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GUERNSEY LAW JOURNAL

TWENTY-SIXTH ISSUE

References to this issue in future issues will be cited using the figure and letters 26.GLJ. followed by the paragraph number.

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Presiding Judges

The initials of the judge who presided over each case digested in this issue, other than in the Court of Appeal, is given at the end of the text. Where the judge was sitting with Jurats this fact will be indicated; otherwise it may be assumed that the judge was sitting alone.

The presiding judges during the period relevant to this issue were: the Bailiff, Sir Graham Dorey (GMD); the Deputy Bailiff, de V G Carey (deVGC); and Lieutenant Bailiff and Assistant Magistrate, A R W Hancox (ARWH).

Reporting of sensitive decisions

Where a case reported in this issue is deemed, for whatever reason, to be of a sensitive nature, the parties will not be identified by name and the report will be allocated letters for reference purposes. The full judgment of the Court of Appeal may not be published. Further details may be obtainable from H M Greffier but this will depend on what directions the Court has given as to dissemination of the decision.

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 1998. 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.

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GUERNSEY

ADMINISTRATIVE LAW

Judicial Review – jurisdiction of Court of Appeal to review administrative decisions generally and in particular decisions of H.M. Procureur under the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 – whether 1991 Law made within powers of States

1. See Bassington Limited et al v. H.M. Procureur, and related appeals, paragraphs 4 and 14.

Public law – policies of States authorities – Jurats' rôle

2. See Matheson v. States Housing Authority, paragraph 27.

APPEALS

Appeal to Court of Appeal in civil matters – jurisdiction of Court of Appeal to hear appeals in administrative matters – jurisdiction as successor to Cour des Jugements et Records – dolence – Privy Council

3. See Bassington Limited et al v. H.M. Procureur and related appeals, paragraphs 4 and 14.

Appeal to Court of Appeal in civil matters – leave to appeal – jurisdiction of Royal Court to grant leave in administrative matters – stay pending determination of application

4. In three related applications for leave to appeal to the Court of Appeal from the judgments of the Royal Court that it could not review decisions of H M Procureur to issue Production Notices under section 1 of the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 the Deputy Bailiff HELD that he could not grant leave, being bound by the decision of the Court of Appeal in Century Holdings Ltd v. H M Procureur (see 23.GLJ.32) that the Court of Appeal had no jurisdiction to hear such appeals nor could it grant leave to appeal in such cases, the only avenue being to apply to the Privy Council. In granting an application to stay any further action under the Production Notice the Deputy Bailiff stated that the Court's approach to such applications would be as set out in the White Book at 59/13/1: a stay would be given when the Appeal would otherwise be rendered nugatory or the Appellant would suffer loss for which he could not be compensated in damages. (deVGC).

[Bassington Ltd et al v. H M Procureur; Uoti v. H M Procureur; Lazarenko et al v. H M Procureur – Ordinary Court 14.7.98 (RICE/NJB/HMP)]. (See also paragraph 14).

Appeal to Court of Appeal in civil matters – power of Court to order re-trial – ex parte injunction – circumstances in which appropriate – full indemnity costs – whether properly granted

5. In proceedings concerning a boundary dispute, the Royal Court had found in favour of RR, who had been represented, against A, who had not. Prior to the trial RR had been granted an ex

parte injunction against A and they had also, subsequently, been awarded full indemnity costs. On appeal A was represented. A's advocate argued for a re-trial pursuant to section 14 of the Court of Appeal (Guernsey) Law, 1961 on the grounds that the test set out in Rule 13(1) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964, namely that a new trial should not be ordered on the ground of a misdirection or the improper admission of evidence unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned, was satisfied on a number of minor grounds which collectively could be grounds for a new trial. The matters were:

- (1) that A had been taken by surprise at trial because allegations had been made that were not in RR's Cause;
- (2) that the proceedings against A had been conducted in an oppressive way because RR had obtained an ex parte injunction against A, had commenced proceedings for contempt of Court on this injunction, had fixed a date for trial before interlocutory matters were resolved and had failed to make proper discovery;
- (3) that the Bailiff had misdirected the Jurats concerning the admission of hearsay evidence;
- (4) that RR's advocate had led one of their witnesses; and
- (5) that the Bailiff had erred in law in not summarising A's case adequately to the Jurats.

The Court of Appeal HELD as follows:

- (1) There had been some element of surprise against A but the principles set out in paragraph 59/11/15 of the White Book were applicable in Guernsey and A had to show that there had been a miscarriage of justice.
- (2) The manner in which an ex parte injunction had been obtained was wrong. The Court of Appeal drew attention to its decision in C v C delivered on the 3rd June 1998 (see 25.GLJ.24). The Court reiterated that the granting of an injunction is an infringement of the liberty of the citizen and unless there is extreme urgency should be on notice. However, there had not been oppressive conduct through its use in this case.
- (3) The use of the trial fixing procedure was appropriate in a case involving an unrepresented party unable to complete interlocutory steps.
- (4) The Bailiff had discharged his duty in relation to the Jurats in summing up concerning A's assertion about the location of the boundary.
- (5) A's submissions concerning the introduction of hearsay evidence on behalf of RR were well made, and such evidence should have been excluded.
- (6) References at the trial to the existing injunction should have been excluded, or alternatively made the subject of a specific direction to the Jurats, as it was of no relevance to the issue before the Court.
- (7) The Bailiff had reminded the Jurats of the main features of the case and thereby satisfied the criterion set down by the Court of Appeal in Gallienne v Douglas (see 10.GLJ.76).
- (8) In all the circumstances the element of surprise did not go to the essence of the matter and, although there were instances of misdirection, irregular admission of evidence and other irregularities the Court was persuaded that the trial had been a fair one and that no substantial miscarriage of justice had occurred, the crucial aspect of the trial being what the Jurats did or did not see when they visited the properties on the Vue de Justice.

A's substantive appeal was accordingly dismissed. In relation to A's appeal against the order

for indemnity costs by the Royal Court it was HELD that A had been entitled to dispute the alleged boundary between the properties and also that there were serious issues to be decided at the trial. In the circumstances the case was not a proper one for indemnity costs and the Court substituted an order for recoverable costs in the trial which did not include an order for costs in relation to the injunction or contempt proceedings.

[Smith v. Helmot & Helmot – Court of Appeal 15.10.98 (RJC/DGLem)]. For full report of the judgment of the Court of Appeal see paragraph 80.

Appeal to Royal Court – appeal against decision of States’ authorities – questions of law and of fact

6. See Matheson v. States Housing Authority, paragraph 27.

BANKING, INSURANCE AND FINANCE INDUSTRIES

Investment business

7. Ordinance: The Protection of Investors (Amendment No. 2) Ordinance, 1998. – Makes the operation of an investment exchange a restricted activity under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (see 5.GLJ.5) when carried on in connection with a controlled investment (such as general securities and derivatives).

In force 1.10.98. (No. XX of 1998).

8. Statutory instrument: The Licensees (Financial Resources, Notification, Conduct of Business and Compliance) Rules, 1998. – Replace the Licensees (Notification) Rules, 1989 (see 8.GLJ.9) and introduce new rules (amplified by guidance notes) applicable to all licensees under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (see 5.GLJ.5), save to the extent that an obligation under them is discharged by a designated person under the Collective Investment Schemes (Designated Persons) Rules 1988 (see 6.GLJ.29). The Rules include a set of principles in accordance with which licensees are required to carry on their controlled investment businesses. They also prescribe detailed requirements as to licensees’ dealings with customers and their assets, maintenance of financial resources, proper accounting and record keeping; although the Financial Services Commission may agree in writing to exclude or modify the application of any particular requirement to a licensee if satisfied that this is not prejudicial to the interests of investors. Finally, the rules impose duties on licensees to put in place (and review at least annually) effective compliance and monitoring procedures as respects not only the Law and rules but also other statutory requirements in areas such as insider dealing and money laundering.

