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CONTENTS

HERALD

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TWENTY FOURTH ISSUE

Introduction

This edition covers the six month period from July to December, 1997.

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 24.GLJ. followed by the paragraph number.

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Compiled from sources including all Orders in Council, Ordinances, Projets de Loi and subordinate legislation and selected cases and other relevant material which became available during the months July to December, 1997.

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HEADINGS USED IN THIS ISSUE

GUERNSEY

AGRICULTURE AND ANIMALS

Agricultural census

1. Ordinance: The Agricultural Census Ordinance, 1997. - Replaces the 1932 Ordinance relating to the census of crops and livestock. An agricultural census is to be conducted on 1st July (or such other day as may be prescribed by Order) each year. Everybody who grows crops or keeps sheep, goats, poultry or deer for commercial purposes, and everybody who keeps any bovine animal for commercial purposes or otherwise, must deliver a return to the Agricultural and Milk Marketing Board containing such information as the Board may prescribe by Order. The Board must publish notice of each census in *La Gazette Officielle* and will send a census form to everybody who is known to be under an obligation to make a return; anybody who should make a return but has not received a form at least 7 days before a census must ask the Board for a form. Failure to comply with the Ordinance is an offence punishable by a fine not exceeding level 3 on the uniform scale.

   In force 26.11.97. (No. XXXVII of 1997).

APPEALS

Appeal to Court of Appeal - appeal against decision upholding exception de fonds - whether leave of Royal Court required

2. The Deputy Bailiff held that, where he had upheld an exception de fonds raised by the States in an action brought by a former air traffic controller, his judgment had not been "interlocutory" and therefore his leave was not required before an appeal against his decision could be brought.

   [Nash v. States of Guernsey - Plaids de Meubles 1.9.97 (AMM/HER)].

Appeal to Court of Appeal - application for leave to appeal out of time - factors to be taken into account - application for further stay of execution of eviction pending appeal

3. AA entered into an agreement with, inter alia, the respondent company D and M Ltd whereby M Ltd lent AA a sum of money and D, which had acquired ownership of AA's real property for a nominal sum at an earlier date, was apparently granted the right to sell that property in the event of AA failing to repay the debt by the due date and to apply the proceeds in discharge of that debt. The agreement also entitled D to evict AA from the property, which had been their home for over 50 years, in the event of such default. Following AA's failure to pay the sum due, M Ltd obtained summary judgment (having successfully appealed to the Court of Appeal against the order of the Bailiff refusing such summary judgment) against AA and eviction proceedings were instituted by D. An eviction order was made by the Royal Court in January, 1997 but execution was stayed for 6 months until 28th July, 1997. At this stage AA were unrepresented. On

11th July, 1997 AA lodged notice of appeal against the eviction, over 5 months late, and requested a further stay of execution pending hearing of the appeal. HELD, by the Court of Appeal, in deciding whether to exercise its discretion to extend time for lodging notice of appeal pursuant to Rule 17(1) of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964, the Court had to consider, firstly, whether AA had a sufficiently arguable case on an appeal against the eviction order; and, secondly, whether as a matter of discretion an extension of time should be granted, taking into consideration the explanation given for their failure to lodge the notice in due time and the delay, any prejudice to D as a result of the delay and any other relevant factors. In the Court's view, the evidence before it had raised sufficiently serious issues which might afford them a defence to the eviction proceedings. These issues included whether the procedures employed to secure the loan over AA's property, without taking a registered charge over the property and thus obliging the lender to satisfy Guernsey requirements as to registration and to enforce it by means of saisie proceedings, infringed principles of public policy; whether a provision in the agreement which gave AA the right to a re-conveyance of their property only if they repaid the loan by the due date, was valid in Guernsey law; and whether ownership of the shares in D in fact remained vested in AA. In the circumstances where AA had not received any legal advice on the time for lodging notice of appeal, and where there would be no real prejudice to D in further delay, leave to appeal, and a further stay of execution, would be granted, subject to the imposition on AA of strict conditions for the prosecution of their appeal.

[Gaudion v Weardale Ltd - Court of Appeal 23.7.97 (unrep/PTRF)]. For full report of judgment of Court of Appeal, see paragraph 83.

Appeal to Court of Appeal - application for leave to serve Respondent's Notice out of time - factors to be taken into consideration

4. In an action involving registration in the Royal Court of a judgment of the High Court, R, having been served with Notice of Appeal against the judgment of the Royal Court, applied, pursuant to Rule 17 of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964, for leave to serve a Respondent's Notice to affirm on another ground, a point of law, the judgment of the Royal Court notwithstanding that a period well in excess of that prescribed by Rule 5(4) of the Rules had elapsed since service of the Notice of Appeal. It was HELD by the Court of Appeal, following the principles set out in the White Book concerning the analogous provisions of the Rules of the Supreme Court, that an extension of time in such circumstances should normally be granted unless it could be shown that granting it would cause significant prejudice to the appellant. The matter of delay by itself, or the fact that the point was not taken in the Court below, was not of itself material. If the appellant lost exclusively on that point, the Court of Appeal would have power to rectify any damage done by way of costs. Particularly in view of the fact that the point was one of law and not fact-sensitive, it was entirely appropriate in the interests of justice that the point, if arguably a good

one, should be permitted to be taken.

[Majormine Limited et al v. Lindmar Trust Company Limited et al - Court of Appeal 23.7.97 (DGLeM/RPO)]. For full report of judgment of Court of Appeal, see paragraph 77. (See also paragraph 46).

BANKING, INSURANCE AND FINANCE INDUSTRIES

Insurance business

5. Projet de Loi: The Insurance Business (Amendment No. 2) (Guernsey and Alderney) Law, 1997. - The principal effect of this Projet is to introduce registration and regulation of insurance brokers and other intermediaries. Companies and individuals who carry on business as insurance intermediaries on their own account are required to be registered by the Financial Services Commission and comply with guidance issued by the Commission; and they are themselves responsible for authorising, and supervising the conduct of, their own insurance representatives. Except for people carrying on only limited business to be prescribed by rules of the Commission, registration is compulsory for anyone (other than an insurance representative, authorised insurance manager or authorised industrial and commercial insurance consultant) who advises clients on their insurance requirements and/or arranges contracts of insurance, by way of business.

Applications for registration as an insurance intermediary must be granted (but may be granted subject to special conditions) to applicants who satisfy the Commission that they are fit and proper and comply with certain specified requirements.

Registered insurance intermediaries (and also registered insurers and authorised insurance managers who deal with the general public in Guernsey or Alderney) must authorise insurance representatives to act on their behalf and take responsibility for the conduct of those representatives. With few exceptions (which are set out in the Law) only an authorised insurance representative is permitted, by way of business or in the course of employment, to advise clients or arrange contracts of insurance. Insurance may only be arranged for members of the general public (in Guernsey or elsewhere) with insurers which are registered or exempt under the Law, or included in the Commission's list of recognised insurers.

The Commission is empowered to issue guidance notes applicable to intermediaries etc., and codes of conduct applicable to representatives.

If a registered intermediary contravenes or is likely to contravene a registration condition or guidance note (including a provision requiring the intermediary to ensure that his representatives obey the codes), the Commission may in specified circumstances impose prohibitions, directions and additional conditions. If these are not complied with, or if the intermediary appears to have contravened a condition or guidance note persistently, wilfully, or otherwise so as not to be considered a fit and proper person to be registered, the registration may be suspended or revoked. The provisions of the Insurance Business (Guernsey) Law, 1986

affording rights of representation and appeal are extended to include such sanctions. Persistent, wilful or serious failure by a Guernsey or Alderney company to comply with its obligations may also lead the Commission to apply for the company to be wound up.

The requirement to be registered as an insurance intermediary does not extend to a person who deals only with "large clients" (to be defined in rules made by the Commission) and otherwise falls within the definition of "industrial and commercial insurance consultant". Instead, such a person must now be authorised under, and comply with, Part IV of the 1986 Law, in the same way as an insurance manager.

A further effect of the Projet is to withdraw the previous exemptions from the requirement to register as an insurer from registered friendly societies and insurers authorised within the EEA. Certain adaptations to the 1986 Law apply in the case of such bodies.

Approved by the States of Guernsey 31.7.97 and by the States of Alderney 1.10.97. Awaiting Royal Sanction.

Lloyds TSB merger

6. Order in Council: The Lloyds TSB (Guernsey and Alderney) Law, 1997. - See 23.GLJ.10.

Royal Sanction 30.10.97. Registered 2.12.97. In force on a day to be appointed (see paragraph 7). (No. XXV of 1997).

7. Ordinance: The Lloyds TSB (Guernsey and Alderney) Law, 1997 (Commencement) Ordinance, 1997. - Brings the Lloyds TSB (Guernsey and Alderney) Law, 1997 (see paragraph 6) into force-

(a) in relation to the transfer to Lloyds TSB Bank (Guernsey) Limited of the undertaking of Lloyds, on the 1st January, 1998;

(b) in relation to the transfer to Lloyds TSB Bank (Guernsey) Limited of the undertaking of TSB, on the 2nd January, 1998.

In force 26.11.97. (No. XXXVIII of 1997).

National Westminster Bank

8. Order in Council: The National Westminster Bank (Bailiwick of Guernsey) Law, 1997. - See 23.GLJ.11.

Approved by the States of Alderney and Chief Pleas of Sark 2.4.97. Royal Sanction 26.6.97. Registered 19.8.97. (No. XVIII of 1997). In force 1.1.98: The National Westminster Bank (Bailiwick of Guernsey) Law, 1997 (Commencement) Ordinance, 1997. (No. XLIV of 1997).

CHILDREN AND YOUNG PERSONS

Alderney - application and extension of legislation

9. Order in Council: The Alderney (Application of Legislation) (Amendment) Law, 1997. - See 22.GLJ.8.

Approved by the States of Alderney 7.5.97. Royal Sanction 26.6.97. Registered and in force 19.8.97. (No. XVI of 1997).

10. Order in Council: The Children and Young Persons (Amendment) (Guernsey) Law, 1997. - See 23.GLJ.15.

Approved by the States of Alderney 3.9.97. Approved by the Chief Pleas of Sark 1.10.97. Royal Sanction 26.11.97. Awaiting registration.

COMPANIES

Migration of companies

11. Ordinance: The Migration of Companies Ordinance, 1997. - Provides in Part I that an overseas company (which is any company which is not a Guernsey company) may, with the consent of the Commission and of the Court, be registered as a Guernsey company. The company must be able, under the law of the place of its incorporation, to transfer incorporation. The law of that place as to transfer of incorporation must be complied with. Shareholder consent is needed. The company must not be in the process of being wound up, and must satisfy the solvency test.

Part II of the Ordinance enables a Guernsey company, with the consent of the Commission, to be removed from the Guernsey register for the purpose of becoming incorporated in another place. A special resolution is needed. Written notice to creditors and public notice in La Gazette must be given. A Guernsey company cannot emigrate if it is in the process of being wound up, and must satisfy the solvency test.

In force 1.8.97. (No. XXVI of 1997).

CONSTITUTIONAL LAW

Elections

12. Projet de Loi: The Reform (Amendment) (Guernsey) Law, 1997. - Effects various reforms in the law relating to elections. Candidates are granted an entitlement to be present at the counting of votes either in person or, subject to rules to be made in that regard, by a nominated representative. Additional provision is made as to disorderly and indecent conduct at and around polling stations. The period of each year during which Douzaine Representatives are to be elected is extended. In relation to the election of Constables and Douzeniers new provision is made for specifying their terms of office, filling casual vacancies, responsibility for conduct of such elections, and the precise time for close of nominations.

For all elections a tick on a ballot paper will be acceptable instead of a cross.

Approved by the States 18.12.97. Awaiting Royal Sanction.

Public finances

13. Order in Council: The States Audit Commission (Guernsey) Law, 1997. - Establishes a body known as the States Audit Commission ("the Commission") to audit States' interests, monitor accounting policies and procedures, and assist in the management of States' assets and finances.

The Commission is an agency of the States without independent legal personality, but not a committee of the States. Its primary objective is to assist the Advisory and Finance Committee, in co-operation with other States Committees, to ensure good management of States' finances; but in specified circumstances it can insist on any of its reports being submitted to the States either for information or for debate.

The President of the States Advisory and Finance Committee is an ex officio member of the Commission and the other four members are elected by the States from persons nominated by that Committee, each for a term of three years. The Chairman and Vice Chairman (neither of whom may be the President of the Advisory and Finance Committee) are elected annually by the Commission.

Approved by the States 1.8.97. Royal Sanction 30.10.97. Registered 2.12.97. In force on a day to be appointed. (No. XXIII of 1997).

CRIMINAL LAW AND PROCEDURE

Sentence - misuse of drugs - importation of Class B drug

14. A pleaded guilty in the Royal Court to one offence of importing 96.5 grams of cannabis resin by concealing it within his body. He was of previous good character. He appealed against his sentence of 2 years' imprisonment. HELD, although the quantity of cannabis imported was sufficient to bring the case within the lower end of commercial importation the prosecution had not contended that A had intended to supply drugs to others. Nevertheless, there was a distinction between cases where the amount brought in was merely for personal use for one or two days and those where the amount was a significant amount and a matter for public concern. Taking into account all the facts, including the aggravating factor of the concealment, the sentence was not inconsistent with other sentences passed since the Oren judgment (see 18.GLJ.13) and the appeal would be dismissed.

[Law Officers of the Crown v. Stevenson - Court of Appeal 21.7.97 (HMC/NLeP)]. For full report of judgment of Court of Appeal, see paragraph 73.

Sentence - misuse of drugs - importation of Class B drug

15. A, a mother with three young children, was convicted by the Royal Court of importing just over 3 kilograms of cannabis from England, having been requested to carry the packages by a person she had met in a public house. She was of previous good character but a failed marriage and subsequent relationship had left her in difficult circumstances. As a result of her conviction her family had split up and her children were living with their respective fathers. She applied for leave to appeal against her sentence of 3 years' imprisonment. HELD, the fact that a defendant was of previous good character was of less importance as a mitigating factor in drugs cases than in other types of case because dealers tended to target such people to use as couriers. The fact that A was a courier rather than a dealer was not a mitigating factor; if she had been a dealer, that would have been an aggravating factor. Although there had been a significant effect on A's children, that in itself could not be regarded as a significant mitigating factor because to do so would encourage dealers to target carriers with children. Taking into account the mitigating factors and the aggravating effect of the quantity of cannabis imported, the Royal Court had been correct to allow a six month addition to the minimum sentence suggested in Oren (see 18.GLJ.13) and her application would be dismissed.

[Law Officers of the Crown v. Williams - Court of Appeal 14.10.97 (HMP/CAT)]. For full report of judgment of Court of Appeal, see paragraph 74.

Sentence - series of consecutive sentences - circumstances in which sentences should be imposed consecutively

16. In a case involving a series of offences involving burglary, possession of cannabis, assault and theft, the Court of Appeal HELD, in refusing leave to appeal, that where matters came before the Court which were totally separate and unconnected with each other, and where each in itself justified and required a prison sentence, it was right that those sentences should be made consecutive to each other provided only that the totality of the sentence was not too great.

[Law Officers of the Crown v. Thompson - Court of Appeal 21.7.97 (JRF/ADNH)]. For full report of judgment of Court of Appeal, see paragraph 75.

DIVORCE AND MATRIMONIAL CAUSES

Evidence in undefended cases

17. Order in Council: The Matrimonial Causes (Amendment) (Guernsey) Law, 1997. - See 23.GLJ.36.

Royal Sanction 22.7.97. Registered and in force 6.10.97. (No. XIX of 1997).

Practice direction - matrimonial interlocutory applications

18. 1. As from September 1997, the Court will sit to consider Matrimonial Interlocutory Applications on the second and fourth Tuesday of the month at 4.30 p.m.

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

Practice Direction No. 1 of 1997.

Practice direction - undefended divorces - Matrimonial Causes (Amendment) (Guernsey) Law, 1997

19. Following the adoption of this legislation it is proposed that all undefended divorces should be dealt with in Chambers by affidavit unless there is some special reason from the Petitioner's point of view for doing otherwise or if the Judge decides he wishes to hear oral evidence.

The Court will from time to time designate days on which such applications will be heard and the Petitioner's advocate must lodge with H.M. Greffier AT LEAST SEVEN DAYS before the appointed date an application following closely Form 1 hereto [available from the Greffe]. The Court will also require a confirmatory affidavit from the Petitioner on the lines of Form 2 hereto [also available from the Greffe] to be sworn not more than twenty-one days before the date of the hearing.

Practice Direction No. 2 of 1997.

DOCUMENT DUTY

20. Ordinance: The Document Duty (Amendment) (No. 2) Ordinance, 1997. Introduces reduced rates of document duty payable on conveyances of realty (other than inter vivos gifts, exchanges, partages or delaissances) where the value of the transaction does not exceed £130,000. If that value is not more than £100,000 no document duty is payable; if it is more than £100,000 but not more than £115,000 the new rate of duty is 0.5%; at more than £115,000 but not more than £130,000 it is 1%. Transactions whose value exceeds £130,000 continue to attract document duty at 1.5%.

In force 11.12.97. (No. XLI of 1997).

FIRE SERVICES

21. Order in Council: The Fire Services (Amendment) (Guernsey) Law, 1997. - Amends the Fire Services (Guernsey) Law, 1989 in a number of respects. The principal changes are-

(a) buildings are deemed to be put to a designated use, and therefore are controlled premises subject to fire precaution requirements, if the building as a whole is used as sleeping accommodation for at least ten persons, or if any part of the building below ground floor level or above first floor level is used as sleeping accommodation (single private dwelling houses remain exempt);

(b) in the case of controlled premises in multiple occupation, the duty to ensure that the premises are provided with the necessary means of escape, etc, is shifted from the occupier of the premises to the owners thereof;

(c) in the case of such premises, the duty to ensure that the means of escape, etc, are kept free from obstruction and properly maintained is shifted from the occupier to the owners and occupier on a joint and several basis.

Approved by the States 1.8.97. Royal Sanction 30.10.97. Registered and in force 2.12.97.

FISHING

22. Ordinance: The Fishing Ordinance, 1997. - Repeals and re-enacts the Fishing Ordinance, 1988, as amended.

In force 1.11.97. (No. XXV of 1997).

23. Statutory instrument: The Restricted Fishing Areas Order, 1997. - Restricts trawling or dredging within controlled waters between 1st April and 30th December. Prohibits use of nets to catch crawfish.

In force 1.11.97. (GSI No. XXVIII of 1997).

24. Statutory instrument: The Fishing (Restrictions on the use of Trot Line and Set Net) Order, 1997. - Restricts the use, placing or setting of any trot line or set net within the restricted waters or on the foreshore. Prohibits the setting of nets, other than beach seining, and the use of certain other lines within the restricted waters or on the foreshore. Establishes a register of gear serial numbers for persons using fishing equipment.

In force 1.11.97. (GSI No. XXIX of 1997).

25. Statutory instrument: The Fishing (Minimum Size and Prescribed Species) Order, 1997. - Prescribes the minimum size for certain species of fish for the purposes of section 1 of the Fishing Ordinance, 1997 (see paragraph 22). Sandeels and ormers (other than cultivated ormers, where 48 hours' notice has been given of the intention to export them and a certificate of origin has been obtained from the Sea Fisheries Committee) taken from within the territorial waters or the foreshore cannot be exported.

In force 1.11.97. (GSI No. XXX of 1997).

FOOD

Food and Drugs legislation - extension to Alderney

26. Ordinance: The Alderney (Application of Legislation) (Food and Drugs) Ordinance, 1997. - Extends the Food and Drugs (Amendment) (Guernsey) Law, 1996 (see 21.GLJ.22), which removes the exclusion of "milk" from the foods for which the Board of Health may make Orders in respect of food hygiene, to Alderney.

In force 24.9.97. (No. XXVIII of 1997).

GAMBLING

Channel Islands Lottery

27. Ordinance: The Gambling (Channel Islands Lottery) (Amendment) (Bailiwick of Guernsey) Ordinance, 1997. - Amends the Gambling (Channel Islands Lottery) (Bailiwick of Guernsey) Ordinance, 1975, as amended, so as to enable instant prizes to be won by purchasers of Channel Islands Lottery tickets (through the use of "scratch cards").

In force 29.10.97. (No. XXXIV of 1997).

Gambling with strangers

28. Order in Council: The Gambling (Amendment) (Guernsey) Law, 1997. - Amends section 8 of the Gambling (Guernsey) Law, 1971 to enable the making of an Ordinance regulating when, how and with whom certain forms of gambling with strangers will be regarded as lawful gambling.

Approved by the States 24.9.97. Royal Sanction 17.12.97. Awaiting registration.

HEALTH AND MEDICINE

Prescription charges

29. Ordinance: The Health Service (Benefit) (Amendment) Ordinance, 1997. - Sets prescription charges at £1.70 from the 1st January 1998.

In force 1.1.98. (No. XXIX of 1997).

Tobacco

30. Order in Council: The Tobacco Advertising (Guernsey) Law, 1997. - See 23.GLJ.42.

Royal Sanction 22.7.97. Registered 6.10.97. In force 6.11.97.

HORTICULTURE

31. Order in Council: The Glasshouse Control (Repeal) (Guernsey) Law, 1997. - See 23.GLJ.44.

Royal Sanction 22.7.97. Registered and in force 6.10.97. (No. XXI of 1997).

HOUSING

Control of occupation - application for housing licence - appeal to Royal Court against refusal - whether Authority's decision an unreasonable exercise of its powers - whether issue of law or of fact

32. A applied for a housing licence under section 6(2)(b) of the Housing (Control of Occupation) (Guernsey) Law, 1994 which was refused. She appealed to the Royal Court pursuant to section 56 of the Law on the ground that the Authority's decision was an unreasonable exercise of its powers. In his judgment on an application for directions, the Bailiff ruled that it was for the Jurats to decide on the reasonableness of the Authority's decision. In an interlocutory appeal to the Court of Appeal, A contended that that issue was exclusively an issue of law and therefore fell to be decided by the Bailiff alone. HELD, approving and adopting the decision of 30th October 1996 of the Jersey Court of Appeal in Fairview Farm Limited v. Island Development Committee, the duty of the Court on such an appeal was to override the decision of the inferior body; its duty was not merely to consider whether any reasonable body could have reached the decision which the Authority did reach but to decide whether the Court considered that that decision was, in its view, unreasonable. The Court of Appeal went on to set out five possible views which might be taken on appeal by the Royal Court against an exercise of power by the Housing Authority and the procedural consequences thereof. The Court also disapproved certain obiter dicta, relied upon by A and suggesting that the powers of the Royal Court on appeal under section 56 were limited to matters of law, in Perkins v Housing Authority (see 20.GLJ.93). The appeal against the Bailiff's ruling would be dismissed and the substantive appeal to the Royal Court should be dealt with according to the principles set out in the judgment.

[Walters v. States Housing Authority - Court of Appeal 23.7.97 (PJGA/HER)]. For full judgment of Court of Appeal, see paragraph 76.

INCOME TAX

Company director employed at a salary - agreement that salary would cease to be drawn - whether his income had permanently ceased

33. In 1987 A became a shareholder and director of a company which agreed to pay him a salary for a given number of hours worked. With effect from 1992, A and his co-director agreed that they would not draw any further salary from the company. The Administrator of Income Tax did not accept that his employment had ceased at the end of 1991 for the purposes of

section 31 of the Income Tax (Guernsey) Law, 1975, as amended. A appealed to the Guernsey Tax Tribunal, which upheld the Administrator's decision, and thence, by way of Case Stated, to the Royal Court. HELD, by the Deputy Bailiff, section 31(2) provided that the cessation provisions should be invoked where, in any year of charge, income permanently ceased to be the income of the person chargeable. The fact that A remained a director of the company and there was a potential source of further income did not justify the Administrator in not treating his income as permanently ceasing. The fact that the "source" of the income remained in existence was not relevant to income from an office or employment. The appeal would be allowed.

[Bannister v. Administrator of Income Tax - Plaids de Meubles 2.7.97 (St.JAR/HER)].

Exempt bodies

34. Ordinance: The Income Tax (Exempt Bodies) (Amendment) (Guernsey) Ordinance, 1997 - Increases the annual fee payable on application for grant or renewal of tax exempt status, from £500 to £600.

In force 1.1.98. (No. XXXIX of 1997).

Pensions

35. Order in Council: The Income Tax (Pension Amendments) (Guernsey) Law, 1997. - See 23.GLJ.47.

Royal Sanction 30.10.97. Registered 2.12.97. In force 1.1.98.

INDIRECT TAXATION

Document duty

36. Ordinance: The Document Duty (Amendment) (No. 2) Ordinance, 1997. - See paragraph 20.

Impôts

37. Ordinance: The Impôts (Budget) Ordinance, 1997. - Increases the impôt on tobacco.

In force 11.12.97. (No. XL of 1997).

INTERNATIONAL LAW

Salvage Convention

38. Ordinance: The Salvage Convention (Bailiwick of Guernsey) Law, 1997 (Commencement) Ordinance, 1997. - See paragraph 54.

ISLAND DEVELOPMENT

Application to develop - refusal of permission - appeal

39. In dismissing an appeal from a decision of the Island Development Committee in December 1995 refusing permission for the development of a hotel site into residential and office accommodation, and remitting the matter to the Committee for further consideration, the Deputy Bailiff HELD that it was not the Court's function to consider any new material or change of circumstances that had arisen since the decision was made and therefore it would not be right for the Jurats to see correspondence which had been exchanged since the decision was made nor to receive evidence on affidavit which had not been before the Committee. Further, during the two years since the decision there had been certain changes of policy on the part of the Tourist Board in relation to such cases which would render any decision by the Royal Court under the old regime academic. The Committee should look at the matter de novo and take into consideration not only material that was before it when the original decision was made but also any new material subsequently put forward.

[L. C. Holdings Limited v. Island Development Committee - Appeals to the Royal Court 13.11.97 (PTRF/HMP)].

Exemptions

40. Ordinance: The Island Development (Exemptions) Ordinance, 1997. - Replaces, and generally broadens, the exemptions from planning control previously available under the Island Development (Exemptions) (Guernsey) Ordinance, 1982. The 28 exemptions contained in the 1982 Ordinance, which were arranged according to the zoning categories of the old Detailed Development Plans, are replaced by 34 exemptions classified by type, of which those most frequently used are likely to be within the five sections concerning development and works within the curtilage of a dwellinghouse. Subject to stipulated conditions, these sections exempt from the requirement for planning permission such works as single garden sheds and domestic glasshouses, satellite dishes, traffic mirrors, garden structures and fuel containers; and also, except in conservation areas, the replacement of doors, windows and roof coverings, single porches and small conservatories. The special sensitivity of conservation areas and green areas/zones is also reflected in additional control over resurfacing of paths and drives, and garden walls and fences, which together with the laying of patios are operations which in other areas, subject to size limit and other conditions, are now exempt within domestic curtilages. Finally within this class, the new Ordinance clarifies the position as respects the use of land within the curtilage of a dwelling for the retail sale of produce grown at the dwelling: provided the produce is not grown on a commercial basis such use, if it would otherwise have required permission as a material change of use, is now exempted development; any structures associated with the use are not covered by the exemption, but a further new exemption is introduced regarding signs advertising garden produce.

A few of the above exemptions are extended on broadly similar terms to non-domestic property. The agricultural exemptions are updated. The

system in respect of trees is changed: the former exemption from control over lopping and felling applied to any property on which no planning permission had been given for five years; the new approach is that, when permission would otherwise be required by law, an exemption is afforded for trees within curtilages of less than 5 metres in height which do not form part of a publicly visible hedge; also exempt are dead or diseased trees felled with Horticultural Committee consent. New exemptions are introduced in respect of signs and advertisements. Provision is made to permit temporary development during approved building operations. Finally, by virtue of the Use Classes Ordinance of 1991 (see 11.GLJ.55) certain retail uses to which special considerations may apply stand apart from general retail use; and industrial uses are graded as "light", "general" and "special": the present Ordinance enables changes from special to general retail and industrial uses, and from special or general to light industrial use (but not vice versa), to take place lawfully without permission.

In force 1.1.98. (No. XLII of 1997).

PARTNERSHIP

Limited partnerships

41. Projet de Loi: The Limited Partnerships (Guernsey) (Amendment) Law, 1997. - Amends the Limited Partnerships (Guernsey) Law, 1995 by permitting limited partnerships to elect, at the time of registration, to have legal personality. An election is irrevocable and a failure to make an election is final. Existing limited partnerships will be able to elect to have legal personality within a period of three months beginning on the day of commencement of the amending Law. A limited partnership with legal personality must have the word "Incorporated" in its name.

Approved by the States 1.8.97. Awaiting Royal Sanction.

PRACTICE AND PROCEDURE (CIVIL)

Appeal to Court of Appeal - appeal against decision upholding exception de fonds - whether leave of Royal Court required

42. See Nash v. States of Guernsey, paragraph 2.

Appeal to Court of Appeal - application for leave to appeal out of time - factors to be taken into account - application for further stay of execution of eviction pending appeal

43. See Gaudion v. Weardale Ltd, paragraph 3.

Appeal to Court of Appeal - application for leave to serve Respondent's Notice out of time - factors to be taken into consideration

44. See Majormine Ltd v. Lindmar Trust Company Ltd, paragraph 4.

Costs - full indemnity costs - stay of enforcement of order pending appeal

45. RR obtained a declaration of the Royal Court concerning a boundary dispute and were granted full indemnity costs. A gave notice of her intention to appeal and applied for stay of the declaration pending the appeal. RR applied for security for costs. The Court of Appeal refused A's application but granted an order for security for costs. It also stayed the enforcement of the order for costs in the Royal Court until the hearing of the appeal or 31st December, 1997, whichever was the earlier.

[Smith v. Helmot - Court of Appeal 23.7.97 (unrep/DGLeM)]. For full judgement of Court of Appeal, see paragraph 81.

Judgments - reciprocal enforcement - application to set aside registration of original judgment - jurisdiction of original court - whether rectification of company register constitutes "seizure of property"

46. RR were the judgment debtors of an English judgment subsequently registered in the Royal Court. They applied, successfully, to the Royal Court for the registration to be set aside on the grounds, pursuant to section 6(2)(a) of the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957, that the earlier rectification of a company register so as to remove their names as members under section 359 of the Companies Act 1985 amounted to "property seized" within the meaning of section 6(2)(a)(ii) of the 1957 Law and that they had appeared in the High Court proceedings for the purpose of recovering assets. A appealed to the Court of Appeal. HELD, an entry in a company's register was not in itself "property", and was not capable of being seized as property, therefore on the rectification of the register under section 359 of the 1985 Act there was no such property "seized or threatened with seizure" as to fall within the terms of the exception in section 6(2)(a)(ii) of the 1957 Law. Furthermore, as RR were merely nominees of beneficial owners of the shares who had themselves ceased to be beneficial owners they had no continuing right to stay on the register or to seek to protect any interest in the shares so there could be no "seizure" of property. Nor was there sufficient evidence that there was any legitimate purpose in their intervention in the original proceedings to satisfy section 6(2)(a)(ii). Accordingly, RR could not claim to be protected from enforcement of the judgment under the exception in that sub-section and A's appeal would be allowed.

Majormine Limited v. Lindmar Trust Company Limited et al - Court of Appeal 23.10.97 (DGLeM/RPO). For full report of judgment of Court of Appeal, see paragraph 78. (See also paragraph 4).

Mareva injunction - application for - duty of full and frank disclosure

47. R, a firm of stockbrokers, suspended H, a former associate, for alleged breach of duty in connection with various transactions relating to shares in a company, X Ltd. Following his suspension, H reached a written agreement with R concerning certain shares in X Ltd which he had contracted to buy earlier and which had been rolled over but for which he

now wished to pay. It was agreed that, upon payment being made, the said shares would be transferred into the name of H's wife, A. A third party, Y, agreed to make a loan to A to finance the purchase of these shares against the security of the deposit of the shares. In the event, when payment was made for the purchase of the shares, R did not transfer them into A's name but into the name of R's nominee company. A was therefore unable to fulfil her obligations to Y. R subsequently commenced proceedings against H to recover losses arising from the alleged breach of duty and applied, ex parte, for a mareva injunction restraining H's dealings in all his assets including the shares in X Ltd. The mareva injunction was granted by the Royal Court following the submission of an affidavit by R's advocate. A applied for the injunction to be set aside. The Royal Court refused on the basis that to do so would be to rule on the ownership of the shares in X Ltd and the genuineness of the transaction with Y. On appeal A alleged that R had not made proper disclosure when the order was sought. The Court of Appeal HELD, allowing the appeal, that the duty of a plaintiff seeking a mareva order was to make full and frank disclosure of the material facts, that is to say, material facts known to the plaintiff and any additional facts which should be known, having regard to all the circumstances of the case, if proper enquiries were made. The facts to be disclosed, which must be disclosed in the affidavit and not in exhibits, are those which are necessary to enable the Court to exercise its discretion properly. It was clear from subsequent affidavits sworn by R's managing director that full and frank disclosure had not been made at the time of the application for the injunction. The Court went on to direct that the shares in X Ltd be transferred to Y.

Counsel for R then sought leave to have the decision to order transfer of the shares to Y reviewed prior to the order being perfected. This was refused. Full indemnity costs were ordered against R.

