it is not possible to be certain about this.

The accused gave no evidence and no other evidence was called. It follows that there was no evidence whatsoever before the Court tending to cast any doubt on the reliability of the device used on the morning of 13th May 1990. The importance of this will become clear when we deal later in this judgment with the English authorities on virtually identical legislation. F

Advocate Barnes proceeded to argue before the Magistrate that the true meaning of section 5(5) of the Guernsey Law was that no document was admissible to prove that the accused was over the prescribed limit. In his argument he gave a literal meaning to the words "but no document is admissible if the accused ... has served notice" and he contended that this meant that the automatic statement was ruled out and so was any document in the form of notes made at the time which were based on the readings taken from the device. The case was adjourned for further legal argument. G

A At the resumed hearing the prosecutor began with the following statement:

B "I will say first of all sir, that after Sergeant La Farge had given his oral evidence and at the time the matter was adjourned, the Deputy Greffier asked for Sergeant La Farge's notes including a printed - a print-out attached to them to be taken into the custody of the Court. I should make it clear that the Prosecution have not submitted those items to the Court as admissible documents in this case. The Court is at liberty to inspect them but they are not submitted by the Prosecution as evidence in the case and should be returned to the Prosecution after inspection."

C He then urged (in effect accepting the correctness of part of the submission made by Advocate Barnes) that no documents had been submitted in evidence, but that the case had been proved by the oral evidence of Sergeant La Farge who was entitled to refresh his memory by looking at his own contemporaneous note of the readings from the device.

C Advocate Barnes also argued that the evidence of the self-calibration was inadequate because no figure had been stated by Sergeant La Farge for the reading on the second calibration check. Advocate Barnes further contended that the prosecution had to prove that the officer who conducted the test had been trained in its operation and was, in effect, an expert.

D The Magistrate ruled against all the defence submissions and found the case proved.

As earlier stated, the Deputy Bailiff dismissed the appeal. His judgment may be summarised as follows:

1. He held, first, that the print-out had not been admitted in evidence and did not constitute part of the proof and that the Magistrate correctly relied on the oral evidence of Sergeant La Farge.

E 2. The evidence on the second calibration test was satisfactory because the police officer had stated that the test showed that the machine was working correctly. He held that, there being no statutory requirement in Guernsey Law for the police officer who conducted the tests to be specially qualified, the evidence was satisfactory.

The written grounds of appeal to this court criticised the evidence of Sergeant La Farge on two grounds only:

F The Sergeant (a) was unable to give evidence of the second calibration of the breath testing device and (b) no evidence was given that he was a trained operator of the device.

In the course of the argument in this court, however, Mr. Barnes widened his attack. The expanded grounds on which leave to appeal was sought may be summarised as follows:

G (i) There was no evidence that the device which had been operated was that referred to in the Statutory Instrument, namely, a Lion Intoximeter 3000.

(ii) No formal proof had been given of the Guernsey Statutory Instrument No.3 of 1990, namely, The Road Traffic (Drink Driving)(Approved Device)(Guernsey) Order, 1990. In the absence of this proof there was no evidence before the Court that the device which had been used by Sergeant La Farge was an approved device. A

(iii) No evidence was given of the higher of the two readings taken when Mr. Help gave the two specimens.

(iv) The evidence of calibration of the machine was unsatisfactory because the reading on the second calibration test was not proved. B

(v) It was not proved that Sergeant La Farge had the necessary expertise to operate the device.

(vi) The effect of giving notice under Section 5(5) was to exclude all forms of documentary evidence. This excluded both the automatic print-out and the notes made at the time of the figures which had appeared on the screen of the device. Once the automatic print-out was excluded from evidence (so ran the argument) the onus was on the prosecution to give expert evidence about the intoximeter device to show that in general Lion Intoximeter 3000 devices are scientifically exact for the purpose and that the particular device used on the morning of 13th May 1990 was an entirely accurate recorder of the proportion of alcohol in a specimen of breath. C

As regards the first of these points, the Statutory Instrument approving the Lion Intoximeter 3000 came into operation on 6th March 1990. Article 1 of the Order provided: D

"The Island Police Committee in exercise of their powers under section 3(1)(a) of the Road Traffic (Drink Driving)(Guernsey) Law, 1989, hereby approve as a device for the provision of specimens of breath for analysis the device particulars of which are contained in the Schedule hereto". E

The Schedule named the Lion Intoximeter 3000.