In force 27.7.98. (GSI No. 18 of 1998).

CONSTITUTIONAL LAW

States of Deliberation – replacement of Conseillers

9. Order in Council: The Reform (Replacement of Conseillers) (Guernsey) Law, 1998. – See 25.GLJ.16.

Royal Sanction 21.7.98. Registered 5.10.98. In force in part (sections 1 and 2) 6.10.98; remainder 1.5.00. (No. X of 1998).

CRIMINAL LAW AND PROCEDURE

Criminal damage – alleged damage to vessel in Sark territorial waters – jurisdiction of Ordinary Court – evidence of position of median line between jurisdictions – degree of recklessness required for offence

10. See Law Officers of the Crown v. Donnelly, paragraph 20.

False documents and domicile etc.

11. Order in Council: The False Documents and Domicile etc. (Bailiwick of Guernsey) Law, 1998. – See 25.GLJ.21.

Registered and in force 14.7.98. (No. V of 1998).

Procedure – plea in mitigation – documents in support – Practice Direction

12. Where Defence Counsel as part of a plea in mitigation wish to hand up testimonials and other documents in support of their plea would they please let the presiding judge have copies the day before the trial so that he can consider whether there are any matters raised which require further verification or inquiry. He will also need to consider whether in the event that reference is made to any co-accused in such documentation the document should be disclosed to Counsel for such accused. In some cases it may be necessary to copies to be passed to Counsel for the Crown for comment. If Defence Advocates find that they cannot avoid producing such documents until the last minute, then time must be allowed for the presiding judge to read them before they are passed to the Jurats.

Practice Direction No. 2 of 1998.

Sentence – assault

13. A was sentenced to one year's imprisonment having been convicted by the Royal Court of one offence of assault on his former girlfriend in her bedroom, and in the presence of her young daughter, in the early hours of the morning, having entered the house using a key which he had retained without her permission. He had hit her on the face causing injuries to her head after trying to persuade her to withdraw another charge of assault which was pending against him. A, aged 22, had a long record of previous convictions since the age of 12 involving *inter alia*

assault, drunken or disorderly conduct, burglary and criminal damage, the majority of which were committed whilst under the influence of alcohol. He appealed to the Court of Appeal against the sentence imposed. HELD, a sentence of imprisonment was appropriate having regard to all the circumstances of the assault and his record of violence. However, the sentence imposed was too long and the appeal would be allowed to the extent of substituting a sentence of 6 months' imprisonment consecutive to sentences already imposed on A in respect of other assaults.

[Law Officers of the Crown v. Parsons – Court of Appeal 13.10.98 (PR/CAT)]. For full report of judgment of Court of Appeal, see paragraph 78.

Serious fraud – jurisdiction of Court of Appeal to review H.M. Procureur's decision to investigate – Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 – jurisdiction of Court of Appeal to hear appeals in administrative matters

14. In three related appeals, the appellants (AA) were the objects of a Production Notice issued by H.M. Procureur to B Limited, a trust company, under section 1 of the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 to answer questions and furnish information on the grounds that he suspected offences of serious and/or complex fraud and that he was satisfied that there was good reason for him to exercise such powers. AA sought a judicial review of H.M. Procureur's decision to exercise this power and an order staying and restraining H.M. Procureur from taking any further action or disclosing any documents or information he should receive to third parties. The Deputy Bailiff held (see paragraph 4) that he had no power to review this decision or to grant leave to appeal to the Court of Appeal, relying on the Court of Appeal's decision in Century Holdings v. H.M. Procureur (see 23.GLJ.32) that the Court of Appeal had no jurisdiction to hear such appeals. On an application to the Court of Appeal for leave to appeal from the decision of the Royal Court, the Court of Appeal granted the application subject to the stay of any further action under the Production Notice imposed by the Deputy Bailiff and issued directions. In holding that it had jurisdiction to hear appeals in administrative matters the Court of Appeal considered all the points raised in argument in the knowledge that special leave to appeal to the Privy Council would be sought if AA failed on any one.
 1. Standing The Court of Appeal had no reason at the leave stage to hold that AA lacked standing.
 2. Doléance The Court noted that while this remedy may no longer have had any place in the jurisprudence of Guernsey, in Jersey and the Isle of Man it had been used to introduce a form of judicial review.
 3. Whether decisions of H M Procureur were capable of review The Court noted that H M Procureur, in exercising his powers under the 1991 Law, had a rôle similar to that of the Attorney General in England. The Court cited R v A G ex parte Ferrante (High Court (unreported) 1.7.94) and held that there was no absolute bar preventing the courts from reviewing the administrative or executive decisions of H. M. Procureur.
 4. The jurisdiction of the Ordinary Court and Cour des Jugements et Records to judicially review The Court noted that the informal system of putting right failures in matters of

administration and government as referred to by the Deputy Bailiff in Century Holdings would not satisfy the requirements of Article 13 of the European Convention on Human Rights; and stated that H M Procureur cannot be above the law. The powers of the Court of Appeal equated to the Cour des Jugements et Records but were not limited to the state of the law as it stood prior to 1964 when the Court of Appeal Law, 1961 came into force.

5. Extra-territoriality The Court held that the 1991 Law was made within the powers of the States of Guernsey.
6. Jurisdiction of the Court of Appeal in administrative matters The Court held that it would have been within the jurisdiction of the Cour des Jugements et Records to grant leave to appeal and to hear appeals from the Royal Court regarding decisions of H. M. Procureur under the 1991 Law. Such administrative matters should not fall into a “black hole” between the civil and criminal jurisdictions.
7. Grounds for review The Court of Appeal stated that the question whether H M Procureur’s decision on the facts were open to attack by reference to Wednesbury principles was a matter for the Court of Appeal at the substantive hearing of the appeals.

[Bassington Ltd et al v. H M Procureur; Uoti v. H M Procureur; and Lazarenko et al v. H M Procureur – Court of Appeal 14.12.98 (RICEH/NJB/HMP)]. For full report of judgment of the Court of Appeal see paragraph 86.

Uniform scale of fines

15. Ordinance: The Uniform Scale of Fines (Bailiwick of Guernsey) (Amendment) Ordinance, 1998. – Further amends the table in section 1(2) of the Uniform Scale of Fines (Bailiwick of Guernsey) Law, 1989 so that the maximum fines for offences on levels 1, 2, 3, 4 and 5 are, respectively, £200, £500, £1,000, £2,500 and £5,000. Transitional provisions restrict the increases to offences committed after the date of commencement of the Ordinance.

In force 30.9.98. (No. XXII of 1998).

EMPLOYMENT

Employment protection legislation

16. Order in Council: The Employment Protection (Guernsey) Law, 1998. – See 25.GLJ.26.

Royal Sanction 21.7.98. Registered 18.8.98. In force 4.1.98: The Employment Protection (Guernsey) Law, 1998 (Commencement) Ordinance, 1998. (No. IX of 1998).

ENVIRONMENTAL LAW

Land contamination

17. Ordinance: The Animal Carcasses (Control of Burial) Ordinance, 1998. – Prohibits the burial of any carcase of a deceased bovine or equine animal, except in accordance with conditions approved by the Board of Administration or in compliance with an order under the Animal Health Ordinance, 1996 (see 21.GLJ.3).