[Hulme v. Matheson Securities (Channel Islands) Limited (Nos. 1 and 2) - Court of Appeal 6.11.97 and 28.11.97 (PTRF/MGF)]. For full judgements of Court of Appeal, see paragraphs 79 and 80.

Péremption d'instance - action for personal injury - power of court to restore to Rôle after action has become périmé

48. P was seriously injured in an accident at work in November, 1991. His action against D was placed on the pleading list in November, 1994 and a summons for defences issued but withdrawn, apparently mistakenly, after draft defences were delivered requesting further particulars. The action became périmé in November, 1995. It was not until September, 1996 that P's then advocate, having provided the particulars requested, realised that the action had become périmé and applied for the action to be restored pursuant to Rule 50 of the Royal Court Civil Rules, 1989. D appealed to the Court of Appeal against the Deputy Bailiff's Order that the action be restored to the Rôle. HELD, Rule 50 gave the Royal Court a discretionary jurisdiction to order the restoration of actions which have become périmés or have otherwise been removed from the Rôle and it would be wrong for the Court of Appeal to impose fetters on the exercise of that discretion. The Court would take into account the following circumstances: -

(a) the position of P and the effect on him and his case if the action was not restored;

(b) the history of the action, and the activity or inactivity of P and his legal representatives;

(c) the position of D and the effect on D and his case if the action was restored;

(d) any other special circumstances relating to the action and its conduct by the parties, including settlement discussions or any express or implied agreement not to take further steps in the action for the time being;

(e) the general circumstances in Guernsey relating to the relevant class of litigation including, for example, any difficulties in securing legal representation for impecunious plaintiffs or in securing medical reports for plaintiffs suing for personal injuries.

Given the difference between the statutory provisions relating to the striking out of County Court actions in England and Rule 50 and the absence of a legal aid system in Guernsey it was necessary to take a different approach to that adopted in England and Wales. The Deputy Bailiff had adopted a correct approach, having taken into consideration the delays by P's advocate; the physical and mental condition of P; the effect on P and D of the delay; the impecuniosity of P; and the general circumstances affecting impecunious plaintiffs, especially those who are suing for damages for personal injury and whose earning capacity has been adversely affected by their injuries. The appeal would be dismissed.

[Guernsey Annandale Tile Company (1980) Ltd v Haines - Court of Appeal 6.11.97 (FJH/JPG)]. For full report of judgment of Court of Appeal, see paragraph 82.

PUBLIC ASSISTANCE

49. Ordinance: The Central Outdoor Assistance Board Regulations (Amendment) Ordinance, 1997. - Amends the Central Outdoor Assistance Board Regulations, 1963 by fixing the limit on weekly income for receipt of outdoor assistance and the ordinary maximum rates of outdoor assistance. Also provides for winter fuel allowance.

In force 9.1.98. (No. XXXIII of 1998).

REGISTRATION OF BIRTHS, DEATHS AND MARRIAGES

50. Projet de Loi: The Still-Birth (Definition) (Bailiwick of Guernsey) Law, 1997. - Ensures a uniform construction of references to still-born children and cognate expressions, in all legislation in force in any part

of the Bailiwick, by reference to the 24th week of pregnancy.

Approved by the States of Guernsey 1.8.97; by the States of Alderney 1.10.97; and by the Chief Pleas of Sark 1.10.97. Awaiting Royal Sanction.

ROAD TRAFFIC AND PUBLIC TRANSPORT

Registration marks - sale and retention

51. Ordinance: The Registration Marks (Sale and Retention) (Guernsey) Law, 1997 (Commencement) Ordinance, 1997. - Brings the Registration Marks (Sale and Retention) (Guernsey) Law, 1997 (see 23.GLJ.60) into force on 1st November, 1997.

In force 1.11.97. (No. XXXV of 1997).

52. Ordinance: The Registration Marks (Sale and Retention) Ordinance, 1997. - Creates the detailed system for vehicle owners to purchase or retain the right to have particular registration marks assigned to their vehicles. Establishes the difference between "special" and "non-special marks". Special registration marks may be acquired at public auctions or by tender. A vehicle owner can retain a registration mark for future assignment to another vehicle registered in that person's name upon payment of a fee (currently £50). Persons wanting to obtain the right to use a particular non-special registration mark may upon payment of a fee (currently £50) apply to go on the waiting list for that mark. Whichever right is acquired, it is reflected in the terms of a certificate of entitlement (of which duplicates are available in specified circumstances). The right must be exercised within one year, unless it is extended by payment of a further fee (currently £50). The right is only transferable between spouses. It can be revoked by the States Traffic Committee, although the holder can appeal to the Ordinary Court against the revocation. Refunds on sums paid are not generally available. Article 15 of the Ordonnance supplémentaire à l'Ordonnance ayant rapport au Trafic Véhiculaire en cette Ile (made permanent on the 18th day of January, 1932) is substituted.

In force 1.11.97. (No. XXXVI of 1997).

SHIPPING

Wreck and salvage

53. Projet de Loi: The Wreck and Salvage (Amendment) (Bailiwick of Guernsey) Law, 1997. - Amends the Wreck and Salvage (Vessels and Aircraft) (Bailiwick of Guernsey) Law, 1986 by conferring on officers of police and other persons authorised by the Receiver of Wreck powers to stop, search and arrest vessels in the territorial waters of the Bailiwick where they suspect that a specified offence (for example, the removal of historic wreck) may have been committed. Where such an offence is committed, the

court is given powers of forfeiture and restitution.

Approved by the States 1.8.97 and by the States of Alderney and Chief Pleas of Sark 1.10.97. Awaiting Royal Sanction.

54. Ordinance: The Salvage Convention (Bailiwick of Guernsey) Law, 1997 (Commencement) Ordinance, 1997. - Brings the Salvage Convention (Bailiwick of Guernsey) Law, 1997 (see 23.GLJ.49) into force on 1st January, 1998.

In force 1.1.98. (No. XLIII of 1997).

SOCIAL SECURITY

Attendance and invalid care allowances

55. Ordinance: The Attendance and Invalid Care Allowances Ordinance, 1997. - Fixes the annual income limit for receipt of invalid care allowance at £50,000 and fixes the weekly rate of attendance allowance and invalid care allowance.

In force 5.1.98. (No. XXXII of 1997).

Family allowances

56. Ordinance: The Family Allowances Ordinance, 1997. - Increases the amount of family allowance to £9.50 a week for each child in the family.

In force 6.1.98. (No. XXVII of 1997).

Rates of contributions and benefits

57. Ordinance: The Social Insurance (Rates of Contributions and Benefits, etc.) Ordinance, 1997. - 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 1.1.98 as to sections 2, 3, 4, 5, 6 and 8; and 5.1.98 as to remainder. (No. XXXI of 1997).

Supplementary benefit

58. Ordinance: The Supplementary Benefit (Implementation) (Amendment) Ordinance, 1997. - Fixes the limit of weekly income for supplementary beneficiaries and the normal requirements of persons in need of a supplementary benefit.

In force 9.1.98. (No. XXX of 1997).

WATER

Charges

59. Order in Council: The States Water Supply (Amendment) (Guernsey) Law, 1997. - See 23.GLJ.64.

Registered and in force 19.8.97.

WILLS, SUCCESSION AND ADMINISTRATION OF ESTATES

Prescription

60. Order in Council: The Prescription (Amendment) (Guernsey) Law, 1997. - Replaces section 4 of the Loi relative aux Prescriptions, 1889 by providing that, subject to the publication of notices in La Gazette Officielle, the executors or administrators of the estate of a deceased person may, not less than three months from the date of the second publication, distribute the personal estate among the persons entitled thereto, having regard only to the claims of which they then have notice.

Approved by the States 29.10.97. Royal Sanction 17.12.97. Awaiting registration.

GUERNSEY STATUTORY INSTRUMENTS

61. 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 (Fees) Regulations, 1997	28. 7.97	31.10.97	24
The Parking Places (Amendment) Order, 1997	1. 9.97	3. 9.97	25
The Customs and Excise (Aviation Fuel) (Bailiwick of Guernsey) Order, 1997	10. 9.97	10. 9.97	26
The Migration of Companies (Fees) Regulations, 1997	1.10.97	1.10.97	27
The Restricted Fishing Areas Order, 1997 (see paragraph 23)	30.10.97	1.11.97	28
The Fishing (Restrictions on the use of Trot Line and Set Net) Order, 1997 (see paragraph 24)	30.10.97	1.11.97	29
The Fishing (Minimum Size and Prescribed Species) Order, 1997 (see paragraph 25)	30.10.97	1.11.97	30
The Social Insurance (Benefits) (Miscellaneous Provisions) (Amendment) Regulations, 1997	5.11.97	5.11.97	31
The Social Insurance (Contributions) (Amendment) Regulations, 1997	5.11.97	1. 1.98	32
The Social Insurance (Increase of Benefit) Regulations, 1997	5.11.97	5. 1.98	33
The Financial Services Commission (Fees) Regulations, 1997	28.10.97	1. 1.98	34
The Health Service (Medical Appliances) (Amendment) (No. 2) Regulations, 1997	20.11.97	1. 1.98	35
The Income Tax (Guernsey) (Valuation of Benefits in Kind) Regulations, 1997	20.11.97	1. 1.98	36
The Impôts (Temporary Variation of Rates) Order, 1997	19.11.97	24.11.97	37

The Social Insurance (General Benefit) (Amendment) (No. 2) (Guernsey) Regulations 1997	19.12.97	6. 1.97	38
The Water Charges Order, 1997	22.12.97	1. 1.98	39
The Health Service (Physiotherapy Benefit) Regulations 1997	24.12.97	1. 1.98	40

UNITED KINGDOM STATUTORY INSTRUMENTS

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

	S.I. Number
The Wireless Telegraphy (Licence Charges) (Amendment) Regulations, 1997	1006
The Broadcasting Corporation - Transmission Network) (Guernsey) Order 1997	1755
The Food and Environment Protection Act 1985 (Guernsey) (Amendment) Order 1997	1770
The Hong Kong (Extradition) Order, 1997	1178
The Social Security (United States of America) Order 1997	1778
The Wireless Telegraph (Licence Charges) (Amendment No. 2) Regulations 1997	1885
The Sea Fishing (Enforcement of Community Conservation Measures) Order 1997	1949
The Transfer of Prisoners (Restricted Transfers) (Channel Islands and Isle of Man) Order 1997	1776
The Crime (Sentences) Act 1997 (Commencement No. 2 and Transitional Provisions) Order 1997	2200
The Wireless Telegraphy (Short Range Devices) (Exemption) (Amendment) Regulations, 1997	1996
The Wireless Telegraphy (Network User Stations) (Exemptions) Regulations 1997	2137
The Angola (United Nations Sanctions) (Channel Islands) Order 1997	2594
The Sierra Leone (United Nations Sanctions) (Channel Islands) Order 1997	2599

ALDERNEY

BUILDING AND DEVELOPMENT CONTROL

63. Order in Council: The Building and Development Control (Alderney) (Amendment) Law, 1997. - Amends the Building and Development Control (Alderney) Law, 1975 by inserting an additional Part IIIA entitled "Land use plans & preliminary declarations". Requires the Policy and Finance Committee to prepare Land Use Plans indicating the manner in which the Committee proposes that land should be used and the stages by which such development should be carried out. Land Use Plans may define areas where the Committee recommends that permission for development should not be granted or should not be granted unless there are special considerations. Land Use Plans are to have effect for five years from the date of their approval by the States. The Committee must, before laying a Land Use Plan before the States, request the President of the States to appoint an Inspector to hold a Planning Inquiry to be held in public and at which representations can be made (provided that prior notice has been given). After holding a Planning Inquiry the Inspector must prepare a report; the Land Use Plan and report are then laid before the States for approval.

The Projet also enables persons desiring to carry out development, before making an application to the Committee, to apply for a preliminary declaration, valid for three years.

Approved by the States of Alderney 3.9.97. Royal Sanction 26.11.97. Awaiting registration.

CONSTITUTIONAL LAW

64. Projet de Loi: The Government of Alderney (Amendment) Law, 1998. - Amends the Government of Alderney Law, 1987 by reducing the number of States members from 12 to 10; by reducing the number of candidates to be elected at each election from 6 to 5; by reducing the number of members required to be present at a States meeting when a decision is made to amend the Government of Alderney Law, 1987 from 10 to 9; and by requiring at least 7 of the members present to vote in favour of the resolution; and by reducing the number of States members required to sign a requête from 5 to 4.

Approved by the States of Alderney 17.12.97. Awaiting Royal Sanction.

FOOD

65. Ordinance: The Alderney (Application of Legislation) (Food and Drugs) Ordinance, 1997. - See paragraph 26.

GAMBLING

66. Ordinance: The Gambling (Betting) (Alderney) Ordinance, 1997. - Makes effecting a betting transaction with a licensed bookmaker at a licensed

betting office or electronic betting centre lawful gambling. Lays down rules for the conduct of licensed betting offices and electronic betting centres. Provides for a licensing regime for betting offices and electronic betting centres. Specific matters covered include the manner of application by a local person or company (where a local nominee must be identified) for the grant or renewal of licences; the grounds for refusal; the fees payable and the period of validity. Enables licences to be revoked, suspended or varied. The sentencing court may disqualify licensee or nominee upon conviction for a relevant offence. Regulates steps to be taken on absence, death or incapacity of licensee or nominee.

In force 1.10.97. (No. VIII of 1997).

HEALTH AND SAFETY AT WORK

67. Order in Council: The Health and Safety at Work (Alderney) Law, 1997. - Confers on the States of Alderney the power to make Ordinances for securing the health, safety and welfare of persons at work; for protecting persons, other than persons at work, against risk to health and safety arising out of the activities of persons at work; for regulating the importation, production, storage or use of explosive, highly flammable or other dangerous substances; and for other health and safety matters.

Approved by the States of Alderney 3.9.97. Royal Sanction 17.12.97. Awaiting registration.

HOUSING

68. Ordinance: The Housing (Exemptions) (Repeal) (Alderney) Ordinance, 1997. - Repeals the Housing (Exemptions) (Alderney) Ordinance, 1997 (see 23.GLJ.78).

Ordinance of the States of Alderney of 17.12.97.

RATING

69. Ordinance: The Occupiers' Rate (Level for 1998) Ordinance, 1997. - Sets the occupiers' rate for the calendar year 1998 on property at 158 pence in the pound of rateable value.

Ordinance of the States of Alderney of 5.11.97.

SHIPPING

70. Ordinance: The Boats and Vessels (Speed Limits) (Alderney) Ordinance, 1997. - Imposes a 4 knot speed limit between 10 am and 7 pm from May to September within the defined coastal restricted zone. Creates an offence of navigating dangerously in territorial waters.

Ordinance of the States of Alderney of 17.12.97.

TRUSTS

71. Order in Council: The Terrace Trust (Dissolution) (Alderney) Law, 1997. - Dissolves the Terrace Trust (a trust of an area of land in the Valley, Alderney, given in 1857 for public enjoyment and use); vests the trust property in the States of Alderney; and absolves the trustees from all future obligations and liabilities in respect of the Trust or the trust property.

Approved by the States of Alderney 1.10.97. Royal Sanction 26.11.97. Awaiting registration.

SARK

FIREARMS

72. Projet de Loi: The Firearms (Guernsey and Sark) Law, 1997 (see 23.GLJ.39) was disapproved by the Chief Pleas of Sark.

Resolution of Chief Pleas of 1.10.97.

73. [CRIMINAL DIVISION - APPEAL NO. 218]

1997 JULY 21

THE LAW OFFICERS OF THE CROWN
v.
CHARLES STEWART STEVENSON

Before: CARLISLE, GLOSTER and BELOFF, JJ.A.

Sentence - misuse of drugs - importation of Class B drug

See paragraph 14.

N. Le Poidevin, for the Applicant.
H. M. Comptroller, for the Crown.

CARLISLE, J.A.: Charles Stewart Stevenson, on 15th May of this year, appeared before the Royal Court where he pleaded guilty to one offence of the improper importation of goods, contrary to S23(1) and (1)(a) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, as amended.

The particulars were that on 3rd March 1997, he imported a controlled drug of Class B, namely, cannabis resin, into Guernsey, contrary to the prohibition imposed on any such importation by S2(1) of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974, as amended. He was sentenced to an immediate term of imprisonment of 2 years. His application for leave to appeal to the Court against that sentence was refused by the Bailiff.

He has now renewed that application to this Court and, as I have indicated, we propose to allow the application for leave to appeal and to treat this as the appeal.

The facts are that the Applicant is a man of 34 years of age, who had started work in Brecqhou in 1995 as a labourer and has since August 1996 been resident in Guernsey, commuting to Brecqhou on a daily basis.

Whilst it is correct that he has certain Court appearances, these are all a long time ago, mainly of a minor nature, and none of them were to do with drugs. The Deputy Bailiff made it clear that the Court was treating him as a man of previous impeccable character. We take the same view.

On 3rd March, he arrived at the States Airport on a scheduled flight from Southampton, having left Guernsey on Friday 28th February, claiming the reason of his journey being to visit his girlfriend in Ireland. He was arrested and at first denied being in possession of any controlled drugs, but shortly afterwards he admitted he had some cannabis internally concealed in his anal passage.

It transpired that he had 6 separate packages of cannabis, wrapped in cling film, so concealed within his body. The total amount of cannabis was 96.538 grammes, which is just under 3½ ounces.

He said that he had bought it the previous evening in Southampton in a public house for some £250. He claimed that he was, himself, a habitual user, and that the cannabis was being imported merely for his own use.

The evidence before the Court was that the amount of cannabis was sufficient to provide for 704 reefer cigarettes, and that the current street value of £7 to £9 a gramme meant that the value of that which he was importing was between £675 and £868.

The Crown made it clear that they were unable to assess the truthfulness of his assertion that he was not intending to sell it to other people, but they also made it clear that there was no evidence to suggest that the Applicant had benefited from drug trafficking in the past.

This Court and the Royal Court have repeatedly made it clear that they view with great seriousness any offence of importation of drugs, whether of Class A or Class B, into Guernsey, and that they are determined to do whatever they can to prevent it and discourage such importation.

We have been referred to the case of Law Officers of the Crown v. Oren, 18.GLJ.13, which has rightly been described as a watershed decision, one which has undoubtedly influenced the Royal Court and the Court of Appeal in attempting to obtain consistency in drug sentencing cases. Whilst Oren dealt specifically with cases of importation with a commercial motive, it clearly went wider than that. It made clear, for example, that those who conceal drugs within their person could expect longer sentences, and it was undoubtedly intended to reflect an increase in sentencing for offences of importation as such. Any brief review of the cases of the Court of Appeal and the Royal Court since the case of Oren clearly indicates that that has happened in practice.

In Oren the Royal Court, in dealing with commercial importation, said that the starting point for sentencing in cases of importation of Class B drugs where there was a commercial motive should be 2½ years for those where the amount of the drug was £1,000 or less and the Defendant had pleaded guilty. Here, the amount of the drug that was brought in could easily bring this case within the lower end of commercial importation, but the Comptroller in this Court specifically stated that he was not suggesting that this was a case where the Appellant was intending to supply drugs to others at the time when he imported them. Indeed, he accepted that the words used by the Deputy Bailiff in sentencing at p.21 G of the transcript went further and beyond the way that the Prosecution had presented their case. What the Deputy Bailiff said was this:-

> "... The inference the Court draws in the case of a man in your financial circumstances, and the Court has noted from the Drug Trafficking Report, and it has been agreed by your Counsel, that your worldly possessions really are valued at under £1,000, is that this was a smuggling operation undertaken by you not solely for the purpose of feeding your own personal craving for cannabis.

A It is also noted that you appear to have been coming to this Island for a period within a month or 6 weeks, and this would have been a large amount to have consumed in that period. The Court also takes note of the fact that anyone who brings cannabis here can sell it at a considerably higher price than they pay for it in England."

These words could be taken to mean that the Court in sentencing was doing so on the basis that the importation was intended for gain. The Comptroller had not
B put the case that way.

However, even if the words went further than justified, this Court is satisfied that had in fact the Royal Court been sentencing on the basis that the Appellant had deliberately brought the goods in on a commercial basis, that that fact combined with the method of concealment, on a proper implementation of the Oren guidelines, could properly have led to a longer sentence than that which was passed.

C The Court accepts the distinction made by the Comptroller that whilst there may be cases where there is no evidence of intention to supply at the time of importation, and therefore it would not be appropriate to bring a prosecution for "intent to supply", that nevertheless, there is a distinction between those cases where the amount brought in is merely for personal use for one or two days, and should be equated with "simple possession", and those when the individual brings into the community a significant amount which in itself is bound to be a matter for public concern, because of the continuing risk of the
D existence of the drug within the Island and the temptation that may hold out to people. In cases of that kind, whilst it is not appropriate to indict on possession with intent to supply, nevertheless, the gravity of the importation is in itself far greater than the gravity of offences of mere possession.

We believe that on the facts of this case, together with the method of internal concealment that has been described both as unpleasant and sophisticated, which is in itself an aggravating feature, the sentence of 2 years passed by the
E Royal Court cannot be said to be excessive nor to be out of line with the sentencing passed in other cases which we have looked at since the giving of the Oren judgment.

Finally, we were asked to consider whether it was appropriate that this sentence should be suspended. It was advanced to us that since there was the power to suspend any sentence of 2 years or less, that the Court had a duty in all such cases to consider whether there were any special features which
F justified suspension. We have considered that and we do not consider there are any special circumstances in this case which justify suspension.

For the reasons that I have given, leave to appeal having been granted, the appeal is dismissed. The judgment I have given is the judgment of the Court.

Leave to appeal granted; appeal dismissed.

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74. [CRIMINAL DIVISION - APPEAL NO. 221]

1997 OCTOBER 14

THE LAW OFFICERS OF THE CROWN
v.
GERALDINE SUSAN WILLIAMS

Before: COLLINS, V.-P., SOUTHWELL and BAILHACHE, JJ.A.

Sentence - misuse of drugs - importation of Class B drug

See paragraph 15.

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

COLLINS, J.A.: On the 19th August 1997, Geraldine Sarah Williams was sentenced to 3 years' imprisonment for an offence committed on the 5th June, 1997, of importing certain goods, namely cannabis, contrary to the prohibition contained in the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974, as amended. Against this sentence, she now seeks leave to appeal.

The Applicant together with two of her children and a friend disembarked from the Condor ferry at St. Peter Port, having travelled from Poole. She was driving her Lada motor car, and at 9.25 a.m. she was stopped in the Customs Hall and told that her car would be searched by a dog, trained to detect drugs. When asked, she denied having any goods to declare and denied having any controlled drugs, such as Cannabis, LSD, Cocaine, Amphetamines or Heroin. The dog's search revealed that there were controlled drugs in the car and two packages were found. One was concealed under the rear seat and one, found a little later, was inside a side panel in the boot of the car. After the finding of the first of these packages, she was arrested and taken to an interview room. £480 in cash was found in the glove box and the Applicant stated that £370 of that sum had been provided by her supplier in England.

In the course of her interviews by Customs, she said that she had had three meetings with her supplier in England, whom she had met in the Hawley Arms in Camden Town. At the second meeting she had been asked if she wanted to earn £1,000 for carrying two packages to Guernsey, through the Customs. The £1,000 being additional to the £370 for her expenses. Although she did not know the details and in particular, the type of drug, she knew that the packages which she was to take, which were given to her on a subsequent meeting, were some type of illegal drug. She added some further packing to the packages which she received, and stowed them in her car in the places which I have described.

She said that had she passed through the Customs in Guernsey, she was to telephone a number which she said that she hadn't written down and which she had by now forgotten. She persisted in the same account with regard to the telephone number through a number of interviews. No identification has been provided of the man ("Eddie") for whom she was carrying the Cannabis, apart from his Christian name, or of the person to whom it was to be delivered.

A The quantity of Cannabis was substantial. The total weight of the contents of the two packages was just over 3 kilograms. The resale value was between £21,217 and £27,279 and this represented enough material to produce over 22,000 Cannabis cigarettes.

The Applicant has no previous convictions and she is 32 years old. She worked as a clerk, and then as a live-in nanny until, having married, she became pregnant with the first of her three children; upon that, she lost her job and her accommodation. She and her husband were in Council accommodation and she, while unable to get paid work, did voluntary work in a play group, until she had her second child. Her marriage then broke down after some difficulties, and she was separated and then divorced. She later developed a relationship with another man, with whom she had her third child, and then that relationship also failed. All this occurred between 1984 and 1995.

B

By the time she committed this offence, she had obtained some money from a compensation case, and she had bought the Lada car, which I may add has now been confiscated by the Customs, and she lived in rented accommodation in Hereford, this being near to her terminally ill father.

C

This background is one of the kind that unfortunately attracts drug dealers, when looking for useful couriers. They look for those with a past free of convictions, and those whose previous life has left them vulnerable and short of money.

D In the leading English case of R. v. Aramah (1982) 76 Cr App R 190, Lane, L.C.J. expressed himself thus :-

> "The good character of the courier, as he usually is, is of less importance than the good character of the defendant in other cases. The reason for this is, it is well known, that the large scale operator looks for couriers of good character and for people of a sort which are likely to express the sympathy of the court if they are detected and arrested. Consequently, one will frequently find that students and sick and elderly people are used as couriers for two reasons. First of all, they're vulnerable to suggestion and vulnerable to the offer of quick profit, and secondly it is felt that the courts may be moved to misplaced sympathy in their case."

E

The starting point in considering the appropriate sentence in the case such as the present, as in all cases of importation of and dealing in drugs in this Island, is the case of Law Officers of the Crown v. Oren (18.GLJ.13), confirmed as it was by this Court in Law Officers of the Crown v. Warmisham (20. GLJ.19). In the case of class B drugs the starting point in the case of trafficking in larger quantities, that is to say in quantities larger than would be imported or dealt in for the offender's use, on a plea of guilty, was stated to be 2½ years. This was to be the appropriate sentence where the amount involved was at the lower end of the range of such large quantities. Thus the importation of £1,000 worth or thereabouts would hardly be likely to be for the offender's own use, and would merit a sentence of the minimum thus expressed, unless there were aggravating factors, such as internal concealment. Where larger quantities were involved then the effect could be expected to go up to twice that suggested starting point.

F

G

The purpose of such guidelines, which are not of course statutory, is to seek for consistency of sentencing as between one case and another. In addition, as was pointed out in Oren, each case has to be looked at on its merits and there may be occasional cases in which there are compelling and exceptional reasons for affording leniency to a particular offender. Such was the basis of the decision of the majority of this Court in Law Officers of the Crown v. Inan, (21.GLJ.20), as was pointed out, again by this Court, in Law Officers of the Crown v. Sugget (21.GLJ.21), when we observed that the Inan case was to be confined very much to its own special facts.

The Court is often faced with taking into account both aggravating factors and mitigating factors in placing a particular case on the one side or the other of a guideline; thus some, but not (for the reasons given above) very substantial, effect has to be given to the previous good character of the Defendant when he or she is a courier, as in other cases. The limitation on this factor, although harsh, is dictated by public policy and the need to prevent such crimes from being committed by others.

We do not accept that there is any error on the part of the Bailiff in stating that the fact that the Defendant is a courier is not a mitigating factor. The position, as we see it, is that the guidelines apply equally to the courier and the dealer, but that in the case of the dealer, the fact that he may have organised the importation or the transfer of the drugs is an aggravating factor.

In the present case we consider that by allowing only a six month addition to the minimum 2½ years suggested in Oren, the Royal Court struck a fair balance between the mitigating factors advanced on the Applicant's behalf and the aggravating effect of the quantity, substantial indeed, of the Cannabis the subject of the charge.

The effect on the three children aged between four and eleven, to whom we have already referred, has been urged upon us as a mitigating circumstance; sadly the effect has been significant. As a result of the commission of this offence, they have been deprived of their mother's care and the family has been broken up. The elder two children are living with the Applicant's ex-husband and the youngest, who is only 4 years old and is called Sheelagh, is living with Sheelagh's father. As to the first two, the arrangement may be less than satisfactory, in that they have to make their own way back from school, and there is the additional likely effect of a residence order in favour of the Applicant's ex-husband. Their aunt has told the Probation Service that their behaviour has deteriorated.

Sheelagh, the youngest, has been described as a sensitive child who needs a settled environment, and there is concern as to her emotional development.

We have been faced in this regard with a conflict between the needs of society in the suppression of the trading in drugs and the needs of the children in this particular case. While it is not wholly a question of "sympathy" as the Bailiff expressed it, we see nothing wrong in his approach when he said that if the Court were to take this special factor into account in any significant way, it would mean that drug dealers would target carriers with children to whom they could say "If you're caught, you will have a light sentence". The result, said the Bailiff, would lead to an increase in smuggling. We agree with him.

A So, conscious as we are, of the effect of the sentence upon the children, we nonetheless consider that our duty to the public requires us to dismiss the application for leave to appeal herein.

Application for leave to appeal dismissed.

75. [CRIMINAL DIVISION - APPEAL NO. 227]

B

1997 21 JULY

THE LAW OFFICERS OF THE CROWN
v.
CONNOR ROBERT THOMPSON

C Before: CARLISLE, GLOSTER and BELOFF, JJ.A.

Sentence - series of consecutive sentences - circumstances in which sentences should be imposed consecutively

See paragraph 16.

A.D.N. Havard, for the Applicant.
D J.R. Finch, for the Crown.

CARLISLE, J.A.: The Applicant, Connor Robert Thompson, appeared before the Royal Court on 21st March of this year, together with a co-Accused, Robin Le Ber, where jointly they faced an Indictment containing in all nine counts.

Before the Deputy Bailiff on 21st March, there was firstly a joint count of burglary, alleging that on 15th December they had both broken into Grange End E Pharmacy in St. Peter Port, and stolen a quantity of prescribed drugs, with an alternative count, so far as the Applicant was concerned, of handling the goods stolen on that occasion.

The Applicant, Connor Robert Thompson, pleaded not guilty to count 1 and that plea was accepted by the Prosecution. Robin Le Ber pleaded guilty to the burglary, and the Applicant himself pleaded guilty to the handling.

F On 7th April, before the Royal Court, both the Applicant and Robin Le Ber were sentenced to 2 years' imprisonment with effect from 6th January 1997, so far as those two counts on the Indictment were concerned.

The Applicant, Connor Robert Thompson, also faced and pleaded guilty to five other counts. He pleaded to possession of a controlled drug, namely, cannabis, on 17th December; to obstruction of a police officer on the same occasion; to two separate offences of assault on Naomi Totty on 28th December; and to a charge of theft of a scanner on 2nd January.

G

Insofar as those offences were concerned, on the offence of possession of a controlled drug he received a sentence of 2 months' imprisonment; on the offence of obstruction of a police officer a sentence of 3 months'

imprisonment, those two sentences to run consecutive to the 2 years on count 2, and also consecutive to each other.

On the fifth and sixth counts, the counts of assault, he received concurrent sentences of 6 months consecutive to the other sentences and finally, on the theft of the scanner, he received a sentence of 1 month imprisonment consecutive to the other sentences. He was sentenced in all to a total of 3 years' imprisonment.

For completeness, I should say that Robin Le Ber also pleaded to two other offences, one relating to the scanner, and the other to a further offence of burglary, and that on those two offences he received sentences of 1 month and 2 months respectively, but in his case all his sentences were ordered to run concurrently, making a sentence in all of 2 years.

The Applicant applied for leave to appeal on the ground that the sentences were excessive. That application was refused by the Bailiff on 15th July of this year, and has been renewed to this Court.

I deal briefly with the facts so far as counts 1 and 2 are concerned: The premises, as I say, are a pharmacy inside the Grange End Medical Centre. The proprietor of that Centre went there on 14th December and when he came to leave in the evening all the premises were secure other than there was some problem with the burglar alarm which he was unable to set.

Both Defendants are drug addicts, both with legitimate sources of prescribed drugs, but both clearly in need of further drugs.

About midnight on 14th/15th December, they together went to the pharmacy where they forced the sliding door with a wheel brace. Having done that, they returned to the Applicant's house for the purpose of listening to see whether or not by the forcing of the door they had set off any form of alarm, and if there was any police presence as a result.

It so happened that whilst they were there the Applicant's girlfriend arrived, and later Le Ber, himself, alone, returned to the pharmacy, entered it and stole a quantity of containers containing drugs. Having stolen the drugs he returned to Thompson's house where the drugs were divided up, it appears in equal parts, and the Applicant, Connor Thompson, concealed his in the garden of that house, and Le Ber returned with his share back to his house.

The following morning, the Applicant, along with another man, returned to the premises for the purpose of showing that other man where the cabinet was which contained the controlled drugs, although it is right to say that nothing was taken on that occasion. However, the Applicant was unfortunate enough to leave a fingerprint on the furniture whilst showing the man where the cabinet was, which was to lead to his eventual arrest.

The proprietor returned to the pharmacy on the evening of 15th December, he called the police, who found the fingerprint, and on 18th December both Accused were seen in relation to this offence. Both denied the offence at first but very shortly afterwards admitted it, and the Applicant, Thompson, told the police where he had hidden the drugs.

A This Court wishes to say that it considers this to be a serious case. Any burglary of a pharmacy with the stealing of drugs, whether prescribed or scheduled, is of its very nature a serious offence.

This offence was clearly planned. The drugs obtained, although available on prescription, are drugs which on the open market are easily abused, although it was accepted by the Crown on this occasion, that they were taken merely for their own use.

