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CONTENTS

HERALD

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TWENTY-SECOND ISSUE

Introduction

This edition covers the six month period from 1st July to 31st December 1996.

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 22 GLJ. followed by the paragraph number.

We apologise for the late appearance of this edition. Unfortunately no resources are provided by the States of Guernsey for the production of this Journal other than a contribution to printing costs of Court of Appeal reports, and its appearance is dependant on various busy people finding the spare moment to put it together.

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 1996.

30th September 1997

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

Tel: 01481 723355; Fax: 01481 725439

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HEADINGS USED IN THIS ISSUE

GUERNSEY

ADOPTION

Adoption allowances

1. Projet de Loi: The Adoption (Amendment) (Guernsey) Law, 1996. - Inserts section 34A into the Adoption (Guernsey) Law, 1960, under which the Children Board is enabled to make regulations prescribing the manner in which adoption allowance payments are to be made in appropriate circumstances to persons who have adopted, or intend to adopt, an infant in pursuance of arrangements made by the Children Board.

   Approved by the States 27.11.96. Awaiting Royal Sanction.

ADVOCATES

Right to representation by a Community lawyer in a Guernsey court

2. See Law Officers of the Crown v. Giroult paragraph 28.

AGRICULTURE AND ANIMALS

Animal welfare

3. Ordinance: The Slaughter of Livestock (Amendment) Ordinance, 1996. - Extends the categories of animals subject to controls under the Slaughter of Animals (Use of Humane Killers) Ordinance, 1948; transfers responsibility for operating that Ordinance to the Agricultural and Milk Marketing Board; and repeals sundry legislation relating to abattoirs.

   In force 1.8.96. (No. XVI of 1996).

BANKING, INSURANCE AND FINANCE INDUSTRIES

Insurance business

4. Projet de Loi: The Insurance Business (Financial Guarantee Insurance: Special Provisions) (Guernsey) Law, 1996. - Establishes a framework within which highly rated insurance companies specialising in guaranteeing the regularly scheduled principal and interest payments on investment grade instruments can be made subject to a special régime of stringent regulation and control, more focused and defined than the supervision ordinarily applied under the Insurance Business Law to insurers operating in or from Guernsey. The approach of the Law is to enable the States to designate by Ordinance a particular Guernsey company requiring such specially focused legislation and to impose strict controls by that Ordinance and/or by a licence issued under it.

   Approved by the States 31.7.96. Royal Sanction 19.11.96. (No. XIII of 1996). Awaiting registration.

5. Projet de Loi: The Insurance Business (Amendment) (Guernsey and Alderney) Law, 1996. - Reforms the law governing the transfer of long-term insurance business where one of the bodies concerned is a registered insurer. Under the previous system such a scheme could not be carried out without the written consent of the Commission - which consent could not be given unless the Commission was satisfied, inter alia, that relevant documentation had been served on all of the policyholders of the bodies concerned - and when the Commission had made its decision in the matter an appeal lay to the court at the instance of any person alleging he would be adversely affected. The system set out in the Projet de Loi will require the approval of the court for the carrying out of such a scheme in all cases, to be given only after due publicity, and with opportunities for the Commission and any person alleging he would be adversely affected to be heard, but with power for the court to give alternative directions as to the notification of policyholders where appropriate.

Approved by the States of Guernsey 26.9.96; by the States of Alderney 6.11.96. Awaiting Royal Sanction.

CHILDREN AND YOUNG PERSONS

Adoption

6. See paragraph 1.

Alderney - application and extension of legislation

7. Projet de Loi: The Child Protection (Amendment) (Guernsey) Law, 1996. - Amends the Child Protection (Guernsey) Law, 1972 so as to enable any of its provisions to be extended to the Island of Alderney by means of an Ordinance of the States of Deliberation.

Approved by the States 31.10.96. Awaiting Royal Sanction.

8. Projet de Loi: The Alderney (Application of Legislation) (Amendment) Law, 1996. - Adds Child Care Services to the list of transferred services contained in the Schedule to the Alderney (Application of Legislation) Law, 1948.

Approved by the States 31.10.96. Awaiting Royal Sanction.

Secure accommodation

9. Projet de Loi: The Children and Young Persons (Secure Accommodation) (Guernsey) Law, 1996. - Introduces the criteria to be applied before a juvenile is placed in accommodation provided for the purpose of restricting liberty ("secure accommodation") and enables the States to prescribe the details for the use of secure accommodation by Ordinance. An appeal will lie from the Juvenile Court to the Royal Court and be governed by the rules relating to appeals from the civil jurisdiction of the Magistrate's Court.

Approved by the States 27.11.96. Awaiting Royal Sanction.

COMPANIES

Insider dealing

10. See paragraphs 21 and 22.

Legislation

11. Order in Council: The Companies (Enabling Provisions) (Guernsey) Law, 1996. See 21.GLJ.10.

Royal Sanction 15.10.96. Registered 17.12.96. (No. XII of 1996).

CONSTITUTIONAL LAW

Crown - right of Attorney-General to intervene in private litigation where public interest involved

12. See Barclay and Barclay v. Beaumont paragraph 72.

Elections of Conseillers and Deputies

13. Ordinance: The General Elections Ordinance, 1996. - Prescribes 19.3.97 as the date for the general election of Conseillers and 23.4.97 as the date for the general elections of People's Deputies.

In force 26.9.96. (No. XXII of 1996).

Electoral expenditure

14. Ordinance: The Electoral Expenditure Ordinance, 1996. - Sets the maximum expenditure permitted by candidates at elections for Conseillers, Deputies, Constables, Douzeniers, Procureurs of the Poor and Overseers of the Poor.

In force 1.1.97. (No. XXXII of 1996).

States of Deliberation - Conseillers

15. Order in Council: The Reform (Amendment) (No. 2) (Guernsey) Law, 1996. See 21.GLJ.14.

Royal Sanction 15.10.96. Registered and in force 17.12.96. (No. XI of 1996).

Transfer of functions - Board of Industry

16. Ordinance: The Board of Employment, Industry and Commerce (Transfer of Functions) Ordinance, 1996. Transfers the functions of the States Board of Employment, Industry and Commerce and its President under the enactments set out in Schedule 1 of the Ordinance to the States of Guernsey Board of Industry and its President.

In force 31.10.96. (No. XXXI of 1996).

CONTRACT

Contract of employment - construction - implied terms

17. P was employed as an Air Traffic Controller by the States of Guernsey under the standard conditions applicable to members of the Civil Service with a special addendum relating to provisions as to retirement on grounds of ill-health in the case of Air Traffic Controllers. P gave three months notice of his intention to leave the service of the States. Shortly thereafter and before working out his notice he was certified as unfit medically to continue in his employment. P argued that there was to be implied into his terms of employment a provision that notwithstanding the fact that he had given notice to leave, the terms of the contract relating to benefits to accrue in the event of being certified as being medically unfit still applied to him. In declining to imply such a term into the contract the Deputy Bailiff followed the principles set out in Chapter 13 of Chitty on Contracts 27th Edition and the cases discussed therein.

[Nash v. States of Guernsey - Plaids de Meubles 30.12.96 (AMM/HER)].

COURTS

Magistrate's court

18. Order in Council: The Magistrate's Court and Miscellaneous Reforms (Guernsey) Law, 1996. - See 21.GLJ.15.

Royal Sanction 15.10.96. Registered 17.12.96. In force on a day to be appointed. (No. IX of 1996).

CRIMINAL LAW

Appeal to the Court of Appeal - appeal against a decision of the Royal Court refusing an application for leave to appeal from the Court of Alderney where the appellant pleaded guilty - jurisdiction of the Court of Appeal

19. A pleaded guilty in the Court of Alderney to assaulting a police officer and was fined. He later applied to the Royal Court for leave to appeal against conviction under section 2(2) of the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 on the grounds that there were exceptional circumstances whereby leave should be granted as a result of the appellant allegedly being confused and under the influence of drugs at the time the plea was entered. After adjourning to hear psychiatric evidence the Deputy Bailiff refused leave to appeal. A then applied to the Court of Appeal for leave to appeal against conviction. HELD by the Court of Appeal that the jurisdiction of the Court of Appeal did not extend to review of decisions of the Royal Court relating to the grant of leave to appeal against decisions of the Magistrate's Court (which for the purposes of the Law included the Court of Alderney).

A then applied for a certificate from the Deputy Bailiff that sufficient grounds existed to appeal to the Court of Appeal. This was refused as he doubted whether the Court of Appeal had jurisdiction to review his decision.

[Law Officers of the Crown v. Snowdon - Court of Appeal 22.7.96 (JRF/Unrep)]. For full report of judgment of Court of Appeal, see paragraph 75.

A subsequent application for special leave to appeal to the Privy Council was dismissed on 19.12.96.

Increase in Fines

20. Ordinance: The Miscellaneous Offences (Increase in Fines) Ordinance, 1996. - Increases the maximum penalties for manoeuvring a power-driven boat recklessly or at a dangerous speed and without due care and attention or without reasonable consideration (section 11 of the Boats and Vessels (Registration, Speed Limits and Abatement of Noise) Ordinance, 1970, as amended) respectively to level 5 and level 4 on the uniform scale; and for failing to give way to oncoming traffic (Articles IV(12) and XIII of the Ordonnance relative au Trafic Véhiculaire en cette Ile, 1929, as amended) to level 3 on the uniform scale for a first offence and, for every subsequent offence, to level 4 on the uniform scale.

In force 27.11.96. (No. XXXIII of 1996).

Insider dealing

21. Ordinance: The Company Securities (Insider Dealing) (Bailiwick of Guernsey) Law, 1996 (Commencement) Ordinance, 1996. - Brings the Company Securities (Insider Dealing) (Bailiwick of Guernsey) Law, 1996 (see 20.GLJ.10) into force on the 1st October, 1996.

In force 26.09.96. (No. XXI of 1996).

22. Statutory Instrument: The Insider Dealing (Securities and Regulated Markets) Order, 1996. - Specifies, for the purposes of the Company Securities (Insider Dealing) (Bailiwick of Guernsey) Law, 1996, which establishes the offence of insider dealing (see 20.GLJ.10), the securities to which the insider dealing provisions apply and the regulated markets on which the dealings must have occurred if there is to be an offence.

In force 15.11.96. (S.I. No. 32 of 1996).

Offences against police

23. Order in Council: The Offences against Police Officers (Bailiwick of Guernsey) (Amendment) Law, 1996. - See 21.GLJ.15.

Royal Sanction 23.7.96. Registered and in force 30.9.96. (No. VI of 1996). (No. VI of 1996).

Sentence - misuse of drugs - importation of Class B drug

24. An appeal against a sentence of four years' imprisonment imposed by the Royal Court on a man who pleaded guilty to four offences involving importation of cannabis resin in Guernsey where he was the local organiser of such importation was dismissed by the Court of Appeal.

[Law Officers of the Crown v. Machon - Court of Appeal 22.7.96 (JRF/AJA)]. For full report of judgment of Court of Appeal, see paragraph 74.

Sentence - misuse of drugs - importation of Class B drug

25. An appeal against a sentence of 2½ years' imprisonment concurrent imposed on a local man involved in the distribution of imported drugs following his guilty plea to two counts of importation of amphetamine upheld was dismissed.

[Law Officers of the Crown v. Cogher - Court of Appeal 14.10.96 (HMP/AMM)]. For full report of judgment of Court of Appeal, see paragraph 75.

DIRECT TAXATION

26. Ordinance: The Impôts (Budget) Ordinance, 1996 - Increases the impôt on tobacco.

In force 1.1.97. (No. XXXV of 1996).

DIVORCE AND MATRIMONIAL CAUSES

Domestic proceedings in the Magistrate's Court - definition of "parent" under section 7(1) of the Domestic Proceedings and Magistrate's Court (Guernsey) Law, 1988

27. The natural father of an illegitimate child is a "parent" for the purposes of section 7(1) of the Domestic Proceedings and Magistrate's Court (Guernsey) Law, 1988 and therefore entitled to apply for an order for the custody of a child in accordance with the provisions of that Law.

[A v. B - Magistrate's Court 11.9.96 (Magistrate Gillett) (StJAR/AJA).]

NOTE: Contrast the decision here with that in B v. Children Board (21.GLJ.8.)

EUROPEAN COMMUNITIES

Right to representation by a Community lawyer in a Guernsey court

28. D, the master of a French fishing boat who had been charged with an offence under the Fishery Limits Act 1976, applied to be represented by a French Advocate at his trial. He claimed right to legal representation was a fundamental human right. HELD by the Magistrate that the right to be represented by a foreign lawyer recognised by the European Communities Council Directive No. 77/249/EEC did not apply to Guernsey as the subject matter did not fall within the scope of Protocol 3 to the Accession of 1972. There was further no Guernsey equivalent of the European Communities (Services of Lawyers) Order 1978 (U.K. S.I. No. 1910 of 1978) which implemented the Directive. The Court was further bound by the

provisions of Bar Ordinances which confined the right of audience to Advocates of the Royal Court of Guernsey.

[Law Officers of the Crown v. Giroult - Magistrate's Court 15.11.96 (Magistrate Gillett) (HMP/JJLM)].

FOOD

Food and Drugs Legislation

29. Order in Council: The Food and Drugs (Amendment) (Guernsey) Law, 1996. - See 21.GLJ.22.

Royal Sanction 15.10.96. Registered and in force 17.12.96. (No. X of 1996).

Food safety

30. Ordinance: The Food Safety (Fishery Products) Ordinance, 1996. - Implements Council Directives 91/493/EEC and 92/48/EEC and Commission Decisions 93/25/EEC, 93/51/EEC and 93/140/EEC, as affected by the Agreement of the European Economic Area. Any person intending to operate a factory vessel or establishment must first have the Board of Health's approval. Fishing vessels on board which shrimps or molluscs are processed by cooking must be registered with the Board. Wholesale or auction markets which are not establishments must be registered with the Board. Hygiene conditions are imposed in respect of certain fishing vessels. The Board has a duty to monitor these matters. Conditions are imposed on persons placing fishery products on the market for immediate human consumption, gutting, placing aquaculture products on the market for human consumption, placing processed bivalve molluscs or other shellfish on the market for human consumption and placing live fishery products on the market. Conditions are also imposed on the importation of fishery products which are for human consumption. Contravention of such requirements constitutes a summary offence. An aggrieved person may appeal to the Ordinary Court against a decision of the Board. Powers of entry are given to the Board's authorised officers.

In force 1.10.96. (No. XIX of 1996).

31. Ordinance: The Food Safety (Live Bivalve Molluscs and Other Shellfish) Ordinance, 1996. - Implements Council Directives 79/923/EEC and 91/492/EEC, as affected by the Agreement on the European Economic Area. The Board of Health, in liaison with the Sea Fisheries Committee, is required to designate certain waters as shellfish waters and as production areas. It may designate waters as unsuitable for production. Alterations to designated areas are permitted. Designation affects the activities that can be carried out in the said areas. Any person intending to operate a dispatch centre or purification centre must first have the Board's approval. The Board has a duty to monitor these matters. Conditions are imposed on persons placing live bivalve molluscs or other shellfish on the market for immediate human consumption. Conditions are also imposed on the importation of live bivalve molluscs and other shellfish which are for

human consumption. Contravention of such requirements constitutes a summary offence. An aggrieved person may appeal to the Ordinary Court against a decision of the Board. Powers of entry are given to the Board's authorised officers.

In force 1.10.96. (No. XX of 1996).

GAMBLING

Channel Islands Lottery

32. Statutory instrument: The Gambling (Channel Islands Lottery) (Bailiwick of Guernsey) (First Prize Jackpot Draws) Order, 1996. - Contains the rules for operating a new style of Channel Islands Lottery draw involving the possible enhancement of the first (top) prize by introducing a randomly-drawn bonus ball.

In force 30.1.97. (S.I. No. 40 of 1995).

HEALTH AND MEDICINE

Abortion

33. Projet de Loi: The Abortion (Guernsey) Law, 1996. Re-enacts, in the English language, sections 1, 2 and 3 of the Loi sur L'Avortement of 1910. Those sections prohibit, respectively, the use (whether by the pregnant woman herself or by any other person) of poisons or instruments with intent to procure a miscarriage; the supplying or procuring of poisons or instruments to be unlawfully used with intent to procure the miscarriage of any woman; and the concealment of the birth of a child who has died (whether the child died before, at or after its birth).

Provides in section 3 that a person shall not be guilty of the above offences when a pregnancy is terminated by a recognised medical practitioner if two recognised medical practitioners are of opinion, formed in good faith -

(a) that the termination is immediately necessary to save the life of the pregnant woman;

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman;

(c) that the pregnancy has not exceeded its twenty-fourth week and that, at the time of the diagnosis, there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped; or

(d) that the pregnancy has not exceeded its twelfth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical

or mental health of the pregnant woman or any existing children of her family.

Treatment for the termination of pregnancy must be carried out in the Princess Elizabeth Hospital. Recognised medical practitioners who terminate a pregnancy must keep an accurate medical record of the termination.

The Board of Health can make regulations as to the manner in which a practitioner's opinion as to the necessity of the termination is to be certified, and requiring the preservation and disposal of such certificates. Regulations can also require any recognised medical practitioner who terminates a pregnancy to give notice and other prescribed information relating to the termination and can prohibit the disclosure of information given pursuant to the regulations.

Under section 5 persons are relieved from any duty, whether arising by contract or by statutory or other legal requirement, to participate in any treatment authorised by the Law to which they have a conscientious objection. This does not relieve any person of a duty to participate in treatment necessary to save the life of a pregnant woman.

The Law is to apply in Guernsey, Herm and Jethou and is to repeal, in respect of those islands, the Loi sur L'Avortement of 1910 (which remains in force as respects Alderney and Sark).

Approved 31.10.96. Awaiting Royal Sanction.

Medical Benefit

34. Ordinance: The Health Service (Benefit) (Amendment) (No. 2) Ordinance, 1996. - Amends the Health Service (Benefit) Ordinance, 1990 by amending the definition of "consultation for a medical purpose" (for which the £8 medical benefit grant is payable) and by fixing for the year 1997 prescription charges for Guernsey and Alderney.

In force 01.01.97. (No. XXIII of 1996).

INCOME TAX

Appeal to the Court of Appeal - penalty proceedings for failure to furnish information - meaning of "information"

35. The taxpayer's appeal against the decision of the Deputy Bailiff reported in 21.GLJ.28 was dismissed.

[Gold v. Administrator of Income Tax - Court of Appeal 18.10.96 (StJAR/HER)]. For full report of judgment of Court Appeal, see paragraph 80.

Partnership

36. Order in Council: The Income Tax (Limited Partnership Amendments) (Guernsey) Law, 1996. - See 21.GLJ.29.

Royal Sanction 23.7.096. Registered 30.9.96. In force 1.2.96. (No. V of 1996).

Reliefs and allowances

37. Projet de Loi: The Income Tax (Group Loss Relief Amendment) (Guernsey) Law, 1996. - Provides an opportunity, subject to prescribed conditions, for losses made by one company to be set off for income tax purposes against profits made by another company in the same group. A loss sustained in the carrying on of business by one company during an accounting period may, if and to the extent that it does not otherwise qualify for relief under certain other provisions of the Law, be set off against the assessable income of another company for the same period. The companies concerned must both be either incorporated in Guernsey or carrying on business through a permanent establishment in Guernsey, and must be members of the same group, as defined by the Projet. Certain companies subject to special tax treatment are excluded from this relief. Where an allowance has been brought forward and the company has elected that it be treated as a loss sustained in the business, the conditions referred to above must be satisfied throughout all the years for which the allowance brought forward was originally available. Claims must be made within two years, and must be consented to by the surrendering company. The new provisions apply in respect of any accounting period ending on or after 1st January, 1992.

Approved by the States 30.10.96. Awaiting Royal Sanction.

INTERNATIONAL LAW

Salvage Convention

38. Projet de Loi: The Salvage Convention (Bailiwick of Guernsey) Law, 1996. - See 21.GLJ.32.

Approved by the Chief Pleas of Sark 2.10.96. Awaiting Royal Sanction.

LAND LAW

Conveyancing procedures

39. Order in Council: The Conveyancing (Guernsey) Law, 1996. - See 21.GLJ.34.

Royal Sanction 15.10.96 Registered 17.12.96. (No. VIII of 1996).

Joint tenancy - execution of judgment against one of two or more joint tenants

40. P, a bank, had taken judgment against D in an English Court and registered it for enforcement in Guernsey. D had bought real property in Guernsey jointly and for the survivor with the intervener, they having contributed respectively 27.5 per cent and 72.5 per cent of the purchase price. The judgment was registered against the real property of D and when the property concerned was sold the parties agreed to lodge the proceeds of sale with P to clear D's debt and then to request the Court to allocate the balance of funds according to law on the supposition that P had pursued its rights against the real properties through to judgment. HELD by the Bailiff that on severance the parties to joint tenancies are entitled to equal interests in such land and therefore the net proceeds of sale would be allocated as to one-half to the defendant and one-half to the intervener.

Carpenter v. Field Aviation Limited - Plaids de Meubles 11.1.82 - considered; Le Sueur v. Le Sueur (1968) JJ 889 adopted; Bonn (en dégrèvement (1971) JJ 1971 doubted.

[Barclays Bank PLC v. Robert Curry (Paul Curry intervening) - Plaids de Meubles 18.9.96 (IHB/RPO/JMW)].

LANDLORD AND TENANT

Notice to quit - breach of covenant - effect

41. A landlord issued a notice to quit against a tenant on the grounds of a breach of covenant involving the depositing of rubbish around the premises. The Jurats dismissed an action for eviction on the basis that the proper procedure was for the notice to be served setting out the nature of the breach complained of and the action required to remedy it. In the same way as notice is served under section 146 of the Law of Property Act 1925 the service of the notice must be followed by a reasonable period of time to allow the tenant to remedy the breach if capable of being so remedied.

[Domaille v. Harbour View Oriental Restaurant Limited (Plaids de Meubles) 31.7.96 (JDL/RJD)].

PAROCHIAL MATTERS

Parochial taxation

42. Projet de Loi: The Parochial Taxation (Reserve Funds) (Guernsey) Law, 1996. - Amends the Loi Relative à la Taxation Paroissiale of 1923 (under which it has been generally accepted that parishes may not levy tax in excess of their projected requirements for the year) by enabling parishes to establish and maintain a reserve fund of a specified maximum sum in order to meet certain contingencies, and requiring appropriate sanction for the utilisation of that reserve fund. Only one such fund may be established by any parish, up to a maximum of £50,000 or such other sum as

the States may from time to time specify by Ordinance (disregarding accrued interest), and subject to the limitation that no more than twenty per cent of the mean average of the total sums raised in that parish during each of the three previous calendar years by way of local taxation may be raised in any one year towards the establishment or maintenance of such a fund. The reserve fund may be employed only for capital projects and extraordinary repairs. Any expenditure from the reserve fund must be sanctioned by a parish meeting (whether the normal annual meeting or an extraordinary meeting) and approved, as in the case of any confirmation of a local tax, by the Royal court.