In his evidence Sergeant La Farge stated in the first of the passages already quoted from his testimony that the accused was told that two specimens of breath were required "for analysis by means of an approved device". The only approved device in Guernsey as at 13th May 1990 was the Lion Intoximeter 3000 and Sergeant La Farge could not have been referring to anything but this device. In a later passage in his evidence he referred to "the intoximeter print-out". F

As to the point about the failure to give strict proof of the Statutory Instrument, whatever may be the position in England (as reflected in a decision such as R. v. Clarke (1969) 2 QB 91), in Guernsey the position is that all Statutory Instruments must be lodged with Her Majesty's Greffier and he must give a receipt when he gets them (see The Statutory Instruments (Guernsey) Ordinance, 1949, section 1). The effect of that provision in this jurisdiction G is to make a Statutory Instrument which is duly deposited a public document and one which is in the hands of the Greffier, who is also a principal officer of the courts of justice, acting as he does as the Court's clerk. Accordingly,

A the judges and magistrates are entitled to take judicial notice of Statutory Instruments. On the basis of the maxim *omnia praesumuntur rite esse acta*, a court is entitled to presume that a Statutory Instrument once made has been duly deposited with the Greffier.

B We agree with the decision given on this point in the case of Russell by the Magistrate Mr. J.A.C.W. Gillett. He gave his ruling on 8th March 1991 and was upheld by the learned Bailiff on 4th October 1991. We have seen the transcript of the argument in that case before Mr. Gillett. It was stated by the Procureur, without contradiction by Mr. Barnes who appeared for the accused, that the Courts in Guernsey had never required proof of any statutory instrument. This had been the consistent practice since statutory instruments first appeared.

C As regards the point that the higher breath test reading was not specified, this is not in our view a material shortcoming in the evidence. Sergeant La Farge expressly stated that the second sample was lower and that gave a reading of 85. Manifestly the first sample gave a figure in excess of 85. How much larger was immaterial in view of the provision of Section 2(8) requiring it to be disregarded.

D As regards Sergeant La Farge's failure to state the number which came up on the second calibration test, this too is unimportant. In relation to the first calibration test he said: "The first standard came up as 34 which means that the machine is working correctly and able to accept samples given by the Accused." He then took the two specimens from Mr. Help. His evidence continues: "Afterwards the second standard came up which again showed that the machine was working correctly". It can be reasonably inferred from this evidence that Sergeant La Farge was accepting the figure of 34 as being an acceptable criterion to establish that the machine was working correctly. He must have been referring to such a figure when speaking of the second test.

E In relation to the lack of evidence about expertise, Advocate Barnes quoted an extract from Stone's Justices Manual 1990 Volume 2 page 4243 paragraph 4-8888. It is there stated:

But an officer who gives such evidence (sc. of the breath specimens and the calibration tests) must have been trained in the use and manner of performance of the device, understanding its calibration etc. (Denneny v. Harding (1986) Crim LR 254, (1986) RTR 350)

F The actual decision, however, shows that the Court was there dealing with a somewhat special case. At the trial the prosecutor had been unable to call the Station Sergeant to give evidence of the test which he had conducted. The justices refused to accept the print-out from the device as evidence, but they allowed the arresting officer, who had been present at the tests, to give evidence of his observation of the visual display reading. This was the setting in which the Court is recorded as having said that the officer who gives oral evidence about the working of the device must have been trained in its use and manner of performance and must understand its calibration. There was no evidence in that case that any steps had been taken to calibrate the machine before or after the taking of the specimens. One can quite understand that in such a situation the court should find it unsatisfactory to have evidence of a spectator without some further proof. But where, as here, the

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witness who is called is the Station Sergeant who is carrying out the tests in the Police Station as required by the statute, the position is very different. It must have been apparent to the Magistrate here that Sergeant La Farge was very competent in the operation of the machine. He showed that he knew all about the need for calibration before and after the specimens were taken, as required by Owen v. Chesters (1984) 149 JP 295, (1985) Crim LR 156, (1985) RTR 191 and the Denneny v. Harding case, and he was clearly able to operate the device and record its readings with perfect facility. His evidence could be accepted as that of a perfectly reliable and skilled witness and it was not strictly necessary for him to give an account of the training which he had received or the number of occasions on which he had successfully operated the device.