B

Mr. Havard, on behalf of the Applicant, has submitted to us that it was wrong to give both the Defendants a similar sentence on count 1, and sufficient account was not taken of the fact that the Applicant himself had not entered and stolen the goods, and had pleaded merely to receiving.

Whilst it is right that the Applicant pleaded to receiving the goods, it is a fact that he had himself been involved in the original forcing of the outside sliding door. He, clearly, had been involved in the plan which led to Mr. Le
C Ber committing the burglary, he knew exactly where the drugs had come from, and, indeed, the following day he had returned with another man to point out where the cabinet was.

We consider that the Court was right in the circumstances to treat both of these Defendants in the same way on counts 1 and 2 of this Indictment, and we believe that the offences thoroughly justified the sentence of 2 years imposed upon them both, particularly in view of the fact that both of them had long
D records and certainly, so far as the Applicant is concerned, a record including offences of burglary and receiving.

So far as the other offences are concerned, counts 3 and 4 relate to 17th December, when the police visited the Applicant's house for the purpose of interviewing him with regard to the burglary. They went with a search warrant, and in the house, as well as the Applicant, he had with him a Staffordshire Bull Terrier. He was ordered to tie up the bull terrier. He did so to a bed
E post in his bedroom, and was seen by the woman police officer to take something off the bedside table, which later transpired to be just under 5 grammes of herbal cannabis.

The police officer asked him to hand over whatever he had in his hand. He refused to do so; instead he moved backwards and deliberately unchained the dog, causing the officer to move backwards, and he then threw the cannabis out of the window. As I say, for the charge of the possession of the cannabis, he
F had received a sentence of 2 months' imprisonment and a consecutive sentence of 3 months for obstructing the police.

Counts 5 and 6 relate to a totally different matter. The person assaulted was the Applicant's girlfriend, Naomi Totty. He assaulted her twice in the early hours of 28th December, at the home address. On the first occasion he punched her several times around the head, he then pushed or kicked her down the stairs, and when she attempted to reach the phone, he ripped the telephone out of the socket and hit her with this phone. The second assault related to a
G matter of a few hours later, when he again punched her on the chin and around the head two or three times.

The Applicant admitted these offences, claiming he had little recollection of them, but accepted that what she said was true. On those two charges he received sentences of 6 months concurrent to each other but consecutive to the other charges.

Finally, as far as count 7 was concerned, that was the stealing of a scanner, stolen by the Applicant from Auto Electrics on 2nd January, the value of which is £273. It was found at his home; he said he had always wanted a scanner, one of the uses of such equipment is, of course, to check on police radio frequencies. For that he received a consecutive sentence of 1 month, being 3 years in all.

When the Court is faced with a series of consecutive sentences, as we are in this case, it is necessary to ask really three questions. Firstly, were the sentences themselves correct and justified? Secondly, was it right to make them consecutive? And, thirdly, was the totality correct or excessive?

As to whether or not sentences should be concurrent or consecutive, the Court wishes to say that where matters come before the Court which are totally separate and unconnected with each other, and where each in itself justifies and requires a prison sentence, then it is right that those sentences should be made consecutive to each other provided only that the totality of the sentence is not too great.

Here the offences clearly were of an unconnected nature, both in relation to the handling charge on which the sentence of 2 years had been imposed, and also in relation to each other.

Counts 2 and 3 were two separate incidents relating to the day when the premises were searched. The possession of the cannabis had no connection with the sentence for the original handling, and was properly made consecutive. Equally, the offence of obstructing the police is one that often leads, and rightly leads, to an additional sentence. It did so in this case in the form of a consecutive sentence, and we believe it was right to make the sentence consecutive in this case.

So far as counts 5 and 6 were concerned, they related again to a wholly unconnected incident, namely, the two assaults on Naomi Totty. They were crimes of violence, wholly unconnected to the other offences on the Indictment. It was, therefore, right to make the sentences passed on those cases consecutive to that which had been passed on the other offences, but it was equally right to make them concurrent with each other, as the Court did in this case.

Finally, insofar as count 7 is concerned, the same principles apply, that was a wholly unconnected offence and it was right in principle to consider making that sentence consecutive.

We therefore then turn to the question, were the sentences in themselves too long? It was submitted by Mr. Havard, that so far as the possession of cannabis was concerned, that 2 months was excessive.

This is not the first occasion on which this Applicant has been before the Court for possession of dangerous drugs, and in the circumstances we consider

A the sentence of 2 months was justified. It was also submitted that the sentence for the obstruction was too long. Here the obstruction of the police which, as I say, is always in itself a grave offence, was exasperated by the unleashing of the bull terrier with the intention, I have no doubt, to cause fear to the police officer. In the circumstances we believe the sentence of 3 months was perfectly justified and was justifiably made consecutive for the reasons that I have given.

B So far as the assaults were concerned, these were two nasty offences of violence against a woman with whom the Applicant had lived for many years, and we believe the sentence of 6 months was a totally appropriate sentence to pass on each of those counts.

Finally, as far as the scanner is concerned, we believe the sentence of 1 month was a wholly appropriate sentence.

C We therefore have to ask ourselves the third question; having made the sentences consecutive in the way that they did, was the totality of the sentence passed on this Applicant too great? Criticism has been made by Mr. Havard that it was unreasonable that the totality in the case of his client should amount to 3 years when the totality in the case of Mr. Le Ber, who had also pleaded to two other offences, was only 2 years and that, in fact, it was wrong to make the sentences consecutive in his case, when they were not made consecutive in the case of Le Ber.

D In case there is any feeling that the Applicant was unfairly distinguished in this way, the Court reminds itself that the learned Deputy Bailiff dealt with this very matter in the course of the sentencing of Mr. Le Ber.

He said at p.40, letter F of the transcript:-

> "On the eighth count you will serve a sentence of imprisonment of 1 month and that will be concurrent with that sentence [of 2 years on the first
E count]. That is the offence relating to the scanner. On the ninth count, which was the mean theft of the painting materials from the Sarnia Housing premises, that would call for a period of imprisonment consecutive, but looking at the totality of the sentences, the Court has decided to impose a sentence of 2 months imprisonment ... concurrently."

So that the reason why that sentence was not made consecutive was the belief of the Court that the proper totality in the case of Robin Le Ber was one of 2
F years. So far as this Applicant is concerned, we believe that no criticism can be made of the totality of this sentence of 3 years, which we believe was justified both by the nature of the offences and by the record of the Applicant, and for the reasons I have given, this application is refused. I should say this is the judgment of the whole Court.

Application for leave to appeal refused.

G

[CIVIL DIVISION - APPEAL NO. 231]

1997 JULY 23

JEAN WALTERS — **The Appellant**

v.

STATES HOUSING AUTHORITY — **The Authority**

Before: CARLISLE, BELOFF and GLOSTER, JJ.A.

Housing - control of occupation - application for housing licence - appeal to Royal Court against refusal - whether Authority's decision an unreasonable exercise of its powers - whether issue of law or of fact

See paragraph 32.

P.J.G. Atkinson, for the Appellant.
H.E. Roberts, for the Authority.

BELOFF, J.A.: This is an interlocutory appeal with leave from a judgment of the Bailiff, sitting alone, on 24th January, 1997, on an application for directions.

In his judgment transcript at p.7G, the Bailiff ruled that on an appeal to the Royal Court under s. 56 of the Housing (Control of Occupation) (Guernsey) Law, 1994 (which I shall call "the 1994 law"):-

> "It is, therefore, for the Presiding Judge to rule on whether the Housing Authority has complied with the law in the discharge of its duties, and to decide questions of vires, and for the Jurats to decide on the reasonableness of the Authority's decision."

Mrs. Jean Walters, the Appellant in the appeal to the Royal Court under s. 56, and the Appellant in this interlocutory appeal, was dissatisfied with the Bailiff's ruling. She, through her Counsel, Advocate Atkinson, contends that the issue whether the decision of the Housing Authority (which I shall call "the Authority") was an unreasonable exercise of its powers is exclusively an issue of law and therefore falls to be decided by the Bailiff alone, pursuant to the provisions of S.6(2)(a) of the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950 (which I shall call "the 1950 law"). If the contention be correct, it would entitle the Appellant, if unsuccessful before the Royal Court, to a further appeal to this Court. The Authority, through its Counsel, Advocate Roberts, contends that such issue is exclusively an issue of fact.

The relevant statutory provisions governing the grant of housing licences by the States of Guernsey Housing Authority and appeals to the Royal Court from the decisions of the Authority are contained in the 1994 law, which came into force on 1st July 1994, and replaced the previous legislation relating to the same subject matter. The material provisions are as follows: Part 1 of the 1994 law deals with control of occupation of dwellings. Section 1 provides that occupation is prohibited without a housing licence.

A Section 2 deals with applications for housing licences. Section 3 gives to the Authority power to grant or refuse a licence and to grant it for such period as the Authority may, in its absolute discretion, think fit. In particular S.3(3) provides:-

> "The Authority may, when granting a housing licence or at any time thereafter, impose such conditions in respect of the licence as it considers to be necessary or expedient, including, without prejudice to
B the generality of the foregoing-
>
> (a) conditions considered to be necessary or expedient by reason of any shortage of housing accommodation or of any description of housing accommodation in Guernsey at the time in question;
>
> (b) conditions in relation to a person's employment or in relation to his familial or like connections with Guernsey (including his continued occupation of a dwelling as the member of the
C household of a specified person);
>
> (c) conditions as to the dwelling or description of dwelling (whether expressed by reference to size, value, rateable value or otherwise) to be occupied, having regard to the personal, financial and other circumstances of any person who is or who will be occupying a dwelling in Guernsey under or by virtue of the licence."

D Section 3(5) provides:-

> "In deciding whether or not to impose, vary or withdraw any condition in respect of a housing licence the Authority may take into account any matter which it can take into account under section 6 when deciding whether or not to grant a housing licence."

E Section 6 provides for the procedure for the consideration of applications, and subsection (1) provides:-

> "The Authority, upon receipt of an application under section 2, shall proceed to decide whether or not to grant a housing licence or to grant a housing licence subject to conditions in accordance with the provisions of this section."

F Sub-section (2) provides for the matters that the Authority shall firstly consider.

> "(a) where the application is made in order to enable a person to occupy a dwelling so that he may undertake employment in Guernsey, all or any of the following matters-
>
> (i) whether the employment of that person, by reason of his qualifications, skill or experience, or whether that employment,
G is of sufficient essentiality to the community to justify the grant of a housing licence;

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

(iii) the number of people for the time being entitled to occupy a dwelling under a housing licence of the type concerned; or

(b) in any other case, all or any of the following matters-

(i) whether the person who would be permitted by the housing licence to occupy a dwelling has familial or like connections with Guernsey of sufficient strength to justify the grant of a housing licence;

(ii) without prejudice to the generality of sub-paragraph (i), the periods during which and the circumstances in which that person has been resident in Guernsey or elsewhere."

Sub-section (3) provides:-

"The Authority, having considered the appropriate matter set out in sub-section (2)(a) or (b), may decide to refuse to grant a housing licence."

Sub-section (4) deals with further consideration of an application:-

"If the Authority does not so decide, it shall proceed to consider the application further, and in so doing may take into account whether the number of dwellings (similar by reason of size or rateable value to the dwelling in respect of which the application is made) available for occupation is, in the Authority's opinion, sufficient to meet the housing requirements of qualified residents and persons who have been granted housing licences other than short-term housing licences."

Sub-section (5) provides that:-

"Notwithstanding the provisions of sub-sections (2) and (4), the Authority may, at any stage of its consideration of an application under section 2, take into account all or any of the following matters-

(a) in the case of an application for a housing licence to enable a person to occupy a dwelling so that he may undertake employment in Guernsey-

(i) any criminal convictions (whenever and wherever recorded) of that person;

(ii) whether that person has previously held such a licence or occupied such a dwelling and, if so, when and for what period and in what circumstances;

(b) any population objective set out in the most recent Policy Planning Report or Strategic and Corporate Plan;

(c) any other objective, policy or provision of the most recent Policy Planning Report or Strategic and Corporate Plan;

(d) the likely effect upon any objective, policy or provision mentioned in paragraph (b) or (c) of any decision to grant the application;

(e) such other factors as it may deem necessary or expedient."

Part 2 of the 1994 Law defines persons who do not require a housing licence and enables such persons to apply for a so called "status declaration", that is to say, a declaration as to whether he or she is a qualified resident as defined who, accordingly, does not require a housing licence to occupy a dwelling.

Section 13(1) located in Part 2 of the 1994 Law confers upon a person aggrieved by a decision of the Authority in relation to a status declaration a right of appeal to the Ordinary Court, that is to say, the Royal Court constituted by the Bailiff or Deputy Bailiff sitting together with at least two Jurats, on the grounds that "the decision was wrong."

Section 13(4) provides in turn for a right of appeal to either party to the Court of Appeal from a decision of the Ordinary Court "on a question of law".

Similar provisions exist in S.16 in relation to appeals against the refusal of the Authority to issue "a declaration of lawful residence" in which case the aggrieved applicant may appeal to the Ordinary Court on the ground that "the Authority ought to have issued such a declaration", with a further right of appeal to either party to the Court of Appeal from a decision of the Ordinary Court "on a question of law."

Similar rights of appeal to the Ordinary Court exist in s. 43 in relation to inscription in Part D of the Housing Register on the ground that the Authority was "wrong to decide that the dwelling was being used as a lodging house" and in s.48 against a decision on a declaration of registration on the ground that the Authority's decision was "wrong". Here too the right of appeal from the Ordinary Court to the Court of Appeal is limited to appeals against decisions of the Ordinary Court on questions of law.

The relevant appeal provision so far as this case is concerned is s.56. It provides as follows:-

"(1) Subject to the provisions of sections 13, 16, 43 and 48..."

(to which provisions I have already referred) -

"... a person aggrieved by any decision of the Authority under any provision of this Law may appeal therefrom to the Royal Court on the grounds that the decision was ultra vires or was an unreasonable exercise of the Authority's powers."

Sub-section (2) deals with the manner of institution of such an appeal:-

"... by way of summons which shall set out the material facts upon which the appellant relies..."

Sub-section (4) provides:-

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

On 6th February 1996, after a first application, the procedural history of which is not relevant for present purposes, Mrs. Walters, the appellant, re-applied for a housing licence under S.6(2)(b) of the 1994 law. Under the sub-section the Authority has firstly to consider:-

> " (i) Whether [the proposed occupier] ... has familial or like connections with Guernsey of sufficient strength to justify the grant of a housing licence;
>
> (ii) ... the periods during which and the circumstances in which that person has been resident in Guernsey or elsewhere."

as set out above.

If, having considered these matters, the Authority does not decide to refuse the licence, it then has, as noted above, to proceed to consider the application further and may take account of the factors set out in S.6(4) and (5).

On 7th March 1996, the Authority refused the application. On 14th May 1996, Mrs. Walters appealed to the Royal Court pursuant to S.56 of the 1994 Law on the grounds that the Authority's decision was "an unreasonable exercise of its powers." She did not, it should be noted, seek to rely upon any additional or alternative ground that the decision was ultra vires. Her summons of that date properly sets out the material facts upon which she relies, namely personal details in relation to her and her family's connections with, and residence in, Guernsey and Alderney, and also "the grounds upon which she will rely." These are stated to be:-

> "... that the Authority took into account irrelevant factors and failed to consider relevant factors, as follows:-
>
> (a) failing to consider fully the Appellant's familial or like connections with Guernsey in accordance with the provisions of the Law;
>
> (b) failing properly to take into account the Appellant's residence in Guernsey and in Alderney;
>
> (c) referring in the decision to the Appellant's "recent" familial connections with Guernsey;
>
> (d) failing to give any weight to the fact that the Appellant's children are likely to become qualified residents;
>
> (e) failing to give any weight to the fact that the Appellant's aunts and cousins reside in Guernsey;

(f) failing to give sufficient weight to the fact that the Appellant was born in Guernsey and attended school in Guernsey for six years;

(g) confusing "ordinarily resident" in Guernsey with "resident", S.6(2)(b)(ii) of the Law referring to "resident";

(h) otherwise misconstruing the Appellant's application."

Section 56(1) of the 1994 Law discloses two possible grounds of appeal to the Royal Court. The first ground is the ultra vires ground (which I shall refer to as the "the first ground"). The second ground is the unreasonableness ground (which I shall refer to as "the second ground"). That they are distinct is shown by the use of the disjunctive "or" between them.

Language favours the Authority's contention that whether or not a power has been exercised unreasonably (thus engaging the second ground) is quintessentially a question of fact. The Authority in exercising its discretion under S.6 makes first a finding of facts, and secondly, a judgment on whether, on the basis of such facts, a licence should be granted and if so on what terms or conditions.

A court in determining whether or not such exercise of powers was reasonable or not is asking itself a question of fact and degree. As Lord Hailsham, the then Lord Chancellor, said in the case of In re W. (1971) AC 682 at p.700 between letters E and F, in relation to an issue as to the reasonableness of refusing consent to an adoption:-

> "In coming to its decision on the facts it seems to me ... that the Court must have regard to the totality of the evidence."

There are, in our view, other pointers in the same direction:-

(1) In 1967 when the concept of ultra vires was introduced into the housing legislation of Guernsey (See the Housing Control (Guernsey) Law 1967, S.6(1)) it already embraced making a decision "...so absurd that no sensible person could ever dream that it lay within the powers of the authority." - Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1948) 1 KB 223; per Lord Greene, Master of the Rolls, at p. 229, hence the phrase "Wednesbury unreasonable" or "irrational". If the Appellant's construction was correct, the second ground would be otiose, it would be subsumed in the first ground. Statutes should be interpreted where possible to give utility and meaning to all words and phrases used in them.

(2) The provision in S.56 dealing with appeals to the Court of Appeal, that is to say Sub-s.(4), identifies the sole ground as being "a question of law." If the Appellant's construction were correct such words of limitation would be otiose since any appeal against a decision of the Royal Court would be an appeal on a question of law whether in relation to the first and/or the second ground. The same principle of statutory construction referred to in (1) above is repeated and relied on. Section 56(4) appears to assume that first stage appeals include points of fact. Second stage appeals are by contrast narrower.

(3) Section 56(2) provides that an Appellant shall in his summons "set out the material facts upon which the Appellant relies." This suggests strongly that a ground of appeal thereunder has a factual element.

(4) Policy considerations point in the same direction. We can see the good sense of the States of Guernsey in allowing the Jurats to provide a check against unreasonable decisions in this complex and emotive area. As this Court said in the case of Perkins v. The States Housing Authority, in 1995 20.GLJ.36, at p.66 D:-

> "The Housing Control Laws give the Authority draconian powers to control the occupation of premises in Guernsey. ... The existence of powers such as these is unusual in a democratic society and must be exercised with care and sensitivity to avoid any abuse of those powers."

And as the learned Bailiff noted below - I quote from p.5 of the record of his judgment between letters C and G:-

> "... it is necessary to understand the qualifications of the Jurats, as contrasted with jurymen in the United Kingdom.
>
> Jurats are not picked at random, they are elected by the States of Election (that is the States enlarged with additional members of the parish Douzaines) and they are traditionally elected from among persons of standing within the community on account of their experience in business, States affairs, the armed services, horticulture, Civil Service and education to name some of their backgrounds. When elections take place the common-sense, experience and sound judgment of the candidates are the qualities looked for by the electors. The Court is therefore well qualified in housing appeals to have a final review to rectify committee decisions which, generally speaking, militate against reason, common-sense and fairness."

(5) The case of Fairview Farm Limited v. Island Development Committee, the decision of the Court of Appeal of Jersey delivered on 30th October 1996, is persuasive authority in favour of the view that questions of reasonableness are questions of fact. The Court there had to consider Article 21 of the Island Planning (Jersey) Law, 1964, which provided so far as relevant for present purposes as follows:-

> "Any person aggrieved by the refusal of the Committee to grant permission under Article 6 of this Law, or by any condition attached to the grant of any such permission ... may appeal ... to the Royal Court ... on the ground that the decision of the Committee ... was unreasonable, having regard to all the circumstances of the case."

The Court of Appeal of Jersey at para.50 said this:-

> "The Royal Court is a court of appeal under Article 21. As Lord Greene observed in the first of the passages which we have quoted..." [from Associated Picture Houses Limited v. Wednesbury Corporation]

A

> "... the power of an appellate body is to override the decision of the inferior body. He contrasted this with a power to see only whether the inferior body had exceeded its powers. The Royal Court, as an appellate body, must consider not merely whether the inferior body has followed the correct procedure, but whether its own view is that the decision was unreasonable. It may allow whatever weight it thinks proper to the experience and knowledge of the inferior body, but it cannot escape the responsibility of forming its own view."

B

And it continued at para.51:-

> "... The duty of the Court on an appeal under Article 21 is not merely to consider whether any reasonable body could have reached the decision which the Committee did reach, but to decide whether the Court considers that that decision was, in its view, unreasonable."

C

We respectfully adopt and adapt that analysis and we do not consider that the words "having regard to all the circumstances of the case", which were part of the Jersey legislation, materially affect the relevance of the observations of the Court of Appeal of Jersey in Fairview Farm.

In particular the right to appeal to the Royal Court conferred by the 1994 Law and predecessor Housing Legislation in Guernsey is a right of appeal and not of judicial review. Although it was no doubt convenient to borrow the phrase ultra vires as indicating one ground of appeal, there is no reason to assume

D

that the appellate body was granted powers equivalent to those of a Court exercising the supervisory jurisdiction and no other.

We therefore conclude that the States of Guernsey deliberately gave the Royal Court appellate powers not only over issues of vires, which would be questions of law, but over issues of reasonableness which would be questions of fact. They stopped short only of allowing in effect a general appeal on merits, that is to say, of permitting the Royal Court to substitute its views for those of

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the Authority in a licensing application (contrast the unrestricted powers of appeal under Sub-s.13, 16, 43 and 48 of the 1994 Law to which I have referred above).

It seems to us that there are at any rate five possible views which may be taken on appeal by the Royal Court against an exercise of power by the Housing Authority:-

F

(1) That it is the Bailiff's view that the power was exercised ultra vires, in a way other than Wednesbury unreasonably or irrationally. In such a case the Bailiff would withdraw the matter from the Jurats since, as a matter of vires, that is to say, law, it would fall within his exclusive province. The Court would in consequence allow the appeal.

(2) That it is the Bailiff's view that the decision was Wednesbury unreasonable or irrational. The same procedural consequences would ensue as in (1).

G

(3) That it is not in the Bailiff's view an *ultra vires* (including Wednesbury unreasonable) exercise of power, in which case the Bailiff would direct the Jurats that it was for them to determine whether the

decision was unreasonable, which, in our view, he should emphasise means something other than that they themselves would have come to a different decision had they been the Authority.

In the case of In re W. to which I have referred above, Lord Hailsham, LC, said at p.700 between letters D and E:-

"... Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no Court should seek to replace the individual's judgment with his own..."

Mutatis mutandis, it seems to us that this is the approach that the Jurats should be directed to adopt towards the decision of the Authority insofar as they are free to consider such decision. If the Jurats then consider, having weighed up all the evidence, that the decision reached by the Authority was unreasonable, they should so say and the Court would in consequence allow the appeal.

(4) If, upon such direction by the Bailiff, the Jurats merely consider that they themselves would have come to a different decision but that the Authority's decision under appeal is not unreasonable, the appeal must be dismissed.

(5) If, upon such direction by the Bailiff, the Jurats consider that the Authority's decision was right, equally the appeal must be dismissed.

In cases (1) (2) and (3) which I have identified, the proper order would be to remit to the Authority, as the primary decision maker, the issue in order that they should retake the decision in the light of the observations and, it might be, in appropriate cases, the directions of the Court. [As a matter of principle it is not for the Royal Court itself to make a decision under S.6 or other sections of the 1994 Law.]

The observations of the Court might in an appropriate case amount to a direction, for example, that a particular condition proposed to be imposed by the Authority on the licence was unreasonable. In consequence of any such direction it would not thereafter be open to the Authority to impose it.

In cases (1) and (2) which I have identified, there would be a further right of appeal to the Court of Appeal under S.56(4) of the 1994 Law, because a point of law would be involved, [but not in cases (3) (4) or (5) unless it may be that the Jurats' decision was itself challengeable on the grounds of being perverse or the product of procedural impropriety or tainted by a misdirection as to any relevant law by the Bailiff.]

It is necessary finally, to consider Perkins. In Perkins, at page 73 D, this Court said that an appeal to the Royal Court:-

"... has effectively to be based on matters of law..."

It is common ground between the parties that we are not bound to follow the decisions of the Court of Appeal, see Smith v. Harvey, 14th May 1981, Civil Appeal Report No. 9, and Morton v. Paint 9th February 1996, 21 GLJ 40. A

A fortiori we are not bound to follow obiter dicta. In this case the authority of the observation in Perkins which I have quoted is doubly undermined.

Firstly because the Bailiff, a Member of that self same Court, has stated in this case that the observations of the Court on which the Appellant has relied were obiter (see his judgment transcript at 4D) a conclusion with which we agree.

B Secondly, because the Bailiff himself disagreed upon mature consideration with those observations, (see his judgment transcript 4 E to the end).

We note that the observations of this Court in Perkins, suggesting that the powers of the Royal Court on appeal under S.56 were limited to matters of law, and that the reference in those provisions to unreasonable exercise of powers was a reference to Wednesbury unreasonableness, were themselves unreasoned.

C The Court appeared to derive its conclusions from the language of S.40 which it recited immediately before stating them, but it did not explain how and on what basis it did so. The Perkins dicta relied on by the Appellant in this case were in short purely conclusory. In our view, with all respect to Mr. Southwell, the President, and other members of the Court, for those reasons the dicta are mistaken and ought not hereafter to be followed.

General practice to date in Guernsey appears to be consistent with our view of the law. As the Bailiff said in his judgment in the present case at pp.4H to
D 5A of the transcript:-

> "... no presiding judge of the Royal Court has ever decided an appeal, sitting alone, where the issue has been the unreasonable exercise of the Authority's powers..."

Bad practice cannot make good law, but our view of the law suggests that the practice to date is and has been correct.

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We accordingly reject the appeal and direct that the substantive appeal to the Royal Court be determined by a procedure as described above. This may not be entirely unpalatable to the Appellant whose Counsel observed that an Appellant against a refusal of licence by the Authority might indeed fare better in an appeal if the Jurats could bring, as we have held they can and should, their collective wisdom to bear upon the reasonableness of the Authority's decision, than if their job was curtailed in the manner for which he contended.

F **Appeal rejected; ordered that the substantive appeal to the Royal Court be determined by the procedure set out in this judgment; no order as to costs. (The Appellant's subsequent appeal to the Royal Court was dismissed on 20th January, 1998)**

G

77. [CIVIL DIVISION - APPEAL NO. 233] A

1997 JULY 23

MAJORMINE LIMITED **Appellant**

V

LINDMAR TRUST COMPANY LIMITED **Respondent** B

(JUDGMENT NO. 1)

Before: LORD CARLISLE, GLOSTER and BELOFF, JJ.A.

Appeal to Court of Appeal - application for leave to serve Respondent's Notice out of time - factors to be taken into consideration C

See paragraph 4.

D.G. Le Marquand, for the Appellant
R.P. Ogier, for the Respondent

BELOFF, J.A.: There are before the Court three interlocutory applications arising out of an intended appeal from the judgment given by the Royal Court at the hearing of the action on 14th February 1997, by which it was ordered that D registration in the Royal Court of Guernsey on 15th November 1996, of the judgment of the High Court of Justice, dated 12th July 1995, be set aside. This is a judgment with which all members of this Court agree.

The Appellants are Majormine Limited ("Majormine") and the Respondents are Lindmar Trust Company Limited ("Lindmar").

Two out of the three matters that have been raised have been, helpfully, the E subject of agreement between Counsel for the respective parties, and I deal with those on behalf of the Court at the outset:

The first related to an application to admit certain further evidence in the form of affidavits by a Jane Powell, dated 30th May and 10th June of this year respectively. They are referred to as the third and fourth affidavits. There was a cross application by way of a pre-emptive strike to refuse admission of that evidence on the ground, in essence, that it has not been adduced below, F and that there was no reasonable excuse for the failure so to adduce it. As I have indicated, the parties have resolved their differences, and it is agreed that the third affidavit be adduced in its entirety and that the fourth affidavit be not introduced save in respect of the judgment of Mr. Justice Blackburne of the High Court Chancery Division in England, which was exhibited to that affidavit. The Court insofar as it is necessary to do so, formally so orders.

The second application was by Lindmar in respect of security for costs to be G provided by the Appellant in the sum of £3,250. That payment has now been, we are informed, made, but, nonetheless, in order that its identity be recognised,

A the Court formally makes an order that the sum be so paid and be treated as security for costs of the appeal.

That leaves outstanding the third application that is raised on behalf of the Respondent, Lindmar. At paragraph three of the Notice of Applicant it is asked that Lindmar be granted leave pursuant to Rules 5 and 17 of the Court of Appeal (Civil Division)(Guernsey) Rules 1964, to lodge and serve forthwith a Respondent's Notice in the form exhibited to the affidavit sworn by the
B Advocate on Lindmar's behalf.

In essence, what the Respondent's Notice seeks to raise is an additional ground that [insofar as that judgment included a sum of £3,737.20 in respect of value added tax] it would be contrary to Section 3(2) of the Judgments (Reciprocal Enforcement)(Guernsey) Law, 1957. The argument in essence raised by the proposed Respondent's Notice is that it is not possible to enforce under the Law of 1957 judgments in respect of sums of money "payable in respect of taxes or other charges of a like nature" to quote from the relevant section [it being
C common ground between the parties that the judgment that was so registered did contain an element in respect of value added tax, the proportion to the entire judgment being of the order of something approximately £4,000 as against £20,000.]

The jurisdiction of this Court is conferred by rule 17 of the 1964 Rules. Initially it is necessary to note rule 5(1) which permits service of a Respondent's Notice, inter alia, to affirm on another ground a judgment of
D which it was the beneficiary below, but attaches to that an obligation under rule 5(4) to serve such a notice within 14 days after service of the Notice of Appeal on the Respondent. In this particular case, it is common ground that that period has long since transpired, the Notice of Appeal was dated 13th March 1997, and the Respondents have sought to introduce this fresh point by way of Respondent's Notice at a time which it is agreed is more than three months since that date, although the precise date need not be identified any further. In circumstances where time has elapsed in that way, rule 17(1)
E provides:-

> "The Court or a judge thereof may, on such terms as the Court or judge thinks just, by order extend..."

- I omit immaterial words:-

> "... the period within which a person is required or authorised by these
F Rules ... to do any act and may extend any such period although the application for extension is not made until after the expiration of that period."

That, on its face, gives the Court a discretion to do what is just in all the circumstances, and we are helpfully reminded by Counsel for Lindmar that the analogous provisions of the Rules of the Supreme Court have given rise to a practice that is recorded at page 979 of the first volume of the Supreme Court Practice 1997, in the following form:-

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> "The present practice is that where it is a respondent's notice to affirm ... an extension of time will normally be granted, unless it can be shown that granting it will cause significant prejudice to the appellant..."

(The case of Magmasters Limited v. VCS Limited [1984] 1 WLR 1208 is referred to by the learned editors in that particular context.)

This Court is of the view that similar principles should inform and a similar practice obtain in respect of the Court of Appeal of Guernsey.

Against that background we turn to the three arguments that have been raised against the granting of the necessary leave, by Counsel for the Appellant. Firstly, he notes, as I have indicated, that time has long since past. As against that, in the absence of any definable prejudice, it seems to us, as it was contended on Lindmar's behalf, that the matter of delay by itself is immaterial, indeed, it is only because time has expired that the Court is given a discretion to consider whether to extend it.

The second matter is that the point was not raised below. Again, in the absence of prejudice, it seems to us that this is a phenomenon which must occur on occasion, if not universally, when such an application as is present before us is made. In this particular instance it is notable that the point is a pure point of law, be it good or be it bad, and in no way affected by any considerations of evidence.

The third point, and the only point which in the light of principle appears to us to demand attention, is whether there is in effect any prejudice to the Appellant in permitting the Respondent to raise this point at this particular juncture. It has been argued that had the point been raised at an earlier stage, the issues which it is now sought to debate before this Court could have been debated, no doubt to the advantage of this or any higher court that might have to consider the issue. That again seems to us to be a likely aspect of any point raised in such circumstances and does not by itself, in our judgment, constitute prejudice. In particular we note that if, for the sake of hypothesis, an Appellant was found to lose exclusively on a point of that particular character not raised below, the Court of Appeal would have ample power in respect of costs to rectify any damage that did in effect ensue. Since the point is not a fact sensitive point, it seems to us entirely appropriate in the interests of justice that, if the point be arguably a good one, it should be permitted to be taken.

Had we been persuaded that the point was entirely unarguable then one would see the force of the point that it would constitute prejudice of some kind to compel the Appellants to spend time in dealing with it, but although Mr. Le Marquand, on behalf of the Appellants, has contended that the point, if it is permitted to be run, will eventually fail in as much as the relevant sub-section of the Act to which I have referred only disentitles the registration of judgment of taxes or like charges at the suit of the revenue collecting authority as distinct from at the suit of third parties, and has referred us to dicta of the Bailiff in the Royal Court of Jersey in the case of Le Marquand and Backhurst v. Chiltmead Limited 1987 JLR 86, he was not prepared to suggest that the point was utterly demurrable or of a character that would have entitled him to seek to strike it out had it been raised in a pleading or like document at an early stage.