Approved by the States 27.11.96. Awaiting Royal Sanction.

PRACTICE AND PROCEDURE

Appeal to the Court of Appeal against finding a fact by Jurats - bias - alleged bias of Jurats - application to strike out grounds of appeal

43. The appellant company which throughout the proceedings was represented by its managing director had made a claim against the respondents that they had when they were in the employ of the company misappropriated monies of the company. At the trial the Jurats had found in favour of the respondents. Preliminary to the appeal to the Court of Appeal the appellant sought an order that the Jurats who sat in the Royal Court during the proceedings the subject of appeal and the Jurats and former Jurats who sat on earlier proceedings between the Appellant's managing director and the respondents, and the father of the second respondent should answer a questionnaire relating the to their involvement in freemasonry. HELD by the Court of Appeal after consideration of Guille v. Mackay (Civil Appeal No. 2), Bordeaux Vineries Ltd. v. States Board of Administration 16.GLJ.85 and Law Officers of the Crown v. De Bourgonnière 1979 Criminal Appeal No. 14 that the application was misconceived and should fail.

The Court of Appeal went on to consider the respondents' application to strike out certain parts of the grounds of appeal lodged by the appellant. HELD by the Court of Appeal:-

(1) that as successor to the Cour des Jugements et Records the Court was of the opinion that it had power to strike out pleadings. However, the Court preferred to proceed by applying the principles under which the Court of Appeal in England operates the exercise of its jurisdiction in respect of striking out. Grounds 1, 2 and 3 of the appeal alleged that the majority of the Jurats in the case under appeal and in the previous action in 1986 were freemasons as were the father and brother of the second respondent and that accordingly they were biased. These grounds would be struck out.

(2) A ground relating to the conduct of the respondents' advocate throughout the proceedings was to be struck out as being scandalous and vexatious.

The Court emphasised that in coming to the conclusions to strike out it considered the principle that the power to strike out should be used sparingly and confined to clear and obvious cases should be followed.

At the hearing of the substantive appeal the Court adopted the judgment of the Court in the case of Guille v. Mackay to the effect that the Court will not interfere with the findings of fact made by the Jurats unless satisfied that there was no evidence before them upon which they could have reasonably have arrived at their findings or that those findings were perverse and there being no dispute that the Learned Deputy Bailiff had summed up the case fairly and put both sides to the Jurats the appeal would be dismissed.

[Vekaplast Windows (C.I.) Limited v. Jehan and Jehan - Court of Appeal 22,23,24.7.96, 15,16,18.10.96 (Unrep/JPG)]. For full report of Court of Appeal judgments see paragraphs 77, 78 and 79 .

Evidence - Copy documents produced on Discovery differing from originals produced at Trial

44. In a lengthy civil trial concerning work carried out by marine engineers it was found that with a number of documents produced there were material discrepancies between the copies produced on discovery (which had found their way into the bundles for the Court) and the originals that were produced at Trial. The Deputy Bailiff observed that when copy documents were produced it was incumbent on Counsel before trial to verify that the copy in the Court Bundle was indeed a true copy of the original in its then state.

[Chicks Marine Ltd. v. Kilpatrick - Plaids de Meubles 25.9.96 (NJB/STJR)].

Summary judgment - principles on which the Royal Court should act

45. The Court of Appeal, in allowing an appeal against the refusal of the Royal Court to give summary judgment in respect of the capital amount of a loan made to the defendants, HELD that the provisions of Rules 17 to 21 of the Royal Court (Civil) Rules 1989 should be interpreted in the way in which the Supreme Court of England and Wales interprets Order 14 of the Rules of the Supreme Court.

[Monument Trust Co. Ltd. v. Gaudion and Wife - Court of Appeal 18.10.96 PTRF/JDL)]. For full judgment of Court of Appeal, see paragraph 81.

PUBLIC ASSISTANCE

Change of limit

46. Ordinance: The Central Outdoor Assistance Board Regulations (Amendment) Ordinance, 1996. - Amends the Central Outdoor Assistance Board Regulations, 1963 (set out in the Schedule to the Central Outdoor Assistance Board Regulations Ordinance, 1963) by fixing the limit on weekly income for receipt of outdoor assistance and the ordinary maximum rates of outdoor assistance.

In force 10.01.97. (No. XXVIII of 1996).

RECREATION

Places of Recreation

47. Ordinance: The Places of Recreation (Amendment) Ordinance, 1996. - Amends the Places of Recreation Ordinance, 1975 in various minor respects, including an increase in prescribed fines. Allows the Board of Administration by order to amend the list of places to which the restrictions set out in the Ordinance apply.

In force 31.07.96. (No. XVII of 1996).

48. Statutory instrument: The Places of Recreation Order, 1996 - Amends the Places of Recreation Ordinance, 1975 by replacing with amendments the schedule of places to which the restrictions set out in the Ordinance apply.

In force 02.10.96. (S.I. No. 27 of 1996).

ROAD TRAFFIC AND PUBLIC TRANSPORT

Driving Licences

49. Ordinance: The Driving Licences (Amendment) (Guernsey) Ordinance, 1996. - Amends the Driving Licences (Guernsey) Ordinance, 1995 so as to entitle holders of Category 6 licences issued under the earlier legislation who do not meet the requirements of section 25(3) of the 1995 Ordinance upon the expiration, surrender or revocation of their old licences to receive Endorsed Category C + E licences permitting the holders to drive such vehicles in the Bailiwick of Guernsey only.

Made 31.7.96. Deemed to be in force 1.9.95. (No. XVIII of 1996).

50. Ordinance: The Driving Licences (Amendment) (No. 2) (Guernsey) Ordinance, 1996. - Amends the Driving Licences (Guernsey) Ordinance, 1995 by inserting a new section 2A under which certain riders of motor cycles holding provisional Category P, A or A1 licences must also hold a certificate of completion of an approved training course before being permitted to drive such vehicles on a public highway.

In force 1.1.97. (No. XXX of 1996).

SOCIAL SECURITY

Attendance and Invalid Care Allowances

51. Ordinance: The Attendance and Invalid Care Allowances Ordinance, 1996 - Fixes the annual income limit for receipt of invalid care allowance at £49,000. Fixes the weekly rate of attendance allowance and invalid care allowance.

In force 06.01.97. (No. XXVII of 1996).

Rates of contribution

52. Ordinance: The Social Insurance (Rates of Contributions and Benefits, etc.) Ordinance, 1996 - Fixes the percentage rates of social insurance contributions; the upper weekly and monthly earnings limits; the rates of all social security benefits, allowances and pensions; and the amount of the maternity grant and death grant. Also fixes the General Revenue contribution to the Guernsey Health Service Fund Allocation.

In force 01.01.97 as to part and 06.01.97 as to remainder. (No. XXV of 1996).

Reciprocal Agreement with Malta

53. Ordinance: The Social Security (Reciprocal Agreement with Malta) Ordinance, 1996. - Gives effect to the Convention on Social Security between the United Kingdom and Malta which provides for reciprocity in matters of social security between Guernsey and Alderney and Malta.

Made 26.09.96. Deemed in force 01.09.96. (No. XXIV of 1996).

Supplementary Benefit

54. Ordinance: The Supplementary Benefit (Implementation) (Amendment) Ordinance, 1996. - Fixes the limit of weekly income for supplementary beneficiaries and the normal requirements of persons in need of a supplementary benefit. Makes other minor amendments to the Supplementary Benefit (Implementation) Ordinance, 1971.

In force 10.01.97. (No. XXVI of 1996).

WATER

Charges

55. Ordinance: The Water Charges (Amendment) Ordinance, 1996. - Increases water charges.

In force 1.1.97. (No. XXIX of 1996).

WILLS AND ADMINISTRATION OF ESTATES

Bequest to charities which could not be identified as being in existence at testator's death - section 54 of the Trusts (Guernsey) Law, 1989 - procedure

56. The Advocate acting on behalf of the executrix of the estate of the deceased's estate sought directions concerning (a) two specific bequests of the sale proceeds of jewellery to unidentifiable bodies concerned with apparently promoting the interests of German Shepherd Dogs and (b) a bequest of residue to another unidentifiable body concerned with rescuing

shepherd dogs. Giving preliminary directions the Deputy Bailiff ruled that the residuary bequest probably failed, the residuary estate having been bequeathed "in trust for such of the following charities as shall be in existence at the [testatrix's] death if more than one in equal shares". With regard to the specific bequests relating to the proceeds of sale of the jewellery consideration would have to be given as to whether there was a general charitable intention and whether section 54 applied. In Guernsey there was no procedure such as there was in England for involving the Attorney General in cases such as this, but subject to further argument he would be minded to ask the Procureur to appear as amicus curiae on the basis that his costs would be met out of the estate. As the will which had been made in England also dealt with Guernsey real estate there could be no question of section 54 applying to the proceeds of sale of the testatrix's Guernsey realty as the Trusts (Guernsey) Law, 1989 had no application to a trust of real estate.

[In re Rossiter deceased - Plaids de Meubles 13.11.96 (PMAP)].

GUERNSEY STATUTORY INSTRUMENTS

57. 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 Weights and Measures (Measuring Equipment) (Liquid Fuel and Lubricants) Regulations, 1996	11.7.96	12.7.96	19
The Prohibited and One-Way Streets (Amendment) Order, 1996	15.7.96	15.7.96	20
The Identification of Bovine Animals Order, 1996	16.7.96	17.7.96	21
The Milk (Retail Prices) (Guernsey) Order, 1996	26.7.96	4.8.96	22
The Electoral Roll (Specified Sum for Candidates' Copies) Regulations, 1996	26.7.96	1.1.97	23
The Health Service (Medical Appliances) (Amendment) (No. 2) Regulations, 1996	6.8.96	1.1.97	24
The Collective Investment Schemes Rules 1988 (Amendment) Rules 1996	10.9.96	169.96	25
The Parking Places (Amendment) No. 2 Order, 1996	16.9.96	22.9.96	26
The Places of Recreation Order, 1996 (see paragraph 48)	27.9.96	2.10.96	27
The Prohibited and One - Way Streets (Amendment) (No. 2) Order, 1996	7.10.96	7.10.96	28
The Social Insurance (Contributions) (Amendment) Regulations, 1996	10.10.96	6.1.97	29
The Social Insurance (Increase of Benefit) Regulations, 1996	10.10.96	6.1.97	30
The Social Insurance (Unemployment, Sickness and Invalidity Benefit) (Amendment) Regulations, 1996	10.10.96	5.1.97	31
The Insider Dealing (Securities and Regulated Markets) Order, 1996 (see paragraph 22)	15.11.96	15.11.96	32

The Income Tax (Guernsey) (Valuation of Benefits in Kind) Regulations, 1996	5.12.96	2.1.97	33
The Post Office (Inland Post) (Amendment) Order, 1996	5.12.96	2.1.97	34
The Post Office (Overseas Letter Post) (Amendment) Order, 1996	5.12.96	2.1.97	35
The Post Office (Overseas Parcel Post) (Amendment) Order, 1996	5.12.96	2.1.97	36
The Income Tax (Guernsey) (Annuity Scheme Contribution Limits) Regulations, 1996	5.12.96	1.1.97	37
The Gambling (Channel Islands Lottery) (Bailiwick of Guernsey) (First Prize Jackpot Draws) Order, 1996 (see paragraph 32)	18.12.96	30.1.97	38
The Prohibited and One - Way Streets (Amendment) (No. 3) Order, 1996	23.12.96	23.12.96	39

UNITED KINGDOM STATUTORY INSTRUMENTS

58. 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 Weights and Measures (Guernsey and Alderney) Order (Northern Ireland), 1996	177
The Social Security (Malta) Order, 1996	1927
The Wireless Telegraphy (Licence Charges) (Amendment) Regulations, 1996	1464

ALDERNEY

AGRICULTURE AND ANIMALS

Control of Birds

59. Ordinance: The Protection of Wild Birds (Amendment) (Alderney) Ordinance, 1996. - Amends the Protection of Wild Birds (Alderney) Ordinance, 1950 by permitting the culling of wild birds (by means of the taking of eggs) where necessary by reason of a population growth in a particular species or type of bird such as to be a public nuisance.

Ordinance of the States of Alderney of 19.7.96.

AVIATION AND AIRPORTS

Air Transport Licensing

60. Order in Council: The Air Transport Licensing (Alderney) Law, 1996. - See 21.GLJ.43.

Royal Sanction 23.7.96. Registered 30.9.96. (No. VII of 1996).

BUILDING AND DEVELOPMENT CONTROL

Designated Area

61. Ordinance: The Building and Development Control (Designated Area) (Alderney) Ordinance, 1996. - Takes Fort Houmet Herbe outside the green belt within which no development permission may be granted.

Ordinance of the States of Alderney of 4.9.96.

CHILDREN AND YOUNG PERSONS

Extension of certain Guernsey legislation to Alderney

62. See paragraphs 7 and 8.

CONSTITUTIONAL LAW

Constitution of the States

63. Order in Council: The Government of Alderney (Amendment) Law, 1996. - See 21.GLJ.47.

Royal Sanction 26.6.96. Registered 20.8.96. (No. IV of 1996).

CRIMINAL LAW

Appeal from Court of Alderney to Royal Court, Court of Appeal and Privy Council

64. See paragraphs 19 and 75.

DWELLINGS PROFITS TAX

Abolition

65. Projet de Loi: The Dwellings Profits Tax (Alderney) (Repeal) Law, 1996. - Repeals the Dwellings Profits Tax (Alderney) Law, 1989 which taxed, in prescribed circumstances, the chargeable profit accruing on the sale, etc., of a dwelling.

Approved 4.12.96. Awaiting Royal Sanction.

FEES

Tourist fees

66. Ordinance: The Fees (Amendment) (Alderney) Ordinance, 1996. - Amends the Fees (Alderney) Ordinance, 1990 by increasing to £5 per bed the fee for a permit under the Tourist (Alderney) Law (Fees) Ordinance, 1983.

Ordinance of the States of Alderney of 4.12.96.

FISHING

Parlour Pots

67. Ordinance: The Fishing (Parlour Pots) (Prohibition) (Amendment) Ordinance, 1996. - Amends the Fishing (Parlour Pots) (Prohibition) Ordinance, 1995 by replacing the definition of "parlour pot" the use of which is prohibited in Alderney waters.

Ordinance of the States of Alderney of 4.9.96.

GAMBLING

Gambling with strangers

68. Projet de Loi: The Gambling (Amendment) (Alderney) Law, 1996. - Amends section 8 of the Gambling (Alderney) Law, 1975 by inserting new subsections (2A) and (2B), which enable the making of an Ordinance regulating when, how and with whom certain forms of gambling with strangers will be regarded as lawful gambling, and section 11(1), increasing the maximum penalties for a first offence under the 1975 Law or any Ordinance made thereunder to level 5 on the Alderney uniform scale

and, for any such subsequent offence, to twice level 5 on the Alderney uniform scale.

Approved by the States of Alderney 4.12.96. Awaiting Royal Sanction.

HOUSING

Exemption

69. Ordinance: The Housing (Exemptions) (Alderney) Ordinance, 1996. - Prescribes a Mrs. Birmingham for the purposes of section 1(1)(c) of the Housing (Control of Occupation and Development) (Alderney) Law, 1994. The effect is that the Building and Development Control Committee ceases to be debarred by the terms of the 1994 Law from granting Mrs. Birmingham permission under the Building and Development Control (Alderney) Law, 1975 for the construction of a dwelling. The dwelling in relation to which permission may be granted is also described in the Ordinance.

Ordinance of the States of Alderney of 6.11.96.

Restrictions on grant of permission

70. Projet de Loi: The Housing (Control of Occupation and Development) (Amendment) (Alderney) Law, 1996. - Amends the Housing (Control of Occupation and Development) (Alderney) Law, 1994 by providing that (in addition to the other criteria set out in the 1994 Law) the Building and Development Control Committee can only grant permission under the Building and Development Control (Alderney) Law, 1975 for the construction of a dwelling to a person who is the owner of the land upon which the dwelling is to be built.

Approved 6.11.96. Awaiting Royal Sanction.

RATING

71. Ordinance: The Occupiers' Rate (Level for 1997) Ordinance, 1996: Sets the occupiers' rate for the calendar year 1997 on property at 152 pence in the pound of rateable value.

Ordinance of the States of Alderney of 2.10.96.

SARK

CONSTITUTIONAL LAW

Brecqhou - claim that not part of Sark - right of H.M. Procureur to intervene in proceedings

72. PP, who own Brecqhou, sued D, the Seigneur of Sark, with a view to obtaining a declaration that Brecqhou forms no part of the Fief of Sark and for a number of consequential orders including one to recover the congé paid to D on their acquisition of Brecqhou. H.M. Procureur and Receiver General on behalf of the Crown applied to intervene in the proceedings on the grounds that the Crown has an interest (inter alia) in the extent of the Fief of Sark, the extent and the interpretation of the Letters Patent and Orders in Council relating to Sark and the extent of the jurisdiction of the Court of the Seneschal. PP objected to leave being given to the Crown to intervene. HELD by the Bailiff, his duty was to consider whether on the facts pleaded by the Plaintiffs, the applicant could reasonably show that if the Plaintiffs were to be successful the action of the Plaintiffs might affect the Crown's prerogatives or the Crown's proprietary rights. PP conceded that the Crown had an interest in the question of whether it was entitled to exercise Seigneurial rights over Brecqhou as a feudal superior. In the Bailiff's view the issue was wider as the Crown could be interested in the event of an escheat of the Fief of Sark. Secondly, the interpretation of the Letters Patent which contained an obligation on the Seigneur to keep forty abled men on Sark for the defence of the Island was a matter in which the Crown was interested as it touched the issue of defence and law and order. The Crown was also entitled to intervene in the question of the extent of the jurisdiction of the Court of the Seneschal. The Crown is the fountain of justice and courts can only be established by the Crown. Leave given for the Crown to intervene generally.

[Barclay and Barclay v. Beaumont (H.M. Procureur intervening) Plaids de Meubles 14.8.96 (LLeRS/RJC)].

TAXATION

Harbour dues

73. Ordinance: The Financial Provisions (Amendment) (Sark) Ordinance 1996. - Alters the Harbour dues on vessels entering the harbours but not occupying a berth alongside a jetty from 5p to 1p.

In force 2.10.96. (Ordinance of Chief Pleas of 2.10.96.)

74. [CRIMINAL DIVISION - APPEAL NO. 211]

1996 JULY 22

THE LAW OFFICERS OF THE CROWN
v.
PAUL JOHN MACHON

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

Criminal appeal - sentence - misuse of drugs - importation of Class B drug

See para. 24 of this issue.

A.J. Ayres, for the Applicant.
J.R. Finch, for the Crown.

NUTTING, J.A.: On 4th June 1996, the Applicant, Paul John Machon, and another man, named David John Wright, were jointly charged with four offences of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of cannabis resin, a controlled drug of Class B. The offences occurred at monthly intervals between September 1995 and January 1996.

They both pleaded guilty in the Royal Court and were sentenced by the Deputy Bailiff thus: Wright to 2 years and 9 months on each count to run concurrently, together with a further sentence of 3 months to be served consecutively, arising from a related confiscation order; and the Applicant to 4 years imprisonment on each count to be served concurrently.

The facts are as follows. The drugs in question in this case were slabs, or bars, of cannabis resin. The two Accused were each concerned with the same consignments of drugs, but as H.M. Comptroller said in the Royal Court, they played different roles in the importations. On each occasion the cannabis resin which they imported weighed approximately ½ a kilo.

The role of Wright was that of courier pure and simple. As he had previously held positions in financial concerns, he was well able to adopt the role of a businessman in his attempts to avoid detection. The only money that passed through his hands in any importation was, firstly, an advance payment from the supplier in England for travel and accommodation costs, and secondly, from the Applicant, from whom he received his delivery fee of £350.

The Applicant, on the other hand, did not touch the consignment until delivery to him in Guernsey. He made arrangements with the English supplier, received the drugs in Guernsey, distributed them, received the proceeds of sale and then paid the supplier.

A The Customs Investigator, Mr. Hunkin, in a sworn statement, concluded that the resale value of a consignment of 500 grammes of cannabis resin would have been between £3,530 and £4,538. As tariffs for sentencing are an inexact science, it suffices for this purpose, to average the figures to £4,000 per consignment. The Applicant, however, said that he only received £5,670 for three-quarters of the first three consignments, which would have had a value in Guernsey, of roughly £9,000, according to Mr. Hunkin. If the Applicant was wholesaling the distribution, that figure is quite possible. What has to be remembered about drug importation is B that the real vice lies in the quantity imported not the profit of the dealer.

The Applicant has applied for leave to appeal to this Court on grounds which may be thus summarised:-

He argued firstly that the roles played by himself and Wright were similar, and that accordingly he and Wright should have received sentences C of a similar length. The ground of appeal relating to the disparity of sentences must be considered in the light of the criminal records of the Applicant and Wright. Their records are significantly different. Wright was a man of good character until he committed the present offences; by contrast, the Applicant had a bad record, which included seven serious offences, one of which was possession of cannabis.

Such a ground of appeal must also be considered in the light of the D respective roles played by the two men in the offences they committed. The operator, or manager, of the importation is bound to receive a more severe sentence than the courier in circumstances such as these. It is worth noting that Graham Edward Paul, who financed and managed a cannabis resin importation, was sentenced to 10 years imprisonment by the Royal Court on 1st June, 1995. The sentence was upheld by this Court. In the same case the courier would have received 30 months imprisonment, but this was reduced because she gave evidence for the Crown.

E There is no merit in this ground of appeal.

Secondly, it has been submitted that the Deputy Bailiff should have held a Newton Hearing in this case. It is clearly not every case in which the Court is bound to hold such a hearing where mitigation is advanced which might affect sentence.

In this case, the Applicant pleaded guilty to importing relatively large F quantities of cannabis in four separate consignments, and it was conceded by both parties that each amount was far in excess of that which was necessary or intended for personal consumption. Beyond that the Comptroller could not go.

The position adopted by the Crown is clear from the opening; see the transcript at pages 10 to 11:-

G "Machon dealt with the English supplier of the drugs, stating the amount to be imported, providing the finance, and alleging in interview that he was the 'front man' acting on behalf of a small group of local residents, whom he has not been prepared to name.

> The Crown cannot say whether Machon is truthful in this claim that the distribution of the cannabis resin was limited to a small number of local residents. The importations in each case were of a commercial amount of cannabis resin."

In these circumstances it would have been open to the Applicant to establish his mitigation by entering the witness box to provide evidence of the circumstances in which his commercial dealings in the drugs mitigated, as alleged, the conclusions which were otherwise apparent from his conduct. He did not do so. It is not for the Court to speculate why not, but it is noteworthy that he was unwilling to provide the names of the members of the syndicate when he was interviewed by the Customs Officers.