The most serious contention is the final one, which turns on the interpretation of Section 5(5). The argument which Advocate Barnes intimated to the court half-way through the evidence of Sergeant La Farge was that no document at all could be admitted by the court. He developed this to cover both the statement, i.e. the automatic print-out, any certificate which Sergeant La Farge may have given pursuant to Section 5(3)(a) and all notes made at the time based on Sergeant La Farge's observation of the device's screen. We have already indicated that we consider this sweeping interpretation of Section 5(5) to be wrong. Where notice is duly given by the accused under Section 5(5) all that is excluded is the certificate by the police officer. The statement, i.e. the automatic print-out, is not excluded. Therefore, the prosecution were here entitled to put in evidence the statement. They elected not to do so. What then is the position?

In our view, Section 5(3) is a provision which is designed to allow the prosecution to tender a document or documents instead of calling a police witness. The number of cases of drink driving is unfortunately so large that it was evidently sensible for the legislature in the United Kingdom and for the States here in Guernsey to try to secure the result that the Station Sergeant who carries out the breathalyser tests is not in every case an essential witness. But provision is made whereby his attendance can be secured if notice is given by the defence. On ordinary common law principles of evidence, we can see no objection to the Station Sergeant coming to court to give oral evidence as to how he carried out the tests and to state what readings were recorded when the specimens were taken and when the calibration tests were done. If he can do all this from memory that is perfectly satisfactory. But almost invariably he will want to refresh his memory by looking at a contemporaneous note which he made while doing the testing. This also is permitted and such notes do not themselves become evidence in the case. All this is trite Law (see Archbold 1992 Ed. page 1348 paragraph 8-73).

The contention of Advocate Barnes came to this. Where the accused serves a notice under Section 5(5) of the Law all documents are excluded. This exclusion extends to the automatic statement, the signed certificate, any contemporary notes recording the figures on the device's screen, and every other document of any description. His submission went further still. While conceding that oral evidence of what the machine recorded might be given, he argued that this by itself was insufficient. Without expert scientific testimony to show the capabilities of the type of device used and the reliability of the actual device used on the occasion in question the prosecution must fail, he argued. We consider that this gives far too sweeping

A a consequence to, what is after all, a statutory provision for the benefit of the accused. We refer, of course, to the latter part of Section 5(5) which enables the accused to give a notice which, in practice, necessitates the attendance in court of the officer responsible for the testing. Section 3 of the Guernsey Law, which we have quoted above, gives the police officer statutory power to insist upon breath tests being taken with the approved device. The whole point of approving the device is to establish that, in general, devices of the approved type are scientifically accurate; the Section 3(1) provision further assumes that the particular example of the approved type can be satisfactorily used. The whole mechanism of the Law would grind to a halt if there were a requirement that evidence had to be given about the scientific accuracy of the approved devices in general and of the specific device in particular. If such evidence is required in court once a Section 5(5) notice has been given, why should it not also be required before a Section 3 test can be carried out at all? This reduces the argument to absurdity. In our view the Guernsey Law proceeds on the basis that an approved device is sound and that particular examples of the type are also sound and scientifically reliable. If the accused wants to challenge this he is free to do so. In Cracknell v. Willis (1988) AC 450, 467; (1987) 3 AER 801, 812 c-d Lord Griffiths said, in a speech which was adopted by three other Law Lords: "In the case of a breath specimen there is of course a presumption that the machine is reliable but if that presumption is challenged by relevant evidence the magistrates will have to be satisfied that the machine has provided a reading on which they can rely before making the 'assumption'." (Dicta in that case show that it is in theory possible for the accused to mount a challenge on the basis of clear-cut evidence that he had had nothing to drink prior to the tests. Mr. Help would have been in difficulty on that score in this case in view of the other evidence.)

D There have been cases in England where the Courts have held that oral evidence can be given as to what was recorded on the screen of the device. (See, for example, the Denneny and Owen cases cited above and in addition Morgan v. Lee (1985) RTR 409 and Garner v. DPP (1989) Crim LR 583). It has never been held that such oral evidence has to be supplemented by scientific evidence of the character required by the argument of Advocate Barnes. The only judicial gloss that has been added to the statute is that there must be evidence of the proper calibration of the particular device before and after the breath tests. DDP v. Parkin (1989) Crim LR 379 is authority for the proposition that the device should be presumed to be reliable once evidence of calibration has been duly given (in the absence, of course, of evidence casting doubt on its reliability). A proposition in Phipson on Evidence 13th Ed. (1982) p.209 para. 12-34 has also been held to be applicable in this context, namely: 'In the absence of evidence to the contrary, the courts will presume that [mechanical instruments] were in order at the material time' - per Stephen Brown L.J. in Castle v. Cross (1985) 1 AER 87, 89j.