Having considered all the submissions that were devoted to what appears to us to be the salient issue of prejudice, we consider that the just result is to admit the point to be taken, and accordingly, in respect of the only contested

A matter, we accede to the application of the Respondents and grant them appropriate leave and extension of time to serve the notice in which this fresh point is to be raised.

Leave granted to serve Respondent's Notice within seven days; costs granted in the appeal.

B 78. [CIVIL DIVISION - APPEAL NO. 233]

1997 OCTOBER 23

MAJORMINE LIMITED ET AL **Appellants**
v.
LINDMAR TRUST COMPANY LIMITED
and **Respondents**
C **SVH SERVICES LIMITED**

(JUDGMENT NO. 2)

Before: COLLINS, SOUTHWELL and BAILHACHE, JJ.A.

Judgments - reciprocal enforcement - application to set aside registration of original judgment - jurisdiction of original court - whether rectification of
D **company register constitutes "seizure of property"**

See paragraph 46.

D.G. Le Marquand, for the Appellants.
R.P.Ogier, for the Respondents.

COLLINS, J.A.: This is an appeal by Majormine Ltd. ("the Company") and
E Nicholas Stevenson and Stephen Giles Cooke, to whom (ignoring the Company for this purpose) I shall refer as the "Judgment Creditors", from an Order of the Royal Court of the 14th February 1997 setting aside the registration in Guernsey of a judgment by way of an order for costs which had been made on the 12th July 1995 in the High Court in England.

The application for registration had been made ex parte by the Judgment Creditors under s.4(1) of the Judgments (Reciprocal Enforcement) (Guernsey) Law
F 1957 as amended (to which I shall refer as the Law of 1957) and, being in due form and supported by affidavit, had been granted on the 15th November 1996, from which date (subject to an application to set it aside made in due time) it became enforceable as if it were the order of the Royal Court.

The Judgment Debtors, namely Lindmar Trust Company Ltd., and SVH Services Ltd., (to whom I shall refer as "the Judgment Debtors") having been parties to the proceedings giving rise to the judgment in England and having been ordered to pay costs taxed at £26,396 then applied under sub-Articles 6(1)(a)(ii) and the
G exception to 6(2)(a)(i) of the Law for the registration to be set aside. It is this application which succeeded before the Bailiff in the Royal Court on the 14th February 1997 and which, with the leave of the Bailiff, is now the subject of this appeal.

By sub-Article 6(1)(a) of the Law of 1957 the registration shall be set aside if the Royal Court is satisfied (inter alia)

> "(ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case;"

Then by sub-Article 6(2)(a) it is provided that the courts of the country of the original court are to be deemed to have jurisdiction in an action in personam in certain particular cases, including:-

> "(i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings, or of contesting the jurisdiction of that court:..."
>
> (ii) if the judgment debtor was plaintiff in or counterclaimed in the proceedings in the original court."

The Bailiff concluded that in the present instance the Judgment Debtors had appeared in the High Court proceedings in England for the purpose of recovering assets (namely the only two issued shares in Majormine Ltd) which he held, by reference to an affidavit sworn by a Mr. Stockwell and filed on behalf of the Judgment Debtors, to have been seized from them by virtue of ex parte proceedings in England brought under s.359 of the Companies Act 1985 and which had preceded their application before that same Court which had resulted in the costs order made against them.

The Judgment Creditors' notice of appeal (which is expressed in very general terms) raises as grounds of appeal the contention that the Bailiff's decision was wrong in law in relation to the two sub-articles to which I have referred and generally.

The arguments of those appellants as expanded in their skeleton can be summarised as follows (placing the contentions in a different order from that adopted in the skeleton):-

> It was contended that the effect of an order under s. 359 of the Companies Act 1985 is of its nature such as not to constitute a "seizure of property" within the meaning of the Law of 1957; or alternatively did not constitute such a seizure looked at (as they put it) "subjectively".
>
> Further, it was contended that it is only where the seizure of property founds the jurisdiction of the foreign court that the party's intervention to protect the property is to be held involuntary;
>
> Further again, it was contended that the Judgment Debtors chose to launch their own proceedings;
>
> and again, it was contended that the Judgment Debtors chose to fight the case on its merits;

A and finally, it was contended that the Judgment Debtors had no beneficial interest in the property in question, being nominee shareholders only.

It appears from the judgment of the Bailiff that he had two affidavits before him which he considered relevant, namely those of Mr. Peter Stockwell lodged on half of the Judgment Debtors and the first affidavit of Miss Jane Louise Powell. Also before him were the second affidavit of Miss Powell and
B affidavits from Mr. Parrott and Mr. Ogier. Mr. Parrott's affidavit (sworn in the proceedings leading to the order for costs now sought to be enforced) was made an exhibit to Mr. Stockwell's affidavit and Mr. Ogier's affidavit did no more than present the application for the setting aside of the order. By a consent order made by a single judge of this court, and made on the application of the Judgment Creditors, a further (third) affidavit sworn by Miss Powell was admitted into evidence in this Court together with the full text of the Judgment of Blackburne J. both as to the substantive decision which he reached at the hearing at which the order for costs now sought to be
C registered was made and as to his reasons for awarding those costs. The terms of that judgment have had a material effect in the conclusions to which this Court has arrived, an advantage not enjoyed by the Bailiff. From the terms of that judgment it became clear that the passage from the affidavit of Mr. Stockwell on which the Bailiff founded his judgment gave a partial and superficial view of the true nature of the proceedings in which the Judgment Debtors involved themselves and as to the lack of interest in the principal who stood behind them, they being nominees, in so doing.

D

Mr. Stockwell's affidavit described events from December 1994 onwards and baldly stated that the Judgment Debtors had intervened in order to effect the recovery of assets (namely the two shares in Majormine) of which they were said by him to be the legal owners and which were said to have "effectively been seized" as a result of the ex parte proceedings in England, giving very little background history of the judgment debtors shareholding in the Company. Some sparing information was given by the affidavit of Mr. Parrott, a director of
E the Judgment Debtors and a partner in Touche Ross, the owners of the two companies concerned, lodged in the proceedings heard by Blackburne J. and (as I have mentioned) exhibited to the affidavit of Mr. Parrott. He stated that the Company was set up by BDO Carnabys on instructions received from a Mr. Lloyd in 1987 through BDO Binder Hamlyn, and that only two £1 shares were issued, one in the name of each of the Judgment Debtors. He stated that he knew nothing of the interest in the shares of the Judgment Creditors or the Jamison Trust, a trust which (as was established before Blackburne J.) was the beneficial owner
F of the shares, and indeed that he had not even heard of them prior to the English proceedings. He stated further that he had his instructions from Mr. Lloyd (who it transpired was qualified as a lawyer in Belgium). I mention here that Mr. Lloyd's continued involvement remains unexplained and it became clear in the proceedings in England that he was in no position to give any such instructions. This was because Mr. Lloyd had been removed as a trustee on the 3rd June 1993 after the appointment of the Judgment Creditors on the same day , the instruments of the appointment of the Judgment Creditors as Trustees and of their removal of Mr. Lloyd being exhibited to Miss Powell's third affidavit and
G not being disputed. It was not suggested that Mr. Lloyd, from whom there was an affidavit in those proceedings which has not been before us in this Court , was unaware of his removal. Strange it is therefore to find Mr. Lloyd giving instructions to Mr. Parrott to the effect that (as spoken to in Mr. Parrott's

affidavit), upon the restoration of the Judgment Debtors to the Register he (Mr. Parrott) was to arrange for the shares to be transferred to Mr. Jamison or to the trustees of the Jamison Trust with a proviso for a further transfer to the trustees, such transfer to be regarded as a "settlement into the trust as at the date of the order of the court". These were instructions which (as the Judge held) Mr. Lloyd had no power to give, and which we surmise could have had adverse fiscal consequences for Mr. Jamison or the trust. It is difficult otherwise to see what lay behind these instructions, and they remain unexplained to us.

It appears that one of the causes of Mr. Lloyd's removal had to do with his failure to ensure the filing of the Company's returns and accounts with the result that the Company (being an English company) had been removed from the Register. This was deposed to as being the cause of his removal by Miss Powell in her first affidavit, in which also she deposed to the fact that Mr. Lloyd had proved obstructive despite his removal so that the new trustees were unable to deal with the assets, which included a substantial property in France. No evidence was filed to contradict these assertions. Thus it came about that the first step in the proceedings was taken, namely an application that the Company be restored to the Register of Companies.

This was the first of two applications made by the Judgment Creditors in December 1994 and February 1995 respectively, the first being made by Originating Summons and the second on ordinary Summons in the same proceedings.

The first of these applications sought an order under s.653(2) of the Companies Act 1985 that the name of the Company be restored to the Register, the application being made by the Company and Messrs. Stevenson & Cooke (later to become the Judgment Creditors) and the second application by the same parties was that on such restoration of the Company the names of the current shareholders be replaced by the names of Mr. Stevenson and Mr. Cooke or alternatively that the Register be amended to that effect. These applications were successful in that the company was restored to the Register on 13th January 1995 and in that the Register was rectified on 3rd February 1995 by replacing the Judgment Debtors' names by those of the Judgment Creditors, Mr. Stevenson and Mr. Cooke. The Judgment Debtors should have been made parties to those proceedings, but were not; indeed they were not notified of the applications. They were the existing members on the Register and were removed therefrom without notice.

It is accepted in Mr. Stockwell's affidavit and apparent from Mr. Parrott's affidavit that the Judgment Debtors were the nominees of Mr. Lloyd and, their principal having been removed as trustee, it is surprising that they took steps to have the order of the 3rd February 1995 set aside, and indeed there is no satisfactory explanation for their conduct. Mr. Parrott does not state whether or not he had been informed of Mr. Lloyd's removal. It may be that it was kept from him.

However that may be, the Judgment Debtors issued an application on the 24th February 1995 for an order in the proceedings to which they were not yet parties to set aside the Order of the 3rd February 1995. I do not view this application as constituting the Judgment Debtors Plaintiffs nor do I find that it constituted a Counterclaim; it was an application in proceedings to set aside an Order made ex parte and a step of a different nature. It was in

A relation to that application that Mr. Parrott swore his affidavit.

The matter came before Knox J. on the 12th June 1995 and he ordered that the Originating Summons by which the two sets of proceedings had been commenced be amended by adding the Judgment Debtors and Mr. Lloyd as Defendants and by including a claim that Mr. Stevenson and Mr. Cooke be declared entitled to remain registered in the register of members as holders of the two shares in the Company. It was on that pleading and the Judgment Debtors' application
B that the proceedings were adjudicated upon by Blackburne J.

The order for costs now sought to be registered related only to the hearing of the Amended Originating Summons and of the Judgment Debtors' application before Blackwell J. (together with the costs of certain affidavits) and not for example to the earlier stages in the proceedings up to and including the application of the 24th February 1995 or the amendment of the Originating Summons themselves.

C While it was by the Originating Summons as amended by order of Knox J. that the judgment debtors became parties (as Respondents) to the proceedings, the application of the 24th February 1995 remained material and could be and was pursued by the Judgment Debtors, they having been made parties to the proceedings by such amendment.

By that application the Judgment Debtors sought that the Order of the 3rd February 1995 substituting the names in the Register with consequent
D rectification be set aside on the ground that it was the Judgment Debtors who should have been the registered holders of the shares.

The Judgment Debtor's application failed and the Court ordered that the Order of the 3rd February stood. The Judgment Creditors (including Majormine Ltd) were therefore successful. The Judgment Debtors were ordered to pay the costs of the hearing before Blackburne J and of certain affidavits in the following circumstances. The decision of the Court was reached after a hearing at which
E it appears from the terms of the Judgment that no matter affecting title was argued on behalf of the Judgment Debtors; indeed the contrary was the case. The Judge held that the plain and obvious inference was that the Judgment Creditors were entitled to be registered and indeed observed that counsel for the Judgment Debtors did not seriously contend otherwise; he further referred to an affidavit (which is not before this Court) from Mr. Lloyd, which did not seek to gainsay the repeated assertions of the Judgment Creditors that the shares were the assets of the settlement of which they were trustees. He
F further referred to the affidavit of Mr. Parrott to which reference is made above and said with regard to the instructions which Mr. Parrott was to give to the Judgment Debtors also referred to above that they would have imposed terms on any transfer which neither he nor they were entitled to exact. Rather, the Judgment Debtors relied on two technicalities; first that the original proceedings should have been commenced by Notice of Motion and secondly that they had been removed from the Register without being made parties to the proceedings and without notice, these being complaints in respect of which the Judge exercised his discretion under Order 2 Rule 1, sub-rule 2 of the Rules of
G the Supreme Court. Thus, these were complaints which (as is apparent from the judgment) were directed solely to procedural irregularities and were not backed by any contention of substance. The Judge cut the Gordian knot by holding that it was clear that, because Mr. Lloyd had been dismissed as trustee

and because Mr. Stevenson and Mr. Cooke had replaced him as trustees and because the Judgment Debtors were nominees of Mr. Lloyd, it was clear the Judgment Creditors were entitled to be registered as shareholders , so that it was pointless to order otherwise on a technicality.

The Judge's conclusion with regard to the conduct of Mr. Lloyd and the Judgment Debtors was as follows:-

> "For what it is worth I consider that some of the correspondence emanating from those acting for the second and third applicants (that is the Judgment Debtors) was, in places, unnecessarily acerbic and that at times Mr. Lloyd was unnecessarily obstructive. At one stage, for example, and for no good reason that I can see other than to create difficulties, Mr. Lloyd took to writing letters in Dutch".

Against this background it is easy to see why Blackburne J. made an order awarding the costs of the hearing before him and of those specified affidavits to be paid by the Judgment Debtors.

I turn now to the grounds of appeal in respect of the judgment of the Bailiff.

The first matter to be addressed is as to the nature of s. 359 of the Companies Act and as to whether its operation is capable of amounting to a "seizure of property" within the meaning of the words quoted above from the law of 1957, namely

> "for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings,..."

and if it does whether on the particular facts of this particular instance it does amount to the same.

By s. 22(1)&(2) of the Companies Act 1985 the member of a company is defined; first the subscribers of the company's memorandum are to be entered as members in the company's register of members; thereafter, every other person who agrees to become a member and whose name is registered in its register of members is a member of the company. The status of the register is provided for in s. 361 of the same Act which provides that the register is prima facie evidence of any matters which are by the Act directed or authorised to be inserted in it. By s.360 no notice of any trust, implied or constructive, is to be entered on the register. Thus the beneficial ownership of shares is of no concern to the process of registration, and indeed in many many instances shares are registered in the names of nominees who have no beneficial interest in the shares and who are the puppets of the beneficial owner. On the other hand s.359(3) of the Act provides that a court may on an application to rectify decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from the register. This is a long-standing provision which was considered by the Court of Appeal in Ex p. Shaw (1877) 2 Q.B.D. 463 in which at p.470 Kelly C.B. said that he could not imagine language better adapted for conferring jurisdiction to decide disputes between two alleged members of a company in respect of the title to shares therein. In cases where the facts are in dispute however the Court considered that the proper proceedings were by way of an action for specific performance. This authority has been applied in the ensuing years and is to be found

A reflected in the treatment of the matter in Gore-Brown on Companies Vol.2 para.20.10.

The relevant provisions of s.359 read as follows,

(1) "If (a) the name of any person is without sufficient cause entered in or omitted from the company's register of members...the person aggrieved or any member of the company may apply to the court for
B rectification of the register.

(2) The court may either refuse the application or may order rectification of the register and payment of damages sustained by any party aggrieved.

(3) On such application the court may decide any question relating to the title of any person who is a party to the application to have his name entered into or omitted to the register...and generally may
C decide any question necessary or expedient to be decided for rectification of the register".

Taking all the above matters into account, I have reached the conclusion that an entry in the register, while evidencing membership and relevant to disputes as to title where this is challenged, is not in itself "property" and is not capable of being seized as property; it may or may not be evidence of title; it is evidence of membership; but it is the shares that are the property and not
D the register which is no more than evidence; thus I find that on the rectification of the register under s.359 there is no such "property seized or threatened with seizure " as to fall within the terms of the exception contained in sub-Article 6(2)(a)(i) of the Law of 1985.

If I were wrong as to the construction of the words "property seized, or threatened with seizure" I do not consider that the matter would stop there; on the facts of the present case, as explained in the judgment of Blackburne
E J., there is in my judgment no room (viewed objectively) for a finding that there was in fact any such seizure or threatened seizure of the shares or indeed of any rights to such shares. This was put forward in argument and in the Case as a matter to be judged subjectively, but I consider that an objective approach is appropriate but nonetheless that such approach has the result contended for by the Appellants.

I conclude that the only link between the Judgment Debtors and the shares in
F question was their registration as nominees of an erstwhile trustee who by the time of the rectification had long ceased to be such a trustee and to have any interest, fiduciary or otherwise, in the shares; this was an erstwhile trustee moreover who was instructing them through Mr. Parrott to take a course which he was in no position to instruct and which was at least likely to be inimical to the interests of the ultimate beneficiary by whom he had originally been appointed and moreover a trustee who had been dismissed well over a year before, there being no other probable reason for his having formulated such instructions in such circumstances than to cause trouble. The Judgment
G Debtors' names were on the register but they had no continuing right to stay on the register and no standing to seek to protect any interest in the shares. In these circumstances, I conclude that there was in any event no "seizure" or "threatened seizure" of property for the purpose of sub-Article 6(2)(a)(i) of

the law of 1957 on the making of the order of the 3rd February 1995 or otherwise. A

Furthermore, I conclude that there is no sufficient evidence that the "purpose" of the submission to the Court in England by the Judgment Debtors was such as to satisfy the sub-Article; the inference from the evidence before us is that there was in substance no legitimate purpose in the Judgment Debtors' intervention. This is supported by the terms of the judgment of Blackburne J. to which I have already referred and doubtless underpins the Judge's decision to order the costs of the hearing before him and of the affidavits identified by him to be paid by the Judgment Debtors. B

In these circumstances the Respondents' claim to be protected from enforcement of the order for costs under the terms of the exception within sub-Article 6(2)(a)(i) fails; the effect is that there was a submission to the jurisdiction of the English Court of a nature to lay the Respondents open to enforcement of the order for costs in this Island. This being the case, it is not necessary for this Court to consider the alternative grounds of appeal advanced by the Judgment Creditors and summarised above, although it will be clear from the reasons which also appear that in my judgment the fact that the Judgment Debtors were nominees plays its part in the conclusions reached, and that the procedure adopted did not constitute the Judgment Debtors as Plaintiffs or include a Counterclaim on their part. C

For completeness I should mention that a point had been raised as to the recoverability of the VAT element in the Costs Order made in England; this was, however, abandoned in the course of the hearing before this Court. D

As pronounced at the sitting of this Court on the 16th October 1997 the appeal of the Judgment Creditors is allowed and the Order of the Royal Court of the 15th November 1996 is restored to the extent that the Court thereby ordered that leave should be granted for the registration of the Costs Order of the High Court of Justice, Chancery Division, Companies Court, in England dated the 12th July 1995 and made against the Judgment Debtors, such costs having been taxed at £26,396.65 including £3,737.20 Value Added Tax, such registration being pursuant to the Judgments (Reciprocal Enforcement) (Guernsey) Law 1985 as amended, with interest accruing as provided for in that Order; as similarly pronounced, the costs in this Court and the Court below are ordered to be paid by the Respondents to the Appellants. E

Appeal allowed; order for costs in favour of Appellants.

F

G

A 79. [CIVIL DIVISION - APPEAL NOS. 234 AND 240]

1996 NOVEMBER, 29
1997 MAY 27, NOVEMBER 6

SARAH LYNN HULME (Mrs. Hulme)
v.
B **MATHESON SECURITIES (CHANNEL ISLANDS) LIMITED (Matheson)**
and
MATHESON SECURITIES (CHANNEL ISLANDS) LIMITED
v.
DOUGLAS HULME (Mr. Hulme)
and
SARAH LYNN HULME

C **(JUDGMENT NO. 1)**

Before: SOUTHWELL, COLLINS and BAILHACHE, JJ.A.

Mareva injunction - application for - duty of full and frank disclosure

See paragraph 47.

D P.T.R. Ferbrache, for Mrs. Hulme.
M.G. Ferbrache, for Matheson.

SOUTHWELL, J.A.: This Court is concerned with appeals in respect of two actions:

(1) an action brought by Matheson Securities (Channel Islands) Ltd ("Matheson") against Mr Douglas Hulme ("Mr Hulme"), which I will call
E "the Matheson Action"; and

(2) an action brought by Mrs Sarah Hulme ("Mrs Hulme"), the wife of Mr Hulme, against Matheson, which I will call "Mrs Hulme's Action".

In 1996 Mr Hulme was an associate with Matheson, who are stockbrokers carrying on business in this island. In about May 1996 Mr Hulme met a Captain Ismail, for whom Matheson, at Mr Hulme's bidding, bought 1.8 million shares of an
F English property company called Middlesex Holdings plc ("Middlesex"). It appears that Mr Hulme had been dealing in Middlesex shares through Matheson for his own account, and for the accounts of Brocksom Ltd (a company controlled by Mr Hulme), his wife, their son, and other clients introduced either by Mr Hulme himself or through him by an English solicitor, Mr Isaacs.

Between 3 and 7 June 1996 Matheson bought 8.2 million more shares of Middlesex in the name of Captain Ismail, at the bidding again of Mr Hulme. It is alleged by Matheson that some at least of these shares were Middlesex shares then sold
G by Mr Hulme, Brocksom and Mr Isaacs, and that this was not disclosed to Captain Ismail, or to the relevant persons in the management of Matheson. On 30 June 1996 Captain Ismail wrote to Mr Hulme stating that he had not authorised the purchase of Middlesex shares in his name.

On 15 July 1996 Mr Hulme was suspended from his duties by Matheson. On 19 July 1996 solicitors for Matheson wrote to Captain Ismail treating his refusal to pay for the Middlesex shares as a repudiation of the contracts of purchase.

On or shortly before 29 July 1996 Mr Hulme discussed with Matheson certain Middlesex shares which had been bought much earlier and rolled over on a number of occasions by sales and repurchases. Mr Hulme wished to stop rolling over these shares and to pay for them. These shares were for the account of the following:

Mr Hulme	2,000,000 shares
Brocksom	1,650,000 shares
Mrs Hulme	430,000 shares
AC Hulme (son)	120,000 shares
	4,200,000 shares

In order to pay for these shares, financial assistance was required by the Hulmes. A friend of the Hulmes, Mr Edward Richard Heron ("Mr Heron"), agreed on about 27 July 1996 to make a loan of £300,000 against the security of the deposit of the shares. The document evidencing the loan and containing its terms was addressed by Mr Heron to Mrs Hulme alone, and required the deposit of 4 million Middlesex shares as security together with blank transfers duly executed by Mrs Hulme.

On the affidavit evidence there is some doubt as to the circumstances surrounding the loan. At p.15 of Mr Hulme's affidavit of 18 September 1996 he referred to the loan as one to

> "me (or, rather, my wife)"

and as

> "the loan I had obtained from Mr Heron".

In Mrs Hulme's first application of 21 October 1996 in the Matheson action for the release of shares, her advocate Mr Peter Ferbrache referred to shares held by Matheson "on behalf of the Defendant [i.e. Mr Hulme] and Brocksom Limited", whereas in her replacement application of 25 October 1996 reference was made by Mr Peter Ferbrache to "her sharehold interest in Middlesex".

Further, the money lent by Mr Heron was paid into a joint account of Mr and Mrs Hulme. This is explained by Mrs Hulme as being the only major bank account in her name, the bank accounts in her sole name being merely for relatively minor purposes and not appropriate for payment in and out of a sum as large as £300,000.

Matheson will wish to argue that in so far as Mrs Hulme was involved, this was merely as agent for Mr Hulme. That is a matter for trial, and this Court cannot form any final view on it at this interlocutory stage.

Returning to the history of this matter, Mr Hulme discussed the 4.2 million Middlesex shares with Matheson, and the result of the discussion was a letter dated 29 July 1996 from Matheson to Mr Hulme which he countersigned. The terms of this letter agreement are important, and I quote them in full:

A " [Matheson letterhead]

29 July, 1996

D Hulme Esq.
Clairmont
Jerbourg Road
B St Martins
GUERNSEY
GY4 6BJ

Dear Dougie,

With regard to your query this morning concerning the payment of your rolling positions in Middlesex, I confirm that upon receipt of the due funds, the shares can and will [be] registered into the name of Mrs Sarah
C Lynn Hulme, Clairmont, Jerbourg Road, St Martins, Guernsey, GY4 6BJ.

For your reference I have attached a schedule of your current positions of the various accounts in value date order.

Would you please sign and return the attached copy of this letter as acknowledgment of safe receipt.

D Yours sincerely

G D Le Tissier
Matheson Securities (Channel Islands) Limited
cc: G Lovett Esq.

Enc:

D H Hulme Esq	12559
E Mrs S L Hulme	13087
A Hulme Esq	12892
Brocksom Limited	12761

Received [Mr Hulme's signature]"

Mr Hulme alleges, but Matheson denies, that he explained to Matheson that a loan was being taken to pay for the shares which would be deposited as security with the lender.

F 200,000 Middlesex shares were disposed of. 4 million Middlesex shares were paid for, most of the money coming from the sum of £300,000 lent by Mr Heron. Certificates for 550,000 shares in respect of the shares in the names of Mrs Hulme and her son were supplied by Matheson. The balance consisting of 3,450,000 Middlesex shares were not registered, as Matheson had agreed by the letter agreement of 29 July 1996, in the name of Mrs Hulme, but in the name of Chardon Nominees Ltd ("Chardon"), a nominee company controlled by Matheson. It is said by Matheson that Chardon hold the 3.45 million shares for Mr Hulme.

G I will return later in this judgment to consider in greater detail what was done by Matheson in relation to these shares in August and early September 1996.

Matheson did not inform Mr or Mrs Hulme at that stage that they had not complied with the letter agreement of 29 July 1996.

Between 5 and 26 August 1996 Matheson sold the 8.2 million Middlesex shares purchased in the name of Captain Ismail, making a loss of £189,591.

On 16 August 1996 Mr Hulme and Mr Grahame Lovett, the Managing Director of Matheson, met in a Guernsey hotel. Mr Lovett did not tell Mr Hulme that Matheson had not complied and would not be complying with the 29 July 1996 letter agreement.

On 21 August 1996 a letter was sent on Matheson's behalf demanding payment of £189,591 and other losses within 14 days.

On or about 10 September 1996 Matheson advised by Advocate Mark Ferbrache of Collas Day & Rowland decided to apply to the Royal Court for a Mareva order against Mr Hulme in respect of his assets within Guernsey including "any interest whether legal and/or beneficial in Middlesex Holdings Plc". It seems then and subsequently to have been assumed that the 3.45 million shares would be and were covered by such Mareva order.

The application for the Mareva order was supported by an affidavit of Mr Mark Ferbrache sworn on 10 September 1996. Because this was the affidavit by which Matheson disclosed to the Royal Court the relevant circumstances, as they were required to do when seeking ex parte a draconian Mareva order, it is of some importance to refer to the terms of this affidavit.

Mr Mark Ferbrache first referred to and cited from the associate agreement between Matheson and Mr Hulme. He then referred to the circumstances leading up to and connected with the purchase by Matheson of 8.2 million Middlesex shares in the name of Captain Ismail, and to Captain Ismail's repudiation of the transaction. He referred to the sale of these shares leading to the loss of £189,591 plus interest. He described the conduct of Mr Hulme in connection with the 8.2 million shares as a breach of Mr Hulme's implied obligation owed to Matheson to "conduct himself with requisite skill and care with regard to his dealings with Matheson." I quote verbatim the remaining paragraphs of his affidavit:

> "19. There is now produced and shown to me marked "MGF5" a letter from Matheson to Mr Hulme date 29th July, 1996. Matheson is currently holding on behalf of Mr. Hulme and his trading company Brocksom Limited various assets. They comprise 3,450,000 Middlesex shares valued at approximately £267,375.00. Mr Hulme is requesting the re-registration of the shareholding into the name of his wife, Mrs Sarah Hulme.
>
> 20. It is the intention of Matheson to issue proceedings against Mr Hulme to recover its losses.
>
> 21. In the above circumstances, I am instructed that there is a risk of the assets being dissipated and/or disposed of before Matheson is able to obtain judgment and/or is otherwise able to levy execution against the assets of Mr Hulme.

22. In the premises Matheson seeks an order in the terms set out hereunder."

The order was applied for ex parte and made by the Deputy Bailiff on 11 September 1996.

Mr Hulme then applied for the Mareva order to be set aside, supporting his application with an affidavit sworn on 18 September 1996. For the purposes of this judgment it is not necessary to refer to the long passages relating to Captain Ismail, but it is necessary to cite part of the text on pp.14-16:

"Paragraph 19 (This is a reference to paragraph 19 of Mr Mark Ferbrache's affidavit)

(1) Matheson is not holding assets on my behalf and that of Brocksom Ltd, and it never has. Brocksom (2 million) and my wife, Mrs SL Hulme (430,000), my son A C Hulme (120,000) and I (1.65 million) had a total position of 4.2 million shares in Middlesex. These had never been paid for so they had never been registered. The shares had been contracted through Matheson, quite openly, in these names and, for some time, they had been rolled - i.e. 3 days before payment was due, the stock was sold and then bought back through the market, with the market maker charging 1/16th penny per paid to finance the stock for another 25 days. After my suspension from Matheson, I realised that it was unsatisfactory to continue rolling the shares. I did not have the funds available, so contacted a friend in England, Richard Heron, who agreed to lend me (or, rather, my wife) £300,000. He naturally required the Middlesex shares certificates as collateral, together with signed transfer forms, so, before paying for any stock, I contacted Matheson to make sure that if the shares were paid for, they would be registered in the name of my wife and released. I received a letter of approval to this effect from Matheson, signed by Mr G Le Tissier and a copy of this letter was sent to Mr Lovett, Matheson's Managing director, who had also previously agreed with me that this was in order. A copy of this letter is exhibited to Mr Ferbrache's affidavit as "MGF5", but without any background explanation. Over a period of about 4 weeks, I paid for 4 million shares on their due settlement dates, with the benefit of the loan I had obtained from Mr Heron, and disposed of 200,000 shares at the time of the final payment. To date, certificates for only 550,000 shares have been received, namely, those which were originally contracted to my wife and son. On telephoning the Registrars of Middlesex on 12th September 1996, I learned that none of the outstanding shares (3.45 million) have been registered in my wife's name, as had been agreed. There is no holding in my name or that of Brocksom Ltd. A copy of a loan letter from Mr Heron to my wife is produced and shown to me marked "DH2". The original letter, countersigned by my wife, was sent back to Mr Heron. A copy of a bank statement issued by Barclays Bank PLC, where my wife and I maintain a joint account, is produced and shown to me marked "DH3". The credit of £300,000 on the 29th July 1996 reflects the loan to my wife by Mr Heron.

(2) Mr Ferbrache does not explain any of this in his affidavit, with the result that, yet again, there has been gross distortion and a wholly false impression created."

Several other affidavits were filed in relation to Mr Hulme's application, and to Matheson's application to increase the sum covered by the Mareva order to £450,000:

(1) An affidavit of Mr Lovett sworn on 25 September 1996, in which he dealt almost solely with the circumstances relating to Captain Ismail. He responded to the passage I have quoted from Mr Hulme's affidavit as follows in paras.32 and 41:

"32. I refer to paragraphs 19(1) and (2) on pages 14, 15 and 16 of Mr Hulme's affidavit. Mr Hulme states, inter alia, that Matheson is not "holding assets and it never has, on his behalf". This is incorrect. There is now produced and shown to me marked "GPAL8" and exhibited hereto various duplicate contract notes in support of the contentions made at paragraph 19 of Advocate Mark Ferbrache's affidavit. Two of the contract notes are in Mr Hulme's name, amounting to 1.65 million shares in Middlesex. The remaining four contract notes bear the reference "CHARDON NOMINEES LIMITED A/C B35". This is Matheson's reference for Brocksom.

41. As regards Mr Hulme's request to transfer his Middlesex shares into his wife's name, first I confirm that Mr Hulme purchased such shares in his own name (see paragraph 32 above). Secondly, I deny that Matheson knew anything about a loan to Mr Hulme to enable him to purchase the shares. However, it is highly relevant, I submit, that Mr Hulme acknowledges that, having incurred a substantial liability to Matheson, he wanted to move assets out of his name.

(2) An affidavit of Mr Heron sworn on 4 October, confirming his loan of £300,000 to Mrs Hulme herself, and referring to his difficulty in not having received the collateral for his loan in the form of the Middlesex shares.

(3) An affidavit of an expert stockbroker and jobber, Mr J B Woolfenden, on behalf of Mr Hulme.

(4) A second affidavit of Mr Hulme sworn on 7 October 1996 in answer to Mr Lovett's first affidavit, including the following answers to the paragraphs I have quoted above:

"Paragraph 32

(1) Again, Mr Lovett misrepresents the true position. Thus, the relevant shares were only booked in my and Brocksom's names, in about November 1995. There were not paid for, but were rolled.