The Court, in these circumstances, was entitled to evaluate carefully the mitigation advanced. The fact is that on analysis, the amount the Applicant claimed for his personal consumption was considerable, and the extent to which the members of the syndicate were using their shares for their own consumption or for resale, was clearly a matter beyond his control.

In these circumstances the benefit of this mitigation, if true, was necessarily limited. We have been asked to say that this matter should have been "resolved" by a Newton Hearing, and the Applicant given considerable credit for the fact that he had limited the consumers to known members of a small group, rather than to a larger number of unknown dealers. We disagree. A Newton Hearing was not necessary in this case, and we are not convinced that this aspect of the mitigation, if proved, would have made a significant difference to the sentence passed. In the event the Deputy Bailiff specifically rejected this aspect of the mitigation as he was entitled to do.

Thirdly, it was submitted to us that the Deputy Bailiff failed to give credit, or adequate credit, for the assistance given by the Applicant in naming his supplier. We do not accept that contention. It seems to us that the Deputy Bailiff's opening remarks in sentence, at page 40 of the transcript, show that he had these matters adequately in mind. I quote:-

> "In both your cases, David John Wright and Paul John Machon, the Court has given credit for your guilty pleas, it has taken note of the points made on your behalf that the convictions on Counts 1 and 2 depend to a considerable extent on your own admissions, and they have also taken account of all the other points made on your behalf by your advocates, and in the papers before the Court, Social Enquiry Reports and the like."

We reject this argument.

Lastly, the Applicant claimed that the sentence of 4 years imprisonment was manifestly excessive. As already stated, the Applicant's role was to organise and arrange the importation, distribute the drugs, and control the finances, at a risk to himself considerably less than the risk to the courier. The sentence of the Royal Court is within the guidelines set

A out in the case of Oren 18 GLJ 13, and consequently the Court does not find the sentence excessive.

There is in our judgment nothing in any of these points and the application for leave to appeal is accordingly refused.

Application for leave to appeal dismissed.

B

75. [CRIMINAL DIVISION - APPEAL NO. 209]

1996 JULY 22

THE LAW OFFICERS OF THE CROWN
v.
C **JAMES SNOWDON**

Before: CRILL, CARLISLE and NUTTING, JJ.A.

Criminal appeal - appeal to the Court of Appeal - appeal against a decision of the Royal Court refusing an application for leave to appeal from the Court of Alderney where the appellant pleaded guilty -
D **jurisdiction of the Court of Appeal**

See para. 19 of this issue.

The Applicant in person.
J.R. Finch, for the Crown.

CARLISLE, J.A.: This is an application by James Snowdon for leave to
E appeal to the Court of Appeal against the conviction and sentence passed on him by the Court of Alderney on 17th January, 1995. The Royal Court, on 23rd February this year, refused a similar application for leave to appeal against the said conviction and sentence.

The facts, which are somewhat unusual, are that the Applicant appeared before the Court of Alderney on Friday 13th January, 1995, charged with one offence of assaulting a police officer, namely, Police Constable
F Solway, in the early hours of the same day.

On 13th January, 1995, the Applicant, who was not represented, pleaded "not guilty", and made some reference to having been affected by drugs which, he claimed, had been involuntarily administered to him.

Following his Court appearance on that day, he was released on bail and he appeared in Court again on Tuesday 17th January, 1995. On that appearance he was accompanied by his wife. On that occasion, according to the note
G taken by the learned clerk, it was indicated by the Applicant that he now wished to change his plea to one of guilty. When the charge was put to him, he at first, pleaded "not guilty but with mitigating circumstances." It was pointed out to him that this was an equivocal plea, and he then indicated, according to the clerk's note, that he understood the position

and that he wished to plead guilty. A plea of "guilty" was therefore entered and the Court proceeded to hear the facts.

It also heard a statement by the Applicant in which he referred to the fact that he had been heavily effected by the grossly excessive amount of alcohol which he had consumed. He said, in the course of that statement specifically:-

> "I deeply regret my actions. I am sincerely sorry for this incident, and I am ashamed of the state in which I was in. I respectfully ask PC Solway to accept my profound apologies."

The Court then imposed upon the Applicant a fine of £250 or 14 days imprisonment by default and a sentence of 14 days imprisonment suspended for 2 years.

On 25th January, 1995, the Applicant applied for leave to appeal to the Royal Court.

The law concerning the right of appeal from decisions of the Magistrate's Court is to be found in the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988. That law, it is clear, applies to the Court in Alderney because S.12(1) of that Law says that the Magistrate's Court means "in relation to Alderney, the Court of Alderney".

Rights of appeal from the Magistrate's Court to the Royal Court are set down in S.2 of that Law. S.2(1) lays down limitations on the right of appeal and in S.2(1)(b) it states:-

> "2(1) No right of appeal shall arise under this Law-
>
> (a) .....
>
> (b) against the conviction of any person for an offence to which that person has pleaded guilty..."

That limitation to the right of appeal must, however, be read subject to S.2(2) which provides in terms:-

> "2(2) Notwithstanding the provisions of subsection (1)(b)..."

That is the one I referred to just now, saying there shall be no right of appeal where an applicant has pleaded guilty -

> "Notwithstanding the provisions of subsection (1)(b) above, the Royal Court may in exceptional circumstances grant leave to appeal against conviction where the appellant has pleaded guilty and notice of application for such leave shall be given to Her Majesty's Greffier within the time limit referred to in any rules made under the provisions of S.9 of this Law."

It was under that section, 2(2), that the application for leave to appeal to the Royal Court was brought in this case. The basis of that application being that the Applicant claimed that his plea of guilty

A should be disregarded, as he was confused and under the influence of drugs at the time that it was entered.

The application for leave to appeal to the Royal Court was heard by the Royal Court on 9th August of 1995, and at a further adjourned hearing, on 23rd February of this year, when the Court heard evidence from two psychiatrists.

B On 29th February, 1996, the learned Deputy Bailiff refused the application for leave to appeal. In an extremely clear and comprehensive judgment, in which he reviewed all the evidence, he ended by saying, and I quote:-

> "I am not persuaded that this is an exceptional case of the kind revealed in Swain (1986) Cr. LR 480, and accordingly I find no grounds for concluding that the plea tendered by the Applicant in the Alderney Court on 17th January 1995, was unsafe and that this is a case where I should be giving leave under section 2(2) of the Law of
C 1988. His application is refused."

It was following upon this refusal of his application to appeal to the Royal Court that the Applicant now applies to this Court for leave to appeal against his conviction.

The first and fundamental point which we have to decide is whether or not this Court has jurisdiction to entertain such an application. The right
D of appeal to the Court of Appeal from a decision of the Magistrate's Court is to be found in S.7(1) of the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988, and I will read the relevant parts. It states:-

> "7(1) A person whose appeal is dismissed by the Royal Court, or the prosecution whose appeal against the acquittal of an accused person is dismissed by the Royal Court, may appeal to the Court of Appeal against that conviction or acquittal, as the case may
E be:
>
> PROVIDED that no such appeal may be brought without the leave of the Court of Appeal."

Subsection 2 says:-

> "(2) The appeal may be -
>
F (a) on any ground which involves a question of law alone; or
>
> (b) pursuant to a certificate granted by the Bailiff that sufficient grounds of appeal exist in the case."

The Applicant put in a notice of his intention to apply to this Court for leave to appeal against the decision of the Royal Court and in pursuance of S.7(2)(b) the Applicant's application was referred to the Deputy
G Bailiff for a granting of a certificate that sufficient grounds of appeal existed in this case. On 21st March of this year, the Deputy Bailiff refused to give such a certificate. He said, and I quote:-

"I have been asked whether I will grant a certificate under Section 7(2)(b) "that sufficient grounds of appeal exist in the case." The first question to ask is whether a right of appeal exists." A

And later he went on to say that:-

"Prior to the law of 1988 there was no right of appeal from the Royal Court to the Court of Appeal against matters arising in the Magistrate's Court, in which expression I include the Court of Alderney, and the right that was introduced by the law of 1988 was a limited one. Section 7(1) expressly says that:- B

'A person whose appeal is dismissed by the Royal Court ... may appeal to the Court of Appeal against that conviction...' "

He goes on:-

"I have not dismissed the Applicant's appeal - I have refused him leave to appeal. I am in grave doubt as to whether this decision can be reviewed by the Court of Appeal." C

The Applicant then applied to the learned Bailiff as a single member of this court for leave to appeal to the Court of Appeal under the powers of S.7(2)(a).

On May 7, 1996, the learned Bailiff refused that application, and again I quote from what he said in that case:- D

"Section 7(1) of the law is in these terms:-

'A person whose appeal is dismissed by the Royal Court ... may appeal to the Court of Appeal against that conviction...'

There is no common law right of appeal to the Court of Appeal in the Bailiwick. Any right of appeal from the Magistrate's Court, and that includes the Court of Alderney for these purposes, that does exist is statutory and contained only in Section 7 of the Law which has to be carefully studied. E

The point which impinges on the Applicant's intention to appeal is that the only avenue to the Court of Appeal from the Royal Court is where an appeal has been dismissed by the Royal Court as opposed to where an application for leave to appeal has been dismissed." F

This distinction was noted in his judgment by the learned Vice President of this Court in Law Officers of the Crown v. Diment 16.GLJ.86, to which I will refer in a moment.

In a very carefully prepared and well researched argument for which we understand much credit must go to the Applicant's wife, and to whom this Court expresses its gratitude, two points were argued on behalf of the Applicant. Firstly, it was said that there is in effect no difference between an application for leave to appeal and an appeal itself, and that G

since the effect of the refusal of the application for leave to appeal is that the Applicant's conviction still stands, then natural justice demands that he should have a right to apply for leave to appeal to this Court; and the second argument advanced, again with great clarity, was that in any event in this case the Deputy Bailiff did, in fact, on 23rd February this year, hear this appeal rather than merely an application for leave to appeal and that the decision that he gave amounted to an order of the Royal Court under S.6(1)(a) of the Law, where it says:-

> "6(1) On the termination of the hearing of an appeal the Royal Court -
>
> (a) may confirm, reverse or vary the decision appealed against;"

We have listened with care to the arguments advanced, but we have come to the conclusion that the learned Bailiff was right in his judgment and that this Court has no jurisdiction to hear this application. The authorities advanced and, indeed, the quotations put forward to us on behalf of the Applicant do not, in our opinion, support his contention.

An appeal from the Magistrate's Court to the Court of Appeal, is provided not by common law, but by statute, and S.7(1) to which I have already referred is clear in its terms, and it is limited. It says that it limits the right of appeal or application for leave to appeal to this Court to a person whose appeal is dismissed by the Royal Court or to a prosecution whose appeal against the acquittal of an accused person is dismissed by the Royal Court. It provides no right of appeal against the decision of the Royal Court in refusing an application for leave to appeal, but only an appeal where the Applicant's appeal has itself, in fact, been dismissed by the Court.

We were referred in argument to the case of Diment at page 42D, to be found where Sir Godfray Le Quesne, the Vice President of the Court, in giving the judgment of the Court in that case said of this matter:-

> "... It is critically important to observe the language of 7(1) of the Law of 1988..."

And having referred to that Law he said:-

> ""That conviction or acquittal" must be the conviction or the acquittal in the Magistrate's Court. No other conviction or acquittal has occurred. In express terms, therefore, the Law confers a right of appeal against the conviction or acquittal by the Magistrate, not against the judgment of the Royal Court."

The argument that there is no distinction between an application for leave to appeal and an appeal itself is, we believe, unsustainable, and, indeed, in the Law of 1988 itself, that distinction is, in fact, made, because if one looks at S.8 of that Law you will see that:-

> "The Royal Court, or the Court of Appeal, as the case may be, may where it dismisses an appeal or an application for leave to appeal, order the Appellant to pay to the States..." etc.

Clearly there would be no need to refer both to an appeal and an application for leave to appeal if, as the Applicant argues in this case, there is no distinction to be drawn between them.

The Applicant's submission that because the learned Deputy Bailiff had heard evidence and listened to the application, he was, in fact, dismissing his appeal rather than refusing to grant him leave to appeal, we equally believe arises out of a misunderstanding of the situation.

Clearly, when an application for leave to appeal is made to the Royal Court, the Royal Court is bound to consider the facts so as to be able to decide whether there exists exceptional circumstances which would justify that court in granting leave to appeal. This is, in fact, what happened in this case, and having done so, the learned Deputy Bailiff decided that there were no such exceptional circumstances and thus he refused to grant this application for leave to appeal. At no time did he either hear or dismiss the appeal. It follows from that that he did not make an order under S.6(1) of the Law as the Applicant contends, since that section relates only to what should happen following the termination of the hearing of the appeal, and I repeat, in this case there was no appeal, there was merely the hearing of an application for leave to appeal.

In the course of argument we were referred to two English cases, the case of Ex parte Stevenson (1892) 1 QB 609 and further, the other case of Lane v. Esdaile (1891) AC 210. Whilst neither of those cases are, in fact, binding on this court, they are cases which have great persuasive effect, and they lay down quite clearly the proposition that unless leave to appeal is specifically given against the refusal of an application for leave, then no such appeal occurs. In the case of Ex parte Stevenson, the Master of the Rolls said at page 611:-

> "I am, on principle and on consideration of the authorities that have been cited, prepared to lay down the proposition that wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. So, if the decision in this case is to be taken to be that of the judge at chambers, he is the legal authority to decide the matter, and his decision is final; if it is to be taken to be that of the High Court, then they are the legal authority entrusted with the responsibility of deciding whether there should be leave to appeal, and their decision is final. In either case there is no appeal to this Court. What was said in the case of Lane v. Esdaile supports the view that I am taking, that the very nature of the thing really concludes the question; for if where a legal authority has power to decide whether leave to appeal shall be given or refused, there can be an appeal from that decision, the result is an absurdity and the provision is made of no effect."

In the same case Lopes, LJ, said at page 612:-

> "Where an appeal is given that is made subject to the leave of the Court or a judge, or any other legal authority, I think that the granting or refusal of leave by such Court or judge or other legal

A authority is final and unappealable. The object of making an appeal subject to leave is to prevent unnecessary and frivolous appeals."

In this case the Royal Court refused the application for leave to appeal to that court against the conviction imposed by the Alderney Court. There is, in our opinion, no right of appeal from that refusal, and therefore we have no jurisdiction to hear this application for leave to appeal, and it is therefore refused.

B

Application refused. On 19th December, 1996 a petition by the Applicant for special leave to appeal was dismissed by Her Majesty in Council.

76. [CRIMINAL DIVISION - APPEAL NO. 212]

C 1996 OCTOBER 14

THE LAW OFFICERS OF THE CROWN
v.
HEATH ANDREW COGHER

Before: HARMAN, CALCUTT and CARLISLE, JJ.A.

D

Criminal appeal - sentence - misuse of drugs - importation of Class B drug

See para. 25 of this issue.

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

E HARMAN, J.A.: On 29th July 1996, this Applicant, Heath Andrew Cogher, who is aged 27, together with Michael Channon Rowe, aged 19, and Thomas Butler, 65 years of age, appeared before the Deputy Bailiff and Jurats in the Royal Court, having pleaded guilty to counts 2 and 4 of an Indictment containing 4 counts.

Count 2 charged them that between 30th November 1994 and 1st March 1995, they were knowingly concerned in the fraudulent evasion of the prohibition on importation of amphetamine, a controlled drug of Class B, contrary to
F the prohibition imposed by S.2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974, as amended. Count 4 charged a similar offence between 1st January 1996 and 2nd March 1996. The Prosecution offered no evidence on count 1, which related to an alleged offence in relation to cannabis resin, between 30th November 1994 and 1st March 1995, in respect of which there was no evidence; and count 3 was a general conspiracy count in relation to controlled drugs of Class B, which was also not proceeded with.

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The three men were sentenced as follows: Rowe to 2 years Youth Detention on each count concurrent; Butler to 2 years imprisonment on each count

concurrent. In both cases the Court held that the Accused had benefited from drug trafficking to the extent of £300 and £1,609 respectively, and made orders accordingly for the confiscation of small sums of money found on them. They were both of previous good character.

This Applicant was sentenced to 2½ years' imprisonment on each count concurrently. He had previous convictions in the Magistrate's Court in 1987 for offences of burglary, theft, and criminal damage, committed with others when he was aged 18, and for which he was fined. Those matters were disregarded. The Court held that he had not benefited from drug trafficking.

On 30th July, the Applicant gave notice of application for leave to appeal against sentence, on the ground that the Prosecution had made no case to say that he should receive a harsher sentence than his co-Accused. In revised grounds of appeal it is submitted that the sentence was out of proportion to the gravity of the offence and was manifestly excessive, and in addition, that the Deputy Bailiff was wrong to take into account his employment as a manager of licensed premises as an aggravating factor.

The facts of this case can be shortly stated: On 1st March, Butler was arrested on his arrival from Southampton. On him, concealed in a sock in his underpants, was just on 100 grammes of amphetamine, the sale value of which was estimated at the trial as between £1,990 and £2,480.

There was a background to his arrest and that of his co-Accused: In December of 1994 and February 1995, customs officers had been keeping surveillance on a restaurant/cafe called the Mango Shade. They had photographed Butler associating with the manager, Cogher. During this period Butler was staying at a local hotel. When Butler was arrested on 1st March, this Applicant was arrested on the same day. Both were subsequently interviewed at length. It thus transpired that Rowe, who had been under observation in Guernsey for the past week, was involved, and also in respect of an importation in February of 1995. He was arrested on 2nd March.

The evidence against the three men, apart from the circumstances of Butler's arrest, comes from the admissions made separately in the course of their interviews, and the Prosecution case can be summarised in this way:-

Butler was a paid courier in February 1995 and March 1996. He had made an earlier visit by way of reconnaissance in December 1994. It is believed that amphetamine with a sale value of between £600 and £800 was imported on the first occasion.

Rowe assisted Butler's importations from Southampton and made contact arrangements in Guernsey, in particular, for the week before 1st March 1996.

This Applicant was referred to as "the principal Guernsey contact". He arranged for a purchaser in February 1995, and allowed the premises at the Mango Shade to be used for the introduction. He was similarly involved in expectation of the March 1996 importation. It was said that he also

provided a set of scales. The Mango Shade was owned by a company with his mother as licensee.

He ran it between August 1994 and August 1995, when it closed, after which he was the disc jockey at the nightclub premises in Old Government House until his arrest. He claimed that he received no profit from the importations, but nevertheless, he was very much at the receiving end. His Social Enquiry Report included the comment that "he seems to have become involved in these offences from a naive belief that he was not doing anything serious." No doubt he is now disabused. The Deputy Bailiff stated when sentencing:-

> "The Court considers the aggravating feature in your case is that at the time of these offences you were employed in a responsible managerial capacity at licensed premises, to which young people were attracted. Were it not for the fact that your two co-Accused have received sentences lower than the starting point in the Oren guidelines, 18 GLJ 13, which have been referred to, the Court would be minded to move above that starting point."

The Deputy Bailiff emphasised that a sentence of 2½ years was imposed in order to "treat you fairly in accordance with your co-Accused." The Court sees no reason to criticise these words. We have taken into account the question of whether there was an objectionable disparity of sentence, where one of three received a more severe sentence than the others, and where it is submitted that the difference is not justified by any relevant distinction in their culpability or personal circumstances. We have also considered whether the disparity was so substantial that this Applicant may have a justified sense of grievance. We are quite satisfied that the sentence was not excessive, and this application must, therefore, be dismissed.

Application for leave to appeal dismissed.

77. [CIVIL DIVISION - APPEAL NO. 214/1]

1996 JULY 22, 23

VEKAPLAST WINDOWS (C.I.) LIMITED **Appellant**

v.

BARRY KENNETH JEHAN and MRS. LESLEY JEHAN **Respondents**

Before: CRILL, CARLISLE and NUTTING, JJ.A.

(i) Appeal against finding of facts by Jurats - application to serve interrogatories on Jurats and relatives of respondent concerning their association with freemasonry - whether Court has power to make order for interrogatories in such circumstances - principles upon which Court acts.

See paras. 43, 78 and 79 of this issue.

T.A. Picot, managing director, for the Appellant.
J.P. Greenfield, for the Respondents.

CRILL, J.A.: The judgment I am about to give is the judgment of the Court.

The background to the various matters before this Court may be stated briefly.

The company T.A. Picot (C.I.) Limited ("T.A. Picot") is a company registered in Jersey where it has its place of business. There is a Guernsey company, the Appellant, Vekaplast Windows (C.I.) Limited ("Vekaplast"), which is a wholly owned subsidiary of T.A. Picot. The business carried on by Vekaplast in Guernsey is the manufacture of uPVC windows.

The first Respondent had the conduct of the day to day running of Vekaplast in which he held the position of General Manager. His wife, the second Respondent, was the Secretary of that company as well as the bookkeeper. A Mr. Picot who is the beneficial owner of T.A. Picot and the first Respondent, were Directors of both T.A. Picot and Vekaplast.

In February 1984 Mr. and Mrs. Jehan, that is to say the two Respondents, went on holiday for several weeks. In their absence Mr. Picot decided that whilst they were abroad he should come to Guernsey and examine the books of Vekaplast; this he did with a member of his staff from Jersey. As a result of the investigations Mr. Picot came to the conclusion that substantial sums of money had been misappropriated by Mr. Jehan from Vekaplast.

He summoned Mr. Jehan to a meeting in Jersey which took place in March 1984 at which was present also the company's accountant, Mr. Richardson. At that meeting a number of matters were discussed and agreed and Mr. Jehan signed a document dealing with his interests in T.A. Picot and Vekaplast, the contents of which are not relevant to this judgment today except that he also signed in that document a restrictive undertaking or covenant in the form of an undertaking by him that he would not be interested, either directly or indirectly in any limited liability company, firm or business engaged in the manufacturing, wholesaling, retailing, fixing or otherwise of any uPVC windows in the Channel Islands for a period of five years from the date of the agreement under certain penalties. It later transpired according to Mr. Picot, who became a Plaintiff in a first action against Mr. Jehan alone, that he had in fact carried on business so as, it was said, to infringe the restrictive covenant.

Accordingly Mr. Picot brought an action against Mr. Jehan, the first Respondent, which came before the Court in 1986 and which in fact failed. There were other matters in the action which are not germane to the present matter before this Court.

Mr. Picot appealed to the Court of Appeal but failed in that Court also.

A Subsequently, some four years after the conclusion of that appeal, he brought an action through his company Vekaplast rather than in his own name, against the Respondents, claiming the refund of something like £16,720 in respect of money wrongly withdrawn from Vekaplast's bank account. Later at the trial that was reduced by the Appellant company, through Mr. Picot, by some £430.09. The total claim in the pleadings came to £22,580 as reduced from the original sum.

B On 16th August 1994 the Royal Court dismissed the Appellant's claim with costs. The Appellant has appealed to this Court. We are not concerned with his appeal today, nor, subject to what we have to say in a moment, with his amended grounds of appeal which we were told by Mr. Picot are now complete. He now applies to this Court asking for a number of orders.