F Furthermore, Section 5(2) obliges the Court to "take into account" evidence of "the proportion of alcohol...[in] a specimen of breath." That must be a reference to the lower of the two specimens taken pursuant to the Section 3 testing procedure. It would scarcely be consistent with that provision to hold that in any case where the accused has given a Section 5(5) notice the evidence about the alcohol proportion afforded by the reading on the screen of the approved device is inherently suspect in the absence of basic scientific evidence about the reliability of the device and its type species. In this

case the accused gave specimens which Sergeant La Farge clearly considered adequate as specimens (see the language of Section 10(2) quoted above, viz. "...sufficient to enable the analysis to be carried out, and provided in such a way as to enable the objective of the analysis to be satisfactorily achieved"). Section 5(2) then obliged the Magistrate to take into account the oral evidence as to the proportion of alcohol in the lower strength specimen and he was bound by the same subsection to "assume" that the proportion of alcohol in the accused's breath at the time of the alleged offence was not less than in the specimen, there being no circumstances present to rebut that assumption.

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While upholding the conviction in this case we wish to add a comment as to procedure in future cases. In our judgment it would be good practice and would contribute to public regard for the administration of the law if the officer who is called to prove the readings recorded on the screen of the Intoximeter were to refer briefly to the following matters:

- (a) the fact that the device operated was a Lion Intoximeter 3000, that being an approved device according to the Statutory Instrument deposited with HM Greffier;
- (b) the fact that he (the operator) had been trained in its operation and had had experience of its use;
- (c) the readings recorded on the 'before' and 'after' calibration tests; and
- (d) that, if so requested, he was in a position to state the higher figure recorded on the breath tests.

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We nevertheless conclude that, in the circumstances of the present case, none of the criticisms of the conviction urged by Advocate Barnes is sustainable. We think, however, that his client was entitled to have the view of this court as to the meaning of the Drink Driving Law, particularly in view of the drafting deficiencies to which we have drawn attention and which will no doubt be considered by the responsible authorities. The appropriate order, therefore, is that we give leave to appeal, but we dismiss the appeal and we decline to make any order for costs in favour of the prosecution.

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Leave to appeal granted; appeal dismissed and no order made as to costs.

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96.

[CIVIL DIVISION - APPEAL NO. 140]

1991 APRIL 4

PETER JOHN MARTEL
CLIVE WILLIAM MAIDES
SIMON LE PELLEY

Appellants

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WALTER JAMES EUGENE WILKINSON
PATRICIA WILKINSON

Respondents

Before: KENTRIDGE, CALCUTT and BLOM-COOPER, JJ.A.

Estate agent - entitlement to commission - whether effective cause of the transaction - Court of Appeal - powers of court - appeal from decision of Jurats - whether decision perverse

C

See paragraphs 11.GLJ.1, 13.

R.J. Collas, for the Appellants.
R.A. Perrot, for the Respondents.

D

KENTRIDGE, J.: - In this appeal from the Royal Court the Respondents, Mr. and Mrs. Wilkinson, who were the Defendants in the Court below, were the owners of a house known as "Isola Bella" in the parish of St. Peter Port. They put this house on the market during May 1985 and in doing so they gave particulars of it to several Guernsey estate agents, including the Appellants, who were Plaintiffs below, namely Messrs. Martel, Maides & Le Pelley.

On or about the 18th of March, 1986, the Wilkinsons sold "Isola Bella" to a Mr. and Mrs. Beattie for £90,000. The Appellants asserted that in terms of a contract of agency between them and the Respondents they had earned their usual commission of 2% of the purchase price, that is to say £1,800.

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The Appellants claimed this amount in the Royal Court but their action failed. Each of the three Jurats who sat with the Bailiff found for the Defendants.

The Appellants have appealed to this Court on two grounds but before us Mr. Collas for the Appellants, quite rightly if I may say so, placed no reliance on the second ground.

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The first ground is that there was no evidence before the Jurats upon which they could reasonably have arrived at the conclusion that the Plaintiffs were not the effective cause of the transaction whereby the Defendants agreed to sell their property to Mr. and Mrs. I.H. Beattie for £90,000.