(2) Neither I nor Brocksom ever took the shares into our names. As I have explained, the shares were paid for by means of a loan to my wife from Mr Heron. My wife is under obligation to hold the shares in Mr Heron's name as security.

(3) Apart from making a small and wholly misconceived point, there is a studied failure by Mr Lovett to deal with the matters set out in paragraphs (1) and (2) of my first affidavit in relation to paragraph 19 of Mr Ferbrache's affidavit.

(4) If Mr Lovett is attempting to imply that ownership has in some way been switched, despite the fact that I dealt with Matheson very openly on the subject, then, yet again, Mr Lovett's innuendo is completely unfounded.

(5) Mr Lovett does not condescend to <u>any</u> explanation for having unlawfully "hijacked" these shares and, even when confronted by what Matheson has done, Mr Lovett continues to withhold crucial information from the Court. Moreover, having ignored the misappropriation of shares valued at £280,000 i.e. in excess of the original Mareva injunction to the tune of about £100,000, he actually seeks to increase the amount of the injunction by more than £250,000."

<u>"Paragraph 41</u>

(1) This paragraph perpetuates a complete misconception of the position, which he demonstrated in paragraph 32 of his affidavit.

(2) As to his denial that Matheson knew anything about a loan, this is incorrect. At my request, the loan was made by Mr Heron to my wife; in every sense she is the legal borrower. I expressly told Mr Greg Le Tissier, <u>after</u> my suspension, that a loan was being taken out to acquire these shares for my wife and that it was essential that the shares should be given as security. The position was very clearly explained by me and, as appears from his letter dated 29th July 1996 ("MGF5"), he fully understood and agreed to this. None of this was explained in Mr Ferbrache's affidavit; and Matheson has not since seen fit to obtain an affidavit from Mr Le Tissier. These are very serious omissions and have resulted in a gross distortion of the true facts. There can be no doubting that the <u>sole</u> basis for the loan transaction was as I have described it. Even if the loan had been to me, with the intention that I should acquire the beneficial interest in the shares, it would have been quite wrong to suggest that Matheson was entitled to seize the shares without any regard to the underlying security arrangements with Mr Heron).

(3) Astonishingly, Matheson has vouchsafed no real explanation for the transaction, except to invite the Court, on wholly incomplete and misleading grounds, to draw a perverse inference as to my dishonourable intentions. However, Matheson itself has quite literally hijacked 3.45 million Middlesex shares, to an approximate value of £240,000 to which it can have no possible claim and in defiance of the agreement it reached with me.

(4) This conduct on the part of Matheson is to be contrasted with the stance it has adopted in relation to my honesty and integrity. I respectfully submit that, on the grounds of this conduct alone and the associated non-disclosures, the Order made on 11th September 1996 should be discharged."

(5) A second affidavit of Mr Lovett sworn on 8 October 1996 dealing with the position of a Mr Khreino.

(6) A third affidavit of Mr Lovett sworn on 9 October 1996 dealing with Mr Khreino, Mr Isaacs and Captain Ismail, and with the 3.45 million Middlesex shares as follows:

> "5. Finally, I would confirm that Matheson still holds 3.45 million shares in Middlesex in Mr Hulme's name. The shares are trading at 6 pence (if we were to sell them they would not even realise at this price). The shares are accordingly now worth less than £200,000.00."

(7) An affidavit of Rachel Hinks, a director of Mathesons, sworn on 9 October 1996 in answer to Mr Hulme and Mr Woolfenden on stock exchange matters.

(8) A third affidavit of Mr Hulme sworn on 9 October 1996 dealing with his income and expenditure.

(9) An affidavit of Mrs Hulme sworn on 9 October 1996 confirming Mr Hulme's third affidavit so far as relevant to her.

This was the state of the affidavit evidence when the matter came back before the Deputy Bailiff on 15 October 1996. He refused the application to discharge the Mareva order, but varied it in relation to living expenses.

On 21 October 1996 Mr Peter Ferbrache made an application on behalf of Mrs Hulme in the Matheson Action for the release of the 3.45 million shares in the terms I have already quoted. This was replaced by the application of 25 October 1996, also already quoted.

The affidavits filed in relation to this application by Mrs Hulme were as follows:

(1) A second affidavit of Mrs Hulme sworn on 21 October 1996. In this affidavit she dealt with the intention to register the 3.45 million Middlesex shares in her name, with the loan from Mr Heron, which she deposed was a loan to her, with the letter agreement of 29 July 1996 with Matheson, and with the payments made for the shares on the due settlement dates, the last being 2 September 1996, totalling £302,119.89. She stated that

> "It was not until September 12th, when my husband was the subject of a Mareva injunction, that to my total shock and disbelief, I discovered that 3.45 million shares had not been registered in my name."

She then referred to her and Mr Heron's embarrassment resulting from this.

(2) A fourth affidavit of Mr Hulme sworn on 22 October 1996 confirming his wife's second affidavit, and that the shares were owned solely, and always intended to be owned, by Mrs Hulme.

(3) A fifth affidavit of Mr Hulme sworn on 22 October 1996 confirming his income and assets.

A (4) A second affidavit of Mr Heron sworn on 22 October 1996 confirming his loan to Mrs Hulme, and that he would not have lent her the money without her undertaking to deposit 4 million Middlesex shares as security.

(5) A third affidavit of Mrs Hulme sworn on 23 October 1996 confirming that she paid £5,000 interest from a personal bank account of hers on 10 October 1996 to Mr Heron.

B (6) A fourth affidavit of Mr Lovett sworn on 28 October 1996 in opposition to Mrs Hulme's application. Mr Lovett here set out in some detail the position regarding the 4.2 million Middlesex shares, and the 3.45 million shares which were part of these. At para.2(13) he dealt with the letter agreement of 29 July 1996. In paras.2(14)-(17) he stated the following:

C "(14) Had I known on 29th July, 1996 what I now know about what Mr Hulme has done (as set out in my first, second and third affidavits herein), I would never have consented to the transfer of the shares to Mrs Hulme. In particular, although Mr. Hulme had by that time been suspended from Matheson, all that was then known about his defalcations was that there was a potential problem with Captain Ismail (Captain Ismail disputed having given instructions to purchase his Middlesex shares) and , at that time, it was not apparent that Matheson would suffer
D a loss as a result. Further, I had no indication that Mr. Hulme had been guilty of any bad faith.

(15) Mr Hulme paid and/or arranged for the payment of the 3,450,000 shares in Middlesex between 1st August, 1996 and 2nd September, 1996 (i.e. on the due settlement dates).

(16) I have arranged for all of the 3,450,000 shares in Middlesex to
E be registered in the name of Chardon Nominees Ltd (Matheson's nominee company) and they are held by Chardon Nominees Ltd for and on behalf of Mr Hulme. The shares were registered in Chardon Nominees Ltd's name between 6th August, 1996 and 17th September, 1996. The reason I did this was because, by then, it was becoming clear that Mr Hulme had been in serious dereliction of his duties to Matheson and that, as a result, Matheson was facing large losses as a result of Mr Hulme's
F activities.

(17) In particular, and having taken legal advice from Matheson's Jersey lawyers, Ogier & Le Masurier, I considered that Matheson was not bound by the letter dated 29th July, 1966 written by Mr Le Tissier (on my instructions) since it had been procured by fraud. Had Mr Hulme told me the true position as I now understand it to be (see my first, second and third affidavits), or indeed if he had just told me a small part of
G the truth, I would never have authorised the letter to be sent. I would have demanded that the 3,450,000 shares which Mr Hulme had contracted to buy must be paid for by him immediately and that Matheson would hold the shares until the extent of the

losses suffered by Matheson at the hands of Mr Hulme had been established. Mr Hulme must have known full well that this would have been my position had he told me the truth, and I can only conclude that Mr Hulme deliberately did not tell me or anyone else at Matheson what he had done with the intention of putting the shares beyond the reach of Matheson in his wife's name so as to frustrate any attempts by Matheson to recover from him the very serious losses which Matheson has suffered."

Thus Mr Lovett here spelled out the reason why, he said, Matheson failed to comply with the letter agreement as being the allegation that Mr Hulme procured the agreement by fraud. The rest of his affidavit (like much of Mr Hulme's affidavits) was argument. I repeat what this Court has often said, that affidavits should contain only evidence of fact, or of expert opinion, and not argument.

(7) An affidavit of Mr Gregg Le Tissier sworn on 28 October 1996 dealing, in particular, with the conversation and letter agreement of 29 July 1996, and challenging Mr Hulme's evidence that Mr Hulme told Mr Le Tissier that a loan was being taken out to acquire the shares and that the shares were to be deposited with the lender as security.

It was on this evidence that Mrs Hulme's application was heard and refused by the Deputy Bailiff on 29 October 1996. His first judgment had to be revised, and I refer to the second revised judgment handed down on 29 November 1996. The Deputy Bailiff referred to the Matheson Action in which Matheson are claiming more than £1 million from Mr Hulme. He took the view that the application raised directly the question whether Mrs Hulme was entitled to the shares, an issue of fact and law, which in so far as related to facts was an issue to be tried before Jurats, and in his judgment not to be decided on an interlocutory application by Mrs Hulme in the Matheson Action. It appears that during the hearing the Deputy Bailiff indicated that in his view any claim by Mrs Hulme would have to be by separate action brought by her. Such an action had been started by Mrs Hulme (Mrs Hulme's Action) on 5 November 1996.

The decision of the Deputy Bailiff in October and November 1996 appears to me to have been made in the Matheson Action on an application by Mrs Hulme as a third party intervening. In my judgment all that Mrs Hulme needed to do was to intervene in the Matheson Action. The Notice of Appeal is, however, entitled in Mrs Hulme's Action. No point on this was taken by Mr Mark Ferbrache for Matheson, and it appeared that both parties were content to treat the appeal as correctly pursued in Mrs Hulme's Action.

Leave to appeal was refused by the Deputy Bailiff, but granted by this Court on 16 April 1997.

Other steps were taken in relation to the joinder of the two Actions, but these I can leave since they arise in relation to the second appeal.

I have set out the evidence before the Deputy Bailiff at what may be thought to be inordinate length. I have done so in order that the matters which arise on this appeal may be seen against the full background.

A In his written submissions on the appeal for Mrs Hulme Mr Peter Ferbrache directed a strong attack on Matheson's conduct in entering into the 29 July 1996 letter, then ignoring its terms and registering the 3.45 million shares in the name of Matheson's nominee company, and then obtaining a Mareva order against Mr Hulme which has been assumed by all three parties to cover these shares. Indeed, Matheson's conduct was described as dishonest. These submissions were served early in August 1997.

B The Court of Appeal sittings began on 13 October 1997. Early that week (at 1.10 pm on 14 October 1997), while Mr Peter Ferbrache was before this Court responding to another appeal, Mr Mark Ferbrache for Matheson informed him, but not this Court, that he would be taking a preliminary point at the outset of the hearing of this appeal. The preliminary point which was taken before this Court was that it was not open to Mrs Hulme to attack Matheson's conduct as dishonest, this not having been raised by her before the Deputy Bailiff or in her Notice of Appeal. This Court dealt with the preliminary point by giving Mrs Hulme leave to amend the Notice of Appeal, while making it clear that the
C Court of Appeal would not reach a conclusion whether or not Matheson's conduct was dishonest on an interlocutory appeal.

The raising of this preliminary point focused close attention on the conduct of Matheson between 29 July and mid-September 1996. Mr Peter Ferbrache pointed out (by reference to Mr Lovett's fourth affidavit, paras.2(16) and (17) - quoted above) that in relation to the 3.45 million Middlesex shares, these had been paid for in about six tranches between early August and mid-September
D 1996. He said that it was common ground that before each settlement date Mr Le Tissier spoke to Mr Hulme to remind him of the forthcoming settlement date and of the amount required by Matheson to pay for the tranche of shares. On none of those occasions had Matheson told Mr Hulme that they would not be complying with the 29 July 1996 agreement, or that Matheson would be registering the shares in the name of Chardon Nominees Ltd, and not of Mrs Hulme as agreed. Mr Peter Ferbrache also pointed out that Mr Lovett in para. 2(17) of his fourth affidavit referred to legal advice being given to Matheson that they were not
E bound by the 29 July 1996 agreement. He also pointed out that, since the first tranche was paid for and registered in Chardon's name very early in August 1996, the inference could be drawn that this legal advice had been obtained by Matheson soon after the 29 July 1996 agreement was made.

Faced with this submission, Mr Mark Ferbrache arranged for a fifth affidavit to be made by Mr Lovett overnight and this was sworn by him on 16 October 1997. Mr Lovett's fifth affidavit revealed the following circumstances:

F

(1) There were six contract notes for the six tranches of shares making up the total of 3.45 million shares.

(2) These contract notes were due for settlement on various dates between 1 August and 2 September 1996.

(3) Shortly after the 29 July 1996 agreement was made (but Mr Lovett did not specify the precise date), he decided that registration of the shares
G should initially be in the name of Chardon and,

"once the final block of shares had been paid for in cleared funds, a re-registration of the shares in one block would be made to Mrs Hulme"

pursuant to the agreement. Mr Lovett gave as reasons for so deciding (a) concern about whether payment would be made (b) in the case of the first tranche on 1 August 1996, Mr Hulme had not yet returned a counter-signed copy of the agreement, and (c) having registered the first tranche in Chardon's name it was more convenient to register the rest in Chardon's name.

I observe that the terms of the 29 July 1996 agreement provide no support for the notion that the six tranches were to be dealt with, as regards registration in Mrs Hulme's name, all together once the last tranche had been paid for.

(4) Mr Lovett decided not to tell Mr Hulme that each tranche of shares was being registered in Chardon's name.

(5) On 16 August 1996 Mr Lovett and Mr Hulme met at a Guernsey hotel. Mr Lovett states that he

> "did not know of Mr Hulme's breaches of fiduciary duty"

though he accepts that he did know that Mr Holme's clients had defaulted on their obligations. He gave Mr Hulme until the end of 18 August 1996 to find a solution.

(6) He caused a lawyers' letter to be sent to Mr Hulme dated 21 August 1996 giving Mr Hulme until 4 September 1996 to pay Matheson's losses or to propose satisfactory terms. No satisfactory proposals were made by that date.

(7) Shortly after 4 September 1996 he took advice from Ogier & Le Masurier and was advised that the 29 July 1996 agreement was unenforceable. Having received that advice, on or about 5 or 6 September 1996 he took the decision not to transfer the shares into Mrs Hulme's name.

I observe in this connection that (i) no documentary evidence as to the advice from Ogier & Le Masurier, or when that advice was given, was produced by Mr Lovett; (ii) the statement in this fifth affidavit that advice as to the unenforceability of the 29 July 1996 agreement was not obtained until after 4 September 1996, and therefore after all the six tranches had been paid for by Mrs Hulme, sits ill with Mr Lovett's decision shortly after 29 July 1996 not to act in accordance with the terms of the agreement, and with his earlier fourth affidavit (the relevant passages have already been cited); (iii) Mr Mark Ferbrache for Matheson accepted that if the Hulmes had been told shortly after 29 July 1996 that the shares would be registered in Chardon's name they obviously would not have paid for any of the tranches; (iv) Mr Lovett in his fifth affidavit states that

"It was by good fortune, and no more, that the share transfer process had not yet been completed"

by 5/6 September 1996; what this means is that by failing to comply with its obligations under the 29 July 1996 agreement Matheson had gained the

A advantages of receiving payment and retaining the shares in Chardon's name.

It is not for this Court to reach any concluded view as to the veracity or otherwise of the affidavit evidence, before it has been tested by cross-examination. But the evidence of Mr Lovett that advice on the unenforceability of the 29 July 1996 agreement was not sought or obtained until about 5/6 September 1996 is evidence which particularly calls for further consideration and examination.

B

I should add that a further affidavit of Mr Hulme in response to Mr Lovett was produced towards the end of the hearing, but nothing turns on this.

I now turn to the two main questions which this Court has to decide on this appeal.

C The first main question is whether proper disclosure was made to the Royal Court when the Mareva order was sought on 11 September 1996.

A Mareva order is a draconian one, freezing the defendant's assets. It cannot be too often emphasised that it is the duty of a plaintiff seeking a Mareva order to make full and frank disclosure of the material facts, that is, material facts known to the plaintiff and any additional facts which should be known, having regard to all the circumstances of the case, if proper enquiries are made. The facts to be disclosed are those which are necessary to enable
D the Court to exercise its discretion properly. The material facts are to be disclosed in the affidavit or affidavits, and not in exhibits.

If proper disclosure is not made

(1) the Court will ensure that the plaintiff is deprived of any advantage obtained from the breach of the duty of disclosure;

E (2) whether a fact not disclosed is sufficiently material to justify the immediate discharge of the injunction depends on the importance of the fact to the issues to be decided;

(3) the Court may in its discretion continue the Mareva order or grant a new one.

As regards disclosure by Matheson I have already set out the relevant
F paragraphs in Mr Mark Ferbrache's affidavit which was the only affidavit sworn in support of the ex parte application. In the light of the later evidence of Mr Lovett, and especially his fifth affidavit, it is abundantly clear that what Mr Mark Ferbrache, on instructions from Matheson, disclosed was not, by a long way, proper disclosure. All the facts and circumstances set out in Mr Lovett's fifth affidavit should have been disclosed. So that there is no doubt on this score I refer to para.19 of Mr Mark Ferbrache's affidavit, which read

G "19. There is now produced and shown to me marked "MGF5" a letter from Matheson to Mr Hulme dated 29th July, 1996. Matheson is currently holding on behalf of Mr Hulme and his trading company Brocksom Limited various assets. They comprise 3,450,000 Middlesex shares

valued at approximately £267,375,00. Mr Hulme is requesting the re-registration of the shareholding into the name of his wife, Mrs Sarah Hulme."

The letter of 29 July 1996 was an agreement between Matheson and Mr Hulme, who appears to have made it on behalf of himself, his wife and Brocksom Ltd. That agreement provided for registration of the 3.45 million Middlesex shares in Mrs Hulme's name. It was not a question of Mr Hulme "requesting" registration. Pursuant to the agreement Matheson were holding the shares under an obligation to register them in Mrs Hulme's name, and not on behalf of Mr Hulme and Brocksom Ltd. The propositions set out in this paragraph 19 amounted not to statements of fact but arguments of law, which could only be put forward on the basis of prior full disclosure of at least all the facts finally disclosed in Mr Lovett's fifth affidavit.

Put shortly, there was a serious failure on Matheson's part to perform the duty, owed to the Royal Court and to Mr and Mrs Hulme, of full and frank disclosure.

I wish to make it clear that I do not address any criticism to Advocate Mark Ferbrache. It appears that Matheson had been for some time acting on the advice of Jersey lawyers, and that Mr Mark Ferbrache had little time and inadequate instructions for the preparation of his affidavit.

In view of the extent and serious nature of the non-disclosure, I have no doubt that, applying the principles I have set out, the Mareva order must be set aside.

This leads me to the second main question, whether any fresh order should be made.

In my judgment no such order should be made and the 3.45 million shares (with one minor exception) should be released forthwith to Mr Heron, for the following (amongst other) reasons:

(1) By not telling Mr or Mrs Hulme in early August 1996 that Matheson would not be registering any of the tranches of shares in Mrs Hulme's name (at all events until the last tranche was paid for in early September 1996), Matheson secured payment for the six tranches on a false basis. It is common ground that if Matheson had told Mr or Mrs Hulme, none of the shares would have been paid for. So by concealing this from Mr and Mrs Hulme Matheson secured each of the payments.

(2) Having achieved a situation in which, in early September 1996, all of the 3.45 million shares were held by Matheson's nominee company, Matheson then was able to obtain a Mareva order covering these shares. Mr Lovett described this as being "by good fortune, and no more". I take that statement with a due pinch of salt. But even if entirely true, it remains the case that Matheson were only able to achieve an effective Mareva order over these shares by not complying with the agreement, by not telling Mr or Mrs Hulme that they were not complying, by thereby securing full payment for the shares, and by making no proper disclosure when applying for the Mareva order.

(3) The advantages which Matheson obtained by this conduct are advantages which they cannot be allowed to retain under the principles I have set out.

(4) The person who has in reality suffered most by Matheson's misconduct is Mr Heron, who has lent £300,000 to Mrs Hulme without receiving all the security to which he is entitled (on the evidence before this Court little weight can be given to Matheson's suggestion that Mrs Hulme was acting on behalf of her husband, having regard to the terms of the loan agreement under which she was and is personally liable to Mr Heron for repayment of the £300,000 with interest). Mrs Hulme through Mr Peter Ferbrache accepts that the release of the shares should be direct to Mr Heron, and not to her.

The minor exception arises in this way. The total price for the 3.45 million shares was £304,410.89. Of this total, £288,210.82 came from the moneys lent by Mr Heron to Mrs Hulme. The balance of £16,200.07 came from moneys owing by Matheson to Mr Hulme. Accordingly the release of shares to Mr Heron should be of that number of shares which represented the price of £288,210 at an appropriate date which for this purpose should be taken as 2 September 1996. I will return to this when considering the terms of the order.

Mr Mark Ferbrache for Matheson argued strongly that either the Mareva order should not be discharged or a fresh order should be made, and he said that he would recommend to Matheson that they should give cross-undertakings against any damage caused to Mr Heron or Mr or Mrs Hulme. His argument was on these lines. If the shares pass to Mr Heron, they will be sold, and the money applied in repayment of Mr Heron's loan. That will effectively end Mrs Hulme's action against Matheson. But in the Matheson Action issues such as whether the 29 July 1996 agreement was secured by Mr Hulme's fraud and whether on that ground Matheson have effectively avoided the agreement will remain to be decided. If these issues are decided at trial in favour of Matheson, Mr and Mrs Hulme will have secured the advantage of the release of the shares, an advantage to which they were not entitled.

There are short answers to this argument:

(1) Matheson secured payment for the shares by concealing their intention not to perform the 29 July 1996 agreement.

(2) Matheson secured the Mareva order by concealing from the Royal Court most of the relevant facts, and therefore by failing to perform their duty to the Court to make full and frank disclosure.

(3) If proper disclosure had been made, it is improbable that any Mareva Order would have been made in respect of these shares.

(4) Matheson have only themselves to blame for their own misconduct.

After the close of the hearing of the appeal this Court indicated that it would order the release of, and transfer to Mr Heron of, the 3.45 million shares, with the exception of such number of shares as were represented by a total price of £16,200 as at 2 September 1996, on the basis of the market price on that day. The Advocates Ferbrache agreed to sort out the figures between them.

They have done this and have agreed that £16,200 represented 216,000 shares. So the number of shares to be released from the Mareva order and transferred by Matheson to Mr Heron is 3,234,000 Middlesex shares.

Mr Peter Ferbrache made an application for full indemnity costs, and this was adjourned for argument when our reasons were delivered.

In the interval between the close of the hearing and the delivery of our reasons, a single Judge of the Court of Appeal, Mr Martin Collins QC, granted a stay of drawing up the order and its execution until our reasons were delivered, that is, until today, Mr Mark Ferbrache having indicated in correspondence that he would wish to argue today that the shares should not be transferred to Mr Heron.

The second appeal by Matheson in the Matheson Action was by agreement of the parties adjourned generally with liberty to restore.

Appeal allowed; order for transfer of shares.

80. [CIVIL DIVISION - APPEAL NO. 234]

1997 NOVEMBER 6 and 28

SARAH LYNN HULME (Mrs. Hulme)
v.
MATHESON SECURITIES (CHANNEL ISLANDS) LIMITED (Matheson)

(JUDGMENT NO. 2)

Before: SOUTHWELL, COLLINS and BAILHACHE, JJ.A.

See paragraph 47.

P.T.R. Ferbrache, for Mrs. Hulme.
M.G. Ferbrache, for Matheson.

SOUTHWELL, J.A.: In this case the Court of Appeal heard argument on Mrs Hulme's appeal on 15 and 16 October 1997 and at the close of argument stated the result of the appeal, with reasoned judgments to follow. Judgments were delivered on 6 November 1997. Following delivery of the judgments further argument was heard on four applications. This Court's conclusions on the four applications were stated at the close of argument on 6 November 1997. This is the judgment of the Court setting out the reasons for those conclusions.

Powers of the Court of Appeal

By the first application Mr Mark Ferbrache for Matheson, with his usual tact and perserverance, sought to persuade this Court to alter the Order which this Court had made on the appeal on 16 October 1997.

A At 6 November 1997 the Order of this Court had not yet been perfected, and it was open to the parties to seek to persuade the Court to alter the Order before it was perfected. Ordinarily, this Court will not permit argument to be presented seeking alteration of an unperfected Order unless new matters have arisen since the hearing which would justify further argument. In the present appeal the Court of Appeal permitted Mr Mark Ferbrache to make the application because he proposed to argue that this Court had no jurisdiction to order that the relevant shares be transferred to Mrs Hulme or to Mr Heron. In this B judgment the same abbreviations are used as in the earlier judgment of Mr Southwell, and the facts as there stated are taken as the background to this judgment.

In most cases involving Mareva orders, the orders are made in respect of assets within the possession or control of the defendants, and discharge of the orders is all that is required in order to ensure that full control over the assets is restored to the defendants. In the present case the position is unusual. The Mareva order is in respect of the assets of Mr Hulme. The only reason why the C shares which Matheson agreed to register in the name of Mrs Hulme became, arguably, subject to the Mareva order, is because Matheson chose to register the shares in the name of their nominee company, and then to treat the shares as held by their nominee company on behalf of Mr Hulme (rather than Mrs Hulme). Merely to lift the effect of the Mareva order from these shares would not restore control of them to Mrs Hulme. In the course of argument on the appeal, the Court had indicated that it might be minded to order the transfer of the shares to Mrs Hulme. Mr Mark Ferbrache for Matheson was contending that his D clients would wish to apply again for a second Mareva order in respect of these shares once in the hands of Mrs Hulme. On the other hand, Mr Peter Ferbrache for Mrs Hulme argued that Mrs Hulme must be free to place the shares as collateral with Mr Heron, and indicated that Mrs Hulme was both willing and desirous that the order for transfer should be direct to Mr Heron, rather than to her.

Mr Mark Ferbrache's argument on the first application was that the Court of E Appeal had no jurisdiction to make any order except an order discharging the Mareva injunction in so far as related to these shares. For this Court to go beyond merely discharging the Mareva order, and to order the transfer of the shares to Mrs Hulme (and a fortiori to Mr Heron), would (he argued) be to prejudge issues of fact to be determined by the Jurats at trial, including the issues whether the agreement of 29 July 1996 was obtained by fraud, and whether Mrs Hulme had or has any right in law or equity to the shares.

F The powers of the Court of Appeal are statutory. The relevant provisions of the Court of Appeal (Guernsey) Law 1961 are contained in Part II concerning "Appeals in Civil Matters", in sections 14 and 17:

> "14. For all the purposes of and incidental to the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction which vested in the Royal Court sitting as a "Cour des Jugements et Records" and shall have power, if it G appears to the Court of Appeal that a new trial ought to be had, to order, if it thinks fit, that the verdict and judgment be set aside and that a new trial be had."

"17. The Jurisdiction vested in the Court of Appeal under this Part of this Law shall, so far as regards procedure and practice, be exercised in the manner provided by this Law or by rules of court, and, where no special provision is contained in this Law or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained." A

Pursuant to the 1961 Law, the Court of Appeal (Civil Division) (Guernsey) Rules 1964 were made. Rule 12 deals with the general powers of the Court of Appeal, and provides, so far as relevant, as follows B

"12. (1) [amendment of documents]

(2) The Court shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before a Jurat of the Royal Court of Guernsey, the Chairman of the Court of Alderney or the Seneshal of Sark or before an examiner or commissioner: C

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds. D

(3) The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.

(4) The powers of the Court under the foregoing provisions of this Rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not so specified in such a notice: and the Court may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties. E F

(5) [Security for costs]

(6) The powers of the Court in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal."

Having regard to these statutory provisions, this Court was and is satisfied that its powers are wide enough to enable this Court to resolve the matters in issue between the parties by ordering the transfer of the shares to Mr Heron (so that he can hold them as security for the loan by him to Mrs Hulme) in the particular circumstances of this case, including (inter alia) the following: G

A (1) Matheson agreed on 29 July 1996 to register the shares in Mrs Hulme's name if they were paid for.

(2) In reliance on that agreement Mrs Hulme borrowed £300,000 from Mr Heron and agreed to provide the shares to Mr Heron as security for the loan.

(3) Payment was made to Matheson for the shares in 6 tranches between early August and early September.

B (4) It was accepted by Mr Mark Ferbrache for Matheson that, if Mr and Mrs Hulme had known that Matheson would not register the shares in Mrs Hulme's name, Matheson would not have been paid by Mrs Hulme.

(5) Matheson concealed the registration of the shares in their nominee company's name from Mr and Mrs Hulme.

C (6) Having secured payment for all six tranches of the shares, and registered the shares in their nominee company's name, Matheson purported to treat the shares as held for Mr Hulme (not Mrs Hulme) and obtained a Mareva injunction which, they contended, covered these shares.

(7) Matheson makes no claim against Mrs Hulme whether in respect of these shares or otherwise.

D (8) Matheson's claim against Mr Hulme is not a claim in respect of the shares, but a claim to be indemnified in the sum of £1,049,731.30 in respect of transactions alleged to have been wrongfully effected by Mr Hulme for clients including Captain Ismail.

(9) Accordingly, no issue as to the title to or ownership of these shares is raised by Matheson by its pleading in the Matheson Action.

E Mr Mark Ferbrache for Matheson argued that no order should be made, other than an order lifting the Mareva injunction from these shares, so that it would be open to Matheson to apply to the Royal Court for a fresh Mareva injunction in respect of these shares. He argued that as a result of Mr Lovett's fifth affidavit full disclosure has now been made by Matheson, and the defects in their previous disclosure to the Royal Court have been remedied. Following from this argument attention was again directed to a comparison of Mr Lovett's fourth and fifth affidavits.

F Para.2(16) and (17) of his fourth affidavit were quoted in Mr Southwell's judgment. The words there used by Mr Lovett appeared to indicate that, shortly after the agreement of 29 July 1996 was made, he decided to register all the shares in the name of Matheson's nominee company, Chardon, because "by then" (i.e. by early August 1996) "it was becoming clear that Mr Hulme had been in serious dereliction of his duties to Matheson", and Matheson's Jersey lawyers had advised (apparently by early August 1996) that the agreement of 29 July 1996 was not binding on Matheson because procured by fraud. That Mr Lovett's story was that Matheson had discovered Mr Hulme's defalcations early in August
G 1996 was confirmed by Matheson's skeleton argument in reply before the Court of Appeal, at para.17.

However in his fifth affidavit Mr Lovett told a different story, which was summarised in Mr Southwell's judgment. The story in his fifth affidavit was that he did not know of Mr Hulme's alleged breaches of fiduciary duty either in early August 1996 or by 16 August 1996, and that knowledge of those breaches reached him only late in August 1996, or even after the last of the six tranches of shares had been paid for at the beginning of September 1996, and it was then that he took legal advice from Matheson's Jersey lawyers on or shortly after 4 September 1996.

As Mr Peter Ferbrache for Mrs Hulme pointed out, Mr Lovett has still not told a consistent story of the important events leading up to the application for the Mareva order. This was one of the matters which the Court of Appeal took into account in refusing to make the fresh Mareva order which Matheson had sought. As was observed by this Court in the course of argument on the first application, for Matheson to seek a fresh Mareva order from the Royal Court, in circumstances in which an application for such an order had been made to, and refused by, the Court of Appeal, would have been entirely inappropriate, and might indeed have been regarded as an abuse of the process of the Court.

As already mentioned, Mr Mark Ferbrache also sought to argue that for the Court of Appeal to order transfer of the shares to Mr Heron (or to Mrs Hulme) would involve prejudging issues as to ownership of the shares and whether the agreement of 29 July 1996 was obtained by Mr Hulme by fraud. As this Court has already observed, no question as to ownership of the shares or whether the agreement was obtained by fraud is raised by Matheson in their pleaded case. This ground of argument is accordingly misconceived.

Matheson's application for reconsideration of the form of Order is refused. There should be no alteration to the Order which this Court made on 16 October 1997.

Costs

It was common ground between the Advocates Ferbrache that

(1) Mrs Hulme should be paid by Matheson the costs of her intervention and her appeal to this Court; and

(2) the relevant powers in relation to costs are those set out in Rule 48 of the Royal Court Civil Rules 1989 and S.18 of the Court of Appeal (Guernsey) Law 1961.

What was in issue between them was whether Mrs Hulme should be paid her costs on the basis provided by the Royal Court (Costs and Fees) Rules 1981 (as Matheson contended) or on a full or partial indemnity basis (as Mrs Hulme contended).

Rule 48 provides (so far as relevant):

> "48. (1) The Court may in any action -
>
> (a) make such order as to the costs of the proceedings, or of any stage of or application in the proceedings;

(b) order any party to give security for costs in such amount, on such terms and in such manner, as the Court thinks just.

(2) [deals with security for costs]

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

(4) The circumstances referred to in paragraph (3) are as follows -

(a) where, in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than on the basis provided by the Royal Court (Costs and Fees) Rules, 1981; or

(b) where any party has pleaded or otherwise pursued or defended an action, claim or counterclaim unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court.