In force 28.10.98. (No. XXVII of 1998).

EUROPEAN COMMUNITIES

Euro

18. Ordinance: The European Communities (Euro: Miscellaneous Provisions) (Guernsey) Ordinance, 1998. - Incorporates into Guernsey law certain provisions of Council Regulation (EC) 1103/97 relating to the introduction of the euro. Replaces references in legal instruments to the ECU by references to the euro. The introduction of the euro does not discharge or excuse performance under any legal instrument.

In force 30.9.98. (No. XXIV of 1998).

Treaty of Amsterdam

19. Ordinance: The European Communities (Amendment) (Bailiwick of Guernsey) Ordinance, 1998. – Adds certain Articles of and Protocols to the Treaty signed at Amsterdam on 2nd October 1997 to the definition of the Treaties in the European Communities (Bailiwick of Guernsey) Law, 1973, thus implementing the Treaty of Amsterdam within the terms and status conferred on the Bailiwick by the 1972 Treaty of Accession of the United Kingdom to the European Communities.

EVIDENCE

Public document – chart of territorial waters of Guernsey and Sark – median line drawn in manuscript – admissibility – whether offence committed in Sark waters

20. D was charged with criminal damage to a sailing sloop within the jurisdiction of the Sénéchal of Sark. The matter was transferred to the Royal Court (Ordinary Division). D submitted that there was no case to answer because there was no sufficient evidence that the offence had been committed within Sark territorial waters. The prosecution had argued that, although the evidence did not show conclusively that the collision occurred within Sark's jurisdiction, the reckless act which led to the damage had started in Sark waters when D, having seen the yacht when he was in Sark waters, failed to keep a proper lookout for it and thus the offence was committed in Sark waters. This argument was rejected by the Deputy Bailiff – it was only when D had passed the point when no avoidance of a collision was possible that his conduct

had reached the realms of recklessness required for the offence of criminal damage. A separate issue arose over a chart that had been submitted which showed the territorial waters of Guernsey and Sark and upon which the median line between Sark and Guernsey's dependencies of Herm and Jethou had been drawn in manuscript. HELD by the Deputy Bailiff, that as there was no evidence as to who had drawn the median line on the chart or that the relevant jurisdictions had agreed it, the document could not be admitted into evidence as a public document and thus did not assist the Court in delimiting the jurisdiction of the Sark Court. The Deputy Bailiff directed the Jurats to acquit D. (deVGC, sitting with Jurats).

[Law Officers of the Crown v. Donnelly – Full Court 26.10.98 (PR/AMM)].

FIREARMS

21. Order in Council: The Firearms (Guernsey) Law, 1998. - Re-enacts with modifications the Firearms (Guernsey) Law, 1983, as amended.

Part I of the projet is entitled "Possession, handling and distribution of weapons and ammunition; prevention of crime; and measures to protect public safety". Clauses 1 and 2 impose a requirement for a firearm or shotgun certificate for persons possessing, using or acquiring a firearm, shotgun or ammunition. Clause 3 prohibits persons from manufacturing, selling, etc, firearms by way of trade or business unless registered as a firearms dealer. Clause 4 prohibits conversion of firearms (including shortening the barrel of shotguns). Clause 5 imposes controls on imitation firearms.

Clauses 6 and 7 impose a general prohibition on certain classes of firearm (e.g., self-loading and pump-action rifles). Clause 8 provides that weapons are considered to be de-activated only if marked by specified proof houses. Clause 9 empowers the States by Ordinance to control the import, export and internal movement of weapons and ammunition.

Under clauses 10, 11 and 12 persons may possess a firearm without a certificate if they hold a police permit or if they are firearms dealers or auctioneers acting in the ordinary course of business. There are also, under clauses 13, 14, 15 and 16, exemptions for veterinary surgeons, licensed slaughterers, sporting events, ships and aircraft (for signalling equipment) and visitors attending organised shoots.

Clauses 17 to 21 create criminal offences of the possession of firearms or air weapons with intent to injure; the use of firearms or air weapons to resist arrest; the carrying of firearms or air weapons with criminal intent or in a public place; and trespassing with firearms or air weapons. Clause 22 provides that a person may not (without police consent) fire a firearm in any place other than an approved range. Clause 23 creates a criminal offence of firing a firearm in a road, street, etc. or during the hours of darkness. Clause 24 prohibits the possession of firearms by persons previously convicted of certain offences. Clauses 25 and 26 control the acquisition and possession of firearms by minors or persons who are drunk or insane. Under clause 28 it is an offence to use a firearm unless insured.

Part II of the Projet is called "Firearm and shot gun certificates; registration of firearms dealers". Clauses 29 to 34 deal with applications for, and the grant, variation and revocation

of, certificates. Clause 35 provides for the payment of a fee for a certificate. Clauses 36 to 42 deal with the registration of firearms dealers, and the refusal, renewal, conditions and removal of registration. Clause 43 requires the registration of transactions in firearms. Clauses 44 and 45 make provision as to transactions with persons who are not registered as firearms dealers and transactions for export. Under clause 46, there is an appeal to the Royal Court against the refusal by the Chief Officer of Police of a firearm or shotgun certificate. Clause 47 enables the court to de-register a registered firearms dealer convicted of an offence under the Law.

Part III of the Projet is called "Law enforcement and punishment of offences". Clause 48 empowers the Bailiff to grant search warrants. Clauses 49 to 52 empower police officers to stop and search, to require the production of firearms certificates, to seize weapons being moved in contravention of clause 9 and to arrest without warrant persons suspected of specified offences. Clause 53 enacts schedule 2 (which specifies penalties for offences under the Law) and clause 54 enables the forfeiture and disposal of firearms, and the cancellation of firearms certificates, by a convicting court.

Part IV of the Projet is entitled "Miscellaneous and general" and deals, in clauses 55 to 62, with the making of Ordinances, the application of the Law to the Crown and police officers, the service of notices, interpretation, savings, repeals, extent, citation and commencement.

The three schedules deal respectively with offences the commission of which is aggravated by the carrying of a firearm; penalties; and repeals.

The Law applies only to Guernsey, Herm and Jethou. Sark therefore continues to be governed by the 1983 Law.

Approved by the States 30.7.98. Royal Sanction 17.11.98. Registered 15.12.98. In force on a day to be appointed. (No. XII of 1998).

GAMBLING

22. Ordinance: The Gambling (Betting) (Amendment) Ordinance, 1998. – Increases various fees in relation to gambling.

In force 9.12.98. (No. XXXVI of 1998).

HEALTH AND MEDICINE

Prescription charges

23. Ordinance: The Health Service (Benefit) (Amendment) Ordinance, 1998. - Sets prescription charges at £1.80 from the 1st January 1999.

In force 1.1.99. (No. XXX of 1998).

Public health

24. **Projet de Loi: The Public Health (Amendment) (Guernsey) Law, 1998.** – Widens the ambit of Guernsey’s public health legislation to include prescribed matters which are likely to cause injury to health, as well as those which can be positively shown to cause injury to health, using the word “prejudicial”, appropriately defined, to address both circumstances. Revises the definition of a statutory nuisance by: extending the ambit of smoke nuisance to include smoke emitted from any premises and defining “smoke”; clarifying and simplifying the extent of nuisance caused by effluvia; and encompassing noise, vibration and light within the statutory definition. Amends the provisions dealing with inspection and enforcement, clarifying the times at which powers of entry may be exercised and including persons authorised in writing by the Board of Health as “Sanitary Inspectors”. Updates the States’ powers to enact Ordinances, *inter alia* conferring power to enable authorised officers to impose requirements and in urgent cases take abatement action: in such cases provision must be made for rights of appeal and, in certain circumstances, for the payment of compensation.