Eliminating the double negative, that ground is the ground that the Jurats on the evidence before them should reasonably have found that the Plaintiffs were the effective cause of the transaction and that their finding was in effect perverse.

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The facts of this case as appears from the pleadings were virtually common cause but it is necessary for me to set out at least the relevant facts in the case and I shall do so as briefly as possible.

As I have already indicated the Respondents had, in May 1985, put their house into the hands of a number of estate agents including the Appellants. The Appellants sent the Respondents a copy of their standard terms of appointment and the Respondents by their pleading do not dispute that these were contractual terms of a contract between them and the Appellants. A

The term relied on by the Appellants reads as follows (I read only the relevant part):-

"Our commission"- B

that is the commission of Martel Maides & Le Pelley,

"Our commission amounting to 2% of the purchase price will have been earned when we have introduced a purchaser and when Conditions of Sale have been signed by each party, a deposit paid and a conveyance conducted as a result thereof." C

Early in 1986 Mr. and Mrs. Beattie, who were looking for a suitable house to buy in Guernsey, got into touch with several estate agents. A number of them, including the Appellants, sent them particulars of "Isola Bella". The Beatties were at once interested in the property and on the 14th February, 1986 they approached another estate agent, one not otherwise involved in this case, with a request to make an appointment to view it on the following day.

The following day was a Saturday and that other agent either could not or would not arrange the appointment. It was in those circumstances that the Beatties got into touch with the Appellants' firm. D

The Appellants then arranged the necessary appointment and the Beatties viewed the house on the 15th February. There was no representative of the Appellants who was present on that occasion but the Appellants later arranged another appointment for the Beatties to view the house. This was early in March. Again, the Beatties viewed the house and again no representative of the Appellant was present. E

On the 4th March the Beatties decided to make an offer of £85,000. They made this offer through the Appellants and in particular through a Mr. Mauger, who was a negotiator employed by the Appellants. On the same day he conveyed this offer to the Wilkinsons, the present Respondents, who rejected it but said that they would be prepared to accept £90,000. Mr. Mauger in turn communicated this to the Beatties. That was on or about the 4th March. F

On the 17th March the Beatties made an increased offer of £87,500, which was again communicated to the Wilkinsons by Mr. Mauger, but by that time the Wilkinsons had entered into an agreement with another purchaser, Dean by name, through the agency of another firm of estate agents called Huelin Estates, sometimes confusingly referred to by the witnesses also as Sarnia Estates. This sale had been for the sum of £88,000.

The First Respondent, that is Mr. Wilkinson, told Mr. Mauger as much and informed him that a deposit had been placed, although the Conditions of Sale had not yet been signed. He indicated to Mr. Mauger that the property was no longer available and Mr. Mauger duly reported this to Mr. Beattie on the G

A selfsame day.

Mr. Mauger's evidence of this is of some importance and I turn to the transcript of the record of the trial to see what he said. He said (page 3 of the transcript) that Mr. Wilkinson had told him that a sale had previously been agreed at a price of £88,000 to another party; he would not consider the offer as submitted by Mr. and Mrs. Beattie - that is the offer of £87,500 - as agreement had been reached with another party. "He also told me that a deposit had been placed although Conditions of Sale at that time hadn't been signed."

B Mr. Mauger then went on as follows:-

"I then immediately- well, in fact, I tried to contact Mr. Beattie, this was during the early part of the afternoon. He was unavailable so I then spoke to Mrs. Beattie and informed her of the position as relayed to me by Mr. Wilkinson. I then had a 'phone call from Mr. Beattie who had since been contacted by his wife and then informed him of the position again, as explained to me by Mr. and Mrs. Wilkinson."

C He was then asked "What did Mr. Beattie say to you?" and his answer was:-

"Mr. Beattie was disappointed that the property was unavailable but that was how the matter was left. I had explained that I had been told the property wasn't available, that a sale had been agreed. He then told me that he had been looking out generally for properties in the price range of up to £90,000 and I told him that we would keep him informed of any such properties."

D Later, (page 6 of the transcript) under cross-examination by Mr. Perrot, who appeared for the Wilkinsons in the Court below as he does here, this question was put to him:-

"In fact you didn't put forward any offer for £90,000, did you?"

E Mr. Mauger's answer: "No, because no offer had been made of £90,000"

Question: "Exactly. So you were not instrumental in negotiating the sale of this property for £90,000 were you?"

Answer: "I wasn't because I had been informed that a sale had been agreed so therefore it wasn't available to anybody else."