First that the Jurats who sat on both cases, together with two relatives of Mrs. Jehan, be ordered to answer what amounts to some interrogatories from the Appellant, mostly concerned with the Jurats' and those relatives' C connection with the Masonic Order and particular Lodges. It is not necessary to go into the exact details of those questions.

Secondly the Appellant asks the Court to rule that the Respondents should be deemed to have abandoned their defence. That matter will be dealt with separately at the conclusion of this part of our judgment.

Thirdly the Respondents themselves have issued a summons which we shall D hear at the conclusion of Mr. Picot's second application, to strike out the Appellant's amended pleadings. Again it is not necessary for me at this stage to say on what grounds that application is being made.

Mr. Picot complains that, although quite inappropriately in our opinion, he had written to the six Jurats, that is to say the three who sat in the 1986 case and the three who sat in the 1994 case, the answers which they gave were unsatisfactory. One replied he was not a Mason and that E disposed of him, one was but said he could not say whether he was in a particular Lodge of the Masonic Order, two had been advised by the Deputy Bailiff, who had presided at the trial of the second action, not to reply and one said he would not communicate to the Appellant on the matter. The father of the second Respondent was not well enough to reply but his daughter replied for him, in effect saying he should not be troubled because he was in such poor health.

Mr. Picot said that he had begun to think about the question of the Jurats F and their relationship with the Masonic Order some time, he could not be exact, after the judgment in the second action had been handed down. Had he not told us this it would have been difficult for him to raise this matter in view of the clear rulings of the Court of Appeal here in the case of De Bourgonnière 1979 Crim. Rep. No. 14. In that case the Court accepted on the facts which were before it that an objection to the constitution of the trial Court could have taken place at or before the trial. No objection had been taken and the Court of Appeal held:

G

> "...The consequence of [objection] not having been taken at the trial is, in our judgment, that the Appellant must now be treated as though he had consented to the composition of the Court before which he was

> tried. It is very important that any objections to the constitution of the Court be taken as soon as the facts, believed by the party concerned to give ground for objection, come to that party's knowledge. If such an objection is not taken at the proper time in that way, it cannot be subsequently made a ground for appeal..."

The first question this Court has had to ask itself is whether it indeed has power to make such an order even if it were minded to do so. It derives its powers, or its composition rather, from Section 13 of the Order in Council confirming the Court of Appeal (Guernsey) Law, 1961 which says this:

> "On such day as shall be appointed in that behalf by Ordinance of the States there shall be vested in the Court of Appeal the appellate jurisdiction in civil matters which immediately before that day was vested in the Royal Court, sitting as a "Cour des Jugements et Records."

We do not know, and Mr. Greenfield for the Respondents has told us that without further research he was not able to tell us, what common law powers that division of the Royal Court had. But we think it highly likely that it had inherent power to order interrogatories between the parties. It is unlikely however, in our opinion, that that power would have extended to being able to order interrogatories from people who were not parties to the action, and we confirm on balance the observation of Mr. Collins sitting as a single Judge, that in fact the Court has no power to make such an order. But even if we had such power we would decline to exercise it. But because Mr. Picot most cogently has advanced the reasons why we should, and Mr. Greenfield of course has replied, we think it fair to the parties to say why, had we the power, we would not have exercised it.

Firstly there has been no direct evidence of any kind of bias by the Jurats concerned.

Secondly of course, Mr. Picot is going beyond asking us to order the Jurats in the case against the decision of which he is appealing of 1994, but even going further back to the much earlier hearing. It is not surprising of course that he has no direct evidence because it is not the custom for the Jurats when they deliver their judgment on the facts as directed by the Bailiff or Deputy Bailiff, to give reasons for their decision. Of course an aggrieved party is not without remedy, but he would have to show that the Jurats if properly directed could not have reached their decision reasonably, see Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1948) 1 KB 223. Furthermore there is the case of Guille v. Mackay which is a decision of this Court, 1967 Civil Rep. No. 2, which lays down the following rule:

> "...That it is proper for the Court [of Appeal] to approach the Jurats' findings on questions 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 jury, that is to say ... [that the Court will] not interfere with the findings of fact made by the Jurats unless [it is] satisfied that there was no

A 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."

It seems to us that because the main thrust of Mr. Picot's, or the Appellant's, amended reasons, which will be before the Court of Appeal when it hears the Appeal, is that in fact the Jurats' decisions or decision was perverse, that if after hearing the case the Court finds that
B that decision, or those decisions, of the Jurats was, or were perverse in the light of the evidence, then the motive or the reason why it was perverse, whether it was due to Masonry or anything else, becomes totally irrelevant. And the other side of the coin is even if the Appeal Court did not decide that the judgment of the Jurats was perverse but correct, then equally the motive behind that decision is irrelevant.

But we think it behoves us to say something about the position of Jurats
C generally. We have mentioned the case of Guille v. Mackay but there are two other cases which are of some assistance. We refer first of all to the case of Regina v. Gough 2 All ER 724, where the House of Lords said, and we read from the headnote:

"That in the case of alleged bias on the part of a justices' clerk, the Court, having considered whether there was a real danger of bias, should go on to consider whether the clerk had been invited to give the Justices advice and, if so, whether it should infer that there
D was a real danger of the clerk's bias having infected the views of the Justices adversely to the applicant."

The point was that whether the clerk retired with the Justices and did not give them any advice was not the important fact, he should not have retired at all with them and as we say the House of Lords drew attention to the fact that there had to be a real danger of bias.

E The second case is that of Bordeaux Vineries Limited v. States Board of Administration 16.GLJ.85, a Guernsey Court of Appeal case on which two members of the present Court in fact sat. That case concerned a question of nuisance and the Appellant amongst its reasons for the Appeal said this in an affirmation by its director, at p.34D:

"Furthermore, some years ago whilst the Bailiff who was then the Deputy Bailiff, was walking with his wife towards the east side of the quarry I met them. They were at that time picking blackberries.
F I made an observation that the blackberries were probably tainted by the dust from the quarry and I immediately realised that perhaps it was not proper for me to make such observations in view of the actions before the Court. The Bailiff told me that he would not embarrass either himself or me and my family by hearing the action, I would certainly feel some embarrassment were the Bailiff to preside at any hearing..."

G There were some other observations about the dual capacity of the Bailiff as President of the States and President of the Royal Court but these are not really germane to the present arguments before us.

But at p.37G the Court said this:

> "There can be no doubt that the blood relationship or personal friendship between the Bailiff and a party to a matter before the Court can disqualify the Bailiff from hearing the matter. Whether it does disqualify him depends upon whether the relationship or friendship is so close as to make it embarrassing for the Bailiff to sit or to create a reasonable suspicion that he would be incapable of impartiality or detachment.
>
> When an objection is made on the ground of personal friendship, the Bailiff is peculiarly well placed to decide whether it is valid. He knows how close the friendship is and whether it would cause him any embarrassment if he were to hear the case. He has to exercise his discretion in deciding whether he is disqualified. If after weighing the circumstances of the friendship, which he knows better than does any third party, he decides to continue sitting, a strong case is needed to persuade an Appellate Court that his exercise of his discretion was wrong."

We see no reason why those remarks should not be equally applicable to the case of the Jurats of the Royal Court as they are to the President of that Court.

The third case is a Jersey appeal case, that of Attorney General v. Drew 1994 JLR 1, decided on 6th January 1987. It concerned an appeal against sentence imposed by the Superior Number of the Royal Court on 2nd July 1986. There are a number of passages which are important in that judgment, which are germane to this part of our hearing and to which we must refer in extenso. We now read from the judgment in Drew, at p.11 line 42:

> "There is a further ground upon which the appeal in its original form must fail. If we had been of the view that interest of those members of the Court who were members of the Société was such as to found a récusation, it is clear that objection should have been raised before or during the trial. In Le Geyt Code des Lois, Titre IV (De la Récusation de Jurés), it is stated, in Article 4 "il faut récuser avant que celui qu'on récuse opine, la Récusation doit par écrit."

The Court then goes on to refer to the case of De Bourgonnière which we have already mentioned. We should add that the Drew case in short concerned an Appellant who had stolen some property from the Société Jersiaise, the learned society of Jersey, and then set fire to part of the premises. As in Guernsey the Jersey Jurats are the judges of fact and find the appropriate sentence in criminal proceedings which they did in the case of Drew. All but three who sat on the bench were in fact members of the Société Jersiaise. The Court goes on at p.12 line 36:

> "Before leaving this part of the Appeal we should indicate that some degree of caution is required before applying, without qualification, the principles developed in the English Courts in relation to apparent bias to the different circumstances which exist in this Island. Jurats of the Royal Court of Jersey are not closely

A analogous to Justices of the Peace in England. The Jurats number only twelve and they are chosen to administer justice in this Island on the basis that they will bring knowledge, experience and independence to their important office. It is inevitable, from the nature of the Island community, that there will be cases in which one or more Jurats will be known to have some connection, in the loose sense, with the subject matter of the proceedings. We have no doubt that, in the vast majority of such cases, the Jurats themselves will be quick to recognise any possibility of apparent injustice and will B excuse themselves from sitting. There may be other cases in which a récusation will properly lie. The law provides for this. But it should not be thought that récusation will necessarily lie against a Jurat in all circumstances in which a Justice of the Peace would be disqualified in England. Nor should it be expected that this Court will interfere in circumstances in which the complainant has been content, with knowledge of grounds upon which it could object to the composition of the trial Court, to allow the trial to proceed."

C

Now Mr. Picot has urged upon us that we should extend those words used in this judgment concerning a connection where it says, at p.12:

> "... there will be cases in which one or more Jurats will be known to have some connection in the loose sense, with the subject matter of the proceedings."

D and that we should extend it to include not only a reference to the matter in dispute, or about which the case is being heard, but also to the question of the parties themselves. We think that is too drastic a view to take and we prefer to leave it as it is in the words of the Jersey Court.

We should close by referring also to the oath of the Jurats in Guernsey. All Jurats take this oath before the Court and it contains amongst other E things the following passage:

> "... Que vous assisterez et aiderez avec le Baillif ou son Lieutenant en la compagnie d'autres Jurés, vos frères, en cours ordinaires à votre tour et en cours extraordinaires, toutes fois et quantes qu'en heure due en serez requis, à rendre bonne et loyale Justice entre Sa dite Majesté et ses sujets, et de partie à partie, tant au petit qu'au grand, et principalement aux veuves et orphelins sans aucun supporter, ou favoriser ou autrement; ..."

F

That is a very clear duty laid upon the Jurats and Mr. Picot is suggesting that the influence of Masonry was such that the Jurats consciously or unconsciously showed bias. As we have said there is no evidence whatsoever in that direction for the simple reason, as we have already said, that the Jurats are not required to give a detailed judgment when they deliver their decision.

G It seems to us therefore, that this application is misconceived and should fail and it accordingly does so.

Appellant's application for an order that the Jurats who sat in the Royal Court during the proceedings subject of the appeal, and the father of the female Respondent, answer a questionnaire DISMISSED, with costs.

78. [CIVIL DIVISION - APPEAL NO. 214/2]

1996 JULY 23, 24

VEKAPLAST WINDOWS (C.I.) LIMITED **Appellant**
v.
BARRY KENNETH JEHAN AND MRS. LESLEY JEHAN **Respondents**

Before: CRILL, CARLISLE and NUTTING, JJ.A.

(ii) Application by respondent to strike out grounds of appeal - powers of the Court and principles upon which Court acts - allegations of bias on the part of Jurats - allegations of misconduct on the part of the respondent's Advocate.

See paras. 43, 77 and 79 of this issue.

T.A. Picot, managing director, for the Appellant.
J.P. Greenfield, for the Respondents.

CRILL, J.A.: When we had finished considering our judgment Mr. Picot sent in to us a letter addressed to Advocate Greenfield attached to which was a transcript of the closing speech of Mr. Greenfield. We regret to say that those passages arrived too late to be of any assistance to us in considering our judgment and accordingly we have not used them.

The judgment which now follows is that of the Court and is confined to the application by summons of the Respondents to strike out the whole of the amended grounds of appeal of the Appellant which as we said yesterday had now been finalised.

The summons is as follows:

> "That the Appellant's Appeal be struck out under the inherent jurisdiction of the Court and/or pursuant to Rule 12(1) of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964, on the grounds that
>
> (a) it discloses no reasonable course of action;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it is otherwise an abuse of the powers of the Court ..."

A The summons also requests that we order that the Appellant gives security for the Respondents' costs in the sum of £25,000 and we are not concerned with that part of the summons at this stage.

The first matter that needs to be addressed is whether this Court indeed has the power to strike out pleadings. Earlier in the Court's judgment in the application to order interrogatories to be put to the Jurats who sat on the 1986 and 1994 cases and to two relatives of the second Respondent, B the Court said that as it was given the same powers in its appellate jurisdiction in civil matters which immediately before the day it was constituted were vested in the Royal Court sitting as a "Cour des Jugements et Records", it had jurisdiction to order interrogatories of parties but not third parties. By the same reasoning, notwithstanding that there is no express statutory power to do so as regards striking out, we think that this Court has the power to strike out pleadings. It would in our opinion be absurd if the Royal Court when seized of a case in the first instance could do so under its inherent jurisdiction, but on appeal C this Court could not. Nevertheless this is not the grounds upon which we believe that we have jurisdiction. By analogy with the Court of Appeal in England, and applying the principles under which it operates the exercise of its jurisdiction in respect of striking out, we consider that those principles may be properly applied and followed in this Court.

To support that view Advocate Greenfield directed our attention to two of the principal cases on this point. The first was that of Aviagents D Limited v. Balstravest Investments Limited (1966) 1 All ER 450, where Willmer LJ said at p.452E:

> "It appears to me inconceivable that this Court should not have inherent power to control its own proceedings by striking out a notice of appeal in a case where an appeal is plainly not a competent appeal. In those circumstances unusual though the application is..."

E - that is so of course in the instant case -

> "... in my judgment it succeeds and the Notice of Appeal ought to be struck out."

The second case is that of Burgess v. Stafford Hotel Limited (1990) 3 All ER 222. In that case, which was distinguished from the earlier case, Glidewell LJ said at p.226C:

F

> "There, so far as counsel's researches go, the matter rested. Certainly we have had no other authority cited to us until two recent decisions. The first is a decision in this Court in Ghadami v. Petticoat Lane Rentals Limited (1986) CA Transcript 432, decided by a Court comprising Parker, Woolf LJJ, and Sir Denys Buckley. The second, to which Sir Denys was also a party, is Deerslade Limited v. Hilton International Hotels (UK) Limited (1989) CA Transcript 565. The first judgment in that case was given by Staughton LJ. We have G the advantage of a transcript in the Deerslade case. In the course of his judgment, with which Sir Denys agreed, Staughton LJ said:

"I turn then to the second and third points raised on this application that this appeal is frivolous, vexatious and an abuse of the process of the Court." A

Glidewell LJ then, as we have said, distinguishes the case under discussion there from the earlier case of Aviagents by saying:

"That is the very point with which Davies LJ had said they were not dealing in Aviagents v. Balstravest Investments Limited ..." B

The learned Lord Justice also said at p.228B:

"However, I do want to sound a word of warning. The jurisdiction to make orders striking out notices of appeal is one that is just as capable of abuse as is the power to put in hopeless notices of appeal. In my view the power to strike out should be confined to clear and obvious cases. It should not be utilised, and an order to strike out should not be made, where any extensive inquiry into the facts is going to be necessary." C

That warning was reinforced by Sir Denys Buckley who said at p.229A:

"I entirely agree with the judgment which Glidewell LJ has delivered in all its aspects. I do not think that I can usefully add anything further to what he has already said, but I would like to associate myself with the word of warning which he voiced in respect of the use of the jurisdiction to strike out a notice of appeal on the ground of the Court's general jurisdiction in any but cases which are clear and obvious and do not involve inquiry into the facts underlying the decision appealed from." D

The amended grounds of appeal which are now before the Court need not be repeated, but in addition to those grounds the Appellant is seeking an order for a contribution towards its costs from Advocate Greenfield personally both here and in the Royal Court. We consider that this application is totally misconceived, is an abuse of the process of the Court and should be struck out. E

We turn now to the grounds of appeal themselves.

Grounds 1, 2 and 3 relate to the allegation that the majority of Jurats both in the current case under Appeal and in a previous action in 1986 were Freemasons, as are the father and brother of the second Respondent, and for this reason would have been biased in an adjudication on the facts. F

We have no hesitation in striking out each of these grounds as being scandalous and vexatious. Whether or not the allegation that the Jurats were Freemasons is true or not is of no concern to this Court. The Appellant has not advanced any evidence to suggest that the Jurats' impartiality was in any way affected and in the opinion of this Court these grounds amount to a totally unjustified impugning of the honesty and impartiality of the Jurats. G

A Before such an allegation of bias in a tribunal can be considered it is a necessary condition that some evidence sufficient to found

> "... a real danger of bias ..."

must be placed before the Court; see R v. Gough (1993) AC 646.

We would however like to add something further concerning the question of
B Masons and their relations to the Jurats.

Mr. Picot drew our attention to a pamphlet headed "A Guide on Admission into Freemasonry". On the second page of that pamphlet there is a paragraph which reads

> "Freemasonry teaches that a man's first duties are to himself, his wife, his family and connections. No-one should join the Order who
C cannot well afford to pay the initiation fees and subscriptions to the lodge and contribute to the Masonic Charities without detriment to the comfort and well being of those who have any claim on him for support ..."

That paragraph is interpreted by Mr. Picot, at least the first part of it, as indicating the practise of Masonry to the extent that Masons put their obligations as Masons above their other civic liabilities and obligations, as for example the Jurats in relation to their oaths; that indeed there
D was a conflict of interest between the obligations of Jurats as expressed in the oaths, which we referred to yesterday, and Masonry; and that if there was indeed such a conflict then the interest of Masonry would take precedence.

We do not agree with that view. A reading of the whole document shows that Masons require a high degree of probity in their members. It follows that even if all the Jurats who sat in the 1986 and 1994 cases were
E Masons, their obligations as Masons did not conflict with their duties as Jurats in respect of the oath which we have already mentioned. On the contrary a conscientious Mason will, if anything, bring to the office of Jurat another degree of probity that will enhance, not detract, from that office. It might of course be different if a Jurat was a personal friend of one of the parties who happened to be a Mason, but it would be that friendship and not the fact that that party was a Mason that would be significant, and which would bring into play the principles we mentioned earlier during the course of these applications in the Bordeaux Vineries
F case.

Turning to Ground 4 and having read those parts of the transcript to which we were directed, and without expressing any view as to the merits of this ground, we are nevertheless satisfied that this is not a ground which should be struck out. Likewise concerning Grounds 5(a) and (b), having had our attention drawn to those parts of the transcript at which these matters are raised we do not consider that the issues addressed are so
G clear and obvious as to be disposed of without an inquiry into the facts.

Accordingly the application to strike out these two grounds are also refused.

Ground 5(c) in our view adds nothing to Ground 4 and is therefore struck out. A

We turn now to Ground 5(d). It became clear during argument that Mr. Picot was under the misapprehension that certain evidence relating to Advocate Harwood and referred to in the ground of appeal was hearsay and should therefore have been ruled inadmissible by the learned Deputy Bailiff. When the error was demonstrated Mr. Picot readily conceded his mistake and accordingly agreed that this ground ought to be struck out as disclosing no reasonable ground of appeal. B

The issues raised under Ground 6 all relate to allegations of errors in the learned Deputy Bailiff's summing up of the evidence. Of their nature they cannot be considered without a thorough investigation into the evidence. Indeed Advocate Greenfield conceded in argument that if it was necessary to undertake more than a brief and peremptory review of the evidence so as to discover whether a ground of appeal had any merit, an application to strike out would not be appropriate. C

Accordingly the application to strike out these grounds is refused.

For the same reason as we have expressed in relation to Ground 6, the application to strike out Ground 7 is refused.

Ground 8 however is of a different nature. It is an allegation of the conduct of the Respondents' Advocate throughout the proceedings. We have neither seen nor heard any evidence which in our opinion would justify this allegation and it is struck out as being scandalous and vexatious. D

In coming to the conclusions which we have reached in relation to all the applications we think it right to emphasise that we have adopted the principle that the power to strike out is one that should be used sparingly and that it should be confined to clear and obvious cases. It follows that so far as those grounds which we have declined to strike out are concerned, our conclusion should not be taken as an indication of a view on the merits of this appeal or any aspect of it. E

Applications by the Appellant and the Respondents respectively DETERMINED as follows:-

1. The Appellant's application for leave to file an amended Notice of Appeal was HELD to be unnecessary, given the provisions of Rule 6 of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964. F

2. The Applicant's application for an order that the Respondents' defences be deemed abandoned was REFUSED, the Court having held that under Rule 17 of the said Rules it was open to the Respondents to apply at any time for an extension of time within which to do any act required by the said Rules.

3. The Respondents' application for an order that the Appellant's Appeal be struck out was ALLOWED to the following extent:- G

- Grounds 1, 2 and 3 were each struck out as being scandalous and vexatious.

- The Application to strike out Grounds 4, 5(a) and 5(b) was refused.

- Ground 5(c) was struck out, as adding nothing to Ground 4.

- Ground 5(d) was struck out, by consent, having been based on a misapprehension.

- The application to strike out Grounds 6 and 7 was refused.

- Ground 8 was struck out as scandalous and vexatious.

4. The Respondents' application for the Applicant to be ordered to lodge security for costs was GRANTED, and the Applicant was ordered to lodge with the Registrar the sum of TEN THOUSAND POUNDS (£10,000) as security for costs, and the proceedings were ordered to be stayed in the meantime.

AND THE COURT FURTHER ORDERED:-

(i) That the Appellant file its revised Case within 14 days.

(ii) That the Appellant pay the recoverable costs of the Respondents as respects the application set out in paragraph 2 above.

(iii) That as respects the application set out in paragraph 3, the costs shall be in the cause.

E[79]. [CIVIL DIVISION - APPEAL NO. 214/3]

1996 OCTOBER 15, 16, 18

VEKAPLAST WINDOWS (C.I.) LIMITED **Appellant**

v.

BARRY KENNETH JEHAN and MRS. LESLEY JEHAN **Respondents**

Before: CALCUTT, HARMAN and CARLISLE, JJ.A.

(iii) Appeal against finding of facts by Jurats - principles upon which Court acts.

See paras. 43,77 amd 78 of this issue.

T.A. Picot, managing director, for the Appellant.
J.P. Greenfield, for the Respondents.

CARLISLE, J.A.: This is an appeal by the Appellant Company Vekaplast Windows (C.I.) Limited ("Vekaplast"), against the decision of the Royal Court on 16th August 1994, whereby the Appellant's action for the recovery of £16,720, money said to be money belonging to the Appellant Company and converted by the Respondents for their own use, was dismissed. By its amended Notice of Appeal dated 24th July 1996, the Appellant asked for that judgment to be set aside in favour of a fresh hearing, or alternatively, that judgment should be entered in favour of the Appellant for the sum of £16,720.