Approved by the States 30.9.98. Awaiting Royal Sanction.

25. **Ordinance: The Public Health (Amendment) Ordinance, 1998.** – Makes new provision as respects the abatement of nuisances involving imminent danger to public health. An authorised officer (as defined) may in any such case by notice require the taking of specified measures, and in the event of non-compliance he may take those measures himself and the Board of Health may recover any costs thereby incurred from any person responsible for the nuisance. Unless the Magistrate’s Court, on an application brought by the Board within 7 days of the notice, declares itself satisfied that such an imminent danger did exist at the time, the Board is liable to pay compensation (not exceeding £1,000,000 in total in respect of any one notice) to anyone who incurs expense or suffers financial loss as a direct result of complying with the notice. The Ordinance also extends the circumstances in which an abatement of nuisance notice can be served; and empowers authorised officers to serve notices where nuisances have occurred, even if no longer subsisting at the time, requiring measures to be taken to prevent its recurrence. Rights of appeal are extended so as to encompass such notices. It also effects minor adjustments to the respective powers of authorised officers, the Medical Officer of Health and other Sanitary Authorities.

To be brought into force on the same day as section 8 of the Public Health (Amendment) (Guernsey) Law, 1998 (see paragraph 25). (No. XVIII of 1998).

HOUSING

Control of occupation – amendment of Housing Register

26. **Ordinance: The Housing (Control of Occupation) (Amendment of Housing Register) Ordinance, 1998.** - Permits the Housing Authority to inscribe certain named dwellings in Part A of the Housing Register. Housing licences for the occupation of the dwellings are to terminate unless application for inscription is made within 3 months of the commencement of

the Ordinance.

In force 28.10.98. (No. XXXIV of 1998).

Control of occupation – application for housing licence – appeal to Court of Appeal – factors to be taken into consideration – applicant previously resident in open market accommodation – questions of law and fact – Jurats’ role

27. A had lived in Guernsey since 1977 in open market accommodation which he had both owned and rented. His marriage had ended in 1988 since when he had brought up his three children on his own. The children were all qualified residents and one was still at school in Guernsey. A had to leave his subsidised open market rented accommodation and lacked the means to rent at full market value. A had no substantial family connections outside Guernsey. A’s application for a housing licence was refused and his appeal to the Royal Court was dismissed. On further appeal to the Court of Appeal, HELD, allowing the appeal and remitting the case to the Housing Authority for reconsideration, the circumstances referred to in section 6(2)(b)(ii) of the Housing Law 1994 (periods of residence in Guernsey and elsewhere) were a relevant but not a decisive or overriding factor in considering such an application. The Housing Authority had misdirected itself in law in treating the fact that A had lived in Guernsey as an open market resident as fatal to his application. Sections 53 and 54 of the 1994 contemplated the possibility of open market residents being granted a licence to occupy local market accommodation. The Court of Appeal also considered the practice of hearing appeals on the grounds both of law and fact in such cases. Since Walters v. States Housing Authority (see 24.GLJ.32) the practice had developed that issues of law (ultra vires and Wednesbury unreasonableness) would be heard first by the Bailiff sitting with the Jurats. In the present case the only pleaded ground of appeal was of broad unreasonableness on the facts. This had been a tactical decision to avoid a split appeal of two hearings. In the event the Court of Appeal considered that it could deal with the Housing Authority’s error in law despite the form of the summons. Walters did not prescribe any particular procedure; where there was a double ground of challenge the Court of Appeal considered that the course adopted in the present case was not necessary. As long as the respective rôles of the Bailiff and the Jurats were kept well in mind throughout, considerations of justice and convenience would decide the most appropriate way of dealing with section 56(1) appeals in any particular case. The Court of Appeal also considered that it was a well-established principle of public law, applicable to Guernsey, that a public authority, such as the Housing Authority, could have a policy as long as (1) it conforms with the Law and (2) those who apply it were prepared to listen to reasons why it should not apply in a particular case. If the Jurats considered a policy in general, or its application in a particular case, was unreasonable they had a duty to override it. The Jurats’ role was not to find a level of Wednesbury unreasonableness or irrationality but to apply the less strenuous test of reasonableness.

[Matheson v. States Housing Authority – Court of Appeal 24.7.98 (StJAR/HMP)]. For full report of judgment of Court of Appeal, see paragraph 82.

Control of occupation – restricted qualified residents

28. Order in Council: The Housing (Control of Occupation) (Amendment) (Guernsey) Law, 1998. – See 25.GLJ. 30.

Registered and in force 14.7.98. (No. VI of 1998).

INCOME TAX

Computation of income

29. Ordinance: The Income Tax (Exemption of Benefits) (Amendments) Ordinance, 1998. – Increases, from £4,000 to £4750, the maximum amount of disturbance allowance payable to an employee recruited from outside Guernsey which qualifies for exemption from income tax under the provisions concerning taxation of benefits.

Applies to allowances payable from 1.1.98. (No. XIX of 1998).

Guernsey Tax Tribunal

30. Projet de Loi: The Guernsey Tax Tribunal (Validation) (Guernsey) Law, 1998. – Rectifies an oversight as a result of which all the members of the Guernsey Tax Tribunal, including its President and Vice President, purported to continue to perform their functions as such after their terms of office had expired on 4th June, 1997, new members having been appointed with effect from 31st March, 1998.

Approved by the States 28.10.98. Awaiting Royal Sanction.

Returns

31. Projet de Loi: The Income Tax (Returns Amendment) (Guernsey) Law, 1998. – Requires returns as to income tax to be made within such period as the Administrator may specify in a notice requiring their submission under section 68 of the Income Tax Law (instead of the previous inflexible period of 21 days) provided that such period must not be less than 21 days.

Approved by the States 25.11.98. Awaiting Royal Sanction. Provisionally effective 1.1.98 (States Resolution on Article 27 of Billet d'État No. XXI of 1998 under the Taxes and Duties (Provisional Effect) (Guernsey) Law, 1992).

INDIRECT TAXATION

Impôts

32. Ordinance: The Impôts (Budget) Ordinance, 1998. – Increases the impôt on tobacco and introduces a reduced rate of impôt on beer produced by independent small breweries (as

defined).

In force 9.12.98. (No. XXXVIII of 1998).

INJUNCTIONS

Ex parte application – circumstances in which appropriate

33. See Smith v. Helmot, paragraph 5.

INTERNATIONAL LAW

Yugoslavia and Serbia

34. Ordinance: The Yugoslavia and Serbia (Freezing of Funds and Prohibition on Investment) Ordinance, 1998. – Makes it an offence to commit a breach of Council Regulation (EC) No. 1295/98 of 22nd June, 1998 concerning the freezing of funds held abroad by the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia; or Council Regulation (EC) 1607/98 of 24th July, 1998 concerning the prohibition of new investment in the Republic of Serbia. The Advisory and Finance Committee is empowered to grant authorisations for release of funds pursuant to Council Regulation (EC) No. 1607/98, and to require the production of information for the purpose of ensuring compliance with the EC Regulations.

Made by the States Legislation Committee on 30.9.98 and in force from that date. (No. XXXVII of 1998).