(5) In the event of any difference or dispute between the parties as to the costs recoverable under an order of the Court under para.(3), the difference or dispute shall be referred to Her Majesty's Procureur, whose decision is final."

Mr Peter Ferbrache for Mrs Hulme submitted that this is an appropriate case for an order for full indemnity costs, within sub-rules (3) and (4), (i) because of the special circumstances of this case, and (ii) because Matheson's conduct falls within sub-rule 4(b).

The Advocates made brief reference to the Rules of the Supreme Court of England and Wales, under which costs orders may be made on a "standard basis" or an "indemnity basis", and to p.1057 of the Supreme Court Practice 1997. It is apparent from the English decisions that the discretion to order costs to be taxed on an indemnity basis is regarded as one not to be fettered or circumscribed beyond the requirement that exercise of the discretion must be "appropriate". Many of the relevant cases were cited by Mance J in Cepheus v GRE [1995] 1 Lloyds Rep 647 including the observations of Millett J in Macmillan v Bishopsgate (unreported, 1994) in which he referred to the English Court of Appeal's decision in Disney v Plummer noted at [1991] Fleet Street Rep 165, and summarised the correct approach in English cases as follows:

> "The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion to what is at stake, may

> also expect to be ordered to pay costs on an indemnity basis if they lose, and to have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be [fettered] or circumscribed beyond the requirement that taxation on an indemnity basis must be "appropriate"."

This Court is here concerned with the application of Royal Court Rule 48. The discretion under this Rule is also not to be fettered or circumscribed, and is a discretion to be exercised judicially in the light of the particular facts of each case.

Reference was made to two Guernsey authorities. In Main v Laughton [1995] 20.GLJ.62 the Court of Appeal considered whether full indemnity costs should be ordered against an appellant who withdrew his longstanding appeal shortly before the date for the appeal hearing. This Court cited Rule 48, and also S.18(1) and (2) of the Court of Appeal (Guernsey) Law 1961. This Court stated (at p.65C-D):

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

This Court went on to order a full indemnity in view of the appellant's conduct which had been "wholly unreasonable".

The second case was Belair v Brouard [1994] 17.GLJ.35. In that case the Deputy Bailiff had to consider an application for full indemnity costs where the plaintiff had obtained an ex parte interim injunction, which was discharged on an inter partes hearing. The plaintiff and his advocate had failed to discharge the heavy burden on persons seeking ex parte injunctions to see that the affidavit evidence was correct. If the true facts had been known to the Deputy Bailiff he would not have been likely to grant the injunction in the first place. Accordingly full indemnity costs were ordered.

In the judgment of this Court an order for full indemnity costs is both justified by the terms of Rule 48 and appropriate in the present case because (inter alia)

(1) There was a serious failure on Matheson's part to make the full and frank disclosure required to be made when seeking a Mareva order ex parte.

(2) If full and frank disclosure had been made, it is probable that no Mareva order would have been made, and Mrs Hulme would have incurred no costs at all.

(3) The disclosure now made by Matheson is still not complete, having regard to the discrepancies already referred to between Mr Lovett's fourth and fifth affidavits. In one or the other of these affidavits Mr Lovett has not set out the true story of events within Matheson.

(4) The conduct generally of Matheson as described in this and the earlier judgment is such as to make it appropriate to mark this Court's disapproval. The facts that Matheson as stockbrokers, having entered into the agreement of 29 July 1996, almost immediately began not to perform that agreement without telling Mr and Mrs Hulme, thereby securing payment by Mrs Hulme, and began to make arrangements which had the effect that they could purportedly secure a Mareva order over the shares on the footing that they held the shares for Mr Hulme, are facts which, coupled with the misuse of the Court's procedure, call for a special costs order in favour of Mrs Hulme.

(5) The conduct of Matheson was plainly unreasonable within Rule 48(4)(b), and might also be described as an abuse of the process of the Court.

(6) The circumstances of this case are special, within Rule 48(4)(a), having regard to the facts set out in both judgments.

In our judgment this is a paradigmatic case for the making of an order for full indemnity costs, because there was no justification for putting Mrs Hulme to the expense of any costs at all. Accordingly this Court orders that Matheson pay Mrs Hulme's costs of her intervention on a full indemnity basis. This must include (inter alia) all costs of her application to the Royal Court, of all the hearings before the Royal Court including the application for leave to appeal, of her application for leave to this Court, of her appeal to this Court and of all the hearings before this Court including the application for leave to appeal. These costs are to be taxed (if not agreed) and paid forthwith.

As noted in Mr Southwell's earlier judgment, Mrs Hulme brought a separate action for recovery of the shares. She was led into doing this by strong indications by the Deputy Bailiff during argument before him and in his judgment that such a separate action was necessary. The view of this Court is that such a separate action was unnecessary, as also noted in Mr Southwell's judgment. It appears that Matheson by Mr Mark Ferbrache tacitly supported the Deputy Bailiff's view. The question who should pay the costs of this separate action is not now before this Court. Mr Mark Ferbrache, however, indicated that when this question arises for decision he will argue that Mrs Hulme should pay Matheson's costs of the separate action because it was an unnecessary step. It will be appropriate that the Court which has to decide this question should be informed of the view of the Court of Appeal that

(1) Matheson misconducted themselves in the manner set out in these two judgments;

(2) in the absence of that misconduct there would have been no need for Mrs Hulme to take any legal steps at all;

(3) Mrs Hulme was led to bring her separate action by Matheson's misconduct, and by the Deputy Bailiff's indications which Matheson tacitly supported.

Leave to appeal to the Judicial Committee of the Privy Council

The judgment of the Court of Appeal concerns an entirely interlocutory matter.

Section 16 of The Court of Appeal (Guernsey) Law 1961 provides:

"16. No appeal shall lie from a decision of the Court of Appeal under this Part of this Law without the special leave of Her Majesty in Council or the leave of the Court of Appeal except where the value of the matter in dispute is equal to, or exceeds, the sum of five hundred pounds sterling."

In Havilland Estates Ltd v Channel Island Ceramics Ltd (No.2) [1993] 15 Guernsey Law Journal 53 the Court of Appeal held that under S.16 the Court of Appeal has no jurisdiction to grant leave to appeal to the Privy Council from an interlocutory decision of the Court of Appeal or any decision which is not a final or definitive decision on the matters in issue between the parties.

In reaching this conclusion as to the correct interpretation of S.16 in Havilland Estates the Court of Appeal had regard to a similar decision on a similar statutory provision in Jersey by the Court of Appeal of Jersey: Forster (trading as Airport Business Centre) v Harbours and Airport Committee [1990] Jersey Law Rep 82. The Court of Appeal of Jersey reached its conclusion in part by reference to the decision of the Privy Council in Esnouf v Attorney-General of Jersey (1883) 8 App Cas 304. In Esnouf the Privy Council was concerned with a criminal matter, and with the wording of an Order in Council of 1572 relating to Jersey (and not to Guernsey) in which it was provided that

> "no appeal in any cause or matter great or small be permitted or allowed before the same matter be fully examined and ended by definitive sentence."

In Esnouf it was held that a decision as to mode of trial was not a "definitive sentence".

Mr Mark Ferbrache argued that in Havilland Estates the Court of Appeal wrongly relied on the Jersey cases. The relevant words in S.16 are "a decision of the Court of Appeal". He argued that these words are not confined to "final decisions", and are wide enough to encompass "interlocutory decisions". Accordingly the Court of Appeal of Guernsey has jurisdiction, he said, to grant leave to appeal to the Privy Council from this or any other interlocutory decision.

In the judgment of the Court, Havilland Estates was correctly decided, and we will follow that decision, even though not bound by it. In S.16 the words "a decision of the Court of Appeal" do not mean any decision of the Court of Appeal and are confined to decisions which are final in effect.

In interpreting S.16 it is permissible and necessary to use a little commonsense. If "a decision of the Court of Appeal" included any decision whether interlocutory or final, and if the value of the matter in dispute were £500 or more (as it is in most instances), there would be a virtually automatic right of appeal to the Privy Council. This could mean that the Privy Council would be flooded with appeals from the Guernsey Court of Appeal from interlocutory decisions, however trivial. In our judgment commonsense shows that this cannot have been the intention of the draftsmen of S.16 which forms part of legislation designed to interpose a Court of Appeal between the Royal Court and the Privy Council, and thereby to relieve the Privy Council of part of the burden of appeals otherwise falling to be decided by the Privy Council. If the interpretation for which Matheson contends were correct, the 1961 Law

A would have imposed a much greater burden on the Privy Council, rather than relieving in part the burden previously falling upon it.

The limitation on the right of appeal to the Privy Council may be by express words or by necessary intendment; compare the decision of the Privy Council in De Morgan v Director-General of Social Welfare on 7 October 1997 on petitions for special leave from New Zealand (The Times, 4 November 1997). This Court entertains no doubt that the limitation of the jurisdiction of this Court to
B grant leave only in relation to final decisions is to be found by necessary intendment in S.16 of the 1961 Law.

This Court, therefore, has no jurisdiction to grant leave to Matheson to appeal to the Privy Council from its present interlocutory decision.

Furthermore, if (contrary to this conclusion) this Court had jurisdiction to grant leave, this Court would not have granted leave. This Court's decision is based on the application of well-established principles to the particular facts
C involved in Matheson's conduct of these proceedings. There is no far-reaching question of law or matter of dominant public importance, requiring the attention of the final appellate tribunal.

Stay of Execution

Mr Mark Ferbrache for Matheson applied for a stay of execution pending an application to the Privy Council for special leave if Matheson were minded so
D to apply.

The well-settled principle is that in a case in which it is realistic to suppose that the Judicial Committee may grant special leave, it may be appropriate for the Court of Appeal to grant a stay of execution on suitable terms, so as to ensure that the appeal, if special leave were granted, would not be rendered nugatory.

E This Court has already set out the reasons why it would not have granted leave to appeal, even if it had concluded that it had the necessary jurisdiction. These are also reasons why it is wholly unrealistic to suppose that the Judicial Committee would grant leave. It is not the practice of the Judicial Committee to grant leave from run-of-the-mill interlocutory decisions involving merely the application of well-established principles to particular facts. There is here no important question of law or matter of great public importance for the Privy Council to decide: see the cases cited in Halsbury's Laws of
F England, volume 10 - Courts, para. 785. In this Court's view, the likelihood of the Judicial Committee granting special leave is remote in the extreme. To allow Matheson to remain any longer in control of the relevant shares would be to perpetuate for a substantial further period control which Matheson achieved only by their misconduct vis à vis the Courts of Guernsey and vis à vis Mrs Hulme. In these circumstances it would not be appropriate to grant a stay of this Court's order.

G **Application for alteration to order refused; order for full indemnity costs; leave to appeal to Privy Council refused; application for stay of execution pending application to Privy Council for special leave refused.**

81. [CIVIL DIVISION - APPEAL NO. 237]

1997 JULY 23

KATHLEEN EDNA SMITH **Appellant**
v.
VINCENT ROGER HELMOT and SONIA ELIZABETH HELMOT **Respondents**

Before: CARLISLE, GLOSTER and BELOFF, JJ.A.

Costs - full indemnity costs - stay of enforcement of order pending appeal

See paragraph 45.

The Appellant in person.
D.G. Le Marquand, for the Respondents.

CARLISLE, J.A.: The parties to this action, Mr. and Mrs. Helmot and Miss Smith, are neighbours and were, apparently, on good terms until 1992 whereafter unfortunately they fell out. On 30th April of this year the Royal Court, on an action brought by Mr. and Mrs. Helmot, as Plaintiffs, made a declaration in their favour as to the line of the boundary between the parties, and also awarded costs against the Defendant, Miss Smith, on a full indemnity basis.

It is accepted that Miss Smith has a right to appeal to this Court and on 12th May 1997 she gave informal notice of her intention to do so, and has indicated in that notice her intention to call further evidence at that appeal, evidence which she did not rely on in the Royal Court. I think I have adequately explained to Miss Smith how she should go about that, namely, that that evidence must be put into affidavit form, served on the Court, and served on the Respondents.

The applications before this Court today, are twofold. An application by Miss Smith to stay the declaration pending the hearing of the appeal - the Bailiff, to whom that application had been made, having specifically referred that application to this Court for a decision - and an application by the Respondent for security for costs.

As I say, it is apparent from what we have told, that the dispute over this boundary has been going on since about 1992, and we have been told by Mr. Le Marquand, and we have seen an affidavit to the effect, that the Plaintiffs, Mr. and Mrs. Helmot obtained, in fact, an injunction restraining Miss Smith from using this land as long ago as 2nd May 1996.

The present situation is that the Helmots have a declaration of the Court in their favour, and we see no justification for granting a stay on that declaration today. Mr. Le Marquand, on behalf of his clients, having made it clear that they do not, prior to the hearing of that appeal, intend to do any building or act in any other way which would do irreversible damage to that property, or affect the evidence as to the location of the boundary, pending the outcome of the appeal, we see no reason why the declaration given by the Royal Court should be stayed pending this appeal. We see no reason why the

A Helmots, should they wish, should not delineate the line of the boundary as granted by the Court by putting up the stakes that they have.

So far as security for costs is concerned, the situation is that the Court below ordered full indemnity costs to be paid by the Appellant to the Respondents in the sum of £8,566 and the Respondents asked also for security for costs for the hearing before this Court. We are prepared to grant, and think it right in all the circumstances to grant, the order for security for
B costs so far as it relates to the likely costs of the hearing of the appeal, and therefore we make an order for security for costs in the sum of £2,500. On the other hand, we propose to stay the enforcement of the order for costs in the Royal Court pending the outcome of the appeal and so as to ensure there can be no delay in pursuing the appeal so as to avoid paying the costs, we do so either until the hearing of the appeal or the end of this year, 31st December 1997. If the appeal is not heard by that date the stay on the enforcement of the costs of the Royal Court hearing is then lifted.

C So, Miss Smith, you will have to give security for costs of £2,500 and you must obey the declaration of the Royal Court pending the hearing of the appeal, and I do point out to you that it is very much in your interests that you should obey that order in the meantime, however strongly you may disagree with the declaration that was made.

D **Stay of declaration refused; order for security for costs granted; enforcement of order for costs stayed pending the outcome of the appeal or 31st December, whichever was the earlier.**

82. [CIVIL DIVISION - APPEAL NO. 239]

NOVEMBER 6

E **GUERNSEY ANNANDALE TILE COMPANY (1980) LIMITED** — **Appellant**

v.

RICHARD JOHN HAINES — **Respondent**

Before: SOUTHWELL, COLLINS and BAILHACHE, JJ.A.

F **Péremption d'instance - action for personal injury - power of court to restore to Rôle after action has become périmé**

See paragraph 48.

F.J. Haskins, for the Appellant
J.P. Greenfield, for the Respondent.

G SOUTHWELL, J.A.: In this action Mr Haines seeks to recover damages from Guernsey Armandale Tile Company (1980) Limited ("GATC"), his employers, for serious personal injuries which he suffered on 12 November 1991, at the age of 22, when a fork-lift machine that he was driving fell over on top of him. His injuries were so serious that his left leg had to be amputated. The claim, if well founded, is a large one, amounting to nearly £300,000. A letter before

action was sent on 17 June 1994. The action was by Act of the Royal Court dated 3 November 1994 placed on the pleading list. A summons was issued for defences to be filed in December 1994. Defences were delivered in draft (but not formally filed) containing exceptions de forme requesting further particulars of the cause, as well as niances and prétentions. For Mr Haines it was accepted that the particulars requested should be given. The summons for defences was withdrawn, apparently by mistake, as Mr Haines' advocate had intended that the summons should be adjourned generally. Thereafter he seems to have acted on the footing that because it had been adjourned, there was no danger of the action becoming périmé (after a year and a day of inactivity). It was submitted by Mrs. Haskins who appeared for GATC (and who put GATC's case cogently before us) that this mistake ought not to have been made, because the contemporaneous letter made clear that withdrawal, a positive act by Mr. Haines' advocate, had taken place.

At this point it is right to mention that, in part no doubt as a result of the accident, Mr Haines was not in 1994, and is not now, in a position fully to fund the litigation. There is no system of legal aid in civil matters in Guernsey. It was necessary for Mr Haines to find an advocate willing to take on his case on extended credit. The Deputy Bailiff in his judgment drew attention also to the potential availability of funds to help impecunious plaintiffs to obtain medical and other reports.

Between about August 1994 and August 1995 Mr Haines was in prison. Though he was seen regularly by his advocate, it was not possible to take the action forward, because, for example, detailed quantification of his claim could not be achieved with any certainty.

After Mr Haines' release from prison, he was on parish relief until, early in 1996, he obtained employment. By the summer of 1996 this employment had become permanent. He was then going and had continued to go to England on a regular basis for further attention to the leg stump and the artificial leg, and assessment of the effects of his injury.

On 2 August 1996 Mr Haines' advocate wrote to the advocate for GATC with the requested particulars of his claim and asking for defences within 21 days. On 3 September 1996 GATC's advocate wrote stating (inter alia):

> "On 22nd June 1995 the matter was called on to the Role and went rayée and the matter has now become perempt. Furthermore, the limitation period has now expired as the alleged incident took place on 12th November 1991.
>
> In these circumstances, we would strongly oppose any application you may make to restore this matter."

On 12 December 1996 the advocate then acting for Mr Haines applied to the Royal Court for an order that the action be restored to the Pleading List pursuant to Rule 50 of the Royal Court Civil Rules 1989, which reads:

> "Where an action becomes périmé -
>
> (a) the Court's powers under Rule 48 are not prejudiced; and

A (b) any party to the action may apply to the Court for an order that the action be restored."

The reference to the matter being "called on to the Rôle" and becoming "rayée" is explained in this way. After a matter has been for six months on the pleading list, the action is listed by the Greffier on the usual notice board in the Royal Court foyer, with a red "R" against it. This is the Greffier's notice indicating that the matter will become "rayée" if no steps are taken when the action is next called before the Court on the date specified in the B list. No steps were taken and the action became "rayée" on 22 June 1995. All that this means is that on that date the action was removed from the pleading list. But clearly when that occurred it was a form of warning to Mr Haines' advocate that time had gone by, and he should be considering whether steps needed to be taken.

After a year and a day, in November 1995, the action became "périmé", or out of time. This is a different concept from prescription. Before 1989, if an action C became périmé at a time when the claim was not prescribed, a fresh action could be brought; but if it became périmé at a time when the relevant prescription period had run, that was the end of the matter: the claim was finally prescribed and could not be renewed. An important change was made in 1989 by the introduction of Rule 50 which I have already cited. From that time the Court has had power to restore the existing action (avoiding any need for a new action to be started), whether or not the prescription period has run.

D The concept of péremption after inaction for a year and a day appears from the ordinance and the texts to which we have been referred:

(1) Ordonnance au sujet de la Péremption d'Instance et du Rôle des Causes à plaider (1848, 1850 and 1851), Article 4:

"4. Toute Acte d'Inscription sur le Rôle des Causes à plaider sera périmé par la laps d'an et jour."

E

(2) Gallienne, Traité de la Renonciation par Loi Outrée et de la Garantie (1845), p.312 et seq: see at pp.312-313:

"Cette espéce de prescription n'éteint cependant pas le droit d'action du demandeur; elle ne fait qu'opérer l'extinction de la procédure, et a l'effet de remettre les parties dans la même position, l'une envers l'antre, qu'elles l'étaient avant que F l'instance fût entamée; le droit d'action, et la demande faite en justice, qui est l'exercice de ce droit, ne doivent pas être confondus, car la négligence commise par ne pas poursuivre l'action ne doit pas en faire perdre le droit. Il est néanmoins un cas où la péremption d'instance éteint, indirectement, tant le droit d'action que la procedure ..... il est de principe qu'une interpellation judiciaire interrompt la prescription; mais quoiqu'une demande soit intentée en justice, si le demandeur discontinue sa procédure et que la péremption devienne acquise, apré que le temps pour prescrive le G droit d'action soit accompli, - l'interpellation faite ne produit aucun effet, quant à l'interruption de la prescription."

(3) Terrien, Commentaires du Droit Civil (1574) chapter XXXIX, pp.401-402. A

The effect and operation of Rule 50 has not yet been considered by the Court of Appeal. But it has been considered by the learned Deputy Bailiff in three cases:

(A) Saromaje Ltd v Janet Holdings Ltd (15.GLJ.53). In that case the action became périmé only six days before a further step was attempted by the plaintiff's advocate, and not surprisingly the discretion under Rule 50 was exercised in favour of restoration of the action. B

(B) Le Moigne v Hargetion (20.GLJ.51). In that case the accident was in November 1986. An action was started within the three year prescription period. The action became périmé in April 1991. It was not until February 1996 that the defendant's advocate told the plaintiff's advocate that the action was périmé and that he would oppose any application to restore. The Deputy Bailiff rejected any comparison with applications to strike out for want of prosecution, because, as he rightly observed, in those applications the burden is on the defendant to show an appropriate case for striking out, whereas under Rule 50 the burden is on the plaintiff to show an appropriate case for restoration of the action. In that case ten years had gone by since the accident, and over five years since the action became périmé. But the Deputy Bailiff held that the delay had mainly resulted from the continuing unstable medical condition of the plaintiff. As he pointed out, in such a case there are bound to be delays. The Deputy Bailiff then referred at length to, and drew analogies from cases in England and Wales arising from the County Court rules which now provide for actions to be struck out automatically if certain steps are not taken within certain prescribed periods, in particular, Rastin v British Steel [1994] 2 All ER 641 CA. I will return to these cases later, but in the context of the strong caveats that the circumstances in Guernsey, including the absence of a civil legal aid scheme, are different, and that the English statutory requirements for County Court actions are also substantially different from the Guernsey common law principles as to péremption. These differences were set out by the Deputy Bailiff at pp.6-7 of his judgment. He ordered restoration of the action under Rule 50. C D E

(C) The present case, in which again the Deputy Bailiff ordered restoration. I will turn to his judgment in the present case in a moment.

Before I do that, it is necessary to set this appeal in context. Rule 50 gives to the Royal Court a discretionary jurisdiction to order the restoration of actions which have become périmés or have in other circumstances been removed from the Roll. That discretion is not fettered by the terms of Rule 50. It is for the plaintiff to satisfy the Royal Court that in all the circumstances it is just to exercise the discretion in the plaintiff's favour. I emphasise the words "in all the circumstances". In each case the circumstances will be different, and it would be wrong for the Court of Appeal to impose fetters on the exercise of the discretion which have not been included in Rule 50 itself. F G

Naturally the Court will take into account as part of the relevant circumstances:

(1) the position of the plaintiff, and the effect on the plaintiff and the plaintiff's case if the action is not restored;

(2) the history of the action, and the activity or inactivity of the plaintiff, and of the plaintiff's legal representatives, which have led to the action becoming périmé;

(3) the position of the defendant, and the effect on the defendant and the defendant's case if the action is restored;

(4) any other special circumstances relating to the action and its conduct by the parties, including such matters as settlement discussions or any express or implied agreement not to take further steps in the action for the time being;

(5) the general circumstances in Guernsey relating to the relevant class of litigation, including, for example, any difficulties in securing legal representation for impecunious plaintiffs, or in securing medical reports for plaintiffs suing for personal injuries.

In my judgment this is the correct approach to applications under Rule 50 to be adopted by the Royal Court and the Court of Appeal, and it would be an incorrect approach simply to adopt the principles applied in English cases in relation to the automatic striking out of County Court actions. The statutory provisions are entirely different. The general circumstances in England and Wales are different too, since there is (at present) a well established system of legal aid for impecunious plaintiffs, and it is established that legal aid cases are, in general, to be treated no differently from cases which are privately, not publicly, funded. In the absence of a system of civil legal aid in Guernsey, it is necessary to take a rather different approach to that adopted in England and Wales.

In his judgment in the present case the Deputy Bailiff adopted a correct approach to the exercise of his discretion. He considered all the matters I have referred to, including

(a) the delays by Mr Haines' advocate, and his responsibility for those delays;

(b) whether it was appropriate to delay until after the physical and mental condition of Mr Haines was stabilised;

(c) the effect on Mr Haines' and GATC's respective cases of the delay, on which he correctly concluded that the delay is more likely to have adverse effect on Mr Haines' case (the primary evidential burden in the action being on Mr Haines);

(d) the impecuniosity of Mr Haines;

(e) the general circumstances affecting impecunious plaintiffs, especially those who are suing for damages for personal injury and whose earning capacity has been adversely affected by the injuries for which they are suing.

The first ground of appeal relied on by Mrs. Haskins was that the Deputy Bailiff had not recognised in his judgment in this case that the burden was on Mr. Haines to show that this was a case for restoration under Rule 50. It is true that the Deputy Bailiff did not expressly state that the burden was on Mr. Haines. But he had correctly set out the burden of proof in Le Moigne, and his references to Le Moigne, and indeed the whole tenor of his judgment, show in my judgment that the Deputy Bailiff had this point well in mind. A

The second ground of appeal was that the Royal Court ought to have laid down "threshold criteria" to be met by a plaintiff seeking restoration under Rule 50, on the lines of the threshold criteria laid down by the English Court of Appeal in relation to English County Court proceedings, and ought to have concluded that Mr. Haines did not meet any such criteria. B

As already appears, I do not accept this submission. I have set out some of the matters which the Royal Court will need to take into account when considering Rule 50 applications. But the Royal Court's discretion under Rule 50 is not to be fettered by judge-made criteria which the legislature has chosen not to impose. C

The circumstances in England and Wales are entirely different from those in Guernsey. There is a large number of County Courts and a much larger number of Circuit and District Judges (or deputies) sitting in those Courts. If there is to be any reasonable degree of consistency of decision making, there has to be a reasonably consistent judicial approach. In the Royal Courts of Guernsey the number of Judges is small enough to achieve this consistency without any difficulty, and without any need for the Court of Appeal to impose rigid criteria. D

I also reject the analogy of English cases in which the Courts have had to decide whether or not to extend the limitation period of 3 years in cases involving personal injuries. The British parliament has laid down a detailed statutory framework, and the reported cases concern the way in which that framework is to be applied. Mrs. Haskins referred to Nash v Eli Lilly & Co [1992] 3 Med. LR 353 English Court of Appeal, concerning the multi-party litigation about the drug Opren, in this connection. In my judgment those cases have no relevance to the decision which the Royal Court had to make under rule 50. E

Thirdly, Mrs. Haskins, drew attention to the detailed history of this matter, and the rather surprising extent of the inaction on the part of Mr. Haines' then advocate. These were all matters which the Deputy Bailiff took fully into account. F

Fourthly, Mrs. Haskins sought to persuade us that Mr. Haines' case is a weak case, and that this is a factor we should take into account. All that this Court has for the purposes of assessing the strength of Mr. Haines' case is the cause and the draft défenses. This Court could not possibly conclude, merely on the basis of legal pleadings, that Mr. Haines has a weak case. Indeed I am unpersuaded that his case is a weak one. G

Fifthly, Mrs. Haskins submitted that Mr. Haines as the plaintiff was bound to conduct his action positively, and had failed to discharge the burden on him of showing that he had taken any or any sufficient positive steps. She referred

A in this connection to English House of Lords decisions in cases in which it is sought to strike out for want of prosecution. In those cases the burden is on the defendant to show want of prosecution and prejudice: in the present case the burden was on Mr. Haines as plaintiff to show a sufficient basis for restoration. Little helpful analogy can be drawn from those cases.

Sixthly, Mrs. Haskins referred to the position of GATC as defendants. If the case is restored they will have lost a prescription defence, but that is one
B reason why Rule 50 was made, in order to enable the Court to restore an action even when the prescription period has expired. She stated that the defendants would have little hope of recovering their costs if they won, memories are likely to have faded, and therefore the defendants will suffer more than the plaintiff, Mr. Haines. These were factors fully taken into account by the Deputy Bailiff.

Having heard Mrs. Haskins' excellent submissions, this Court did not think it
C necessary to call on Mr. Greenfield as Mr. Haines' present advocate.

In my judgment it has not been shown by GATC that the Deputy Bailiff erred in the exercise of the discretion under Rule 50. On this appeal the burden is on GATC to show, not merely that the Royal Court made a decision with which the Court of Appeal might reasonably disagree, but rather that its decision was so plainly wrong that the only appropriate conclusion the Court of Appeal could reach is that the Deputy Bailiff erred in the exercise of the discretion. This burden GATC has not discharged. On the contrary my conclusion is that the
D exercise of the discretion by the Deputy Bailiff was a correct one. The appeal should, in my judgment, be dismissed with costs.

Appeal dismissed.

83. [CIVIL DIVISION - APPEAL NO. 241]

E 1997 JULY 23

HERBERT FREDERICK GAUDION
and **Applicants**
RUBY ADA GAUDION

v.

F **WEARDALE LIMITED** **Respondents**

Before: BUCKLOW, GLOSTER and BELOFF, JJ.A.

Appeal to Court of Appeal - application for leave to appeal out of time - factors to be taken into account - application for further stay of execution of eviction pending appeal

G See paragraph 3.

The Applicants in person
P.T.R. Ferbrache, for the Respondent

GLOSTER J.A.: This is an application by Mr. and Mrs. Gaudion, first for leave

to appeal out of time against an Order of the Royal Court dated 28th January 1997, ordering that Mr. and Mrs. Gaudion be evicted from La Cache Farm and other property, their home for over 50 years, but staying the execution of such order for 6 months; and secondly, for an extension of the stay from 28th July 1997, until after the hearing of the proposed appeal. A

Mr. and Mrs. Gaudion have been unrepresented before this Court and Mr. Gaudion has appeared in person on his own and on his wife's behalf. Mr. Gaudion is an elderly gentleman, who is somewhat infirm. B

The respondent is Weardale Limited ("Weardale") which has been represented by Advocate Ferbrache. It is accepted by Advocate Ferbrache that Mr. and Mrs. Gaudion would not have needed leave to appeal against the eviction order had they appealed in good time, and that accordingly, it is a matter for this Court's discretion as to whether time for appealing should be extended pursuant to Rule 17(1) of the Court of Appeal (Civil Division)(Guernsey) Rules 1964, from 28th February (which was the date on which notice of appeal should have been lodged by Mr. and Mrs. Gaudion) to 11th July when their proposed notice of appeal was actually received by the Greffe, i.e. some 5½ months late. C

In deciding whether to exercise its discretion to extend time for lodging notice of appeal, the Court has to consider the following matters:-

1. Whether Mr. and Mrs. Gaudion have a sufficiently arguable appeal against the eviction order. D

2. Whether as a matter of discretion an extension of time should be granted. This in turn involves a consideration of-

   (i) the explanation given by the Gaudions for their failure to lodge notice of appeal in due time and their subsequent delay in so doing;

   (ii) any prejudice to the plaintiff, Weardale Limited, as a result of the late service of notice of appeal and the consequent delay in the hearing of the appeal; and E

   (iii) any other relevant factors.

As to the application for the stay of execution of the eviction order pending appeal, it is accepted by Advocate Ferbrache that if the Court, in the exercise of its discretion, were to grant an extension of time for lodging notice of appeal then he could not and, indeed, would not, resist a stay of execution of the eviction order pending the hearing of the appeal. F

Much of the relevant factual history relating to this matter is set out in the judgment of the learned Bailiff delivered in summary judgment proceedings brought by the Monument Trust Company Limited against Mr. and Mrs. Gaudion, dated 10th June 1996, and in the judgment of this Court on 18th October 1996, on appeal from the Bailiff's refusal to grant summary judgment to Monument.

Since this is not the hearing of the appeal, but merely an application for an extension of time, I need do no more than briefly set out a few salient background facts. G

A On 22nd December 1994, the Monument Trust Company Limited (which I shall refer to as "Monument") provided a loan facility of £800,000 to Mr. and Mrs. Gaudion as borrowers, under the terms of a loan agreement of that date. I shall refer to that agreement as "the Monument Loan Agreement." The purpose of the facility was said to be to enable the borrowers, Mr. and Mrs. Gaudion, to repay monies which they owed to a previous lender, Sigmet Inc., of Monrovia, and the Royal Bank of Scotland.

B The relevant clauses of the Monument Loan Agreement for present purposes are clauses 3, 4, 5, 6, 7 and 12:-

"3. Period — The Loan shall be for a fixed period until 9.00 a.m. on the Sixteenth day of December 1995 and the Lender does not bind itself to give any concessions to the Borrowers as respects interest or other costs or charges incurred by the Borrowers under the terms of the Loan Agreement or the Agreement in respect of any earlier repayment of the Loan.

C

4. Security — The Loan shall be secured to the extent provided for under the terms of the Agreement.

5. Interest — The Borrowers shall pay interest on the Loan at the rate of 16.5% above the base lending rate of the Royal Bank of Scotland Plc from time to time providing that

D

the minimum aggregate payment of interest shall not be less than £90,000 which interest shall be paid to the Lender without deduction together with the repayment of the Loan at the time and date provided by Clause 3 hereof unless the parties shall otherwise agree in writing upon earlier repayment. Interest shall be calculated at 3 monthly intervals, commencing from the date hereof and capitalised on each such 3 monthly

E

anniversary. The written statement of the Lender as to the amount of interest payable pursuant to this Clause shall in the absence of manifest error, be conclusive.