F Mr. Beattie gave his own account of what had happened. He was very disappointed to hear that the house had been sold. He said that he would at that stage have gone to £90,000, but it must be emphasised that he at no stage made such an offer through Mr. Mauger.

His evidence gives a good indication of his own state of mind at this point. At Page 16 of the transcript, he was asked by Counsel:

G "Had you then understood that that offer, that is of £87,500, was not acceptable?"

And his answer was:

"I don't think I can put it as precisely as that. What I can say is that no offer could be made through Martel Maides because they were telling me that the property was sold." A

And a little later he repeats that. He says:-

"That the property had been sold so - well it wasn't as definite. It was rather muddled the way it was put to me. It wasn't as though the property had been sold but there was no more that could be done as far as they were concerned in that a deposit had been paid by another interested party." B

The phrase "as far as they were concerned" refers, I think, to the present Appellants.

And then, a little later on the same page in answer to a question from the Bailiff Mr. Beattie said:

"It wasn't as precise as that. It's hard to recall now but the general flavour was that, yes it wasn't really available for offers to be put in. They wouldn't consider, you know, negotiating any further because the deal as far as they were concerned was concluded through someone else, but they didn't know how much it had gone through for, they didn't know the other agents, they didn't know anything really, other than to say that was the end of it." C

The people referred to as "they" in that passage were again the Appellants. Under further questioning, Mr. Beattie was asked this: D

"As far as you were concerned there was no purpose in taking the matter any further with Martel Maides & Le Pelley?"

And he said:

"No, that's right." E

With reference to the same conversation Mr. Beattie recollected that Mr. Mauger had said that he knew of other properties and as they came in he would keep his ear to the ground- he'd keep his ear to the ground also as far as "Isola Bella" was concerned because that was "in a state of flux". He was cross-examined by Advocate Collas, the Advocate for the present Appellants. At page 23 of the transcript, again referring to this same conversation on the 17th March, Mr. Beattie was asked the following question: F

"So that indicated that agreement had been reached between the Wilkinsons and the other party?"

He replied:

"Well I didn't know. I mean, he couldn't say whether it had been sold, he couldn't say exactly what had gone on, all he could say was that he knew it hadn't been finally concluded because he was going to keep his ear to the ground as far as the property- you know, the movement was concerned." G

That conversation on the 17th March marked the end of any active part played by

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the Appellants in the sale of "Isola Bella". What happened next was described by Mr. Beattie. That very day, quite by chance, he was walking down a street, when he passed the premises of Huelins, or it may be Sarnia, and he saw in the window a photograph of "Isola Bella" with a sticker over it reading "Under Offer". He thought it odd in view of what he had been told by Mr. Mauger and he immediately went back to his own office, telephoned Huelins, and told a receptionist that he was prepared to offer £90,000 for the property. That receptionist passed this message on to a negotiator in the firm of Huelins.

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Now it transpired, although this was not known at the time to Mr. Beattie, that the sale to Dean at £88,000 had fallen through for some reason and therefore Huelins put Mr. Beattie's offer of £90,000 to the Respondents who at once accepted it. On the following day the Beatties were told of this acceptance by Huelins' negotiator.

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Mr. Beattie signed the Conditions of Sale at once. In fact, so fearful was he of losing the sale that he wouldn't wait for new conditions bearing his and his wife's name to be drawn up. He took the conditions which had been drawn up for Mr. Dean and he amended them in so far as it was necessary. He arranged certain amendments of various clauses and he signed those conditions. The sale then went through, the Wilkinsons were paid and the property was conveyed to the Beatties.

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It was in the light of these facts that the Royal Court, or more strictly the Jurats in the Royal Court, had to decide whether the Appellants had earned their commission.

In his summing up, the Bailiff, having said that the burden was on the Appellants to prove their case on a balance of probabilities, said that in coming to a decision the Jurats had to consider:

"Which agent was the effective cause of the transaction taking place."

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And, explaining the law to the Jurats, quoting from an edition of Chitty on Contracts which is not identified in his summing up, he said:

"The agent need not, however, be the immediate cause of the transaction, provided there is sufficient connection between his act and the ultimate transaction."

And then he cited a passage from Halsbury's Laws of England to the following effect:

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"Where several agents are concerned in negotiating a transaction between the principal and a particular third party, the agent entitled to remuneration is not necessarily the agent who first introduces the business to him, but the agent who is the effective cause of the transaction being completed."