The grounds of appeal as set out in the amended Notice were four-fold: Firstly, that the Deputy Bailiff erred in allowing the Respondents to introduce significant new evidence which was different to the case that they had pleaded, without requiring any amendment of the pleadings; secondly, that the learned Deputy Bailiff should have ordered discovery of the Respondents' bank accounts (a ground which, in fact, was not pursued at the hearing) and also should have ordered the playing of a tape-recording of a meeting held between the parties on 23rd March 1984; thirdly, that the summing-up failed adequately to address the alleged contradictions and lies in the Respondents' evidence; and finally, that the verdict of the Jurats was perverse as being against the weight of that evidence. So far as the latter two grounds are concerned, the Appellant accepted during argument that the learned Deputy Bailiff had drawn the attention of the Jurats to the contradictions in the evidence, but said that the Jurats failed to take any notice of them.

Other grounds of appeal which had been in the original Notice of Appeal had been struck out by order of the Court of Appeal on 24th July 1996.

The facts giving rise to this action are as follows:-

The Appellant, whose case has been argued throughout by Mr. Picot, its Managing Director, is a Guernsey registered company which is concerned in the manufacture and sale of uPVC windows. The First Respondent was a Director of the Appellant Company. The Second Respondent was the Company Secretary. The Respondents, that is the First and Second Respondents, were authorised signatories to the Appellant's cheques.

At the same time, as well as being part of the Appellant Company, the Respondents conducted their own business under the name of Aquacraft, which among other things, was involved in the delivery and fitting, in Guernsey, of windows manufactured by the Appellant Company.

The action related to some nine cheques issued as long ago as between April 1983 and 31st January 1984. Those cheques were drawn on the Appellant's bank account and were signed by the Respondents, six of which were made payable to Aquacraft and three to companies to whom the Respondents were themselves indebted.

The Appellant's case was that the Respondents had no right to sign those cheques which did not relate to any debts owing to Aquacraft by the Appellant Company.

A Mr. Picot claimed that he had only become aware of the existence of these payments when he had examined the company's books in March 1984, whilst the Respondents were away on holiday.

The Respondents, by their Defence, claimed that all the cheques related to money owing to the Respondents by reason of work done and services provided to the Appellant Company by Aquacraft.

B Their case as pleaded was that whilst Vekaplast was concerned with the supply and the sale of windows to purchasers, the handling and the fitting of the units was wholly a matter for Aquacraft so far as sales in Guernsey were concerned.

So far as payment was concerned, Aquacraft would normally invoice customers direct for the cost of fitting the windows, but the Respondents claim that so far as handling and delivery charges were concerned, these were included in the cost of the windows charged to the customers of
C Vekaplast, who would then account to Aquacraft for the work that they had done.

Further, the Respondents claimed that, in practice, they carried out any follow-up or remedial work and also they assisted from time to time with work in the factory which was then charged by Aquacraft to Vekaplast.

So far as the specific nine cheques were concerned, the Respondents
D claimed that they each related to payments due to the Respondents either for what was described in the Pleadings as "delivery charges" or for work performed by Aquacraft on behalf of Vekaplast.

The trial commenced in the Royal Court on 6th June 1994, and took some 19 days of Court time, ending on 8th August 1994.

It is clear that there was substantial conflict in the evidence given by
E both sides and, indeed, in the course of his summing-up the learned Deputy Bailiff said as follows at page 1310 E of the transcript:-

> "This is a case where I do not see how you can fit the evidence together without concluding that deliberate lies have been told to you during the course of this hearing. The reason why, in Guernsey, we have civil trials before Jurats is that the Jurats are respected for their ability to decide who is or who is not lying, and it is very important that I should not usurp that function."

F

He went on to say at letter F:-

> "As I said at the beginning, it is for you [namely, the Jurats] to come to your own conclusion at the end of the day."

The Jurats found for the Respondents, and the claim was accordingly dismissed.

G

The Appellant Company, as I have said, appeal that decision.

I turn now to summarise the arguments put forward on behalf of the Appellant Company, and in doing so I wish to express the Court's indebtedness to Mr. Picot for the great clarity and courtesy with which he advanced his arguments. He dealt first with his contention that the Jurats' verdict was perverse because they had failed to take account of what he said were the many discrepancies in the Respondents' case.

Dealing with the justification put forward by the Respondents for the money received under what had been described as "the labour invoices" it was the contention of the Appellant that the contradictions in the evidence of the Respondents as to how those invoices were created were such as to destroy any credibility in the invoices themselves. The Appellant maintained that in cross-examination he had demonstrated that many of the charges bore no relationship to the time sheets that had been produced, and further that whilst the labour invoices related to work said to have been done in 1981 and 1982, the Respondents themselves had admitted that the invoices were not prepared until some considerable time later, and that he, Mr. Picot, had not seen them until May of 1984.

In short, he claimed that the invoices as shown to him were fictitious.

Mr. Picot went on to maintain that at a meeting between himself and Mr. Jehan in 1984, Mr. Jehan had claimed that those cheques which had been described as "loans" to Mr. Jehan were advance payments towards the labour invoices which were not yet prepared, whereas in the Pleadings it had been claimed that the loans were taken in advance payments in relation to money owing to "deliveries".

In relation to those cheques which had been justified as being for "delivery of windows" Mr. Picot denied that there had ever been any agreement that the Respondents could charge for deliveries. He pointed out that the invoices themselves were in fact headed "windows fitted" and that the Respondents had now changed their justification for these charges and claimed that the majority of the cost in these invoices was not for delivery as pleaded, but had been incurred in work done in the glazing and finishing of the construction of the windows for which no records could be produced to confirm the work that had been done. He said further that the Respondents had also changed their case in that it was said that it was not a fixed charge for delivery as pleaded but a charge that varied according to the amount of work that had needed to be done on each contract.

So far as the sum of £1,500 was concerned which was said to relate to the Notre Dame windows, Mr. Picot denied completely the Respondents' claim that this was in the form of a subsidy agreed between the parties to account for the fact that the cost of the fitting of the windows was far more than that for which the purchasers could be charged.

Together with his criticisms of both the "labour" and the "delivery" invoices, the Appellant also relied on various criticisms that he made of the Respondents' evidence as to the method of payment. In particular he ridiculed the Respondents' evidence that the payments were made "only as and when needed"; and claimed that the Respondents' claim that they were

A entitled to be paid for "delivery" had been demolished by his evidence that such claims were not made in some forty separate cases.

Mr. Picot further maintained that at a meeting between the Appellant and the First Respondent held in March of 1984, the First Respondent had accepted that the reason for claiming this money from Vekaplast was that he, the Respondent, and the firm, Aquacraft, were in a dreadful financial state and also claimed that at that meeting the First Respondent had
B offered to pay the money back if given the time to do so. The Appellant claimed that the First Respondent had not denied that these things had been said at that meeting.

In general Mr. Picot claimed that these and other discrepancies to which he drew the Court's attention, showed that all of these invoices were fictitious, and that they had been made up so as to arrive at a figure of money owing by Vekaplast to the Respondents which would justify the money taken from the Appellant Company by the Respondents, and thus avoid the
C repayment of money which he claimed had in fact been taken by them from the Appellant Company as a loan.

His case, he said, was that the decision of the Jurats was "perverse" because it showed by their decision that the arguments and contradictions that he had advanced had been disregarded.

In considering these arguments it is necessary to look to see what is the
D role of the Jurats in civil cases in Guernsey, and to remind ourselves of the powers of the Court of Appeal in such matters. The Jurats, and the Jurats alone, are the judges of fact in civil actions. As the learned Deputy Bailiff said at page 1306 of his summing-up:-

> "As to the law, you must accept what I tell you. As to the facts, you alone are the judges. It is for you to decide what evidence you accept and what evidence you reject or of which you are unsure."

E This Court accepts that as an accurate statement of the law of Guernsey.

The Jurats heard the evidence. They have had the opportunity to see and observe the witnesses and they came to a conclusion of fact on that evidence which was presented.

It is not the role of the Court of Appeal to attempt to retry the case on the papers. As the President, Mr. Godfray Le Quesne (as he then was) said
F in this Court in the case of Guille v. Mackay 1967 Civil Rep. No. 2, at page 29:-

> "[The Court] will not interfere with the findings of fact made by the Jurats unless we are satisfied that there was no evidence before them upon which they could reasonably have arrived at those findings. I should perhaps add that in order to cover any exceptional cases which may arise, that it will also be proper for this court to interfere if
G we are satisfied that for any reasons the findings of the Jurats were perverse."

In essence Mr. Picot's case was that the Jurats had been wrong in accepting the evidence of the Respondents, and that they should instead have accepted his own evidence. He went on to say that since they were wrong in the conclusions that they had come to, that they were in fact "perverse" and that the Court of Appeal should set aside their judgment and give judgment for the Appellant.

The Court is unable to accept that argument.

As I say, this is a case in which there was a substantial conflict between the evidence called on behalf of the Appellant and the evidence for the Respondents. It is not disputed that the learned Deputy Bailiff summed the case up fairly and put both sides to the Jurats. The Jurats, as I have said, heard that evidence and had the opportunity to observe the witnesses. They were the body to decide where the truth lay, and to decide what findings of fact they should reach. The Jurats, by their verdict, found for the Respondents and we have no doubt that there was ample evidence before them on which they could "reasonably arrive" at that decision.

That being so this ground of appeal is dismissed.

The second ground of appeal advanced with equal cogency by Mr. Picot was:-

> "That the learned Deputy Bailiff erred in law by allowing the Respondents to adduce and the Jurats to consider significant evidence of a new claim which was neither pleaded nor so pleaded by amendment."

The Appellant claimed that he was taken by surprise by this evidence and was thereby disadvantaged.

The "new evidence" or the evidence of a "new claim" on which the Appellant relied was the fact that whilst in their Pleadings the Respondents had claimed that much of the money they had obtained from the Appellant was for delivery of windows, when it came to the evidence Mr. Jehan maintained that a substantial proportion of that money was not for the delivery of the windows but, in fact, for the work involved in glazing and finishing the windows prior to the delivery. The Respondents' case was that, due to the pressure of work in the factory, whilst the employees at Vekaplast were able to finish the windows for delivery in Jersey, in the case of some 90% of those windows to be fitted in Guernsey further completion work had to be carried out by Aquacraft employees themselves. Work of course done on behalf, they say, of the Appellant.

Mr. Greenfield, on behalf of the Respondents, maintained that it was wrong to describe this as a new claim, and said that in his view no amendment to the Pleadings was required. He maintained that these matters were adequately pleaded, firstly in para. 17 of the Defences where it is said:-

> "Whereas charges for fitting were met directly by the customer, it had been agreed between Mr. Picot, the First Defendant and the Second Defendant that the Plaintiff should be responsible for Aquacraft's delivery charges (that is man hours spent loading and unloading uPVC

A units and ancillary items at the factory and at customer sites and also for costs of transportation of units from factory to site including the provision of a vehicle, fuel and normal wear and tear)."

And at para. 18 of the Defences, where it was pleaded:-

"Aquacraft was also entitled to charge the Plaintiff for labour costs
B incurred ... when Aquacraft employees assisted the Plaintiff's employees in the factory with backlogs in orders. Mr. Picot always insisted that the Jersey orders should have priority as it was a larger market in the early years. As the Guernsey market became more established and the Plaintiffs' employees could not keep up with orders for both the Jersey and Guernsey markets, Aquacraft employees provided additional labour which was in due course charged to the plaintiff."

C With the benefit of hindsight Mr. Greenfield accepted that it was perhaps unfortunate that the Respondents, by their Defence, should have referred merely to "charges for delivery" in relation to the individual cheques when in practice they were claiming that the work involved was more than the work of mere delivery.

However, having carefully considered the arguments advanced by Mr. Picot, the Court is satisfied that he was not disadvantaged by what happened at
D the trial, or that there is merit in this ground of appeal.

We say that for the following reasons: Firstly, that it was the learned Deputy Bailiff himself who first drew attention to what he called this new evidence. Secondly, that no complaint was ever made during the course of the case that this matter required an amendment of the Pleadings, and if it had been raised we have no doubt that an application to amend would have been granted. Thirdly, that far from being taken by surprise Mr.
E Picot was able to cross-examine at great length on the matters which had been raised, and put his arguments fully before the Court; and fourthly, that the Deputy Bailiff himself in the course of his summing-up drew to the attention of the Jurats that in fact the evidence relating to these payments differed substantially from the case as it had first been pleaded. Indeed, he emphasised this difference by reading those Pleadings to the Jurats.

Mr. Picot suggested before us that had in fact the Pleadings been amended,
F he would have had the opportunity to call additional evidence to rebut what he said was this new case - an opportunity which he implied was thereby denied to him. We are not persuaded by that argument. We believe that Mr. Picot, had he wished to do so, could and would have asked the learned Deputy Bailiff for leave to call any further witnesses to answer any evidence by which he was said to have been surprised, and we have no doubt that the learned Deputy Bailiff who, as I said, himself referred to this as new evidence, would have acceded to any such request. No such
G request was in fact made. The arguments on the whole of this evidence were put fully before the Court, and we do not consider that Mr. Picot can be said to have been disadvantaged.

The final ground of appeal relates to the fact that the Deputy Bailiff did not admit before the Jurats the transcript or tape-recording of the meeting that had been held between the parties (that is Mr. Picot on behalf of the Appellant, and the First Respondent) in March of 1984. The Deputy Bailiff approached the tape-recording in the following way. He made it clear to both the parties that, whilst he was not willing to admit the transcript in the first place, Mr. Picot should be free to put to Mr. Jehan what he claimed had been said by Mr. Jehan at that meeting, and that if Mr. Jehan were to dispute it then he would allow the tape-recording to be played so as to contradict the evidence given by Mr. Jehan. This appears to this Court to be the correct approach. In the circumstances Mr. Jehan at no stage directly contradicted anything which he had said at that meeting and, indeed, he accepted that he had used or probably used the words that were put to him by Mr. Picot. In those circumstances it became unnecessary for the Jurats to see the transcript and we consider that the Deputy Bailiff was right to rule as he did. It is clear from the evidence that at no stage did Mr. Picot ask, and the Deputy Bailiff refuse, to allow the recording to be heard. Indeed Mr. Picot himself, during the course of the hearing before the Royal Court, agreed to the approach towards the transcript and the tape-recording which the Deputy Bailiff had taken.

He said at page 473G of the transcript:-

> "I wouldn't wish to complicate the case in any way and I think if it can be ... referred to if the matter is raised and the evidence that I've put in is challenged, then I think it's fine."

The Deputy Bailiff:-

> "Yes I think that is a much neater way of dealing with it, quite honestly."

Mr. Picot:-

> "Yes, yes, I agree."

It is I consider worth adding that the tape-recording itself was merely the recording of some 14 minutes of what was said to have been a four hour meeting. It is accepted by both parties that much of that tape-recording is indistinct, and, indeed, the transcripts which we have seen show much of it to have been inaudible. In those circumstances we doubt whether in fact the transcript or the tape-recording would have been of any real assistance to the Jurats in any event.

For the reasons that I have given this ground of appeal is also disallowed and therefore the appeal is accordingly dismissed.

ADVOCATE GREENFIELD: Sir, in those circumstances I would ask for costs.

LORD CARLISLE: You can't resist that, can you?

MR PICOT: Yes sir, I will accept costs in the normal way.

A LORD CARLISLE: The appeal will be dismissed with costs.

MR PICOT: Thank you, sir. Can I ask the Court if they would be kind enough to grant me leave to take it to the Privy Council?

SIR DAVID CALCUTT: Well, may I just say this to you first; you are in person, it's a serious step to ask for leave to appeal, we will deal with your application if you wish us to, alternatively, you may want time to
B consider the matter.

MR PICOT: Well I would like, obviously, to read the judgment, but I'm, you know, so I can study it- I've just heard it, and it's been put very clearly, I'm most grateful to Lord Carlisle for doing so, but I wish to consider my position.

SIR DAVID CALCUTT: You would wish to consider the judgment?

C MR PICOT: I would wish to consider the judgment.

SIR DAVID CALCUTT: Well, what the Court would be perfectly willing to do, is to allow you to renew your application before the next sitting of this Court.

MR PICOT: Thank you sir, I will be grateful.

D SIR DAVID CALCUTT: I think one of my colleagues will, in fact, be attending that hearing, and therefore will be reasonably familiar with your case, so can deal with the matter. Can I just make it plain that it seems to me on the face of it that you may have the right in law to appeal, but the Court here would wish to attach conditions to the grant of that leave to appeal. That is a matter which you may want to consider, because you've got to consider the question of expense, and I wouldn't want you to be under any illusions about that.

E MR PICOT: I know sir, in fact, my children have had no holidays for the last 14 years, know what sacrifice is for the truth, and that's what they've been brought up to believe.

SIR DAVID CALCUTT: So be it, but it is a serious step to take, and you would obviously want to go very carefully before you embark on that course. We shall adjourn the application for the next sitting of the
F Court.

Appeal dismissed, with costs. Conditional leave to appeal to Her Majesty in Council was granted on 6th January, 1997.

G

80. [CIVIL DIVISION - APPEAL NO. 223]

1996 OCTOBER 14, 18

HARRY GOLD **Appellant**

v.

THE STATES OF GUERNSEY INCOME TAX AUTHORITY **Respondents**

Before: CALCUTT, HARMAN and CARLISLE, JJ.A.

Income Tax - penalty proceedings for failure to furnish information - meaning of "information" - Income Tax (Guernsey) Law, 1975 sections 68, 193 and 200.

See para. 35 of this issue.

St. J.A. Robilliard, for the Appellant.
H.E. Roberts, for the Crown.

CALCUTT, J.A.: Harry Gold, whom I will call "the Appellant", is a Solicitor of the Supreme Court of England and Wales, and practising as such, under the style of H. Gold & Co., in Guernsey. It appears that, in addition to dealing with conveyancing and advising on property located in England, the Appellant also advises and assists in the administration of a number of international commercial and trust companies.

In or about 1994 the Administrator of Income Tax for the States of Guernsey (which expression I use throughout this Judgment to include the Assistant Administrator), wishing to assess the Appellant's liability to tax, caused a notice to be given to the Appellant in accordance with S.68(1) of the Income Tax (Guernsey) Law, 1975, so placing the Appellant under a duty to deliver to the Administrator a return as to his income. In response, the Appellant provided certain information but the Administrator remained concerned, inter alia, about two particular matters.

First, the Administrator enquired about the source of monies used to repay a National Westminster Bank mortgage. The Appellant's accountants informed the Administrator that they believed that the loan from the bank was a short-term bridging loan which was, in turn, replaced by other loans. The Administrator then wrote to the appellant in these terms:

> "Can you please provide copies of the National Westminster Bank loan account statements to support this?"

After further correspondence, the Appellant adopted the position that the Administrator was not entitled to a copy of the relevant bank statements. The Appellant's accountants, however, asserted that they themselves had had inspected the relevant bank statements. They confirmed the dates of the bridging loan, and (subsequently) indicated that they were prepared to certify if required to do so. The Administrator maintained that he was entitled to production of copies of the bank statements, and that a failure to produce them to him would give rise to a breach of S.68(1) of

A the 1975 Law. The Royal Court ruled, on this issue, in the Administrator's favour. The Appellant appealed that ruling.

The first issue which arises for this Court's determination is whether or not bank statements (and copy bank statements) are "information" within the meaning of S.68(1) of the 1975 Law.

Section 68(1) of the Law is in these terms:

B

> "It shall be the duty of every person to whom a notice for that purpose has been given, and whether or not he is liable to pay any tax, to deliver to the Administrator, within 21 days of the date of the issue of such notice, a return as to his income in the form and manner required by the Administrator, and every such person shall furnish to the Administrator, within such period as the Administrator may specify, such accounts or other information as he may require, certified if he so requires, by an accountant competent to appear on
C an appeal in accordance with the provisions of subsection (2) of S.78 of this Law."

In my judgment, on a true construction of S.68 "information" should be so construed as to include bank statements (and copy bank statements). In one sense "information" could be said to be restricted simply to the information which is set out in a document (or copy document), and that it does not extend to the document itself, but "accounts", in its primary
D sense, means the document on which the financial information is recorded, though it can also refer, and often does, to the information itself: see the (UK) Taxes Management Act 1970, S.8(1)(a) and 8(1)(b). Further, the distinction is, in practical terms, a purely theoretical one; it is unreal to acknowledge that the Administrator would be entitled to all of the information which is set out in a bank statement, but that he would not be entitled to require the production of the statement itself (or a copy of it).

E In Cutner v. Commissioners of Inland Revenue (1974) 49 TC 429, the Court was concerned with S.443 of the (UK) Income and Corporation Tax Act 1970. This section provides that "the Board ... may ... require any party to a settlement to furnish them ... with such particulars as they think necessary ..." MacKenna J., holding that the Board were entitled to require a party to furnish them with information of the exact contents of the settlement, said this (at page 431):

F

> "It follows as a matter of common sense that the Board, who ask for that information, are entitled to require that the party shall give it in the form of a copy of the settlement. It would be absurd to suppose that the party can insist on communicating the contents of the settlement orally either to the Board en masse or even to one of their officers, or to suppose that the Board must be content with a paraphrase of the instrument".

G Those words are apposite in this case.

Secondly, the Administrator enquired about fees paid to the Appellant in respect of professional fees received as a solicitor. The Administrator

sought details of payments received by the Appellant paid by or under the instruction of eight named companies. The Administrator sought to learn the identity of the companies for whom legal work had been carried out and the details of the fees so received. After correspondence, the Appellant's accountants, on the Appellant's behalf, asserted that no fees had been received from four of the eight companies, but, without disclosing which of the remaining four companies had paid what fees, nevertheless listed the payments which were said to have been received in respect of each of the relevant financial years. It was asserted on the Appellant's behalf, that information identifying specific clients was protected by legal professional privilege. The Administrator disputed this claim. The Royal Court ruled, on this issue also, in the Administrator's favour. The appellant also appealed this ruling.

The second issue which accordingly arises is whether the Appellant, in his capacity as a tax payer, could lawfully decline to furnish the information sought on the ground of legal professional privilege, alternatively on the ground of the duty of confidence owed by a solicitor to his client.

Advocate Robilliard, who appeared on behalf of the Appellant, conceded that he could point to no case in which it had been held that information of the nature now sought had been held to have been protected by legal professional privilege. Whilst nevertheless maintaining that the Appellant was entitled to rely on this privilege, Advocate Robilliard invited the Court, in the alternative, to consider the Appellant's duty of confidence to his client.

It is not every communication between a solicitor and his client that attracts the protection of legal professional privilege: see Phipson on Evidence, 14th edition, para. 20-18 and following. Even if information relating to the payment and receipt of professional fees could, in some circumstances, attract legal professional privilege, such privilege is not, in my judgment, available to a solicitor, as a tax payer, in respect of "information", sought by the Administrator, relating to the payment and receipt of professional fees.