6. Arrangement Fee In addition the Lender shall receive from Weardale Limited or the Borrowers an arrangement fee equal to Thirty Percent of the proceeds of sale of any realty which is sold pursuant to the terms of

F

Clause 12 and/or Clause 3 of the Agreement and/or at any time hereafter, such sum to be calculated after all amounts due under this Loan in respect of capital, interest, fees and all costs incurred in affecting the dale of such realty have been met in full, the said arrangement fee to be payable immediately upon completion of the sale of such realty PROVIDED THAT for the purposes of this Clause separate sales of parcels of the realty shall be aggregated.

G 7. Repayment — The Loan will be repaid by the Borrowers to the Lender at the time and date specified in Clause 3 of the Agreement PROVIDED ALWAYS that upon the sale of any realty by Weardale Limited pursuant to the terms of Clause 3 of the Agreement the proceeds of such sale shall be exclusively

applied forthwith in reduction of the Loan and the charges in respect of interest, arrangement fee and costs incurred in respect thereof unless the parties shall otherwise agree in writing. Such repayment shall be made in full without any set-off or counter claim and free and clear of and without any deduction whatsoever WELL UNDERSTOOD that any liability to withholding tax whether upon interest or otherwise shall be for the account of and be paid in full by the Borrowers.

.....

12. Sale of Realty The Borrowers undertake that they will use their best endeavours to procure the sale of the realty presently owned by Weardale Limited and listed in the First Schedule to the Agreement at the earliest available opportunity and that in so doing they will take all such steps as are necessary to facilitate such sale prior to the expiry of the period for repayment of the Loan for the best price reasonably attainable. This Clause and the related provisions of the Loan Agreement and the Agreement shall survive any expiry or termination of this Loan Agreement and/or the Agreement."

Monument, according to affidavits sworn on its behalf by a Mr. Timothy Simon Howarth, an English solicitor, is effectively an Ernst & Young company. Mr. Howarth and Ernst & Young apparently had a mutual client who, as Advocate Ferbrache informed us during the course of the hearing, was a Mr. Karl Erb. He, or one of his trusts, made available the facility of £800,000 which Monument lent to the Gaudions. According to certain written submissions made by Monument in the proceedings before this Court on the summary judgment application, Monument "acted throughout as nominee of Mr. Erb as undisclosed lender."

Ernst & Young, and its senior partner, Mr. Harlow, as well as acting for Mr. Howarth's client, had acted as the Gaudions' accountants for some years. As well as the Monument Loan Agreement an agreement of the same date (which I shall refer to as "the Composite Agreement") was entered into by Mr. and Mrs. Gaudion, the plaintiff, Weardale, Monument, Sigmet, the previous lender, and Mr. Harlow.

Weardale had acquired substantial real property at La Cache as well as elsewhere under the terms of a conveyance dated 18th November 1993; I refer to that property as "the Property." Weardale acquired it for the sum of £5,000 although it is common ground that at the time of its acquisition, it was worth substantially in excess of that sum. According to Mr. and Mrs. Gaudion the property was valued at in excess of £1.1 million, and represented the vast majority of their wealth. The conveyance to Weardale in 1993 was made in connection with the previous arrangements in relation to the loan by Sigmet, in respect of which there were similar, although not identical, agreements.

The Composite Agreement recited that the parties had entered into it to the intent that Weardale would provide security for the new loan (that is the Monument Loan to the Gaudions) on the terms and subject to the conditions appearing in the Composite Agreement. In fact, the Composite Agreement did

A not appear on its true construction either to impose any obligation on Weardale to sell the Property or apply the proceeds in discharge of the Monument debt, or impose any obligation on Weardale to guarantee or provide security for the repayment of the Monument debt. Nor did it, apparently, create any security right in favour of Monument either over the Property or over the shares in Weardale so as to enable Monument to exercise control over Weardale, although the true construction and effect of that agreement is obviously a matter for argument at a later date if and when appropriate.

B The relevant parts of the Composite Agreement for present purposes are clauses 3, 4, 5, 6, 7 and 9:-

"3. In the event that the New Loan has not been repaid by 9.00 a.m. on the 16th day of December 1995 or earlier in event of default under the New Loan then the parties hereto agree that the Company shall be at liberty to immediately sell by auction or otherwise all or any parts of the Realty as the Company shall in its absolute discretion
C see fit and to apply all or part of the monies therefrom in settlement of the New Loan any interest or arrangement fee due in respect thereof and all outstanding costs and charges in connection therewith, together with the costs and charges of the Company in respect of the New Loan or any security in respect of it including but not limited to all interest and professional fees.

4. In the event that the Company exercises its right to sell all or any
D of the Realty it will pay to Mr. and Mrs. Gaudion any monies not otherwise required to be paid to the New Lender or the Company under the provisions of Clause 3 hereof.

5. In the event that the Company exercises the right provided by Clause 3 hereof it hereby undertakes that it will thereafter and without any undue delay re-convey to the Mr. and Mrs. Gaudion all that Realty which was conveyed to it by Mr. and Mrs. Gaudion on the 18th November
E 1993 then remaining in its ownership <u>WELL UNDERSTOOD</u> that the costs of such re-conveyance and any other charges incurred by the Company in connection therewith or transferring the security thereon shall be for the account of the Mr. and Mrs. Gaudion.

6. In the event that Mr. and Mrs. Gaudion have repaid the New Loan in full by the due date and met all other fees costs and charges as set out in the Second Schedule hereto then the Company will without any undue delay re-convey to the Mr. and Mrs. Gaudion all the Realty in
F accordance with the caveat contained in clause 5 hereof.

7. From the date hereof until the date specified in Clause 3 (above) the Company grants to Mr. and Mrs. Gaudion a "droit d'habitation" in respect of the Realty in consideration for which the Mr. and Mrs. Gaudion hereby undertake that they will occupy the Realty as "bon pere de famille" and that they will maintain and keep the same in good repair and condition meeting at their own expense all outgoings
G in respect thereof and discharging all rates, taxes and other expenses whether of a parochial nature or otherwise and without prejudice to the generality of the foregoing will maintain all douits hedges boundaries and fences in good order and in strict accordance

with the proper requirements of the parish authorities WELL UNDERSTOOD that should Mr. and Mrs. Gaudion fail to maintain and keep any part of the Realty in good repair and condition the Company shall upon having given 14 days written notice to them in respect of such failure thereafter be at liberty to enter onto the Realty with workmen materials, plant and equipment for the purpose of carrying out such works at its own expense and such costs incurred in carrying out the said works together with a management charge of one half of such costs shall be recoverable in full under the provisions of Clause 3 (above).

.....

9. Mr. and Mrs. Gaudion hereby undertake to the Company that in the event of any of the provisions of Clause 3 (above) being implemented or their being in default under the provisions of Clause 8 of the New Loan they will with immediate effect cease their occupation of the whole of the Realty or such lesser part thereof as the Company may in its absolute discretion require without claiming any further rights of occupation or seeking any stay of such proceedings as the Company may bring in order to obtain vacant possession thereof and that in so vacating the Realty they will leave it in a good and orderly condition having removed all or such of their personalty as the Company may in its absolute discretion require and that immediately thereafter they will make good any damage suffered to the Realty as a result of the removal of such personalty WELL UNDERSTOOD that in the event of them failing to make good such damage the Company shall be at liberty to carry out such works of reparation at its own expense and recover the same together with a management charge of one half of the cost of such reparations under the provisions of Clause 3 (above)."

It is to be noted that under the terms of the Composite Agreement the Gaudions had no entitlement to have the property re-conveyed to them in the event that they failed to repay the Monument loan by the due, i.e. contractual, date of repayment, that is 16th December 1995. Their entitlement to have the property re-conveyed by Weardale to them was dependent apparently on repayment by them of the Monument loan by the due date. It is common ground that the Gaudions failed to repay the Monument loan by 16th December 1995.

The recent history of this matter is that, on 13th February 1996, eviction proceedings were instituted by Weardale pursuant to the terms of the Composite Agreement. On that date they were adjourned for four months to enable the Gaudions to file defences.

Subsequently, on 10th June 1996, the Royal Court refused Monument's application for summary judgment and thereafter on 24th June 1996, directed that Weardale's eviction proceedings should be tried at the same time as Monument's debt proceedings. Monument appealed from that decision and on 18th October 1996, the Court of Appeal awarded summary judgment to Monument on its appeal in the principal sum of £526,103 plus interest on that amount at a rate of 8%.

A On 21st January 1997, the Bailiff in consequence of the judgment given by the Court of Appeal, ordered that the debt and eviction proceedings could be heard separately, notwithstanding the previous order that he had made. On 28th January 1997, Weardale tabled an action to evict Mr. and Mrs. Gaudion from La Cache Farm, pursuant to the provisions of the Composite Agreement on the grounds that they were in breach of the Monument Loan Agreement, and on that date an eviction order was made by the Royal Court, as I have said, and was suspended for 6 months.

B Mr. and Mrs. Gaudions' time for lodging notice of appeal against the eviction order made by the Bailiff accordingly expired one month later on 28th February 1997. In their proposed notice of appeal dated 9th July 1997, received by the Greffe on 11th July 1997, Mr. and Mrs. Gaudion have formulated their proposed grounds of appeal as follows:-

"1. That the Royal Court under the provisions of Rule 28 of the Royal Court (Civil Rules) 1989, was wrong in holding that it was no longer necessary
C that the eviction proceedings should be heard at the same time as the Monument Trust Company Limited v. Mr. and Mrs. Gaudion.

2. That the procedure followed by Monument Trust Company Limited and the plaintiff in securing the debt would be found to be against public policy.

3. That the defendants are the beneficial owners of the plaintiff, that is Weardale."

D The proposed grounds of appeal against the eviction order have been amplified in Mr. Gaudion's affidavit sworn on 10th July 1997, and further amplified in a statement which he produced and read to this Court in the course of this hearing.

It appears to the Court, which I emphasise has not had the benefit of any legal argument on behalf of Mr. and Mrs. Gaudion in relation to what may be
E complex issues of Guernsey Property Law and Security Law, that, prima facie at least, the evidence before the Court does raise sufficiently serious issues which might, and I emphasise the word 'might', afford Mr. and Mrs. Gaudion a defence to the eviction proceedings. The issues, if resolved in their favour, might enable them to contend that Weardale was not entitled to enforce the Composite Agreement so as to evict them from the property on the grounds that the agreement was void, invalid, or otherwise unenforceable at the suit of Weardale.

F The Court takes the view that prima facie, and subject to issues of discretion with which I deal below, the issues which are raised on the evidence are of sufficient seriousness that Mr. and Mrs. Gaudion should not be deprived of having the opportunity to argue such points on appeal. For the assistance of any subsequent court hearing these matters, I outline the issues which have been the subject of evidence or argument during the course of this hearing.

G The first issue is whether, as a matter of public policy, Weardale can enforce its purported rights under the Composite Agreement and as legal owner of the property under the 1993 conveyance in the event of a default by Mr. and Mrs. Gaudion of their obligations to Monument under the terms of the Monument loan

agreement. This is the point addressed in paragraph 24 of the Bailiff's judgment dated 10th June 1996, in the Monument summary judgment proceedings. I quote paragraph 24 of the judgment:-

> "24. A further ground for allowing this point to be taken is the way in which this whole transaction has been set up. In Guernsey we have got a well established procedure whereby persons seeking to lend money on the security of realty do so by the giving of a bond. Unlike personalty (until the reforms of 1979) a creditor has always been able to make a secured lending on real property but he could only do this within the framework of the Guernsey legal system and the rules for levying execution in saisie proceedings. Saisie proceedings contain their own equitable protections in the form of the delay in making an interim westing order to enable a debtor to realise his property at a better price than the amount of his debt, and the delay on the making of an eviction order. A further protection in the case of saisie is that once a lender exhausts the debtor's real property and has it vested in him he has no right to come back to recover any shortfall from to a debtor's personalty. It seem to me doubtful public policy to allow situations whereby lenders can circumvent these protections by getting borrowers to transfer their real property to a company and then for the lender to take over de facto control of the company by way of security for the loan."

What in effect has happened is this: Monument, as lender, has chosen not to take a registered charge over the Property, which could only have been created if the Guernsey requirements as to registration and other requirements relating to the creation of security over real property had been complied with, and which could only have been enforced in compliance with the rules for levying execution in saisie proceedings. Instead-

(i) Weardale has acquired the ownership of the property from the borrowers at an obvious under-value;

(ii) Weardale has apparently been granted the right to sell what is ostensibly its property and to apply the proceeds in discharge of a debt which Mr. and Mrs. Gaudion owe to Monument, although Weardale is not, apparently, under any obligation to do so, and has not itself guaranteed or agreed to discharge the Monument debt, nor agreed with Monument to apply the proceeds in such discharge; and-

(iii) the arrangements apparently envisaged Weardale acting at the direction of the lender, Monument, when realising the property and applying the proceeds in discharge of the Monument debt, free from any requirement apparently to comply with the requirements of saisie proceedings which, as Mr. Ferbrache has told us, govern the enforcement of charges over real property. However, there is no contractual obligation on Weardale to act at Monument's direction.

Advocate Ferbrache has made submissions in an attempt to persuade the Court that no principles of public policy could possibly have been infringed as a result of these apparently unusual arrangements. He has made forceful

A submissions as to what could have happened in circumstances where Mr. and Mrs. Gaudion had remained owners of the property and Monument had duly enforced a registered charge through the medium of saisie proceedings.

However, in the absence of full argument on both sides as to what are the Guernsey Law requirements, whether customary or statutory, for the creation and enforcement of security over real property and as to the mischief at which the common law and statutory requirements are aimed to avoid, we are not
B prepared to accept, for the purposes of this application for an extension of time, that Mr. and Mrs. Gaudion have no arguable defence, or no arguable appeal.

The second issue, which is closely linked to the first and likewise raises issues, or possible issues, of public policy, is this; as I have already said under the provisions of the Composite Agreement, Mr. and Mrs. Gaudion only have the right to obtain a re-conveyance of the property from Weardale if they repay the loan by the due contractual date. If they default, then under the
C express terms of the agreement they apparently lose all right to obtain a re-conveyance of the property even if they were to discharge the loan after the contractual date but prior to the sale of the property by Weardale. Thus, on the strict terms of the agreement, Weardale appears to have the right to sell the property so as to ensure that Monument obtained the benefit of its 30% arrangement fee under clause 6 of the loan agreement, and so as to deprive the Gaudions of the right to obtain a re-conveyance of the property.

D A provision in a security agreement which prevents or hinders a borrower from redeeming its property after the contractual date for redemption has passed, or prevents him from doing so, other than on payment of a fee or fine to the mortgagee, might well not be upheld as a matter of English Mortgage Law. We have not had the benefit of full argument as to the validity of such a provision as a matter of Guernsey law, although Advocate Ferbrache has submitted to us that Guernsey Law does not recognise the principle that there should be no clog on the mortgagee's equity of redemption; that is to say, his
E right to obtain a re-conveyance of his property after the contractual date for repayment has passed.

However, the authority which he cited to us, that is to say Godfray v. Constables of the Island of Sark [1902] AC 534, and in particular the passage at 539 to 540, was not directed to a security or mortgage transaction but rather was dealing with equities in the context of a sale transaction. The statement therefore that in Sark, at any rate, and also one must presume in
F Guernsey:-

> "There is no Court which can decree specific performance of a private contract, or which administers the equities familiar to English lawyers arising out of part performance, acquiescence by the vendor in expenditure of money by the purchaser on the faith of the contract, or other similar equities."

is not in point, since it is apparently referring to a consideration of
G equities in the context of a sale transaction. In the circumstances, although obviously an issue that will need to be debated on any appeal, we do not regard the authority cited as a conclusive response to the point. Accordingly, the existence of such a provision as that which is to be found in

the Composite Agreement, and whether it would be permitted in a charge over real property created in accordance with Guernsey law, likewise raises issues of public policy similar to those identified in issue 1 above. All we need to say at this stage is that this point is not so obviously unarguable as to deprive Mr. and Mrs. Gaudion of the right to argue it on appeal.

The third possible issue is the argument based on what Mr. Gaudion alleges is a factual dispute over the ownership of the shares in Weardale. Again, this was addressed to some extent in paragraphs 21 to 23 of the Bailiff's judgement. The evidence before us on this point was somewhat confused and apparently incomplete. We were referred by Advocate Ferbrache to paragraph 13 of Mr. Howarth's affidavit dated 19th March 1996, in which Mr. Howarth said that Ernst & Young undertook to him, on behalf of his client, that the shares in Weardale would be held to the order of his client, pending repayment of the loan. We were also shown two faxes, dated respectively 7th December 1994 and 24th December 1994, in which Ernst & Young purportedly confirmed that the shares in Weardale would be held:-

> "To the order of Monument re ITB."

(Whoever that might be) until such time as the loan was repaid. We were told by Advocate Ferbrache that no declaration of trust or other agreement in writing apart from what is represented in the faxes had been executed or assigned, setting out the terms, if any, on which the shares were to be held or noted.

On the other hand, Mr. Gaudion's evidence is to the effect that Ernst & Young had told him that Weardale had been formed as a holding company for his real property, and that he was led to believe that the company was, and would remain, under his control. His evidence was that at the time he agreed to the transfer of ownership of the property on the basis that he retained ownership of the shares in Weardale.

Mr. Gaudion also produced a document which appeared to be an extract from Mr. Harlow's, of Ernst & Young, response to a complaint that Mr. Gaudion has apparently made to the Institute of Chartered Accountants in relation to Mr. Harlow's role in the matter. In that response Mr. Harlow is reported as having said:-

> "We had a shelf company which we sold to Mr. Gaudion for the purpose of the property transfer. The company was owned by him until he defaulted on the loan from Monument."

The relevance of this factual dispute and why its resolution might possibly afford a defence to Weardale's eviction proceedings pursuant to the Composite Agreement is as follows: The circumstances suggest that Monument and Mr. Howarth's client at any rate, intended that one or other of them should have a charge or pledge over, or a right to control, the Weardale shares until the repayment of the Monument loan by Mr. and Mrs. Gaudion, and in that way secure control of Weardale and the underlying property.

The first sub-issue in relation to this issue is therefore whether such a charge or pledge or escrow arrangement was created at all. The second sub-issue is whether it was created with Mr. and Mrs. Gaudions' authority, if they

A were indeed the original owners of the shares. The third sub-issue, and most critical for present purposes, is whether, in the absence of a written declaration of trust or other security or escrow agreement, signed by Mr. and Mrs. Gaudion as debtors, any security interest that was created satisfied the requirements of the Security Interests (Guernsey) Law 1993, and is accordingly a valid security over those shares. If no valid charge, pledge, or other security interest was created over the Weardale shares then it may be open to Mr. and Mrs. Gaudion to argue that control of Weardale has in fact remained at
B all times with them. This is because the composite agreement, as I have already said, does not apparently either impose any obligation on Weardale to sell the property or to apply the proceeds in discharge of the debt, nor does the agreement amount to the creation of a charge or other security interest over the property in favour of Monument.

Accordingly, whether the Gaudions could procure Weardale not to sell the property and accordingly not to apply its assets in discharge of the Monument debt is a matter that may, and again, I emphasise the word 'may', depend on
C ownership of the shares in Weardale. These matters may accordingly provide a defence to Mr. and Mrs. Gaudion to the eviction proceedings since it might enable them to contend that Weardale is not entitled to enforce the Composite Agreement as against them since they in effect control, and have at all times controlled, Weardale and its shares.

Advocate Ferbrache forcibly submitted that even if it was the position that the Weardale shares remained in the ownership of the Gaudions, the fact is
D that Monument, as a judgment creditor, could, by going through the appropriate procedures execute against the shares in Weardale and in that way eventually achieve a sale of the Property and satisfaction, or at least partial satisfaction, of the Monument debt out of the proceeds of the sale of the Property. Accordingly, he submitted from a commercial and practical point of view, there was no point or merit in any appeal because ultimately the commercial result would be the same.

E Likewise, Advocate Ferbrache has forcibly submitted that, on the evidence, the admitted debt of £526,000 odd plus interest in respect of which Monument has obtained summary judgment, is likely to exceed the value of the Property. The Court has little doubt, on the evidence before it on this application, that sooner or later the Property will have to be sold to meet the unsatisfied liability of the Gaudions to Monument for the judgment sum of £526,103 plus interest, awarded by this Court on the summary judgment application.

F It may well also be the case that it is highly unlikely that there will be any surplus in the Property remaining after the discharge of that indebtedness. However, what is in issue in the present proceedings is whether Weardale, not Monument, has the right to evict the Gaudions from the Property pursuant to the terms of the Composite Agreement. And, if Weardale does not have that right, because the Composite Agreement is void, or otherwise invalid, or unenforceable, then this Court should not allow those eviction proceedings to proceed simply because, at the end of the day, another party, i.e. Monument, may have the ability as judgment creditor in other proceedings, to execute
G against the Weardale shares in the ownership of Mr. and Mrs. Gaudion and therefore ultimately to have recourse to the Property to discharge the Monument debt.

I should also mention the fourth and fifth possible arguments or lines of defence raised on the face of Mr. Gaudion's evidence. The fourth point is that the Monument loan was tainted with illegality insofar as it was made to discharge the earlier loan from Sigmet, that had an excessive interest rate. The Ordinance of 6th December 1930, that is to say the Ordonnance donnant pouvoir à la Cour de réduire les intérêts excessifs, confers on the Court power to reduce excessive interest rates. Accordingly, or so the argument might run, the Monument Loan Agreement and the Composite Agreement could not, as a matter of public policy, be enforced insofar as the monies lent pursuant thereto discharged a previous tainted loan transaction; see Spector v. Ageda [1973] Ch. 30 and Chitty on Contracts 27th edition, volume 1 para. 16.140.

The fifth argument is that the circumstances of the transaction, as a whole, arguably show that Mr. and Mrs. Gaudion entered into an unconscionable or disadvantageous bargain or were otherwise unduly influenced to enter into the arrangements and that therefore they are void, invalid or otherwise unenforceable. Although Advocate Ferbrache submitted that neither of these equitable or legal remedies or defences were available as a matter of Guernsey law, and despite our reservations as to whether such defences would indeed be available on the facts to Mr. and Mrs. Gaudion, even if they were good as a matter of law, we are not prepared to hold, at this stage, in the absence of full argument, that they are so unarguable as to preclude Mr. and Mrs. Gaudion raising them on an appeal. Therefore, this Court considers that the issues which have been raised on the evidence do demonstrate that Mr. and Mrs. Gaudion have a sufficiently arguable case on an appeal to justify an extension of time per se.

I move on therefore to consider other matters that affect the exercise of the Court's discretion. First the reasons for the delay; clearly in exercising its discretion the Court must be satisfied that there is some explanation or reason for the delay in lodging notice of appeal. The time limits are there to be complied with and the Court will not lightly extend time, particularly where, as here, the delay has been of several months. The reasons given by Mr. Gaudion for the delay of five months are not impressive. In a letter to the Greffier dated 9th July 1997, he said that he and his wife were not advised of the time restriction for placing an appeal, believing that it would be possible to appeal at any reasonable time before 28th July 1997, being the date of eviction.

In his additional statement produced during the course of this hearing, he says:-

> "At no time during the hearing or after was I advised of a time restriction for placing an appeal. It was my belief that it would be possible to appeal at any reasonable time before 28th July, being the date of our eviction.
>
> One month ago I enquired of the procedure to appeal and was advised by H.M. Greffier of the time limit. I subsequently took immediate steps to make this application to appeal out of time."

Mr. Gaudion has told the Court that he has not received any legal advice from his previous advocate, Advocate Loveridge, since before 28th January 1997. Advocate Ferbrache sought to argue that the explanation for the delay put

A forward by Mr. Gaudion should not be accepted and he sought to draw inferences from certain correspondence to suggest that Advocate Loveridge was likely to have advised Mr. and Mrs. Gaudion of their right of appeal and the time within which they should be exercised. He also suggested that it could be inferred that Mr. Gaudion deliberately left lodging notice of appeal until towards the end of the expiration of the period of the stay of the eviction order.

However, although the reasons that have been given for the delay by Mr.
B Gaudion are not altogether satisfactory, the Court must take account of the personal position of Mr. Gaudion and his wife, and the fact that according to Mr. Gaudion he has not received advice from Advocate Loveridge since before 28th January 1997. In the circumstances of this case, where public policy considerations may arise in relation to the issues on the appeal, we do not consider that it would be right to refuse an extension of time, simply because the explanation for the delay is not altogether satisfactory.

C The next factor in the exercise of the Court's discretion is the potential prejudice to the plaintiff by virtue of the delay. In this case the plaintiff is Weardale. Advocate Ferbrache has submitted that Monument is prejudiced because of the delay in obtaining satisfaction of all or part of its debt out of the proceeds of the sale of the Property, and that, because Weardale is the vehicle of Monument, the Court can have regard to Monument's prejudice. The fact of the matter, however, is that Weardale, the corporate entity, which is distinct from Monument, is under no contractual obligation to sell the Property or pay the debt, and does not itself benefit from any such sale.
D Likewise, Weardale itself suffers no prejudice through any delay in the exercise of its rights under the Composite Agreement, if any. Moreover, the Composite Agreement does not provide that Weardale holds such rights of realisation as it may have on behalf of, or as agent, or trustee, for, Monument.

However, on the assumption in Advocate Ferbrache's favour that it is legitimate for this Court to take account of any commercial prejudice to
E Monument in the delay in the realisation of the property, we do not consider that any potential prejudice is sufficiently serious as to deprive Mr. and Mrs. Gaudion of an extension of time to which they would otherwise be entitled for lodging notice of appeal.

No specific prejudice, such as, for example, diminution in the value of the Property, has been identified in evidence before us, and no specific prejudice has been relied upon, other than the delay in payment of Monument's debts.
F Nor has it been suggested in evidence that in reliance on the apparent finality of the eviction order Weardale or Monument have taken any irreversible steps, whether to enforce payment of the debt or otherwise, and that accordingly it would be unfair now to let an appeal against that order proceed.

Bearing in mind the long period of time that this matter has already taken, this Court takes the view that such legitimate concerns as there may be about delay can be adequately addressed by imposing strict requirements on Mr. and
G Mrs. Gaudion in relation to the prosecution of their appeal and we refer to these below. Accordingly, we propose to extend time to Mr. and Mrs. Gaudion for them to lodge notice of appeal until 28th July, 1997. However, that extension is subject to the following conditions:-

1. that Mr. and Mrs. Gaudion agree to the appeal being listed for hearing at the next sitting of this Court, that is to say, the session starting on 13th October 1997, and that, save with the leave of this Court, they do not seek to obtain an adjournment of the hearing of their appeal;

2. that not later than 14 days before 13th October, they lodge with H.M. Greffier:-

   (i) a skeleton argument setting out the contentions that they propose to raise on the appeal; and

   (ii) an affidavit exhibiting for the record, first, the statement for the Court of Appeal produced by Mr. Gaudion to this Court in the course of this hearing and second, the following documents produced by Mr. Gaudion to this Court in the course of this hearing, namely: the response of Mr. Harlow to the allegations made by Mr. Gaudion- and the subsequent response to Mr. Harlow's responses by Mr. Gaudion, together with the two documents apparently attached to those documents, namely, a letter or part of a letter from Ernst & Young to Mr. Erb of 11th November 1994, and an unsigned fax message of 17th October 1994; and

   (iii) that Mr. and Mrs. Gaudion use their best endeavours otherwise to prosecute their appeal diligently.

That leaves one further matter in relation to the hearing of the proposed appeal. This Court is concerned that at the hearing of the appeal it should receive the benefit of full legal argument from both sides as to the issues which we have identified in this judgment. It is obvious from the way in which this hearing has been conducted, and I say this out of no disrespect to Mr. Gaudion who has tried to assist us, that Mr. and Mrs. Gaudion are not in a position to assist the Court in relation to detailed legal arguments relating to matters of Guernsey Property and Security Law.

Although, obviously, Advocate Ferbrache will continue to present his client's case in the fair and even handed way that he has done before this Court, during the course of this hearing, he cannot be expected or required to present or develop the arguments that there may be against his client's position. In these circumstances that Court proposes to invite the Procureur to attend the hearing of the appeal by counsel as amicus curiae and address the Court on such issues as may arise on the appeal or upon which it may be appropriate for him to address the Court.

Finally, I turn to the application for stay of execution pending appeal. It is not in dispute before us that a power to extend the stay of execution exists. Advocate Ferbrache has fairly accepted that, if the Court were minded to extend the time so that Mr. and Mrs. Gaudion's appeal was to be heard, it is appropriate that the stay of execution should continue pending the hearing of the appeal. Accordingly, the Court proposes to suspend the operation of the eviction order until after the hearing of the appeal which is to take place in October.

Finally, I should conclude by expressing the Court's gratitude to Advocate Ferbrache for the fullness, fairness and even-handedness of the submissions

A which he has made to this Court. They have been of considerable assistance.

LORD CARLISLE: I agree with the judgment that has been given by Miss Gloster and have nothing to add.

MR. BELOFF: I also agree.

ADVOCATE PETER FERBRACHE: Could I just ask Members of the Court for one
B clarification?

LORD CARLISLE: Yes.

ADVOCATE PETER FERBRACHE: Presumably it would also assist the Court of Appeal in October if it had a submission on behalf of my clients. Could I suggest, and it's a direction that I hope won't come back to haunt me, that I file a submission within 7 days of the receipt of Mr. Gaudion's submission. That means the Court would then receive the submissions no later than 7 days before
C the hearing.

LORD CARLISLE: Can I say Mr. Ferbrache, I have no doubt the Court of Appeal would have the advantage of a submission if you are appearing for your clients at that hearing, and very full submissions; but certainly, if you think it would be helpful that that order be made, then we will make that order.

ADVOCATE PETER FERBRACHE: Well, that normally would be the case, my Lord,
D because you would normally expect written submissions from both sides.

LORD CARLISLE: Certainly, yes. And we hope very much that this matter will be concluded as speedily as possible.

Leave to appeal granted; application for stay of execution pending appeal granted.

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SUBMISSIONS OF NO CASE TO ANSWER IN THE MAGISTRATE'S COURT

By: J.R. Finch, B.A. (Hons); LL.B.; F.C.I.Arb.; Magistrate

This is one of those areas in which substantial guidance can be obtained from English authorities and in which caution should generally be exercised. It is often tactically tempting to make a submission of "no case" but, unless the grounds are firmly understood and well established, the only consequence will be a waste of everyone's time. A further complication is that the rules are different in criminal cases and civil cases, including a sub-classification in matrimonial matters. Also, care needs to be taken in applying texts and authorities from criminal trials on indictment to summary trials in the Magistrate's Court.

1. Criminal Cases

In the Magistrate's Court the appropriate test is set out in the PRACTICE NOTE [1962] 1 ALL ER 448 which, it was said in Stonely v. Coleman [1974] Crim. L.R. 448, should be used for guidance in every submission of no case in the trial of a criminal case in the Magistrate's Court.

The test is that a submission there is no case to answer may properly be made and upheld:

(a) when there has been no evidence to prove an essential element in the alleged offence; or

(b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

The Practice Note continues:-

> "Apart from these two situations a tribunal should not in general be called in to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it."

In addition the Note states that the test to apply is not whether at that stage the Court would convict or acquit, but whether the evidence is such that a reasonable tribunal might convict. "If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.".

It should be noted that the familiar case of R v. Galbraith [1981] 1 WLR 1204 applies to the situation where there is trial by jury and that the guidance offered is that case is applicable to that situation and not necessarily to summary trial.

Complications have frequently arisen where the Bench of lay Justices has mistaken the submission of "no case" for a final speech. However if the Court has not pronounced sentence (and is therefore not "functus officio") the case can be put before a different Bench and re-heard. The "conviction" is a nullity - see S v. Manchester City Recorder [1971] AC 24, an important House of Lords decision on the powers and duties of Magistrates' Courts generally.

There is a division of opinion on the rights of the Prosecutor after a submission of "no case" has been made. On the one hand it is suggested that it is always a legal submission so the Prosecutor has the right of reply. In my view this is too sweeping. Two situations will generally exist - either there is a point of law or there is insufficiency of evidence, and it seems right that on a legal point there is a right of reply on the law, but not on the general evidential sufficiency type of submission. One simple example might be an allegation of driving whilst disqualified; if it were submitted that on the facts shown the accused was not "driving" that is a point of law; if it is that the sufficiency of the identification evidence was the issue (as opposed to the test to apply in assessing it) then that would be fact, with no right of reply. Identification cases (of course) always need special care from both sides and are a minefield.

Submissions based on the insufficiency of evidence can be made too optimistically and there is quite a hurdle to get over. Abortive examples worthy of note are Cooke v. McCann [1973] Crim L.R. 522, where the only evidence was that the accused bore the same name as on a driving licence produced by the alleged offender to a traffic warden and Creed v. Scott [1976] Crim. L.R. 381, where counsel appeared for the accused in answer to a summons and there was evidence that the (traffic) offender gave the same name as the accused. There is little point in the multiplication of examples, but they serve to show the hurdle the prosecution has to surmount is a considerably lower one than at the end of the whole case. The effect of a misconceived or premature submission is to waste time and thus misdirect the mind of the Court. If the Magistrate's Court errs in rejecting a submission of no case the appellate tribunal cannot take account of the defence evidence and uphold the conviction on the basis that no miscarriage of justice took place - R. v. Cockley (1984) 79 Cr. App. R. 181.