LAND LAW

Boundary dispute – rights of way – loss of rights through non-user – proprietary estoppel – interference with decision of Jurats after Vue de Justice

35. A dispute arose between the owners of adjoining properties which had at one time been in common ownership. R had instituted proceedings in the Royal Court (see 18.GLJ.30) seeking a declaration (1) to determine the line of the boundary and (2) to determine the existence or otherwise of an alleged right of access. In the Royal Court the Jurats had had the benefit of a Vue de Justice. Following the Jurats' finding as to where the boundary lay they held a second Vue de Justice to supervise the exact setting out of this boundary on plans prepared by an architect. A appealed on the basis that the Jurats' findings regarding the boundary were perverse. In relation to the Jurats' siting of the boundary the Court of Appeal HELD, referring to its decision in Guille v. MacKay (14 June 1967), that it would only interfere with a decision of the Jurats as to the facts if it was satisfied that there was no evidence before the Jurats in which they could reasonably have arrived at the finding under challenge in the appeal, or for some other reason their findings were perverse. The Court of Appeal in this case went further and added that it would be "all the more reluctant to interfere when the Jurats have made their findings after a Vue de Justice".

In relation to the right of way the words in the original conveyance were “Droit de passage de pied et avec brouette par dessus le pré de ce bail et ce le long de la dite banque et du dit fossé pour aller et venir toutes fois et quantes entre la dite ruelle et leur dite jaonière.” It was common ground that these words in the conveyance created a valid right of way. The question was whether it had been lost by the lapse of twenty years. This was significant because one of A’s contentions was that the right of way ran through a conservatory which had been constructed recently by R on his property.

The Court noted, as a preliminary point, that the Deputy Bailiff had ruled that there was no principle of proprietary estoppel in Guernsey law, and this finding had not been challenged in the Court of Appeal. Thus it was not open to R, if the Jurats had found that the right of way existed and ran through his conservatory, to raise a defence based on acquiescence by A or her predecessors in title in the construction of the conservatory.

In relation to the right of way the Jurats had held that the right of way on foot still existed, and then set out the path in which it could be exercised (not through the conservatory). The Jurats further held, however, that the right of way with a wheelbarrow had been lost by twenty years non-user. Although there had been a misdirection by the Deputy Bailiff in that he had failed to refer to the Jurats certain evidence relating to user of the right of way with a wheelbarrow, the user ignored did not fall within the terms of the right of way and therefore there had not been a material misdirection. The Court of Appeal therefore upheld this finding.

Evidence had been given by A that she and her father had enjoyed wider rights of way than were formally granted, in particular, the picking of flowers, and the taking of animals along the track in question. The Court of Appeal held these did not affect the right of way and had simply been enjoyed through the kindness of R’s predecessor in title. The Court of Appeal held that “if these simple pleasures are to be burdened by legal analysis I would say that they would fall into the category of licences revocable at will, at least in English parlance”.

[Smith v Slawther - Court of Appeal 24.7.98 (unrep/PTRF)]. For full report of judgment of Court of Appeal, see paragraph 80.

LIQUOR LICENSING

36. Ordinance: The Liquor Licensing (Amendment) Ordinance, 1998. – Replaces the concept of a “meal permit”, which authorised the provision of alcohol with a meal at specified times on Sundays and during extended hours on other days, with a “Family Permit” under which the extended hours for service of alcohol with a meal will also apply on Sunday evenings and alcohol may be served without a meal from 12 noon to 3.30 pm on Sundays. As under the former meal permits, persons under the age of 18 may resort to any part of licensed premises in respect of which a family permit is in force but must not, of course, be served alcohol. Meal permits in force immediately before 1st August, 1998 become family permits on that date.

In force 1.8.98. (No. XVI of 1998).

PRACTICE AND PROCEDURE (CIVIL)

Application to join a third party – prescription – Law Reform (Tort) (Guernsey) Law, 1979 - Royal Court Civil Rules 1989, Rules 34 & 35

37. See Mann v. St. Pierre Park Hotel Ltd, Atlanta Sports Industries Ltd. and Johnson Metal Industries Company Ltd. (Third Party), paragraph 56.

Cause of action – application to strike out – costs – full indemnity costs

38. The Court of Appeal had previously made an Order with regard to the transfer of shares to Y who had allegedly provided a loan for their purchase and who now required them as security (see 24.GLJ.47). Fresh proceedings were brought in the Royal Court by P to determine the ownership of the shares. The Royal Court (see 25.GLJ.35) had held that, since a finding of fact that Y had provided the funds had apparently not been contested in the Court of Appeal, it would not be proper to re-litigate it. On appeal to the Court of Appeal against the Order of the Royal Court striking out a new cause of action to determine the ownership of the shares, the Court of Appeal HELD:

1. A cause of action will only be struck out where there are strong grounds and where the court is fully satisfied that there is disclosed no reasonably argued cause of action, or where for some other reason pursuit of the action is an abuse of the court's process. P was not entitled to pursue an allegation of fraud by D1 in an action against D2 where it had not previously alleged it against D1 as a reason to seek rescission of the contract by which the shares had been acquired. An allegation that D2 was D1's agent in the purchase of the shares was to no avail, as it was not contested that D2 was personally and solely obliged to Y who had provided the funds for the purchase. The order of the Royal Court would be upheld, not for the reason given by the Royal Court but due to the fact that the pleadings did not, for these reasons, provide an arguable case against D2.
2. D2 had brought a separate action against P for the determination of the ownership of the shares as a result of comments made by the Deputy Bailiff. P had applied for the actions to be joined but failed. This was appealed and at the same time D2 had felt compelled to intervene in the action of P against D1. Indemnity costs were awarded against P, as it had been entirely unnecessary for D2 to have to have started a separate action: she had done so only as a result of the urging of the Court with which P had concurred. Indemnity costs were also awarded against P in the strike-out application.

Matheson Securities (Channel Islands) Ltd v Hulme and Hulme – Court of Appeal 4.9.98 (MGF/PTRF)]. For full report of judgment of Court of Appeal, see paragraph 84.

Cause of action – application to strike out – want of prosecution – whether inordinate and inexcusable delay – whether prejudice to defendants – Rule 36(2) of Royal Court Civil Rules, 1989

39. In proceedings concerning an action in negligence against a firm of accountants, the Deputy Bailiff struck out the action for want of prosecution but dismissed an application to strike out the action on the grounds of an abuse of the process of the Court. HELD, in considering the

application to strike out for want of prosecution, the Court should take the approach set out in the decision of the House of Lords in *Birkett v. James* [1978] AC 297 and in considering the application to strike out on the grounds of an abuse of process the correct approach was as set out in the House of Lords decision in *Grovit v. Doctor*. The Deputy Bailiff distinguished this approach from that taken by the Court in considering whether to restore cases to the Rôle after they had become périmée in *Le Moigne v. Hargetion* (see 20.GLJ.51) and *Guernsey Annandale Tile Company (1980) Ltd v. Haines* (see 24.GLJ.48) where the plaintiffs were impecunious parties in personal injury cases. In the present case PP's delay in producing material on discovery and failing to answer requests for further and better particulars had been inordinate and inexcusable. The Court was more likely to strike out in a case such as this where fresh actions in contract and tort were now time-barred. The possibility that an action for breach of fiduciary duty could still be brought without limit of time did not dilute the Court's conclusion on striking out. In finding whether there would be prejudice to DD if the action were allowed to continue, the Court held that the fact that they were professional accountants did not mean that they would be any less prejudiced by the dimming of memories or having the action hanging over their heads than other, non-professional, defendants. (deVGC).

[*Dunne et al v Rowe et al* – Ordinary Court 20.8.98 (JPG/RICEH)].