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Those two passages for all present purposes sufficiently state the law. I would add, as a matter of completeness, a short passage from Bowstead on Agency, 15th Edition, Page 227 where the learned authors say:

"Subject to any special terms in the contract of agency, wherever the

remuneration of an agent is a commission on a transaction to be brought about, he is not entitled to such commission unless his services were the effective cause of the transaction being brought about." A

So far from there being any special terms in the contract of agency in this case which ran contrary to that general principle, the terms which I have already read out in my opinion fully embody that principle.

It may in a sense have been more strictly accurate for the Bailiff to have said that the sole question was whether the Appellants' services were the effective cause of the transaction because, in theory at least, it is possible for there to be two effective causes or, on the other hand, for no agent to have been the effective cause notwithstanding the employment of agents. In this regard I refer to Bowstead, Page 230, at note 29. But in this case I believe that the Bailiff put the practical question - was the effective cause of the sale the introduction of the Beatties by the Appellants when they made the appointment with the Wilkinsons, or the chance viewing by Mr. Beattie of the photograph in Huelins' window after he had been led to believe that the possibility of buying the property was at an end and that there could be no purpose in his making a further offer? B C

So the question is one of finding the effective cause of the transaction entered into eventually by the Wilkinsons.

The term "effective cause" is not susceptible of linguistic analysis. In problems of causation one usually finds that there is a succession or a chain of potentially relevant events leading to the final event in question and the choice of effective cause, or the identification of the effective cause is not, as has often been said by Judges, a matter of scientific or philosophical analysis. It is rather a matter of selecting on a common sense basis from the succession or chain of possible causes a cause which an ordinary reasonable man would say was the effective cause of what took place. The effective cause need be neither the first nor the last event in the chain of causative events. And what for many years the Courts have made clear in many contexts is that the question of effective cause is a question of fact to be decided by the triers of fact - in this case the Jurats. D E

It is true as the Appellants' Counsel, Mr. Collas, said in the course of his forceful and, if I may say so, attractive argument that in this case the primary facts were not in dispute so that the question of where the effective cause lay in relation to the final transaction could be said to be a question of inference from the primary fact. It was not a question, for example, of which witness to believe and in this connection Mr. Collas pointed out to us that in terms of the rules of the Court of Appeal (Civil Division) Guernsey Rules promulgated in 1964, one finds in Rule 12(3) the following: F

"The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require."

So that there is no doubt that we have the power to draw an inference for ourselves. The question, however, is in what circumstances this power is to be exercised when hearing an appeal on fact from the Royal Court where the facts have been found or decided on by the Jurats. G

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Mr. Collas referred us to English cases and in particular to the case of Whitehouse v. Jordan and Another (1981) 1 AER 267 in which the House of Lords pointed out that where there was no dispute of primary facts but what was in issue was not credibility, but the question of what inference was to be drawn, an Appellate Court was often just as well placed as a Trial Court to determine the proper inference to be drawn. That is so, but nonetheless the fact remains that where the appeal is an appeal from in England a jury's verdict, and in Guernsey the verdict of Jurats, it is not open to the Court on appeal to ask itself simply what inference it would have drawn if it had been the Court of first instance.

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Mr. Collas himself quite properly drew our attention to the judgment of this Court in Guille v. Mackay decided on the 14th June, 1967 in which this Court said the following, and I take this from the headnote:-

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"It is proper for the Court of Appeal to approach the Jurats' findings on a question of fact in the same way as the Court of Appeal in England would approach the findings of a Jury in an Appeal in a Civil Case which had been tried by a Judge and a Jury, i.e. that the Court would not interfere with the findings of fact made by the Jurats unless it was satisfied that there was no evidence before them upon which they could reasonably have arrived at those findings or that for any other reasons the findings of fact of the Jurats were perverse."

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Many years ago the House of Lords pointed out that even where the issue before the Appeal Court was one merely of inference nonetheless there was a distinction between the approach to be taken in an appeal in a civil case from a jury and an appeal from a judge sitting alone. See Mersey Docks and Harbour Board v. Proctor (1923) AC 253, 258-259 in the judgment of Viscount Cave, the Lord Chancellor.

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And indeed Mr. Collas in his first ground of appeal in effect accepts this principle.

Now the proper inference to be drawn in any case in relation to effective cause may be a very nicely balanced and difficult question. The views of reasonable triers of fact may differ in the selection of effective cause. A case to which we were referred by Mr. Perrot, Bartlett v. Cole (1963) 188 Estates Gazette 397, was a case where the decision on effective cause was described as a nicely balanced one and in my view the present case is another such case.