The importance in general terms of maintaining legal professional privilege is not in doubt: see R. v. Derby Magistrates Court, ex parte B (1995) 4 All ER 526, per Lord Taylor of Gosforth at pp.540-541. But exceptional circumstances may arise where neither legal professional privilege nor a solicitor's duty of confidence can prevail over certain requests for disclosure: see Parry-Jones v. Law Society (1969) 1 Ch.1. Exceptional circumstances may arise in the field of taxation. R. v. Inland Revenue Commissioners, ex parte Taylor (No.2) (1990) 2 All ER 409, concerned a notice given under S.20 of the (UK) Taxes Management Act 1970. There the legislature specifically considered the position of a legal adviser. Bingham L.J. (as he then was) said this at page 413:

> "Parliament has expressly preserved the clients' legal professional privilege where disclosure is sought from a lawyer or tax accountant in his capacity as a professional adviser and not a tax payer. That is the position covered by S.20B(8). Parliament has, moreover, provided a measure of protection where the notice is given under S.20(1) or (3) concerning documents relating to the conduct of a

A pending appeal by the client, but there is no preservation of legal professional privilege and no limited protection where the notice relates to a lawyer in his capacity as taxpayer who is served with a notice under S.20(2). The clear inference is, in my judgment, that a client's ordinary right to legal professional privilege, binding in the ordinary way on a legal adviser, does not entitle such legal adviser as a taxpayer to refuse disclosure."

B The tax legislation in Guernsey is less explicit than the counterpart legislation in the United Kingdom. Nevertheless, although there is no explicit protection in the Guernsey legislation for legal advisers as such, where the adviser is himself the taxpayer, he is, in my judgment, under the duties set out in S.68(1) of the Guernsey Law to deliver a return as to his income and to furnish such accounts or other information as the Administrator may require; and he cannot lawfully decline to furnish that information either on the ground of legal professional privilege or on the ground of his duty of confidence.

C

As a further ground of appeal, it was contended that the information and/or documents requested by the Administrator did not relate or did not directly relate to the proposed assessment to tax of the Appellant and so accordingly the Administrator was not entitled to request it under S.68 of the Law. Section 68 imposes a duty to furnish "such accounts or other information as (the Administrator) may require". In States of Guernsey v. Hillcrest Executor and Trustee Company Limited 16.GLJ.35, the Royal Court

D held, inter alia, that "require" means "think necessary", as those words are to be found in S.453 of the (UK) Income and Corporation Taxes Act 1970. It is for the Administrator to decide what information and/or documents he "requires" or "thinks necessary"; and see also Goulding J. in Wilover Nominees v. Inland Revenue Commissioners (1973) 1 WLR 1393, at page 1396. For my part, I can see no basis on which the actions of the Administrator can sensibly be disputed.

E The Administrator, having regard to S.193 of the Guernsey Law, and being of the opinion that there were prima facie grounds for believing that the Appellant was liable to a pecuniary penalty, served a notice on the Appellant under S.200(1) of the Guernsey Law. The Appellant (as he was entitled to do) sent the Administrator a notice requesting that the proceedings against him should be taken before the Royal Court sitting as an Ordinary Court; and the Administrator accordingly caused penalty proceedings to be instituted in that court. The Royal Court adjudged that the Appellant was liable to a penalty. The proceedings before the Royal

F Court were adjourned pending the determination of this appeal.

In my judgment this appeal should be dismissed.

Appeal dismissed with costs.

G

81. [CIVIL DIVISION - APPEAL NO. 226] A

1996 OCTOBER 16, 17, 18

THE MONUMENT TRUST COMPANY LIMITED **Appellant**

v.

HERBERT FREDERICK GAUDION and RUBY ADA GAUDION **Respondents**

Before: CALCUTT, HARMAN and CARLISLE, JJ.A. B

Practice and procedure - summary judgment - principles on which the Royal Court should act

See para. 45 of this issue.

P.T.R. Ferbrache, for the Appellant. C
J.D. Loveridge, for the Respondents.

HARMAN, J.A.: This is an appeal by Monument Trust Company Limited ("Monument") from the judgment given by the Bailiff on 10th June 1996, refusing an application for summary judgment against the Respondents, Mr. and Mrs. Gaudion, in the sum of £526,103.

On 6th February, proceedings had been commenced against the Gaudions in the sum of £707,504.82, and on 22nd March 1996, Defences were tabled in the Royal Court. Meanwhile, an application for summary judgment had been lodged on 19th March. The application was made pursuant to Rule 17 of the Royal Court Civil Rules 1989. By Rule 17(1):- D

> "(1) The Plaintiff may, at any time after inscription of the action on le Rôle des Causes à Plaider, apply to the Court for summary judgment against the defendant. E
>
> (2) The grounds of the application shall be that the defendant has no defence -
>
> (a) to the plaintiff's claim, or to any particular part thereof; or
>
> (b) to the claim or part thereof except as to the amount of damages claimed." F

Under Rule 20:-

> "Unless on the hearing of the application under Rule 17 the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial, the Court may give such judgment against the defendant on the claim or part thereof as the Court thinks just." G

Under Rule 21:-

A "The Court may by order, subject to such conditions, if any, as it thinks just, stay execution of any judgment given under Rule 20 until after the trial of any counterclaim set up by the defendant in the action or of any separate action commenced or to be commenced by the defendant against the plaintiff."

In the present case there is no counterclaim or action by the Defendants against the Plaintiff, that is the Respondents and Appellant at this
B hearing.

These Rules follow the form of the English provisions for summary judgment under the Rules of the Supreme Court of England and Wales, although not in precisely the same language, and it has been submitted to us by Mr. Ferbrache for the Appellant that the substance is indistinguishable. This has not been challenged by Mr. Loveridge on behalf of the Respondents.

C Under Order 14, Rule 1:-

"(1) Where in an action to which this rule applies a statement of claim has been served on a Defendant and that Defendant has given notice of intention to defend the action, the Plaintiff may, on the ground that that Defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed,
D apply to the Court for judgment against that Defendant."

Under Rule 3(1):-

"Unless on the hearing of an application under Rule 1 either the Court dismisses the application or the Defendant satisfies the Court with respect to the claim, or the part of the claim, to which the Application relates that there is an issue or question in dispute
E which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the Plaintiff against that Defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed."

In our opinion the way in which the Supreme Court of England and Wales has interpreted Order 14 should apply in the interpretation of Rule 20.

F We have been referred to the case of <u>European Asian Bank AG v. Punjab and Sind Bank (No. 2)</u> (1983) 1 WLR 642 and the judgment of Robert Goff LJ (as he then was) in these terms at p.653:-

"Now it is true that the words used in the rule are "the Court <u>may</u> give such judgment for the Plaintiff ..." and at first sight the word "may" could be read as indicating that the Court has a discretion. But it is to be observed that the Court can only give such judgment
G if (1) the Court has not dismissed the Plaintiff's application (presumably for some defect in the application itself, e.g. that there is no due verification of the claim), and (2) the Defendant has not satisfied the Court either (a) that there is an issue or question

in dispute which ought to be tried, or (b) that there ought for some other reason to be a trial. Once these three possibilities are eliminated, it is very difficult indeed to conceive of any circumstances where the Court should not give judgment for the Plaintiff, especially when it is borne in mind that the policy underlying R.S.C. Order 14 has always been that, on a proper application, if the judge is satisfied that there is no triable issue, he should give judgment for the Plaintiff. ... The use of the word "may" in this context is, we strongly suspect, a survival from the days when R.S.C. Order 14 did not contain the words "or the Defendant satisfies the Court ... that there ought for some other reason to be a trial..." If, having regard to those words there remains any discretion in the Court, once the three possibilities we have referred to are eliminated, to decline to give judgment, it can only be a discretion of the most residual kind."

It follows, in our opinion, that any issue or question in dispute, or other reason for a trial, must provide a defence to that part of the claim for which summary judgment is sought. We emphasise these matters at the outset because we have been told that this is the first appeal to this Court from a decision of the Royal Court on an application for summary judgment under the Royal Court Civil Rules, 1989.

We turn to the facts of this case:-

A loan agreement had been entered into between Monument and Mr. and Mrs. Gaudion on 22nd December 1994 when Monument agreed to advance the sum of £800,000 to the Gaudions subject to provisions as to repayment and interest. The sum claimed in the action is said to represent the principal sum and interest outstanding, less repayments, as at 16th December 1995. The sum claimed in the application for summary judgment is said to represent principal monies due under the loan agreement which remain unpaid.

There is a recent history of borrowing by the Respondents which goes back to 1992. At that time the Gaudions' real property was subject to charges in favour of the States of Guernsey in the sum of approximately £38,000 and the Royal Bank of Scotland in the sum of £270,000. The lands owned by the Respondent were substantial and their value was said to be in excess of the sums owed by them at that time. Further, their value would be greatly enhanced if planning permission for development was granted. On 15th December 1992, the Respondents borrowed the sum of £230,000 from a businessman named Michael Neuman. This was said to be for the purpose of financing a proposed development after anticipated contractual arrangements with American business contacts had fallen through. A bond had been registered against the Respondents' real property on 15 December 1992, under the terms of which the Respondents were required to pay Mr. Neuman a total of £285,000 or at Mr. Neuman's option the US dollar equivalent. The date for repayment was to be by 15th March 1993.

This would have represented an annual interest rate of over 90%, and Mr. Loveridge acknowledged before us that the loan pointed to the Gaudions' desperate shortage of ready money at this time. He does not, in fact, criticise this loan. By 15th March a sum of money, 31,000 US dollars,

had been repaid. On 22nd April 1993, judgment was given against them in the sum of 410,750 US dollars, representing the full amount of capital and interest outstanding plus further default interest, and with a right to levy execution on their real property. On 3rd June 1993, during Saisie proceedings before the Royal Court, Mr. Gaudion's net assets were estimated by his Counsel, Mr. Loveridge, at £2,910,000 and it was argued that it would be unjust should he forfeit all his real property due to default on the comparatively small Neuman loan. It appears that it was in consequence of these representations that the Royal Court stayed the proceedings until 1st December 1993.

The parallel eviction proceedings had previously been stayed on 13th May until 13th November 1993. By that date the Respondents had not obtained the necessary refinancing of any of their loan indebtedness and did not have available any funds to repay any of it. They consequently faced imminent enforcement of the eviction proceedings and Saisie proceedings. It has been pointed out to us that at this stage they might have applied for a further stay of the interim vesting order, but not of the eviction order.

However, on 18th November 1993, they entered into an agreement as borrowers with Sigmet Inc. which is a Liberian company, it seems, used by Hamilton Brothers Limited to hold investments for clients. Hamilton is incorporated in Guernsey and its business is trust and company administration. Mr. Timothy Howarth is a director of that company. The principal sum involved in this loan was £345,000 and its main purpose was to be the repayment of the Neuman loan together with interest and costs. In consequence the Saisie proceedings and eviction proceedings were set aside.

The agreement of 18th November 1993, was between Mr. and Mrs. Gaudion of the first part referred to as "the vendors"; Weardale Limited of the second part, referred to as "the purchaser" and Sigmet Inc. called "the lender" of the third part. The sons of Mr. and Mrs. Gaudion were joined to confirm that they were in agreement with the arrangements entered into between the parties and to affirm that they would not exercise any rights of retraite or other rights which either of them might have or might claim to have in respect of the realty which was the subject of the agreement.

Under the agreement Weardale would endeavour but was not bound to procure long term finance to the Gaudions from a third party or parties for the purpose of repaying the loan. But if the long term finance did not materialise and the Gaudions were otherwise unable to repay the loan, then as from 10th November 1994, Weardale was at liberty to sell the realty and apply it in settlement of the loan. This included all outstanding costs and charges from secured creditors. Any monies following sale which were not required to be paid to the lender or creditors would be paid to the Gaudions and any realty remaining in the ownership of Weardale would likewise be reconveyed to them. Meanwhile, the borrowers were granted a droit d'habitation in respect of the realty.

On 18th November 1993, in addition to the loan agreement with Sigmet Inc. the Gaudions had entered into a further agreement with Weardale Limited and Sigmet Inc. whereby they conveyed all their real property to Weardale.

Mr. Gaudion has since stated that it was his belief that Weardale was owned by his wife and himself. He has pointed to a letter dated 21st November 1994, from Mr. Harlow of Ernst & Young, his accountants, in which Mr. Harlow refers to the need for "your company to submit an annual return to Her Majesty's Greffier in January." This letter was written under the heading "Weardale Limited." Mr. Gaudion maintains that it was as a result of advice received from Mr. Harlow that in November 1993 he changed his advocate to Mr. Dadd of Ferbrache & Co. Mr. Dadd afterwards advised the Gaudions in relation to the agreements and conveyance. At the same time Mr. Dadd was aware that Mr. Gaudion had been seriously unwell and, indeed, on 19th November 1993, he referred to Mr. Gaudion's illness in a letter, while expressing a hope for his quick recovery. In a later affidavit Mr. Gaudion referred to his belief that both Mr. Harlow and Mr. Dadd were directors of Weardale while representing and advising himself and his wife.

Mr. Gaudion has stated that it was not until January 1996 that he discovered that Weardale was not owned by his wife and himself. He suggests that at all material times Weardale Limited was owned by Monument Trust Company Limited, and that its directors were the partners in Ernst & Young and Mr. Dadd. He has stated that Mr. Dadd was the advocate acting for Monument Trust Company Limited, Weardale Limited, and himself and his wife in relation to the negotiation and execution of the agreements. However, Mr. Dadd wrote to Mr. and Mrs. Gaudion on 15th November 1993, in anticipation of the agreements to be entered into between the parties on 18th November and in the course of that letter he emphasised the advisability of them taking independent professional advice. But it is said that he had nevertheless already advised them himself.

As the Bailiff stated in his judgment the upshot was that the Defendants had another year's respite from creditors which unfortunately they were not able to turn to their advantage. The Bailiff also stated that it was not clear at this stage who owned Weardale. He suggested that there were conflicting pointers, and that the fact that the property was conveyed with the agreement of the Law Officers for £5,000 might indicate that there was no change of beneficial ownership in November 1993 if the Law Officers took a generous view of some, perhaps, temporary or technical family arrangement. According to Mr. Gaudion, in or about October 1994, Mr. Harlow advised him and his wife that he had been able to identify a person who might be prepared to lend the money required at a rate of 15% per annum. On 23rd November he advised that in fact the rate of interest would be 15% per annum above the rate at which the lender would, itself, have to borrow the money with which to make the loan. As Mr. Gaudion saw it, it was virtually impossible for them to obtain alternative financing at that time and consequently they had no alternative other than to proceed with the lender found by Mr. Harlow.

According to Mr. Gaudion, Mr. Harlow did not disclose the identity of the proposed new lender but the Gaudions, acting on his advice, entered into the loan agreement and the agreement dated 22nd December 1994. It was then that they learned that the new lender was Monument. Mr. Gaudion has suggested that Monument was at all material times wholly owned and controlled by Ernst & Young, but that he was not aware of that fact when he entered into the 1994 agreements. He said that they were never

advised by Mr. Harlow to obtain independent advice. He was not aware that Mr. Harlow was a director of Monument until August 1995. According to Mr. Gaudion, Mr. Dadd prepared the documents for Sigmet Inc. and he also prepared the documents for Monument. He advised the Gaudions on the agreements with Monument but he did not on this occasion suggest that they should take independent advice.

The Gaudions have further submitted that they entered into the two agreements on conditions which were manifestly disadvantageous to them. These conditions are set out in para. 14 of Mr. Gaudion's affidavit. They include the fact that the Respondents were required to pay interest at 16.5% above base lending rate at the Royal Bank of Scotland PLC with a minimum of £90,000; that Monument assumed total control of Weardale so that the Gaudions were unable to sell any of the real property which they had formerly owned and which they had transferred to Weardale, and thus discharge the loan to Monument. They further complain that the conditions included the discharge of a guarantee given by Mr. Harlow in favour of Sigmet Inc. in the sum of £50,000 in respect of which, they said, they had no prior knowledge. Mr. Loveridge has submitted to us that this guarantee is significant in pointing to a personal interest on the part of Mr. Harlow in obtaining the Monument loan.

The Gaudions were required to repay the loan by 16th December 1995 when, as they suggest, Monument knew that Weardale would not be able to effect the sales within such time to discharge the loan and the costs. It is submitted also that by virtue of the fact that the directors of Monument were and are also partners in Ernst & Young, Monument as lenders had additional information about them which they would not have had otherwise, namely:

(1) That the Gaudions had to repay the loans to Sigmet and to the Royal Bank of Scotland (Guernsey) Limited by specified dates;

(2) That the Gaudions had not received independent financial or legal advice; and

(3) That both were unwell to the extent that they were unable to make properly informed and considered decisions on financial and legal matters.

Mr. Gaudion contends that they entered into each of the agreements as a result of the undue influence placed on them by Monument via its director Mr. Harlow and its Advocate Mr. Dadd.

We have considered the effect of the affidavits of Mr. Timothy Howarth which support the application under Rule 19. In two affidavits Mr. Howarth referred to an apparent attempt by Mr. and Mrs. Gaudion to dissipate their assets with a view to avoiding part of their obligations to Monument. The suggestion was that payments, which were unjustifiable, were made to each of their sons, of £41,000 each. The alleged purpose of these payments was in turn denied by Mr. Gaudion in his affidavit where he stated that the monies were "monies due to each of our sons upon termination of their employment in accordance with the terms of Conditions

of Employment." Mr. Gaudion states that the figures were included in their accounts for the year 1995.

Mr. Howarth, in his affidavit dated 29th January 1996, stated that he is an English solicitor, with a client mutual to the Monument Trust Company Limited and that in relation to that mutual client he acts for Monument. He is also a director of Weardale Limited. In a second affidavit dated 19th March 1996 he set out the history of the Gaudions' borrowings from the point of view of his client. In it he questioned Mr. Loveridge's estimate of the Gaudions' wealth as at June 1993, which was advanced to the Court at that time, and he estimated the value of the entire real property belonging to the Defendants on a forced sale in November 1993 as being approximately £835,000. Mr. Howarth further made the point that the loan indebtedness of the Royal Bank of Scotland in the sum of £270,000 and a debt to the States of Guernsey in the approximate sum of at this time £15,000 were also outstanding by the time the matter came back for consideration in November, but these earlier debts would have been satisfied out of the Gaudions' real property before Mr. Neuman would have benefited from any surplus proceeds. Any surplus therefore would have borne no relation to the sum contended by Advocate Loveridge. Indeed, on that estimate there would have been a shortfall.

Mr. Howarth set out his own involvement in the third loan. On 7th December 1994, he was contacted by Mr. Harlow. This was in connection with the so called "mutual client" already referred to by Mr. Howarth in an earlier affidavit. This client was said to be an international businessman based in Europe, who had grown accustomed over the years to consult with Mr. Howarth in relation to various of his commercial dealings. Monument, it seems, through Mr. Harlow had proposed to Mr. Howarth's client that he should make a loan to the Gaudions. Mr. Howarth's client wished him to consider it and Mr. Harlow emphasised that the matter was urgent. There were further conversations between Mr. Howarth and Mr. Harlow on 8th and 9th December. On 12th December Mr. Howarth's client telephoned him from Mr. Harlow's office to say that he understood the Gaudions were very upright people who had been on the brink of losing everything in 1993, when Sigmet rescued them. They had been continuing to pursue their long held ambitions of developing their farming land and buildings but for various reasons had been unsuccessful in the period of that loan. His client was minded to make the loan relying on the ability of the Gaudions to sell their real property before repayment at a premium should planning permissions, which were expected shortly, materialise, but in any event at such a price as would cover the sums to be advanced with interest. The decision was eventually made to proceed with the loan despite Mr. Howarth's misgivings which were partly due to the fact that the shares in Weardale were not charged and were held by Monument which was effectively an Ernst & Young company, while the Gaudions were clients of Ernst & Young and further the directors of Weardale were Mr. Harlow and Mr. Dadd.

Mr. Howarth was appointed to the Board of Directors of Weardale to represent his client's interest. He did not meet or speak to the Gaudions throughout, but dealt with Mr. Dadd whom he regarded as their representative at all times. Mr. Howarth confirmed that there was no connection between his client and Sigmet and no connection with the funds

advanced under the Sigmet agreement. His client had not been connected in any way with Mr. Neuman. He thus insisted that the Gaudions obtained wholly new financing in December 1994, involving disbursement by Monument of £800,000. The security comprised all the real property which had previously been conveyed by the Defendants to Weardale, and the Gaudions were as from December 1994 under a best endeavours obligation to procure sale of the security at the earliest available opportunity for the best price reasonably obtainable. The Gaudions were to receive 70% of any net profit obtainable from such transactions and Monument would receive 30% of any net profit on the sales of that security. Monument entered into the agreement in the expectation that all sales of the security would be completed before December 1995 and that the sales would generate sufficient proceeds to repay all sums due.

Meanwhile, the Gaudions' son, Michael, held a power of attorney granted by his father in his favour and was handling the greater part of his parents' affairs. The Gaudions themselves were also being advised by Mr. Harlow. Although Mr. Harlow insisted at all times that the Gaudions were acting in good faith it had become apparent, at least by August 1995, that they were unlikely to meet their obligations. Mr. Howarth wrote to Mr. Harlow about this on 22nd August 1995. This was followed by certain voluntary prepayments of the loan. By the beginning of December it was being proposed by the Gaudions, through their son Michael, that the security should be "signed over" because the Gaudions had no assets to satisfy their obligations. On 18th December 1995, a letter was sent to Mr. and Mrs. Gaudion from Monument giving notice of the intention of Weardale to sell the realty and referring to their obligation to vacate the property. In this letter it was pointed out that there was likely to be a shortfall to Monument of some £200,000 to which must be added continuing interest and costs. In the event Mr. and Mrs. Gaudion failed to move, claiming that they had nowhere to go. Meanwhile Weardale could not sell the security with vacant possession. The liabilities of the Gaudions and Monument's losses were therefore said to be further escalating.

On the hearing of the application the Bailiff declined to make an order for summary judgment on a number of grounds. These included:-

(1) The uncertain relationship between the Gaudions and Mr. Dadd.

According to Mr. Gaudion as the result of advice received from Mr. Harlow he changed his advocate in November 1993. It was not at all clear that Mr. Dadd was in fact acting for the Gaudions at that stage. It did however seem that he was acting for Weardale Limited, and if in fact, Weardale Limited was a creature of Mr. and Mrs. Gaudion then he was acting for them and should have been advising them accordingly.

(2) It was not clear at this stage who owned Weardale. This was an issue which needed to be resolved.

(3) When it came to Monument, the new lender was a mutual client of Mr. Harlow of Ernst & Young and Mr. Howarth who described himself as an English solicitor. Mr. Howarth was solely concerned with the interests of his principal, the so-called international businessman.

(4) The fact that the sons were brought into the 1994 agreement was evidence of the rush in which the arrangements were made and the lack of full consideration by those involved advising the Plaintiffs and the Defendant.