Cause of action – application to strike out – want of prosecution – whether inordinate and inexcusable delay – whether prejudice to defendants – Rule 36(2) of Royal Court Civil Rules, 1989

40. In early 1989 PP started to negotiate the purchase of an area of land with the intention of constructing dwellings on it. In December 1988, the Island Development Committee (IDC), which had previously refused permission, had granted approval in principle subject to conditions. In March 1989, a director of P2 sought advice concerning the purchase from a firm of Advocates, DD. PP instructed DD in connection with the purchase. Soon after the sale was completed, PP realised that the conditions imposed prevented the development of the site as envisaged and on 6 June 1989 the IDC refused the planning permission requested. PP alleged that an employed advocate of DD had represented that they would be given permission. PP's cause of action arose at the time of the refusal. PP filed their claim on 7 October 1993 and defences with an Exception de Fonds were filed on 23 November 1993. No further action took place and on 22 October 1998 DD argued that the claim should be struck off for want of prosecution. Counsel agreed that English case law relating to O.25 r.4 could be used when considering Rule 36 (2) of the Royal Court Civil Rules, 1989. HELD, by Lieutenant-Bailiff Hancox, when considering the dismissal of a case for want of prosecution it was necessary for two elements to be satisfied. There must be inordinate and inexcusable delay and also substantial prejudice to the defendants causally linked to the delay. Inordinate delay must also be inexcusable. Delay prior to the issue of proceedings could not be treated as inordinate because the statute permitted it. On the facts, the period of delay between Autumn 1996, until which time there had been some communication between the parties, and Autumn 1998 was inordinate and inexcusable. However, the recollection of witnesses at trial was not prejudiced by the delay because the matter was well documented from the start. The approach to be adopted was that of Neill L.J. in *Shtun v. Zalesika*. When applied to the facts DD had not discharged their burden of showing that they had been seriously prejudiced or that a fair trial of the issues could be heard. The application to strike out failed. 50% of recoverable costs were awarded to PP and DD were granted leave to appeal. (ARWH).

Birkett v. James [1978] AC 297; Trill v. Sacher [1993] 1 WLR 1379; Allen v. Sir Alfred MacAlpine & Sons Ltd. [1968] 1 AER 543; Rath v. Lawrence [1991] 1 WLR 399; and Shtun v. Zaleska [1996] 1 WLR 1270, at p. 1286 considered.

[Willow Property Development Ltd. and Balmoral Homes Ltd. v. John Nikolas van Leuven et al – Ordinary Court 11.12.98 (JPG/NJB)].

Cause of action - leave to amend – application shortly prior to trial to add further particulars to statement of claim – principles upon which applications are granted

41. In an action for professional negligence resulting from an allegedly defective survey on a dwelling-house P sought to add additional particulars to the statement of claim shortly prior to trial. The application was brought under Rule 35 of the Royal Court Civil Rules, 1989, which provides that pleadings cannot be amended without leave. HELD by the Deputy Bailiff, the first issue was to establish that what the plaintiff was seeking to include was a pleading giving further particulars of a cause of action already pleaded rather than a pleading amounting to a new cause of action. As this was a case of adding to particulars of an existing cause of action he would approach the application for leave to amend in the same way that courts in England do, and that the issue to be taken into account was whether the amendment could be made at that stage without causing prejudice to the defence. Following guidance in the White Book at paragraph 20/8/6 leave would be granted. Costs thrown away and costs of the application reserved. (deVGC).

[Williams v Basa Surveying Ltd & Chapman – Ordinary Court 21.12.98 (JPG/LLeRS)].

Costs – full indemnity costs – personal injury claim involving full trial on quantum

42. P made a substantial damages claim against D arising out of a road traffic accident. D admitted liability but alleged contributory negligence and disputed quantum. A full trial took place before Jurats and the Court awarded a figure substantially in excess of what D's insurers had paid into Court. P asked for full indemnity costs (save for the costs of the application relating to péremption (see 20.GLJ.51)). P had been impecunious and had depended on the good will of his advocate in pursuing the claim without payment. There was no question of D having defended the action unreasonably, scandalously, frivolously or vexatiously or having otherwise abused the process of the Court (Rule 48 (4) of the Royal Court Civil Rules, 1989). The question was whether the case fell within paragraph 4(a) of that Rule on the ground that the Court's opinion was that, in the special circumstances of the case, costs should be ordered otherwise than on the basis provided by the Royal Court Costs and Fees Rules, 1981.

The Deputy Bailiff expressed concern that the lack of legal aid and the low level of recoverable costs together with the absence of any procedure for making interim payments in personal injuries cases could encourage unscrupulous insurers to endeavour to settle cases with figures below those recognised in other jurisdictions. P could not have been better served by his advocate whose decision to contest the insurance company's offer had been fully vindicated. Merely to order recoverable costs would result in P having to forgo a substantial part of his damages. On the other hand it would be wrong for plaintiffs in these circumstances to be able to recover the whole of their costs as otherwise there would be no incentive on their part to

settle the matter without resort to litigation. HELD by the Deputy Bailiff that P's advocate's bill of costs should be taxed or otherwise agreed by D and, when he was advised as to the definitive figure as to what P's advocate would receive, he would order a finite figure to be paid as the contribution of P to his advocate's costs. The balance of costs would be paid by D's insurers. (deVGC).

[Le Moigne v. Hargetion (No. 2) – Ordinary Court 26.8.98 (PTRF/JDL)].

Costs – full indemnity costs – when appropriate

43. See Smith v. Helmut, paragraph 5.

Judgments – reciprocal enforcement – application to set aside registration of English judgment – whether judgment debtor received sufficient notice of original proceedings – whether enforcement contrary to public policy

44. A, against whom judgment had been taken in the English High Court on 10th June 1992, applied for the setting aside of registration of that judgment, application for which had been made ex parte in the Royal Court on 5th June 1998. He claimed, first, that he had failed to receive notice of the original proceedings in sufficient time to enable him to appear, and accordingly had not appeared, pursuant to section 6(1)(a)(iii) of the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957, as amended; and, secondly, that because of excessive delay in enforcing the judgment, and failure of the judgment creditor bank (R) to communicate with him concerning the accrual of interest on the debt, it was contrary to public policy pursuant to section 6(1)(a) (v) of the 1957 Law for R to be allowed to enforce its judgment. HELD, by the Deputy Bailiff, although English procedures regarding service of proceedings were different from those in Guernsey, and A had not been given a specific date on which judgment against him would be sought, the English writ of summons, which had been properly served on him, clearly stated the procedures necessary for lodging a defence and, while A had not followed those procedures, he had communicated with R's solicitors in such a way that it was apparent that he understood them. Further, with regard to the question of public policy, although the rate at which interest was accruing had been fixed at a time when interest rates were much higher, there was no power for the English Court to vary that interest rate and the Guernsey Court would likewise have no such power in respect of a foreign judgment. Nor would the fact that R had failed to take action to enforce his judgment until shortly before the end of the prescription period render registration of the judgment contrary to public policy. The application would be dismissed. (deVGC).

[Lloyd's Bank PLC v. Bushby – Ordinary Court 16.11.98 (CAT/StJAR)].