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What we have to ask ourselves is whether it can be said that there was no evidence on which reasonable Jurats could find otherwise than that the Appellants were the effective cause. Put another way, can it be said that the finding of the Jurats was so at odds with the evidence as to be perverse. I do not think that this can be said.

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The Jurats were entitled to take the view of the case which they did. There was evidence before them which provided material for the view which they in fact took. For example, they may have taken the view that when the Respondents told Mr. Mauger that their house was sold that, as far as Mr. Mauger was concerned, was the end of the matter and that as far as the Beatties were concerned the project was dead - not in the sense that the Beatties were no

longer interested in the house but in the sense that the Beatties felt that they had lost their chance of buying the house and felt that they ought to look elsewhere. ^A

They may have taken the view that the Beatties had at that stage reconciled themselves to their failure to acquire "Isola Bella". It seems to me that it was open to the Jurats to find on the evidence that it was Mr. Beattie's chance sighting of the photograph in Huelins' window which led him to put an offer of £90,000 and that that fact was effectively a new cause which broke any chain of causation which had begun with the first appointment. ^B

It must be remembered that, although the Beatties would have gone up to £90,000, they did not in fact make any offer of that sum through Mr. Mauger. They did make that offer later on the same day and the Jurats were surely entitled to ask themselves, what was it that led Mr. Beattie to make an offer in the afternoon that he had not made in the morning and they were entitled to say that it was his sighting of the photograph and the notice in the window of Huelins. ^C

On the evidence the Jurats may also have approached the matter more generally. They may have taken the view that the Appellants had not done enough to make it possible to say that they were the effective cause of the sale.

Mr. Collas referred us to the case of Peter Yates & Company v. Bullock and Another, a decision of the Court of Appeal in England, (1990) 37 Estates Gazette 75, and he said that there were certain analogies in that case to this case. ^D

There are no doubt certain resemblances but there are also differences and although that case is useful as reiterating the test of effective cause and indicating how the concept of effective cause is to be applied, it seems to me that there is not much value in making a detailed comparison of the facts of that case with the facts of this case.

What it seems to me the Jurats were entitled to take into account in this case was the fact that the Appellants were not shown to have been the first agents to bring "Isola Bella" to the attention of the Beatties. The Beatties had seen it in material circulated by many agents and indeed they had first sought to take the matter further not through the Appellants but through another agent. ^E

It was not Mr. Mauger who suggested to the Beatties that they should go to see the house, it was the Beatties who approached the Appellants to arrange the appointment. That apparently applied also to the second appointment. Mr. Mauger duly put the Beatties' offers to the Wilkinsons but he does not otherwise seem to have played any part in negotiating a sale. He did not assert in the evidence that he attempted to exercise any persuasion on the Beatties to induce them to raise their offer to £90,000. ^F

Let me say that this is in no way a criticism of Mr. Mauger or of the Appellants. He acted in a way in which many, perhaps most, estate agents would have acted and it may be true that estate agents often earn their money by doing no more than Mr. Mauger did in this case. But I have outlined the limits on what he did as indicating that whatever may be true in other cases, the Jurats could not be said to have been perverse in finding that in all the ^G

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circumstances of the case, including the events of 17th March, his services, such as they were, were not the effective cause of the sale.

I do not say that other triers of fact might not have come to a different conclusion. Other triers of fact may have been persuaded by the very cogent arguments which were put up to this Court by Mr. Collas and which were no doubt put up by him in the Court below. But, as I have said, the question that is before us is the question stated by this Court in its judgment in Guille v. Mackay.

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Can we say that there was no evidence on which the Jurats could reasonably have arrived at their findings or that the findings of the Jurats were perverse? For the reasons I have given and although it was perhaps a nicely balanced case, I think it impossible to say that on the evidence before them the Jurats were not entitled to make the finding which they did, namely a finding for the Defendants.

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In the circumstance in my opinion this appeal must be dismissed.

CALCUTT, J.: I agree.

BLOM-COOPER, J: I agree that this Appeal must be dismissed.

ADVOCATE PERROT: I would ask for costs, sir.

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ADVOCATE COLLAS: I cannot oppose that, sir.

KENTRIDGE, J.: In that case the Appeal is dismissed with costs.

Appeal dismissed, with costs.

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