(5) According to Mr. Howarth, Ernst & Young undertook to him on behalf of his client, the lender, that the shares in Weardale would be held to the order of his client pending repayment of the loan. Whether Ernst & Young had power to do this would depend on the ownership of Weardale.

(6) The second 1994 agreement provided that the borrowers were to use their best endeavours to sell the realty owned by Weardale Limited at the earliest available opportunity. This was in direct conflict with the other agreement which talked about the company selling the realty if repayment was not effected on the due date.

(7) The whole position of undue influence should be left open for evidence of the precise relationship of the parties involved to be explored at trial.

(8) The representation that was made to the Law Officers at the time that they gave their permission for that sale should be examined and if for that reason or for some other reason the sale was defective, the effect of such a sale should be carefully examined by the Court before judgment for any sum could be taken.

However, the application was for summary judgment only in relation to the outstanding principal monies due as at 16th December 1995. Mr. Loveridge has submitted to us that there are a number of triable issues in relation to the capital sum. These are:-

(1) Whether the Respondents owe the capital sum;

(2) whether there was undue influence by Mr. Harlow or Mr. Dadd;

(3) whether there was an unconscionable bargain; and

(4) whether the agreements should be set aside on the grounds of undue influence, unconscionable bargain or as being contrary to public policy.

He referred to two further minor issues, whether the Respondents should be evicted and the uncertain ownership of Weardale.

Mr. Loveridge suggested that the Respondents should never have entered into either the Sigmet or the Monument agreements. As we have already noted he does not question the Neuman agreement where the terms were substantially more onerous. He has submitted that the Monument agreement might be voidable or even void, but he does not suggest that it was illegal. He has argued that unless all the issues are tried at one time there is a danger that injustice will be done. Meanwhile his clients deny that they owe anything. As we have already noted there is no

counterclaim or plea for set off, but simply a straight denial of liability.

In our opinion this cannot be sustainable. As Mr. Ferbrache has correctly stated the capital sum is claimable in any event. If the contract is void or voidable the party who has paid the money is entitled, at least, to repayment of that amount.

We have been referred to the case of Westdeutsche Landesbank Girozentrale v. Islington London Borough Council (1994) 4 All ER 890, and in particular to the judgment of Leggett, LJ at p.967 where he distinguished between protection from loss and securing a windfall. He said:-

> "Any system of law, and indeed any system of fair dealing, must be expected to ensure that Islington do not profit by the fortuity that when it became known that the contract was ineffective the balance stood in their favour. In other words, in circumstances such as these they should not be unjustly enriched."

We are satisfied that these principles apply to the present case and that the Appellant is entitled to the repayment of the capital sum outstanding on the loan, whether or not it is otherwise open to criticism in the main action. There is no defence to the part of the Plaintiff's claim which relates to the principal monies. We therefore allow this appeal and give judgment for the Plaintiff in the sum claimed, namely £526,103.

Appeal allowed and judgment awarded to the Appellant in the sum claimed, with interest prior to judgment, from 9th February, 1996, at the rate of eight per centum per annum, and with costs in respect of this appeal and in respect of the application for summary judgment in the Royal Court.

THE FOLLOWING JUDGMENTS OF THE COURT OF APPEAL HAVE NOT PREVIOUSLY BEEN PUBLISHED IN FULL IN THE LAW JOURNAL OR ELSEWHERE.

82. [CRIMINAL DIVISION - APPEAL NO. 134]

1991 APRIL 3

THE LAW OFFICERS OF THE CROWN
v.
MARLON ALVARO PEDEN

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

(i) Sentence - young offender - criminal damage - driving with excess alcohol - proportionality - consecutive sentences - principles to be applied.

(ii) **Youth detention - statutory restrictions - multiple offences - whether each offence must qualify.**

See 11.GLJ.28, 33.

N. Le Poidevin, for the Applicant.
A.C.K. Day, Q.C. (H.M. Comptroller), for the Crown.

BLOM-COOPER, J.A.: This is the judgment of the court in the case of Marlon Alvaro Peden. The applicant, who presents a distressing picture of criminality and an ill-directed life style over more than 10 years since he committed his first offence at the age of 10, applies for leave to appeal against sentence in respect of a number of offences, all of which were committed within the space of an hour on the 8th of November, 1990.

On the 23rd of January, 1991, he pleaded guilty before the Royal Court to 11 out of 14 counts in an indictment of 15 counts.

The sentences on his co-accused on the first 4 counts have been deferred until the 30th of April, 1991.

In the aggregate the applicant was sentenced to 2 years youth detention, a new form of custodial sentence for persons under the age of 21 by virtue of the Criminal Justice (Youth Detention) (Bailiwick of Guernsey) Law, 1990. It is helpful to refer to the main provisions of that law which corresponds broadly, though not in all details, with the recent law in England in S.1(4) and 4(a) of the Criminal Justice Act 1982, as substituted by S.123(3) of the Criminal Justice Act, 1988.

I now read the relevant provisions of the Guernsey Law of 1990. S.1(1) and (2) provide as follows:-

> '(1) No person aged under 21 years shall be sentenced to imprisonment for an offence.
>
> (2) Where a person aged under 21 years but not under 14 years is convicted of an offence which is punishable with imprisonment in the case of a person aged 21 years or over (not being an offence the sentence for which is fixed by law) and the court considers for reasons which shall be stated in open court that the only appropriate method of dealing with the offender is to pass a custodial sentence that sentence shall be one of youth detention.'

S.2(1) provides:

> '2(1) A court shall not pass a sentence of youth detention unless-
>
> (a) it is satisfied that the offender is unable or unwilling to respond to non-custodial penalties, or
>
> (b) a custodial sentence is necessary for the protection of the public or the prevention of crime; or

A (c) the offence was so serious that a non-custodial sentence cannot be justified.'

And then (2), perhaps it is convenient to read:

'(2) Before passing a sentence of youth detention the court shall take into account any information before it which is relevant to the offender's character and physical and mental
B condition.'

The Deputy Bailiff in this case stated that he was acting under S.2(1)(b, that is to say a custodial sentence was considered necessary for the protection of the public or the prevention of crime, and no quarrel could be advanced in respect of that conclusion by the court.

The offences for which the applicant was sentenced can be broken down conveniently into four blocks. The first four are related to the breaking
C into a garage and taking and driving away a lorry. I put it in the very broad form. The facts of that group of four offences are neatly stated by the Comptroller in presenting his opening address before the Royal Court and I read now at p.19B in the record:

'They [that is the applicant and his co-accused] met at the bus terminus. They had both been drinking. Sometime after 7.30 they both decided to go to Bougourd Bros. at Les Banques to take a motor
D car. They took a taxi there and they went to the security fence at the side of the building, climbed over the fence into the near compound - the garage's rear compound. They then went to a door at the rear of the building, they smashed the glass in the door, Marsh, the co-accused, climbed through and released the locks and allowed Peden to enter the garage - the building.

Inside the building, Mr. Peden got into a lorry, a new and
E unregistered lorry - sat in the driver's seat, the keys were in the ignition.'

Mr. Marsh got into the passenger seat. Mr. Peden started the vehicle and drove it into a motor vehicle that was parked in front of him. In fact there were a series of vehicles parked in front of him and on two occasions, it would appear, he drove the lorry into the first vehicle and so caused the shuttle effect down the line of vehicles. Five cars were involved and, together with the lorry, the total cost of the damages was
F £2,939.'

The sentences were, respectively, 3 months' youth detention for the burglary, 1 month for the criminal damage, that is the damage to the panes of glass to the amount of £175, 12 months' youth detention for criminal damage to 6 motor vehicles, amounting to £2,939.30 and two months' youth detention for taking a conveyance, a Ford Fiesta, without authority. All these sentences were made to run concurrently.

G

It is convenient to say that this court now thinks that 12 months' youth detention for an offence of reckless damage, as it is conceded it was

reckless, to the 6 vehicles is more than is justified. The court will substitute a period of 9 months' youth detention for that count.

The second block of offences concerned driving while disqualified and driving without third party insurance. For these 2 motoring offences the applicant was sentenced to 3 months' youth detention on each count, the first consecutive to the first block of offences, the second concurrently with the other sentences. It is again convenient to take an allied offence in the fourth block, which is a single offence of driving with excess alcohol for which the applicant received, on the face of it, a harsh penalty of 3 months' youth detention, to run consecutively to the other custodial sentences.

For reasons which we will state hereafter, we do not disturb the custodial sentence, but we do think it should have been a concurrent sentence to the offence of driving without third party insurance, the one I have just dealt with. Accordingly, we will alter that sentence to run concurrently.

The third block of offences relates to resisting arrest by a police officer and damage to a police car, for which the applicant received 6 months' youth detention, consecutive to other sentences, and 3 separate periods of 2 months' youth detention concurrent with the other police offences.

In reducing the 2 sentences which we have indicated already, that is to say the 12 months' to 9 months' youth detention for the criminal damage and the change from the consecutive sentence of 3 months' youth detention to a concurrent one, we have adopted two well established principles of sentencing.

First, proportionality, that there must not be passed a sentence disproportionate to the offence for which it is being imposed and secondly, consecutive sentences may be passed only if the offence for which a consecutive sentence is passed is in respect of an offence distinct and committed separately from another offence.

Consecutive sentences are ordinarily not permitted for a single instance or a single criminal event, but there are exceptions. We think that the motoring offences and the resisting arrest from the police officer were distinct from the burglary and the criminal damage done earlier in the criminal event.

It was submitted persuasively by Counsel that under the 1990 Law on youth detention it was necessary for the court to apply the statutory restrictions in S.2(1) separately in relation to each offence for which the applicant was being sentenced, but in the course of argument and as a result of reference to recent English authority this argument became unsustainable.

We refer to Regina v Mussell et al (1991) 1 WLR 187, in the Court of Appeal, Criminal Division, where the Lord Chief Justice, Lord Lane, gave a reserved judgment. Given the textual differences in the two statutes to which we have already referred we nevertheless find the conclusions of the Lord Chief Justice compelling on this issue.

A I refer now to the judgment of Lord Lane in Mussell. It is unnecessary to read the headnote, but at page 192B, the Lord Chief Justice sets out the provisions in S.123 of the Criminal Justice Act 1988, and it is convenient to read it so that those who come to read this judgment can compare it with the Guernsey legislation. S.123(3) provides:-

> "The following subsections shall be substituted for subsection (4) [of section 1 of the Criminal Justice Act 1982]: '(4) A court may not - (a) pass a sentence of detention in a young offender institution; or (b) pass a sentence of custody for life under section 8(2) below, unless it is satisfied - (i) that the circumstances, including the nature and the gravity of the offence, are such that if the offender were aged 21 or over the court would pass a sentence of imprisonment; and (ii) that he qualifies for a custodial sentence. 4(A) An offender qualifies for a custodial sentence if - (a) he has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them; or (b) only a custodial sentence would be adequate to protect the public from serious harm from him; or (c) the offence of which he has been convicted or found guilty was so serious that a non-custodial sentence for it cannot be justified.'"

That is the end of the extract from the section in the English legislation. I now read on in the passage in the Lord Chief Justice's judgment, at p.192E:-

> 'The present appeal raises yet another problem concerning the proper construction of this section. In the case of each appellant the judge was satisfied that the circumstances were such that if he had been aged over 21 years a sentence of imprisonment would have been appropriate and that he qualified for a custodial sentence because he was convicted of at least one offence which was so serious that a non-custodial sentence for it could not be justified: paragraph (c). He said nothing about qualification under paragraphs (a) or (b).
>
> Although it was correctly accepted that a prison sentence would have been appropriate for each of these appellants if he had been over 21 years, it was argued that the judge was wrong to reach the conclusion that any of these burglaries was sufficiently serious to qualify under paragraph (c).
>
> It is established beyond contradiction that when considering paragraph (c) the court is not permitted to take an overall view of the defendant's criminality and achieve a sentence which properly reflects all the relevant features. Unless there is at least one offence of sufficient seriousness, the offender does not qualify for a custodial sentence under paragraph (c).'

The Lord Chief Justice then deals with the offences of burglary in dwelling houses in England. I read finally at p.195C, because this follows on conveniently from what he had said in the passages which have just been quoted:-

'The court has noted on a number of previous occasions that the true construction of paragraph (c) and the question whether an individual "qualifies" for a custodial sentence within the meaning of that paragraph, has revealed a number of anomalies. If the appellants' submission in the present case were correct, the result would be increased confusion and indeed absurdity.

The key to the true construction of the provisions substituted by section 124 of the Act of 1988 is the crucial distinction to be drawn between the stringent tests which must be applied before any of the criteria in Section 1 (4A) of the Act of 1982 substituted are established and the consequences which follow once one of those criteria has been established. The court is precluded from passing a custodial sentence unless it is satisfied that a sentence of imprisonment would be passed on an offender aged over 21 - no further reference will be made to this matter in the present appeal - and that the particular offender under 21 "qualifies" for a custodial sentence. The section then defines the circumstances in which the offender so qualifies. Unless he does qualify, a custodial sentence cannot be passed.

However the section is not drafted in such a way that it precludes the passing of custodial sentences for offences which would not themselves satisfy paragraph (c). In particular paragraphs (a) and (b) do not impose any such restriction. Paragraph (a) contains no reference at all to the seriousness of the offence: paragraph (b) is directed to the whole picture presented by the particular offender and, as was stated in R. v. Davison (Donald) (1990) 1 WLR 940, at 945G, a "broader approach" than that appropriate in a paragraph (c) case "is permissible." Bearing in mind that a custodial sentence for an offence which would not fall within the ambit of paragraph (c) can be passed on an offender who qualifies under paragraph (a) and (b), the construction argued for by the appellants is too narrow.'

The Lord Chief Justice then concluded:

'Looked at as a whole the section imposes restrictions on the power of the court to pass a custodial sentence and limits those powers to offenders who qualify for such a sentence by reference to three express criteria. Paragraph (c) provides one of the criteria by which the offender's qualification for a custodial sentence is established. Once it is established that the offender qualifies for a custodial sentence by reason of one or other of the statutory criteria, then there is no further restriction in the provision substituted by section 123.'

The last words bear repetition.

'Once it is established that the offender qualifies for a custodial sentence by reason of one or other of the statutory criteria [in this case in section 2(1)(a), (b) and (c)] then there is no further restriction.'

A Here the applicant clearly fell within one of the statutory criteria, S.2(1)(b), so no further restriction applied and even if there were offences as indeed there was probably at least one, the excess alcohol offence which would not by itself have qualified for either the criteria - nevertheless that did not matter because the applicant had already fallen within one of the statutory criteria for the other offences.

Accordingly the aggregate period of 2 years' youth detention is reduced
B now by this court to 18 months by altering the sentence on count 3 to 9 months' youth detention and making count 15 a concurrent sentence instead of a consecutive sentence of 3 months' youth detention.

The application for leave to appeal therefore is allowed and to the extent indicated this appeal is allowed.

Leave to appeal granted and the appeal allowed to the following extent:-

C (i) On count 3 the sentence of twelve months' youth detention was reduced to nine months' youth detention; and

(ii) On count 15 the sentence of three months' youth detention was ordered to be served concurrently with, and not consecutively to, the sentence of three months' youth detention imposed on count 6 (driving without third party insurance).

D

83. [CIVIL DIVISION - APPEAL NO. 169]

1991 AUGUST 5

COLIN JOHN SLINN and SUSAN MARY SLINN — **Appellants**

E **v.**

THE OFFICIAL RECEIVER AND LIQUIDATOR OF SEAGULL MANUFACTURING CO. LTD. — **Respondent**

Before: CHADWICK, LE QUESNE, V.-P., and NEILL, JJ.A.

Insolvency - order in aid - request from High Court - section 426 of the Insolvency Act 1986 - application to Court of Alderney.

F

See 12.GLJ.69.

G.W. Allez, for the Appellants.
E.A.G. Prentice, for the Respondent.

CHADWICK, J.A.: Following an investigation under S.447 of the United Kingdom Companies Act 1985, Seagull Manufacturing Company Limited was
G ordered to be wound-up by the High Court in England on the 4th of April, 1990.

The Appellants, Colin John Slinn and Susan Mary Slinn, had been directors of that company between 1986 and 1988. They have at all material times been resident in Guernsey.

Shortly after the winding-up order was made, an application was made to the High Court in England by the Official Receiver and Liquidator of the company for an Order in Aid, under S.426 of the Insolvency Act 1986. That order was made by the Court on the 11th of April, 1990.

The effect of that order was to request the Court of Alderney, to act in aid of, and be auxiliary to the English court for the purpose of holding and concluding the examination of Mr. and Mrs. Slinn with regard to the promotion, formation, business, dealings, affairs and property of the company, and of accepting production of the company's books of account and financial records which the Slinns might have in their possession or under their control.

Shortly after that order was made in London, an application was made to the court of Alderney, ex parte, by the Official Receiver to arrest in Alderney the books, records and other documents of Seagull Manufacturing Company Limited in the possession, custody or control of Mr. and Mrs. Slinn. That order was made in Alderney on the 25th of April, 1990.

Notice of that order was given to the Slinns and the matter came before the Court of Alderney, inter partes, on the 3rd of May, 1990. Mr. Slinn was not then represented by an Advocate and it appears from the transcript which we have seen that Mrs. Slinn, in effect, took no part.

On the 3rd of May, 1990 Mr. Slinn asked the Court of Alderney for an adjournment to enable legal representation to be obtained and, as he put it, to ensure that the proper procedures had been adopted. That application was refused. The Court of Alderney took the view that it had no discretion to refuse the request made by the High Court in London for an Act in Aid. By an Act of Court dated the 3rd of May, the Court of Alderney agreed to act in aid and appointed Jurat Baron as Commissioner of the Court to preside over the private examination of Mr. and Mrs. Slinn.

The Slinns appealed from that order to the Royal Court of Guernsey. The Royal Court heard the appeal on the 8th of November, 1990 and dismissed it. It is from the dismissal of that appeal that the Slinns now appeal to this court.

The relevant provisions of S.426 of the United Kingdom Insolvency Act 1986, so far as relevant, are contained primarily in subsections (4) and (5) of that section. S.426, subsection (4):-

> 'The courts having jurisdiction in relation to the insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.'

Subsection (5):-

'For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.'

In this context 'relevant country or territory' has the meaning given to it by S.426(ii) of the 1986 Act. It includes the Channel Islands. 'Insolvency Law' includes the provisions of the 1986 Act itself - See S.426(1).

Those subsections of the United Kingdom Act must be read in conjunction with Statutory Instrument No. 2409 of 1989, entitled 'The Insolvency Act 1986 (Guernsey) Order 1989'. That is made in pursuance of S.442 of the 1986 Act and it enacts, among other things, that subsections (4), (5), (10) and (11) of S.426 of the Act shall extend to the Bailiwick of Guernsey with the modifications specified in the Schedule to the Order.

The Schedule to the Order includes, at para. 2, that for the words 'The United Kingdom' in subsections (4) and (5) there shall be substituted the words 'Bailiwick of Guernsey' and at para. 3(b) that in relation to Alderney in paras. (a), (b) and (c) of subsection 10 of S.426, there shall be substituted a reference to Part 1 of the Companies (Amendment) (Alderney) Law, 1962. Para. 5 incorporates subsection (11) of S.426 as part of the Law of Guernsey.

The effect of the provisions when read with the Order is that S.426 of the Insolvency Act 1986 has become part of the domestic law in the Bailiwick of Guernsey and that both that Act and the Companies (Amendment) (Alderney) Law, 1962 are relevant insolvency laws for the purposes of S.426.

The provisions now contained in subsections (4) and (5) of S.426 of the 1986 Act, replace those which were formerly contained in S.122 of the United Kingdom Bankruptcy Act 1914. Those provisions were considered by this court in a judgment delivered on the 6th of February, 1989 In re. Roy Clifford Tucker, a Bankrupt, Civil Rep. No. 23. In giving judgment in that case, this court held that S.122 of the Bankruptcy Act of 1914 was part of the Domestic Law of Guernsey, and imposed on the court, to which a request for aid is made, a duty and not a discretion to act in aid of and be auxiliary to the High Court in England, in the absence of some compelling reason to the contrary.

The order of the Court of Alderney is that it shall act in aid of the High Court in England for the purpose of conducting a private examination and for recovering possession of the company's books of account. The English Court would have jurisdiction to make an order for those purposes in the case of a person who was within its own jurisdiction. The relevant

provisions are contained in S.236(2) of the Insolvency Act, 1986. That subsection reads:- A

> 'The court may, on the application of the office-holder, summon to appear before it:-
>
> (a) any officer of the company.
>
> (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or B
>
> (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.'

An office-holder includes a Liquidator of the company.

C

The effect of the order which was made was to exercise in relation to Mr. and Mrs. Slinn in Alderney the powers which the Liquidator and the High Court would have had in England to require them to give information and produce documents, if they had been within the jurisdiction in England.

It was argued before us that, not withstanding the statutory provisions, the Court of Alderney had no power to make the order which it did on the 3rd of May, 1990, because there was no provision in the 1962 Law in Alderney which was comparable to S.236, subsection (2) of the Insolvency Act 1986. D

We were referred, in the course of that argument, to the provisions of S.13 of the Companies (Amendment) (Alderney) Law, 1962 which enable a Liquidator to bring summary proceedings against a past or present director or other officer, who has misapplied or retained or become liable or accountable for any monies or property of the company or been guilty of any misfeasance or breach of trust in relation to the company. Those provisions in S.13 reflect the law formerly contained in S.332 of the United Kingdom Companies Act, 1948, and they deal with a different matter from those now contained in S.236 of the Insolvency Act 1986. But the fact that there is no provision in the 1962 Law of Alderney which is in similar terms to that now contained in S.236, subsection (2) of the Insolvency Act 1986 is immaterial. The language of S.426 subsection (5) of the 1986 Act is such as to confer authority on the court to which the request is made, that is the Court of Alderney, to apply in relation to any matters specified in the request, that is, in relation to the private examination sought by the request, the insolvency law, which is applicable by either court, that is, by either the court in London or the court in Alderney, in relation to comparable matters, that is, matters comparable to those specified in the request, falling within its jurisdiction, that is, falling within the jurisdiction of the relevant court whose insolvency law is made applicable. E F G

The effect is that the Court of Alderney is authorised by S.426, subsection (5) to apply, in relation to the matters specified in the request by the English court, the insolvency law which is applicable by

A the English court in relation to comparable matters falling within the jurisdiction of the English court. The question, therefore, is whether, had the Slinns been within the jurisdiction of the English court, the English court could have exercised the jurisdiction which the Alderney Court was asked to exercise under the Order in Aid.

That point, too, was considered by this court in the appeal of Tucker, I quote from the judgment, at page 15, second paragraph:-

B

> 'We turn now to the second point which was argued before us, namely whether the effect of the second limb of S.122 of the Bankruptcy Act, 1914 is to confer on the Royal Court jurisdiction to order the particular relief sought, namely the private examination of a third party in relation to the affairs of the Bankrupt. It became common ground before us that apart from S.122 there was no such jurisdiction under the domestic law of the Island.'