Judgments – stay of execution – matters to be taken into consideration – arrest of shares – application to confirm and permit sale – whether to be made “inscrite” – whether sale appropriate

45. In 1996 (see 22.GLJ.45) the Court of Appeal had granted summary judgment in respect of a loan against AA in favour of M Ltd, a trust company, shares in which were held by nominees, including R Ltd, of a firm of accountants which firm had also been acting for AA in relation to complex loan arrangements involving the transfer of their realty into R Ltd. R Ltd successfully

applied to the Royal Court for the eviction of AA from their property but in 1998 (see 25.GLJ.12) the Court of Appeal set aside the order for eviction and ordered that M Ltd pay the costs of the proceedings on the primary ground that by bringing the proceedings those who purported to act for R Ltd were acting in breach of their duty to AA whom they also represented. In the course of their judgment, the Court of Appeal had criticised the accountants and advocate acting for AA and called for an investigation into their conduct. Shortly after the 1998 judgment M Ltd caused H M Sheriff to arrest the shares in R Ltd by way of execution of the 1996 judgment and subsequently applied to the Royal Court for confirmation of the arrest and permission to sell. The Bailiff adjourned the hearing "to await the report of the investigation into the action of [the advocate and accountant] which was ordered by the Court of Appeal". M Ltd appealed against that adjournment and AA sought, as an alternative to the adjournment, a stay of execution of the original judgment, which application was based on an action which AA proposed to bring against M Ltd. and an action which they had already commenced against the professional advisers. HELD by the Court of Appeal –

- 1 Even if the Court of Appeal had *ordered* investigations into the conduct of the professional advisers (which it had not), the existence of such an investigation was not a ground for adjourning the hearing of M Ltd's application. Further, the effect of such an adjournment would have the effect of a stay of execution and should not be granted without proper consideration of the appropriateness of such a stay.
- 2 Although AA had produced, at the request of the Court of Appeal, a statement of the basis of their proposed proceedings against M Ltd, there was a substantial lack of particularity in the statement of the causes of action and loss suffered. It was incumbent upon a defendant seeking a stay of execution some considerable time after the judgment had been given to give a substantial explanation of any cross-claim and consequent damages.
- 3 On the second head relied on by AA, M Ltd argued that AA could not rely on an action already pending against the professional advisers in order to stay execution of a judgment in favour of M Ltd. The Court considered relevant case law, and particularly the judgment of Bingham, L.J., in Burnet v. Francis Industries Ltd [1987] 1 WLR 802, which considered the circumstances in which a cross-action against a related party may enable a defendant to obtain a stay of execution of a judgment. Among the relevant points were the proximity of the identity of the judgment creditor and the intended defendant; the inter-relationship between the two claims (the more closely they were identified the more like a counterclaim the second claim became); the strength of AA's claim against R Ltd; the size of the claim relative to the judgment; the likely delay before the merits of the claim could be considered by the Royal court; the extent of the prejudice to M Ltd consequent upon the delay; and the risk of prejudice to AA if they were compelled to satisfy the judgment. The Court considered that the claim against the accountants was a strong one because prima facie they were in breach of their fiduciary duties and duties of care. There would be an obvious prejudice to M Ltd if it were denied the fruits of its judgment but there would be the risk of prejudice to AA if compelled to pay immediately because they would lose their home. In all the circumstances it would be appropriate to give a stay of execution subject to suitable terms such as an undertaking by AA to press the action forward except that the Court had not yet been given any sufficiently clear statement of damages alleged to be recoverable against the professional advisers.

Accordingly, the order would be for the appeal to be adjourned for a short period to enable AA to prepare the necessary statement.

AA had also argued that the application for confirmation of the arrest should have been inscribed on the Rôle des Causes à Plaider pursuant to Rule 13 of the Royal Court Civil Rules 1989. The Court stated, obiter, that whether proceedings in such cases must be served must depend on the nature and complexity of the case. Further, it would not have been appropriate in the circumstances to give permission for the sale of the shares: it would have been more appropriate for the Sheriff to be directed, in the course of liquidation of R Ltd, to sell the realty itself so as to obtain the market value of the realty.

[Monument Trust Company Ltd. v. Gaudion & Gaudion – Court of Appeal 15.10.98 (St.JAR/ADL)]. For full report of judgment of Court of Appeal, see paragraph 83.

PRISON

Administration

46. **Projet de Loi: The Prison Administration (Amendment) (Guernsey) Law, 1998.** – Amends the Prison Administration (Guernsey) Law, 1949 to allow the States by Ordinance to set in place a regime for the testing of any prisoner to ascertain whether he has alcohol or any controlled drug in his body.

Approved by the States 30.9.98. Awaiting Royal Sanction.

47. **Ordinance: The Prison Administration (Guernsey) Ordinance, 1998.** – Replaces the Prison Administration (Guernsey) Ordinance, 1959 and three amending Ordinances of 1981, 1986 and 1988. It reflects the modern regime in place in the Guernsey prison. It covers the following general topics: -

- i. prison accommodation;
- ii. discipline and control of prisoners;
- iii. the training, education and welfare of prisoners;
- iv. physical welfare of prisoners;
- v. the employment of prisoners;
- vi. privileges for untried prisoners;
- vii. provision for appellant prisoners;
- viii. the education and training of young offenders;
- ix. the treatment of prisoners with psychiatric problems;
- x. the regime for civil prisoners;
- xi. the duties and discipline of prison staff;
- xii. establishment of a panel of visitors; and
- xiii. special offences relating to the prison.

In force 1.10.98. (No. XXIII of 1998).

PUBLIC ASSISTANCE

48. Ordinance: The Central Outdoor Assistance Board Regulations (Amendment) Ordinance, 1998. - 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.

In force 8.1.99. (No. XXIX of 1998).

PUBLIC HOLIDAYS

49. Ordinance: The Public Holidays (No. 2) Ordinance, 1998. - Specifies the 28th and 31st December, 1999 and the 3rd January, 2000 as additional public holidays.

In force 30.9.98. (No. XXV of 1998).

ROAD TRAFFIC AND PUBLIC TRANSPORT

Road humps

50. Ordinance: The Road Humps Ordinance, 1998. – Provides, for the purposes of the Road Traffic (Road Humps) (Guernsey) law, 1983, as amended, that road humps constructed or maintained in a public highway shall not raise the surface of that highway by more than 100 millimetres nor lower the surface by more than 40 millimetres on either side of the hump.

In force 29.10.98. (No. XXXIII of 1998).

Speed limits

51. Ordinance: The Road Traffic (Speed Limits and Trials) (Amendment) Ordinance, 1998. – Amends the principal Ordinance of 1987 so as to add Victoria Avenue in St Sampson's to the list of public highways in that parish which are restricted to a 25 m.p.h. speed limit.

In force 30.9.98. (No. XXI of 1998).

SHIPPING

Wreck and salvage

52. Order in Council: The Wreck and Salvage (Amendment) (Bailiwick of Guernsey) Law, 1998. – See 24.GLJ.53.

Royal Sanction 21.7.98. Registered and in force 18.8.98. (No. VIII of 1998).

SOCIAL SECURITY

Attendance and invalid care allowances

53. Ordinance: The Attendance and Invalid Care Allowances Ordinance, 1998. - Fixes the annual income limit for receipt of attendance allowance and invalid care allowance at £52,000. Fixes the weekly rate of attendance allowance and invalid care allowance.

In force 4.1.99. (No. XXVIII of 1998).

Rates of contributions and benefits

54. Ordinance: The Social Insurance (Rates of Contributions and Benefits, etc.) Ordinance, 1998. - 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 amount of the Guernsey Health Service Fund Allocation.

In force 1.1.99 as to sections 2, 3, 4, 5, 6 and 8 and 4.1.99 as to remainder. (No. XXXI of 1998).