"Old-Style" committal proceedings should normally be held because there is a submission to make. It is plainly wrong to misuse them for "the accused to explore the evidence as a rehearsal for trial. It is to consider the situation where the Magistrates may have properly argued before them the sufficiency of the evidence and for no other purpose."; (Eveleigh L.J. in R. v. Grays Justices, ex.p. Tetley (1980) 70 Cr. App. R. 11). The test as to whether there is a prima facie case to answer at a committal appears to be in practice the same as whether such a case exists in a summary trial. There must be such evidence that, if not contradicted at the trial, a reasonably minded jury could convict upon it" - R. v. Brixton Prison Governor ex.p. Bidwell [1937] 1 KB 305, approved by the House of Lords in Schtraks v. Government of Israel [1964] AC 556. The operative word is "could" not "should" or "would".

A submission by the defence is not required: the Court can decide there is no case of its own volition. Where the accused is legally represented this power should not be invoked lightly and it is also necessary in such a case for the prosecution to be given the opportunity to address the Court: see R. v. Barking and Dagenham Justices ex. p. D.P.P. [1995] Crim. L. R. 953. Despite any reservations about premature submissions the defence should always grasp the nettle where they think they are right, as experience shows that weak or indifferent prosecution cases are often considerably boosted by the evidence of the accused and his supporting witnesses.

It goes without saying that a submission should be concise and "punchy". A failed detailed submission followed by a further involved rehash on the facts as a closing speech does not make for the most sympathetic listening; but even a fallacious submission should be carefully followed by the Court in case a point emerges which has been missed hitherto.

2. Civil Cases

A submission of "no case" may be made in civil proceedings before a Judge (or Magistrate) sitting alone. But if this is done the Court must decline to rule on the submission unless the party making it elects not to call evidence - Alexander v. Rayson [1936] 1 KB 169. In other words the party "elects" to rely on his submission alone, or simply calls evidence and the case proceeds in the normal way. At first glance it is hard to work out the rationale of this procedure, but Cross on Evidence (Chapter IV) points out that the judge has to determine the facts as well as the law and ought not to be asked to express an opinion on the evidence until it is complete.

If the Court rules against the submission they should give the unsuccessful party a further opportunity to address them on the facts - see Disher v. Disher [1965] P 31. Both in criminal and civil cases it is correct to rule against a submission and then decide the case in favour of the unsuccessful party. The decision at the end of the case is a different one from ruling on a submission of no case to answer, as was shown in De Filippo v. De Filippo (1963) 108 SJ 56. Leaving aside the question of a submission on a point of law, the simple approach on submission on the facts in a civil case would appear to be that if "the evidence led for the Plaintiff (Complainant) is so unsatisfactory or unreliable that the Court should find that the burden of proof has not been discharged" (Storey v. Storey [1961] P. 63). Where the Court mistakenly fails to put the advocate to his election he does not lose the right to call evidence.

3. Matrimonial Cases

These form, in effect, a separate category. In Bond v. Bond [1967] P 39 it was said:-

> "there are very few matrimonial cases in which justice can be done without hearing both sides .... a power to dismiss a case at the conclusion of the complainant's case should be exercised only in exceptional cases; for example where no credence can be given to the complainant's evidence or where it is crystal clear that the complainant has no case in law".

The editors of Stone's Justices' Manual (1998 ed., Vol. 1 at para. 2-615) suggest that the principle quoted above should also apply to guardianship/ custody proceedings. The same applies to child care cases where it is deemed "rarely appropriate" to put an advocate to his election whether to call evidence or stand on his submission and thereby exclude evidence which may be material to the child's welfare; see M. v. Westminster City Council [1985] Fam Law 93.

It can therefore be seen that in these cases, especially where the welfare of children is an issue submissions should rarely be made and rarely entertained.

The situation is quite different from a civil dispute between two litigants involving a claim for damages.

4. Conclusions

Above all submissions should not be made needlessly or in situations which are not clear-cut. In criminal cases a case to answer is made out on facts far below the standard needed to entertain a conviction. In civil cases a failed submission is likely to deprive the party of calling evidence.

Care should be taken in referring to authorities in criminal cases which are more relevant to jury trials on indictment; the test there is different and rather wider, allowing more judicial discretion. There are various special situations involving identification evidence and cases where there is a mere technical defect in the prosecution case which require special study.

When considering English cases relating to civil matters one must bear in mind the different situation in Guernsey where the Bailiff is judge of law and the Jurats judges of fact. There are no local authorities dealing with the points raised in this article.

HISTORY AND PRACTICE OF PAROCHIAL TAXATION IN SARK AND GUERNSEY

by Advocate J.N. van Leuven

Volumes of the series Ordres en Conseil are given as "OC" and Recueil d'Ordonnances as "RO".

Introduction

1. For various reasons, I recently had to consider the origin and development of parochial taxation. What follows represents the results of my review, and I offer it to those curious of a formerly important, and occasionally troublesome, area of Guernsey's administration, but which remains of interest as still applying in Sark. If tax is one of life's certainties, then the uncertainty inherent in Sark's system provides an apt millennial contrast to the relentless precision of Guernsey's income taxman.

Background

2. The relief of poverty being accounted a Christian virtue, it is not surprising that, from time immemorial, the parish as the original area of ecclesiastical organisation should be responsible therefor; and this was so both in England and Guernsey until the present century.

3. In England, the law as to poor relief originated with the Poor Relief Act, 1601, prior to which early statutes were principally framed to repress mendicancy; see e.g. statutes of 1388, 12 Richard II c.7; 1495 11 Henry VII c.2; 1535-6 27 Henry VIII c.25; 1597 39 Elizabeth I c.4. Originally, relief of the poor within its bounds was the charge of each parish, and parish officers, named overseers of the poor, were appointed, whose duties included that of taxing all occupiers in order to raise a parochial fund for the necessary relief. This identification with the parish led to the complicated law of settlement (in Guernsey "établissement") and removal of strangers ("étrangers"), the object of which was to compel persons likely to resort to the parish fund for relief to return to the parish to which they originally belonged, and so relieve parishes from the burden of maintaining strangers. By settlement was meant the right of a person, by reason of residence in or connection with a particular parish, to have, when occasion arose, the benefit of poor relief in that parish. Concomitant with settlement was removal, which was the right to return parochial strangers to the parish of which they were inhabitants. As parishes were responsible for the relief of the poor, the parish was directly concerned in the question who were the poor it was meant to maintain, and to facilitate an appropriate response to this problem recourse was had to the feudal notion whereby a labourer was deemed to be part of the soil he was born to cultivate, and an applicant for relief was deemed only to receive it in the parish in which he was legally settled.

4. Settlement and removal were not features of relief of parochial poverty unique to England, and precisely similar considerations affected parochial relief of poverty in Guernsey, and much early local legislation was directed towards settlement and removal. The earliest published Guernsey Ordinance relating to parochial relief of the poor is that of 1537 (RO I p

6) which required poor inhabitants to demand assistance from their own parishes, and empowered the "prevôt" to deport poor strangers. An Ordinance of 1588 (RO I p 59) confirmed the parochial basis of poor relief, and required the Constables to have the care of poor children "aux frais communs et publicks, chacun en sa paroisse": and the elderly, without the means either of living or working, "seront subvenues, chacun en sa paroisse, des aumosnes de l'eglise, sans aller mandiant,".

5. A further Ordinance of 1597 (RO I p 64) dealing with parochial relief of poverty for the first time expressly provided for parochial contributions: "... sera faicte et levée une contribution par les dits Connestables et Douzeine ..".

6. An Ordinance of 1611 (RO I p 92) placed on a more formal footing the system of taxing parochial occupiers for relief of poverty: the elders ("Anciens") and deacons ("Diacres") of each parish being bound to enquire from time to time into parochial poor need, and to the extent that the church was not able to relieve poverty, the Constables and Douzaine were authorised to raise a tax, twice yearly.

7. These early Ordinances of 1589 and 1611 were ratified and confirmed by an Ordinance of 1684 (ROI p 218).

8. I have not researched whether, and if so to what extent, the Constables and Douzaines actually maintained a formal system of tax assessment and collection pursuant to the Ordinances mentioned above, despite being required by Article 4 of the Ordinance of 1611 to maintain a register of the poor and taxes levied.

9. Clear dissatisfaction with the system is evidenced by an Ordinance of 1731 (ROI p 259) which recited that several persons had refused to pay tax for poor relief, and directed that no person was permitted to appeal an assessment to tax without having first advanced the sum claimed, reimbursement being allowed to the extent of a successful appeal.

10. As appears from Advocate Peter Jeremie's commentary on Taxation, printed together with the second edition of his treatise on Real Property and published in 1866, by the mid-eighteenth century doubt had arisen as to the basis upon which parochial tax should be assessed. It is reasonable to suppose that parochial taxation had, in practice, been previously assessed principally on the capital value of lands held by the chefs de famille, because as Jeremie wrote:

> "In 1738, the main feature of the present system of Parochial Taxation, - or, at least, now become so from the amount which funded property bears to every other kind - was established by the parishioners of St. Peter Port voluntarily coming forward and subjecting their investments in the English Funds to Taxation with a view of providing for the necessitous poor ... in consequence of the voluntary subscriptions raised at the close of Divine service proving insufficient." (p 7)

11. As appears from the preamble to the Ordinance of 1820 Mode de Taxation etc. (RO II p 80), there had been difficulties relating to the method of

taxation, and in order to obviate uncertainty and render the mode of taxation uniform and fixed, the eventual basis of parochial taxation was laid down by an Ordinance of 1821 (RO II p 257) which remained the principal legislation prior to the enactment by Orders in Council of a more comprehensive scheme of taxation. The Ordinance of 1821 undoubtedly influenced the principal Sark Ordinance of 1899 (ss below). As Jeremie wrote:

> "In 1821, the ordinance relative to Parochial Taxation and Settlement was passed, which forms the basis of the present system; the main feature being that the ratepayer shall contribute on all his property to parochial rates, without distinction as to poor or other rates, according to his means, without any regard as to the nature of that property or the place where situate; real property in England paying poor-rates being alone excepted. Upon every article of this well-known ordinance have been strung a series of judicial decisions which go far to show that the extreme tenacity with which the town and country parishes clung to their respective claims during the greater period of a whole century, was not at all peculiar to corporate bodies; private individuals evincing quite as strong predilection for what they consider their private rights, as the numbers of decisions given upon each of its depositions could clearly show.
>
> As it is against the principles contained in this ordinance that the shafts of a few of the wealthy ratepayers have been long directed, it may be as well to give the reasons on which it was founded - to trace its origin, based upon custom, in other words, general asset whence will be seen the pains with which the Court, the Douzaine and the parishioners generally view with each other in furnishing the requisite information and the impartiality which directed their efforts in arriving at the main principle that was ultimately consecrated as sanctioned by common consent. The Report of the Court's Committee upon this subject may be here given:-
>
> "It now remains," say the members of the Committee, "to advert to the mode of taxation, and to the principles which it has thought right to adopt with reference to the mode of taxation. On a question that arose some time since in the Town Douzaine, the Court took measures to obtain all the information possible. It ascertained, in the first place, that it was the wish of the Parish that *property*, and not *income*, should be taxed. It then ordered that all the Douzeniers out of office should be heard, and it appeared, from their declarations, that the income of money in the public funds had been taxed according to the amount of quarters of annual rent which that income represented, so that it had become a practice to regulate, from time to time, the number of quarters which thirty pounds interest of money in the public funds, represented, because those funds being all, or nearly so, English funds, the difference from the one to the other could never be considerable; but it further appeared, from the declarations of those gentlemen, that it had always been customary to tax houses, stores and land, though untenanted and unoccupied, together with all stock, plate, household furniture, and generally every description of property, though producing no income; but that incomes arising from industry, the church, the army, public

situations, pensions, - in a word, all incomes not arising from some property, - had *never* been taxed.

"It appears then certain," continues the report, "1st, - That no income is ever taxed, unless it be founded on some capital, or on some other effective property. 2ndly, - That capital and other effective property is taxed, though it may yield no income. From all this, (though there may have been some exceptions to the general rule, and indeed it is difficult to frame any rule that shall have no exception) one can hardly refuse acknowledging the evidence which is presented in favour of the general principle of our custom, or doubt that the real value of property of every description has alone formed the basis on which taxes have been levied in this island." (pp 11, 12)".

The 1821 Ordinance

12. It is necessary now to consider the provisions of the 1821 Ordinance, which not only repealed and codified but also extended the legislation relating to parochial taxation. Articles 1 to 17 deal with liability to tax, and related questions of settlement inhabitants and strangers. Article 18 sets out the property subject to general taxation - that is tax raised on every inhabitant in Guernsey for States purposes - and Article 19 dealing with parochial taxation is in the following terms:

"Les Taxes de cette Isle pour les Pauvres, et autres besoins des Paroisses, se prélèvent sur les Personnes qui les habitent, et dont l'obligation de les payer se trouve spécifiée suivi, et sur la différence d'opinion qui a régné à ce sujet entre une Assemblée de Paroisse et la Douzaine de la Ville, et sur l'application faite à la Cour d'en ordonner, La Court a jugé qu'il serait nécessaire, afin de rendre le Mode de Taxation dans les différentes Paroisses uniforme, de statuer le principe qui a réglé la Coutume de cette Isle à ce sujet; et n'ayant en vue que de suivre les principes de l'ancienne Coutume, à trouve qu'il paraissait constaté:

1. - Qu'on ne taxe point de Revenue qui ne soit fondé sur un Capital;

2. - Qu'on taxe les Capitaux et les Propriétés effectives, malgré qu'elles ne produisent point de Revenu.

La Cour déclare donc, conformément aux principes de l'ancienne Coutume, que les Taxes Paroissiales se prélèevent sur autant de Quartiers de Froment de Rente que chacun possède, ou que vaut son Capital et son Bien effectif, de quelque nature que ce soit, à l'exception des Héritages en Angleterre, dans l'Isle de Jersey, et celles de ce Bailliage."

13. In 1833 the legality and effect of the 1821 Ordinance was the subject of litigation in the case of Tupper v. Constables of St. Peter Port, which in 1836 was eventually appealed to the Privy Council, and is reported in 3 Knapp 406 (there styled "Tupper v. Treasurer of St. Peter Port Hospital") in which the plaintiffs, appellants in the appeal argued that in order to raise taxation, including parochial taxation for the relief of the poor,

the Royal Court in passing the 1821 Ordinance had acted effectively ultra vires, as an Order in Council was required to raise taxation, and that no Guernsey law authorised the taxing of British or foreign funds. The Vice Chancellor, in giving the judgement of the Privy Council, held

> (at p 412) "that a practice has prevailed long previous to the year 1821 of rating the inhabitants in respect of their personalty out of the Island of Guernsey ... to the practice itself their Lordships think that no objection can be made; but, on the contrary, that is highly reasonable that persons should be liable to the rate in respect of their property wherever it may be."
>
> (and at p 414) "Their Lordships are also of the opinion, that in point of fact there has been an interference constantly exercised from at least the year 1772 (sic) or 1776 and certain rules have been laid down by the Royal Court with regard to the mode of making the rate for the sustenance of the poor, that it would be too much to say that all that has taken place for nearly a century is wrong and that what is done ought to be set aside merely upon speculative notions of what might have been done better. It is too late to disturb what has so long taken place, ..."

(The cases of the parties to Tupper's Case are maintained in volume 1 of the miscellaneous collection of Privy Council Cases held in the Bailiff's Room.)

14. The remaining Guernsey legislation of the nineteenth century was largely directed towards extending and clarifying the property on which tax should be assessed, and the means of assessment and collection. No doubt as a consequence of Tupper's Case, to avoid further argument such legislation was by Order in Council and by Ordinance made thereunder.

15. By an Order in Council of 1868, the Loi relative a la Taxation Paroissiale (OC I p 474) ("the 1868 Law") the objects of parochial taxation were divided into two classes. By the mid-nineteenth century, the primary purpose of parochial beneficence, the relief of parochial poverty, had been supplemented by various matters including parochial schools, costs of parochial administration, police, roads, fire-fighting, public health, etc. Relevantly, the 1821 Ordinance was claimed in the preamble to the 1868 Law to be "unjust in its principle and defective in its operation". By Article 4 of the 1868 Law, tax for objects of the "First Class", including poor relief, were to be raised:

(1) on the inhabitants of the parish, on the amount of quarters which each possessed, or the value of his capital ("bien effectif") with the exception of real property ("héritage") outside Guernsey;

(2) on all real property in the parish being private property on which the proprietor was not taxed in any of the parishes, of which the then value in quarters exceeded 8, allowance being made for rentes.

In estimating capital the sum of £25 was deemed equivalent to a quarter.

By Article 6 of the 1868 Law, in order to ascertain the amount of capital of each taxpayer, the Royal Court was authorised to pass such Ordinances as were deemed necessary.

16. By an Order in Council also of 1868, the Loi relative aux Declarations en Matiere de Taxation Paroissiale (OC II p 30) a system of declarations by taxpayers was enacted, and it is instructive to reproduce a portion of the preamble:

> "That by the Law relating to Parochial Taxation (of 1868), certain rates have to be assessed from time to time upon the inhabitants of each parish, in respect, as well of their real property within the Island, as of their Personalty wherever situate:- That experience has shewn that it is a matter of some difficulty to ascertain what a man is worth, especially as regards money vested in the funds or other securities, whether British or Foreign:- That by the sixth Article (of the (1868) Law) it was left to the Royal Court to pass Ordinances for the purpose of enabling the Parochial authorities to discover the amount of rateable property belonging to each inhabitant:- That for this purpose it appeared to the Royal Court to be requisite that solemn declarations should be taken from time to time."

The Order in Council then provided, so as to render the taking of such declarations less onerous, that

(1) solemn declarations made by inhabitants with respect to the worth of their "biens" would be valid taken before a single Jurat;

(2) anyone making a solemn declaration who knowingly and wilfully falsely declared would be liable to such penalty, punishment, imprisonment or fine as the Court would determine.

And so there arose a system by which parishioners made solemn declarations of the amount of their property for purposes of tax assessment. The legislation was subject to further amendments, as noted below.

17. By the Loi Supplementaire à la Loi relative à la Taxation Paroissiale of 1911 (OC IV p 414) the 1868 Law was further amended as to the property on which tax should be levied, to include, interestingly, trust property from which the taxpayer derived the income.

18. Pursuant to Article 5 of the 1911 Law, by which the Royal Court was authorised to pass such Ordinances as was necessary "pour arriver à connaître la valeur des meubles de chaque contribuable", a reasonably sophisticated system of returns developed, as is shown by the Ordonnance Provisoire relative a la Taxation Paroissiale, unpublished in Recueil d'Ordonnances, which prescribed forms of declarations categorising "Propriété Mobilière" and "Dettes Mobilières a Deduire". Real property was assessed by the Douzaine and recorded in the parochial cadastres.

19. In 1920 the States introduced income tax, and in 1925 the relief of poverty ceased to be a parochial burden and became an insular charge, to be defrayed out of insular income tax.

Sark legislation and practice

20. The principal Sark legislation is the Ordonnance relative à la Taxe of 1899, which was amended on 3rd October 1923. This is reproduced below in 33.

21. Sark's records are only available as a complete series from about 1675; some records prior to that date exist, principally in the Seigneurial archives. It is known that Sark's poor from 1565, when Sark was colonised, were relieved by a tax levied by Chief Pleas, as appears, for example, from a minute of Chief Pleas of 1624 which shows that tax enforcement was through the Prevôt, and Constable and Vingtenier (junior Constable), on behalf of the Seigneur and Chief Pleas, tax being raised from tenants who, in order of seniority, made voluntary donations, and those who did not were assessed by a committee consisting of the Constable, the Vingtenier and the most junior Jurat (the office of Seneschal was only created in 1675). In this respect, it must not be forgotten that in Sark the extent of the ecclesiastical parish and the civilian precinct precisely coincide, and thus there has never been in Sark a separate parochial administration with civilian functions and powers distinct from those of the Chief Pleas, although for various purposes a "douzaine" compiled from amongst the members of the Chief Pleas had been composed.

22. Besides levying tax to relieve poverty, the Chief Pleas from time to time levied taxes for other purposes, examples of which are:

> 9th February 1675 & 13th June 1681: erection of a cemetery gate
> 20th November 1683: repairs to the church
> 2nd May 1716: removal of stone from Creux harbour
> 5th May 1736: weights for the mill (from Holland)
> 2nd October 1793: maintenance of guard houses ("guets") - tax to be levied 'as is practised in Guernsey'.

23. It is worthwhile to note that, from 1730 onwards, successive Seigneurs of Sark came from prominent Guernsey families, and during the eighteenth and nineteenth centuries the Le Pelley Seigneurs divided their time between Guernsey, where they maintained homes, and Sark. Thus, irrespective of the Order in Council of 24th April 1583 which definitively placed Sark within Guernsey's superintendence, and required Sark to apply Guernsey laws and customs, Guernsey practices of parochial taxation were introduced or adopted in Sark, and indeed the Ordinance of 1899 employs language similar to that of Guernsey legislation.

24. An Ordinance of Chief Pleas of 1770 authorised the Constables to call a "douzaine" of the principal inhabitants of Sark to raise a tax for the subsistence of the poor of Sark. This is not the first reference to a "douzaine" in Sark's records, but is the first record of adoption of a Guernsey scheme of taxation involving a body called a "douzaine"; significantly the then Seigneur was Pierre Le Pelley a prominent Guernseyman who was also a Jurat of the Royal Court. As noted above, in Sark the extent of the ecclesiastical and civilian administrations coincide, and the general government of the Island rested with the Seigneur and the Chief Pleas; thus there would not ordinarily have been

any need to compose a douzaine for parochial purposes. However, whether there existed or was from time to time composed a douzaine for taxation purposes prior to 1770 is not certain. However by 1784 there was a "collecteur des pauvres", because the Chief Pleas ordered that he should be discharged after three years in office.

25. On the 25th October 1797, the Chief Pleas, on the representation of the collecteur des pauvres who complained that, for want of ready money collected to furnish to the poor, he was obliged to resort to his own, ordered that a tax should be raised on the inhabitants of 100 livres tournois to assist the poor, or each should be taxed according to the biens he possessed.

26. On 30th September 1801 the Chief Pleas resolved to levy a tax "pour la subsistence des pauvres d'un sous par cabot sur les Habitants."

27. On 29th September 1802 the Chief Pleas resolved to levy a tax not only for the poor but for "besoins publics" at 4 doubles per cabot, "as usual".

28. A minute of the Chief Pleas of 1820 records that 12 tenants were sworn in to raise and assess tax, and the Douzaine was thus also by then, and remains, a committee of Chief Pleas.

29. As appears from a manuscript note, which on internal evidence can be dated about 1823, assessment of tax had been laid on a more formal footing, as follows:-

> "La terre labourable à 5 cabots la vergée
>
> 1. Les jardins sont inclus avec la terre labourable à 5 cabots par vergée.
>
> 2. Les cotils et jaonnières ensembles évalués à tant de vergées labourable.
>
> 3. Rente et argent à recevoir évaluée ensemble.
>
> 4. Rente et argent à payer déduit sur le tout.
>
> 5. Le Bétail, les Bateaux, les meubles de labourages, les meubles meublants de maison et ménage ne sont point taxes ...

30. In 1828 it is recorded;

> "vu que les propriétaires de terre en cette Isle sont mois taxés que ceux qui ne possedent que des Rentes ou de l'argent, le Comité nommé pour faire la Taxe s'assemblera avant les Chefs Plaids de la St. Michel prochaine afin d'évaluer chaque tenement suivant sa valeur réelle en argent, et, en supposant le Quartier de froment valoir vingt livres Sterling, de taxer un chacun sur ce principe ..."

31. The records of the Chief Pleas consistently show that the rate of tax was annually fixed at its Michaelmas meetings.

32. In 1922, by Article 11 of the Order in Council relating to Sark's constitution (OC VI p 412), the Douzaine was placed on a more formal legislative footing, to be comprised of 12 members of Chief Pleas. This was repeated in effect, and extended, by Article 21 of the Sark (Reform) Law 1951 (OC XV p 215). It is to be noted that both these Articles, in express terms, preserve the ability of the Douzaine to raise revenue, there called "direct tax", for purposes of the Douzaine, which is not now confined to relief of the poor.

The Ordinances of 1899 and 1923

33. The Ordinance of 1899, as amended by the Ordinance of 1923, is as follows.

> "1. Tout étranger sera sujet à être taxé après avoir résidé an et jour dans l'Ile; et sera censé avoir résidé an et jour dans cette Ile, et y avoir fait election de domicile tout étranger qui y aura demeuré [210] jours dans l'espace d'[un an]; et sera celui qui dispute sa taxe ou son domicile assujetti à faire la preuve des jours ou il aura été absent de cette Ile.
>
> 2. Tous natifs ou tous étrangers ayant acquis établissement dans cette Ile et qui sortiront pour résider ailleurs y paieront les taxes en vertu d'ordonnances des Chefs Plaids passées dans le courant d'an et jour depuis leurs départ.
>
> 3. Tous natifs ou tous étrangers ayant acquis établissement dans cette Ile; et qui s'en seront absentés an et jour ou au delà; et qui durant leur absence auront acquis un établissement légal en Angleterre ou ailleurs ne seront sujets à être taxés à leur retour dans cette Ile, qu'après y avoir résidé an et jour; et ils seront censés avoir demeuré an et jour dans l'Ile si depuis leur retour et après an et jour expiré ils ont passé neuf mois hors de douze. Tous les dits natifs et étrangers qui se seront absentés ailleurs qu'en Angleterre, et qui en Angleterre n'auraient point acquis un établissement légal seront taxables dès leur retour.
>
> 4. L'absence d'an et jour ne sera pas suffisante pour rayer de la taxe les personnes en voyages et n'ayant ailleurs aucun domicile permanent.
>
> 5. Tous les biens en héritage en cette Ile; et tous les biens soit en argent ou rente en cette Ile et ailleurs appartenant aux natifs ou aux étrangers quoique les uns et les autres n'aient pont d'établissement dans l'Ile seront sujets à taxation .
>
> 6. Tout étranger qui aura résidé an et jour dans l'Ile suivant les articles ci-dessus de la dite Ordonnance; soit qu'il soit propriétaire, soit qu'il demeure en appartements garnis, soit qu'il réside en hôtel ou qu'il loge avec des amis sera sujet à la taxation suivant aux articles de la dite Ordonnance."

The bracketed words introduced by the 1923 amendment respectively replaced the "366" and "quinze mois consecutifs" of the 1899 Ordinance.

34. The 1899 Ordinance was proposed to be amended in 1940 as follows:

> "Tous natifs et tous étrangers qui auront établi un domicile et auront résidé 6 mois sur 12 seront sujet à la taxe"

but the Chief Pleas did not pursue this proposal.

35. Instances of judicial intervention and pronouncement on Sark's law and practice of tax assessment and collection are rare.

36. Customarily, the Constable, as collector of tax, gave no receipt, which led to the case of Constable of Sark v. Le Page, heard on 27th January 1880, as a result of which the Seneschal ordered the Constable to give a receipt and to pay the costs of the action. The Constable intimated, but did not pursue, an appeal to the Royal Court, and the Chief Pleas subsequently (on 31st March 1880) took care to remind the Seneschal to respect tradition, deciding "que la levee de la taxe se ferait selon l'ancienne coutume et que les Connetables ne seront pas tenus de donner un recu".

However, nowadays a receipt for tax paid is invariably given.

37. As will be seen below, estimation of a taxpayer's capital by reference to quarters is no longer possible, in consequence of inflation, and assessment of capital is comparative, not absolute. In the 19th century, absolute assessment was undertaken. Thus on the 8th March 1866, a case heard in the Sark court is reported as follows:

> "8 mars 1866. MM. les Connetables a silence envers le sieur H de Carteret à se voir être adjugé par la Cour à leur payer £1 10s, étant pour sa portion de taxe pour 60 quartiers levés le 4 octobre 1865 par les personnes autorisées à cet effet, après que le dit H de Carteret a déclaré par serment ne valoir pas au delà de 48 quartiers et sont les connétables aux frais."

(See also Constables v. Philip W. Guille 18th September 1907: claim of £1 5s for 75 quarters; on Guille declaring he was worth only £200, claim reduced to 53 quarters.)

Thus, good faith being presumed, and in the absence of evidence to the contrary, the court was bound to accept the taxpayer's declaration of his assessable capital. The position was explained by Selosse:

> "Si le contribuable se plaint d'une surtaxe ou d'une exagération dans l'évaluation de sa fortune, il refusera de payer et se laissera appeler par les connétables devant le Sénéchal. A l'argumentation et aux présomptions de ceux-ci, le défendeur répondra par une simple affirmation sous serment qu'il ne possède pas 75 quartiers, mais bien 53 ou que taxe à 60 quartiers, il ne vaut pas au-delà de 48. Le Sénéchal prendra acte de ce serment, fixera la taxe d'après le revenu ainsi déclaré par l'intéressé lui-même, déboutera les connétables et les condamnera aux frais. Toute déclaration démontrée mensongère serait punie des peines du parjure. Mais cette sanction éventuelle s'appliquera rarement, tant à raison de la difficulté de prouver le

faux serment que de la bonne foi relative des insulaires en ces matières fiscales.

Par contre, les rôles sont intervertis, si le contribuable conteste son inscription même sur la liste et se prétend non assujetti à la taxe. C'est à lui qu'incombe la charge de la preuve: notamment, il lui faudra établir les jours où il aura été absent de l'île, et dont le total l'empêche d'être considéré comme ayant acquis établissement à Serk par une résidence d'un an et jour." (p 164)."

This practice continued into recent times: in 1952 the Constable actioned Hubert Lanyon for £6 11s 3d tax on 75 quarters: on Lanyon declaring on oath that he was worth no more than 60 quarters, the Court gave judgment for £5 5s being the tax in respect of 60 quarters. (See also Constables v. Campbell, 7th September 1948; Constables v. Sutcliffe 27th August and 3rd September 1954; Constables v. Head 14th and 28th September 1956.)

Current practice of tax assessment

38. Sark tax is broadly divisible into two heads:

(a) tax in respect of real property on Sark (colloquially "property tax");

(b) tax in respect of other capital assets (colloquially "capital tax").

39. As respects property tax, the Douzaine has compiled and maintains a cadastre of all land and buildings, and all tenants and freeholders are required to pay tax assessed on their respective cadastral entries. In practice, land owners recover from their lessees the proportion of the property tax respectively attributable to them. The cadastre exhibits each parcel of real property, its area and the size of buildings on each parcel, which are notionally valued in quarters, and property tax is payable on the cadastral values at the rate fixed annually by Chief Pleas. The quarters however are not an accurate reflection of current capital values: recent transactions suggest that a vergee of Sark agricultural land may be worth £2,000, and tenements are being sold for six figure sums, whereas their cadastral values reflect values between a tenth and a hundredth of their market worth.

40. Capital tax assessments are determined on an individual basis by the Douzaine at a meeting customarily held on the evening of the sitting of Michaelmas Chief Pleas. If the Seneschal is a member of the Douzaine, he withdraws from the meeting. The Douzaine has a list of Sark residents, each notionally assessed as to their comparative worth in quarters. Spouses are jointly assessed. The quarters cannot now, in consequence of inflation, and assessments are not intended to, reflect wealth in real terms, but to assess taxpayers comparatively . In 1996, the number of capital taxpayers divided into bands was as follows:-

Quarters	Nos of taxpayers
25 - 50	153
51 - 100	37
101 - 200	48
201 - 500	46
501 - 1000	46
1001 - 2000	12
	343

The amount of capital tax raised was £115,936.

(Note that, in addition, amongst the 343 capital taxpayers were 60 or so tenants and freeholders paying property tax. The quarters bands above exclude property tax assessments.)

41. Each taxpayer is sent an assessment by the Constables. Following receipt, the taxpayer is able informally to discuss the capital tax assessment with the Douzaine, or a representative of the Douzaine (usually the Dean) and formally make representations to the Douzaine, as a result of which the Douzaine does occasionally reassess taxpayers.

42. In recent years, Sark practice has necessarily changed because of inflation, and assessment of capital in quarters no longer reflects actual wealth, in consequence of which every taxpayer is, on an actual basis, under-assessed. The Court has recently confirmed in cases of recovery that it will require evidence on oath of a taxpayer's actual assessable assets, rather than a sworn declaration by the taxpayer that his assessable assets are less than the quarters claimed, because in real terms the quarters assessment under-values taxpayers' properly assessable assets. In no recent case has such sworn evidence been taken, as objecting taxpayers have invariable elected to pay the tax claimed rather than to depose as to their actual assets before the Court. It is submitted that, having taken such evidence, if the Court remains in any doubt the matter of assessment should be remitted to the Douzaine for reassessment with such directions as appear appropriate. It is now no function of the Court to act as tax assessor in place of the Douzaine, although in former times it did substitute its own assessment, at times when quarters assessed reflected actual wealth, on the basis of taxpayers' sworn declarations. However the Court can enquire into liability to tax founded on alleged residence or non-residence.

43. For how long Sark can retain its current system is a matter of speculation. Ultimately, some more formal scheme of revenue collection is inevitable. The timing of change will depend on resolution of the conflict between Sark's economic imperatives and cultural parsimony.