C The second limb of S.122 is now subsection (5) of S.426 of the 1986 Act.

The judgment then reviews the provisions of S.122 and concludes that the court in Guernsey had power by virtue of S.122 to exercise, in Guernsey, the jurisdiction which the English court could have exercised in London in relation to a person who had been within the English jurisdiction.

Mr. Allez sought to distinguish that authority on the grounds that the
D words in the 1914 Act were "similar matters" whereas the expression used in the 1986 Act is "comparable matters". In my view there is no material distinction between those two words. The purpose of the epithet, whether it be 'comparable' or 'similar' is to make it clear that the question is what powers could have been exercised not in relation to the matter under consideration, but in relation to a matter similar or comparable which had fallen within the jurisdiction of the requesting court.

E In those circumstances the only relevant question on this appeal, as it seems to me, is this: Should Mr. and Mrs. Slinn have been granted an adjournment in order to give them the opportunity to put before the Court of Alderney material which would or might have led it to take the view that there was some compelling reason why it should not act in aid of the English court, despite the mandatory terms of S.426, subsection (4)?

No material has been put forward on affidavit by Mr. and Mrs. Slinn at any stage in these proceedings. The matter was not raised, so far as we were
F told, before the Bailiff, nor is there raised in the grounds of appeal to this Court any matter which could be identified as potentially a compelling reason for refusal to act in aid.

We gave to Mr. Slinn, through his Advocate, an opportunity during the course of argument in this Court to identify those matters which Mr. Slinn would have wished and would still wish to put before the Court of Alderney if this appeal were allowed. Those matters can be summarised as follows:-

G

(1) It said that Mr. Slinn would like to have the opportunity to put his case to the Court of Alderney.

(2) He would like to show that he and the company had complied with S.222 of the United Kingdom Companies Act 1985.

(3) He would like to show that he had prepared, and was sending to England, the books of the company immediately before they were arrested in Alderney pursuant to the Order of 25 April, 1991.

(4) He would like to show that all books of the company had been supplied and are in the boxes now held by the Clerk of the Court of Alderney.

(5) He would like an opportunity to give a full and detailed account of what has happened in relation to the company.

I have considered those matters carefully. If I had thought that there were any points which could be raised in support of a submission to the Court of Alderney that some compelling reason precluded it from acting in aid of the English court, I would be concerned that Mr. Slinn had not had an opportunity to appear before the court with legal representation and make those points.

However, in my view, none of those matters could possibly be relied upon by the Court of Alderney as grounds for refusing to comply with the mandatory provisions of S.426. Mr. Slinn has had the opportunity, in this Court, to put all the legal points which he wishes to raise. If the matter went back to the Court of Alderney it is not difficult to believe that it would eventually return here and we would again be considering those points of law.

The question of whether or not compliance has been made with S.222 of the Companies Act 1985 is, in my view, irrelevant to the question of whether the Liquidator is entitled to have the powers to examine through the machinery of private examination conferred by S.236 of the Insolvency Act 1986. If Mr. Slinn had, indeed, prepared and was sending to England all the books of the company and by coincidence this was frustrated by the arrest of those books by the Clerk in Alderney, then he can have suffered no prejudice. The books, which he was apparently willing to supply, will be supplied pursuant to the Order of the Court. He says that he wants, instead, an opportunity to give a full and detailed account; he will have opportunity to give such an account to the Commissioner who has been appointed by the Act of the Alderney Court. Indeed, it is that full and detailed account which the Official Receiver, as Liquidator of the company, is seeking.

I am satisfied, therefore, that there is no material upon which the Court of Alderney could properly refuse to grant an Order in Aid in the terms which have been sought; and that, accordingly, there is no purpose in allowing this appeal in order to enable the matter to be re-argued before that court with the benefit of legal representation.

The points of law have been fully argued in this court, and no relevant point of fact has been identified which ought to be considered de novo by the Court of Alderney.

In those circumstances I would dismiss the appeal.

A LE QUESNE, J.A.: I agree.

NEILL, J.A.: I also agree.

Appeal dismissed, with costs; Application for leave to appeal to Her Majesty in Council dismissed, with costs, by the Court of Appeal on 23rd October 1991

B 84. [CIVIL DIVISION - APPEAL NO. 179]

1991 AUGUST 5, 6

ARTHUR STANLEY THOMPSON **The Husband/Appellant**
v.
C **NANCY PATRICIA THOMPSON** **The Wife/Respondent**

Before: NEILL, LE QUESNE, V.-P., and CHADWICK, JJ.A.

(i) **Injunctions - matrimonial causes - no evidence of intention to leave Bailiwick - whether appropriate.**

(ii) **Civil practice and procedure - ex parte applications - duty of**
D **disclosure - effect of breach of duty.**

See 12.GLJ.42,45.

Mrs. S.R. Morgan, for the Appellant
A.D. Laws, for the Respondent

NEILL, J.A.: This is an appeal from an Order of the Deputy Bailiff
E sitting alone, which he made on the 19th of July of this year in which he set aside an order which he had made, ex parte, in favour of the Petitioner husband, Mr. Arthur Stanley Thompson, in the following terms: He had ordered on the 3rd of July that Mrs. Thompson, her servants and agents or otherwise, be restrained from charging, selling, giving, leasing and/or transferring or otherwise dealing with:-

(1) A property known as Cordier House, Cordier Hill, St. Peter Port,
F which she purchased from the Appellant by conveyance registered on the 24th of October, 1989; and/or

(2) the furniture, furnishings and/or other property situate thereon; and/or

(3) such other assets as are situated within the jurisdiction of the Bailiwick of Guernsey, until such time as such order be discharged by the Court, until the Court makes final judgment regarding the
G matrimonial property and divorce proceedings;

(4) a charge of £300,000 be registered against the real property belonging to the Respondent, situate in Guernsey; and/or

(5) the arrest of the proceeds of such sale of the Appellant's real property in order to secure the relief sought in the divorce petition of the Appellant.

It will be clearly apparent from that reading of the original Order that it was sweeping in its terms and completely prohibited the wife from any transactions in real estate, or indeed, any other assets in this Island, until further order by the Court.

The history so far as relevant is that the parties were married on Christmas Eve of 1988 and on Boxing Day two years later the husband left the matrimonial home, in effect, forever. It was a short two year marriage. Both parties had been married before. In April of this year the husband commenced divorce proceedings.

There is a complicated history relating to the property in England of Mrs. Thompson. She had land in Sussex to which I will refer later and the husband claims that he had advanced her interest in relation to her English property and added to the value of that, and that was part of the factual material which he brought to the attention of the Deputy Bailiff when he applied for his ex parte relief on the 3rd of July.

I should just mention the procedure that was followed in this case. There was a point in this case where, after the Deputy Bailiff had set aside that ex parte order on the 19th of July, Counsel for the husband went back to the Deputy Bailiff and asked for leave to appeal and asked for a stay on the release of that Charging order. That was refused by the Deputy Bailiff. There was an appeal to the learned Bailiff who granted leave to appeal to the Court of Appeal and continued a stay.

We, yesterday, intimated that the satisfactory procedural step to take was for the court to make itself ready, as it has done, to hear the substantive appeal from the Order of the Deputy Bailiff, so that is where we are today. I propose to begin by reading the Deputy Bailiff's brief judgment of the 19th of July, which is in these terms:-

> 'I discharge the Order.
>
> I am satisfied that there is not sufficient evidence of the Respondent's intention to leave the Island or escape the responsibilities of any order following divorce proceedings. I am not satisfied that sufficient disclosure was made of the Land Charge obtained by the Petitioner at the time he applied for the Charge on the Respondent's property.'

Now those are two grounds of decision by the Deputy Bailiff and we would have to be satisfied, I think, that both were manifestly wrong before we would be justified in interfering.

I propose to deal first with the second ground, which is the non-disclosure point, and before I come to deal with the facts of this case, I

A want to say a little bit about the relevant legal principles to which, I think, great importance must be attached here as in other jurisdictions.

On an ex parte application, there is required from the Applicant a very high duty of candour. The duty rests both on the lay client and on the Advocate who represents the client. The court must be fully informed as to the facts and considerations which are, or may be, material to the exercise by the court of its coercive powers. I include the words 'or may
B be' because it will not suffice for an applicant and the legal advisers to purport to make a conclusive selection of the material facts and considerations. Ultimately, materiality is for the court, so those preparing the application must consciously err on the side of inclusion rather than exclusion. If they are aware of a matter that could be material, they must investigate the underlying facts and, where necessary, ascertain the relevant law and procedure, whether of this forum or of an overseas jurisdiction. If the facts, law and procedure so ascertained are material in the sense described above, namely, obviously material or
C potentially material in the view of the court, then full and transparent disclosure must be made.

I say 'transparent' because it will not be good enough, as it were, to tuck away the information in some place where it is least likely to be noticed by the Judge dealing with the case, as by some parenthetical reference to some other document, to which the Judge has access but which he is not invited to consult.

D

The reasons why an ex parte applicant has this high duty of candour and disclosure are obvious and have been stated many times. This case shows, however, that it will be timely to repeat them.

In the first place, someone who applies ex parte is, by definition, approaching the court behind the back of the other party or parties affected. They are defenceless and there is nobody there to redress the
E balance or to counter the allegations made by the applicant. Elementary justice requires that, in such circumstances, the applicant should, to put it in the vernacular, "come clean" and draw the Judge's attention to points which might lead him to refuse the application. It must be borne in mind that the court's powers, when brought into play, can have far-reaching and sometimes highly damaging effects.

The second reason for candour and full disclosure is this. Legal proceedings in Guernsey (and in other jurisdictions with which members of
F this court are familiar) depend upon a relationship of close trust between the court and the members of the legal profession, A judge must be able to depend implicitly upon the assistance and co-operation of the lawyers who practise in his court. It is, therefore, incumbent upon an advocate appearing on an ex parte application to use his or her best efforts to protect the judge from making an order which he would never have made had he been told the whole truth. This duty is discharged by putting the judge in full possession of all the material facts and considerations,
G materiality being defined as I have indicated above. A similar duty arises when Counsel is aware of a binding authority, fatal or damaging to his case, which has not been brought to the attention of the court.

The question that next arises concerns what is to happen when the judge, on an ex parte application, grants an injunction or in some other way exercises the coercive power of the court, but where it is subsequently conclusively demonstrated that significant material facts were not brought to the attention of the court. Undoubtedly, the old practice was that the ex parte order was set aside forthwith. This was done to ensure that the applicant did not, unjustifiably, continue to benefit from his culpable conduct and, also, let it be said, to make manifest to all litigants and practitioners that the court will insist upon the highest standards of probity on ex parte applications.

This practice of automatically setting aside the improperly obtained order is prima facie the correct procedure where the breach of the duty of candour is serious. There is, however, perhaps this qualification to be added: Despite the past improper conduct of the applicant, the interests of justice may sometimes require that something be done pending trial or further order to protect the interests of the applicant. Once this stage is reached the first enquiry must be whether the past non-disclosure of material facts was innocent, deliberate or otherwise culpable. A case of innocent non-disclosure arises most obviously where neither the applicant nor his lawyers knew of ought to have known of the existence of the particular facts. Another instance would be where a litigant, acting for himself and without legal advice, failed to disclose a matter which he knew about but which he could not reasonable be expected to understand would be regarded as highly material by the court. The case of deliberate non-disclosure needs no gloss to explain it. In the category of otherwise culpable non-disclosure, I would include both cases in which further enquiries ought to have been made, but were not, before the application was launched, and also cases where the material facts were alluded to in such an unobtrusive manner that the court could not reasonably be expected to appreciate their significance.

Copious citation of authorities might be made in support of the principles which I have thus far enunciated. I will content myself with references to the two cases to which Mrs. Morgan, who argued the case very well and with great courage for the Appellant, very properly drew our attention. The first case is Brink's Mat v. Elcombe [1988] 3 All ER 188, a decision of the English Court of Appeal. I refer to what Lord Justice Ralph Gibson said at p.192 G to p.193 D and to Lord Justice Balcombe at p.193 H to p.194 C. Lord Justice Slade agreed with both judgments but usefully drew attention to the practicalities. He said that where an ex parte application has to be prepared in great haste, the court will look with a more tolerant eye at what might, in other circumstances, have been an inexcusable non-disclosure of material facts.

The other English Court of Appeal case cited to us was Behbebani and others v. Salem [1989] 2 All ER 143 which was a case of deliberate non-disclosure. Both members of the Court cited with approval passages from the Brink's Mat case.

Applying these principles to the facts of the case before us, the following points become clear:

A First, there was no reference anywhere in the ex parte application to the fact that Mr. Thompson had made an unsuccessful application to the court by his Advocate in February 1991, to obtain some sort of injunction and/or charging order against Cordier House. The Deputy Bailiff, we were informed this morning, rejected that application on the basis that insufficient evidence appeared as to Mr. Thompson's financial contribution. It should be noted that this application was made before the divorce petition was issued.

B Para. 6(a) of the Petition stated:-

> 'There are and have been no other proceedings in any court in the Bailiwick with reference to the said marriage or between the Petitioner and the Respondent with reference to the property of either of both of them other than on the 16th March, 1991, this Petitioner registered a Class C(III) Land Charge to protect the Petitioner's interest in a property known as Great Groomes, Billingshurst, Sussex.'

C I pause there. The application to the Court in February, 1991 plainly was a proceeding in a court and para. 6(a) is simply wrong. Not only was it wrong in the Petition but there should have been an express disclosure in the affidavit of the fact that a prior application had been made and that it had been turned down. It should also have been demonstrated that the criticism directed to the first application had been cured. There was

D nothing. There was silence.

Next, secondly, there is nothing in the husband's first affidavit, on the basis of which the ex parte order was obtained, referring to the existence of a Class C Land Charge on the wife's real estate in England, namely, some part of the land at Great Groomes, Billingshurst, Sussex, which she still holds.

E The third point is that it is suggested that adequate disclosure of that matter is constituted by the heading at the top of the husband's affidavit. I read that. It gives the names of the Petitioner and the Respondent and then has the heading:-

> 'In the matter of the divorce proceedings brought by the Petitioner in his petition dated 30th April, 1991.
>
> I, Arthur Stanley Thompson ... make Oath and say as follows ...'

F Then follows the affidavit. With great respect I find it difficult to take seriously an argument that that is an adequate reference to the land charge and it is to be understood as saying 'Please read the Petition where you will find additional facts about some of the real estate mentioned later in this affidavit.'

The fourth point is this. Even if reference is made to the Petition and

G to para. 6(a) of it, what does one find? It says that there have been no proceedings etc. with reference to the property of either or both of them, I again quote:-

'... other than on the 16th of March, 1991, the Petitioner registered a Class C(3) Land Charge to protect the Petitioner's interest in a property known as Great Groomes, Billingshurst, Sussex.'

The date tells us that this step was taken after the unsuccessful February application and six weeks ahead of the Petition. What is not stated there, and what Mrs. Morgan cannot tell us today, is what the registration was all about. The court has not seen a copy of what is entered in the register. We do not know whether what was sought to be protected was an existing equitable or alleged proprietary interest in the land deriving from acts done or expenditure incurred by the husband in relation to that land, presumably thereby, so it would be alleged, adding to the value of the property, or is the registration to safeguard the husband's position which will result if (a) his petition is granted, and (b) an order for ancillary relief is made in his favour? If it is the latter, then the husband has already taken steps to achieve the very protection or part of the protection which he wants the Guernsey Court to give him, i.e. to protect him in relation to the post-verdict situation. If the first hypothesis is correct, the husband already has, or claims to have, an equitable claim to land or the proceeds thereof. On this basis it would be untrue to say that he has been stripped of all his assets.

Fifthly, whichever interpretation is correct, the affidavit of Mr. Thompson should have given a full and clear statement of the position. If the relevant English law and practice about equitable interest and the operation of the Land Register was not known to Mr. Thompson and his Guernsey advisers, enquiries should have been made to ascertain the position by consulting English lawyers. One assumes that the registration was actually effected by solicitors acting for Mr. Thompson. If so, they must have known what they were doing, assuming as I do, that the registration was made bona fide and not effected for the purpose of making a sale of the land impossible and thereby assisting in the campaign asserted by the deponent, Mr. Salmon, but as to which no finding can be made before trial, of starving the wife into submission.

The next consideration is the sweeping nature of the injunction and relief sought. I have read that out. Obviously, the coercive powers of the court were being sought in a very extensive way in relation to the property of the wife.

The seventh point concerns the time factor. The husband and his legal advisers had weeks running into months to prepare the application for ex parte relief. They had already had a trial run and been given guidance. There can be no possible excuse based on the extreme haste with which matters had to prepared for the court. I refer to what Lord Justice Slade said in a different context.

Eighthly, as regards the matter not disclosed, I would hold that the disclosure was not innocent. I do not say there was a deliberate decision to suppress, but, in relation to the Great Groomes non-disclosure in particular, I do say that the reference to it was so oblique as to give the Deputy Bailiff no real chance to focus his mind on the materiality of the point.

A Finally, the judgment of the learned Deputy Bailiff on the 19th July on this point, though brief, speaks volumes. I have already read the passage material to this aspect of the case. He clearly felt that he was misled. In my judgment, that ground alone would be sufficient to uphold the Deputy Bailiff and to dismiss this appeal.

I go on to consider the other ground, the first passage in his judgment, in which he said:-

B

> 'I am satisfied there is not sufficient evidence of the Respondent's intention to leave the Island or to escape the responsibilities of any order following divorce proceedings.'

That language in his judgment can be taken back and compared with what was being said to the court at the stage of the ex parte application. In paras. 12 to 14 of his first affidavit, the Petitioner said:-

C

> 'The Respondent is English and most of her family live in England I believe she may intend to return there when the property is sold. I fear that unless restrained by this Court the Respondent will sell Cordier House and remove the proceeds together with the other matrimonial assets from the Bailiwick of Guernsey to defeat my claim of ancillary relief. I, therefore, request an Order to be made in the terms of the application which accompanies this affidavit.'

D Now, when the learned Deputy Bailiff made the ex parte Order, it is as plain as anything could be, that he was acting on the basis of those paragraphs. But the picture totally changed on the inter partes application in many respects. (I will just mention one in passing, that the alleged financial benefits which the wife was supposed to have received by her husband's financial expertise were all put in issue). More significantly, on the point that I am now addressing, Mrs. Thompson, the wife, deposed as follows on p.22 of her affidavit, sub-para. 8:-

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> 'Cordier House has been for sale for some time. It is on the market at the sum of £675,000 with a number of agents including Lovell and Partners, Swoffers and Martel, Maides and Le Pelley. I need to sell it because I am unable to service the mortgage. My intention is to but a smaller property in Guernsey for my children and I to live in free from mortgage and encumbrance. There was a prospective purchaser interested but he could not proceed...'

F And on p.24, sub-para. 13:-

> 'Although I wish to sell Cordier House, I have no intention of removing the proceeds from the Bailiwick of Guernsey, let alone to defeat any alleged claim by the Petitioner for ancillary relief.'

I should say that in important respects the affidavit evidence of the wife was supported by that of Mr. Salmon. But looking at the matter on the
G basis of the totality of the affidavits in front of the Deputy Bailiff, I can conclude that he was fully entitled to reach the conclusions set out in the first paragraph which I read out from his judgment, that is the passage about the intention to leave the Island and escaping

responsibilities. Having regard to that finding and the totality of the evidence I would conclude, also, that it is not just and convenient to grant any interlocutory relief. I say this because Mrs. Morgan attempted in this court to persuade us to look at the case on a new basis, departing as it were from paras. 12 to 14 and saying 'Let it be assumed there is a nil risk of her leaving the country or trying to defeat the order, nevertheless, the court should intervene in this case.'

I would only comment that if such a principle were correct there would be an injunction in virtually every matrimonial case that one can think of because Mrs. Morgan went on to say that if the Respondent attempts to resist that and urges that the order is unnecessary, it can then be said 'That shows we really have got something to worry about; we are confronted with a Respondent who is resisting this order of freezing the assets.'

In my view the English cases which were cited to us (Roche v. Roche (1981) II Fam. Law 243 and Shipman v. Shipman (1991) Fam. Law 145) concern future sums of money which the husband was going to receive. They are clearly distinguishable from the facts of this case where we are talking about real property and intention to switch from a larger house to a smaller house in the Island. In any event those cases are not binding on us.

Accordingly, for that second ratio, I would hold that the learned Deputy Bailiff was fully entitled to reach the conclusion that he did and that is a second ground for dismissing the appeal.

Before parting with the matter, however, there are two other matters to which I desire to refer. One is the question of two letters that were put before us. They were annexed to an affidavit by Mrs. Thompson and they were from the husband. They had at the top of them nothing to indicate that they were 'without prejudice' letters. The husband then, in his second affidavit, exhibited copies which he had taken of those letters- no doubt photocopies or Xeroxes- before sending, where the words 'without prejudice' appear at the top.

That is a matter which, when this case goes forward, must require and get further investigation. We are not in a position to say more about it because Mr. Laws did not have full instructions. I would say I regret that he did not known more about it, this matter having been raised certainly on the inter partes hearing, and it has been therefore for everyone to see on Mr. Thompson's affidavit. There are only two explanations, I think. (There may be more; I can only think of two). One is at the top was cut off and therefore a mutilated document was exhibited. That would, I hardly need say, be an entirely disgraceful matter. The other possibility, which was hinted at by Mr. Laws, but I do not know whether on the basis of instructions, was that the words 'without prejudice' had been added later by Mr. Thompson to his retained copies. That, also, would be highly improper and scandalous conduct. I would simply say we are not in a position to deal with those matters today, but I would not like it to be thought that this court has not noticed them.

The second aspect concerns the so called statutory declarations. There were in evidence two documents executed by the husband in which he purported to say that he irrevocably gave up any claim which he might in

A the future have to the wife's property in the event of a divorce. They are dated quite close to the Boxing Day of 1990, which I earlier mentioned. They are, in fact, dated in the middle of December, 1990. There are indications from the lawyers who drew them up that they were considered by the lawyers to have no legal effect or little legal effect. In one case, there is a letter saying that that was made known by the lawyers- the Guernsey lawyers I think- to both the husband and wife. Now I think that is a matter, too, which requires further investigation, B because at first sight it seems highly unsatisfactory that a document should be put in front of the wife to persuade her, in any way, to take or to refrain from taking any action when it is believed by those putting forward the document that the document is a really a nullity. Of course, that is all innocently explained if the wife was fully aware of what was happening and was willingly taking part in a charade.

However, for the reasons I have given, I would dismiss this appeal.

C LE QUESNE, J.A.: I agree.

CHADWICK, J.A.: I agree with the judgment that has been delivered.

ADVOCATE LAWS: Sir, I would seek costs in the appeal.

NEILL, J.A.: Anything to say on that?

D ADVOCATE MORGAN: Well, I make a token resistance, sir.

NEILL, J.A.: Yes, well you've made your token resistance but I think costs would have to follow the event.

ADVOCATE LAWS: Thank you sir.

Appeal dismissed, with costs.

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