Supplementary benefit

55. Ordinance: The Supplementary Benefit (Implementation) (Amendment) Ordinance, 1998. - Fixes the limit of weekly income for supplementary beneficiaries and the normal requirements of persons in need of a supplementary benefit.

In force 8.1.99. (No. XXXII of 1998).

TORTS

Personal injury – application to join a third party – prescription – Law Reform (Tort) (Guernsey) Law, 1979 - Royal Court Civil Rules 1989, Rules 34 & 35

56. P used a gymnasium at hotel premises owned by D1 and was seriously injured when a rowing machine upon which he was exercising on 27th August 1993 suffered structural failure. P, through his Advocates, negotiated with D1 and D2, the supplier of the machine. The machine was inspected by P's advocates in October 1993 who failed to detect the manufacturer's name. On 31st May 1994 D1's insurers invited P's advocates to communicate with the manufacturers, who they mistakenly thought to be D2, but they did not do so. Proceedings were issued in 1996 within time against D1 and D2. Defences were filed in October 1996 in which D2 named D3 as manufacturers of the rowing machine. On 23rd. August 1997, P applied for leave to amend the cause and to join the manufacturers. HELD by the Deputy Bailiff, it was not reasonable to expect that when P's advocates first inspected the machine D1 would be relying upon defective manufacture. Further, P's advocates had been innocently misled in the early stages by D1's insurers who sought to blame the manufacturers. However, P's advocates had

failed to make diligent enquiries as to the identity of the manufacturers. The issue was whether the date of constructive knowledge of the identity of the manufacturer was after 23rd August 1994. It was impossible to form a conclusive view as to what date after 31st May 1994 P should be imputed with constructive knowledge of the identity of the manufacturer but it could not be placed before 24th August 1994. The application was therefore brought within three years of the date when P should be deemed to have had knowledge of D3. Discretion and prejudice did not need to be considered as it would if the matter had been considered under section 8 of the Law Reform (Tort) Guernsey Law, 1979 rather than, as it was, under section 5. Accordingly, the application to join D3 as third party would be granted. (deVGC).

[Mann v. St. Pierre Park Hotel Ltd, Atlanta Sports Industries Ltd and Johnson Metal Industries Company Ltd. (Third Party) Ordinary Court 30.10.98 (JPG/JMW)].

Personal injury – proceedings incorrectly brought in another jurisdiction – prescription – Law Reform (Tort) (Guernsey) Law, 1979 – Motor Insurers Bureau

57. P and D, both from England, were visiting Guernsey as crew of a fishing boat. It was alleged that on 16 July 1990, D, driving whilst uninsured, caused serious injuries to P. The damages claimed exceeded £1 million. P commenced proceedings in the English High Court on 28 April 1992, well within the 3 year English limitation period. Notice was given to the Motor Insurers Bureau (MIB) on 30 April 1992 under an Agreement between the MIB and the Secretary of State (“the English Agreement”). MIB accepted the notice on 15 May 1992 and instructed its solicitors. D filed defences on the instructions of MIB on 8 December 1992 and in November 1994 MIB was joined as D2. All parties proceeded on the basis that the English Agreement applied. Doubt set in when preliminary issues were tried before Kennedy, J. at Winchester on 3 May 1995. It then became apparent that the appropriate agreement was one dated 4 April 1990 between MIB and the States of Guernsey. The English proceedings were stayed in May 1996. Meanwhile, proceedings were commenced in Guernsey in December 1995. On 5 June 1997 the Bailiff exercised jurisdiction under section 8 of the Law Reform (Tort) (Guernsey) Law 1979 (“the Law”) to disapply the time-bar imposed by section 5 of that Law. D appealed to the Guernsey Court of Appeal. HELD, the matter proceeded on the erroneous assumption of all parties that the English Agreement applied. The first question was whether P, having instituted proceedings in England within the three years prescribed by the Guernsey limitation period, was prevented *in limine* from seeking the Court’s discretion to extend the time limit for his Guernsey action. *Walkley v. Precision Forgings Limited* was of no application, being concerned with discontinuance of proceedings within the same jurisdiction. In this case two jurisdictions were involved and P did not issue proceedings in Guernsey within its primary limitation period of three years. The Bailiff had erred in considering the matter from the point of view of Guernsey as being a forum conveniens. This was not a consideration set out in section 8 of the Law. The Court of Appeal could and must exercise that statutory discretion. P acted with promptitude and the faults of his lawyers should not be counted against him. D2 would suffer prejudice in that it was prevented from mounting a successful defence in England. However, the reasons for which P’s action might well fail in England were both technical and unmeritorious. The justice of the situation required that the time bar be disapplied. The appeal by D was dismissed with costs.

Thompson v. Brown Construction (Ebbw Vale) Limited & Others (1981) 2 All ER 296 applied; Walkley v. Precision Forgings Limited (1979) 1 WLR 606 distinguished; Deerness v.

Keeble (1983) 2 LLR 260, Chappell v. Cooper (1980) 2 All ER 463, White v. Glass (C.A.) (unreported) 17 February 1987, and re Workvale Limited (1992) 1 WLR 416 considered.

[Brown v. Gould - Court of Appeal 24.7.98 (JMW/StJAR)]. For full report of judgment of Court of Appeal, see paragraph 81.

Wrongful arrest – assault – citizen’s arrest –burden of proof

58. A claimed damages against D, a member of the public, for wrongful arrest and assault, D having “rugby-tackled” and restrained A on the understanding that A had been engaged in disorderly conduct. HELD by the Assistant Magistrate that the burden of proof as to whether an arrest was lawful was borne by the person making the arrest. In this case the conduct did not amount to that which might have entitled D to make an arrest. Furthermore, the authority of Morton v Paint (see 21.GLJ.36) did not give rise to a private citizen’s power of arrest in Guernsey equivalent to that found under English common law. Accordingly, the arrest and restraint of A was in all the circumstances of the case unlawful and the torts of assault and wrongful arrest were proved. A was awarded £250 in damages. (ARWH).

[De Carteret v. Kelly et al – Magistrate’s Court 24.12.98 (AJA/PTRF)].

TOURISM

Boarding permits

59. Order in Council: The Tourist (Amendment) (Guernsey) Law, 1998. – See 25.GLJ.45.
Royal Sanction 21.10. 98. Registered 17.11.98. In force 1.12.98. (No. XI of 1998).

TRADE AND INDUSTRY

Trading stamps

60. Projet de Loi: The Trading Stamps (Repeal) (Guernsey) Law, 1998. – Repeals the Trading Stamps (Guernsey) Laws, 1966 and 1990 (see 9.GLJ.78).

Approved by the States 30.9.98. Awaiting Royal Sanction.

TRUSTS

Breach of trust - liability of directors of corporate trustees - fiduciary obligations - directors of corporate trustees as guarantors - section 70 of the Trusts (Guernsey) Law, 1989

61. This was an appeal by D3 and D4 and a cross appeal by P1 and P2 from a decision of the Deputy Bailiff (see 25.GLJ.47). The original action was against a trust company and three of

its directors (D1 Ltd, D2, D3 and D4). PP had placed a large sum of money with D1 Ltd and, following the advice of D2, the money was loaned to X, who was subsequently declared bankrupt and PP lost their money. D3 had signed the authorisation to the bank that enabled the funds to be transferred to X. The three directors of the trust company were joined as co-defendants on the grounds: (a) that they were in breach of their fiduciary duties as directors; (b) that they were negligent; and (c) that they were liable as guarantors under the provisions of Section 70 of the Trusts (Guernsey) Law 1989 ("the Law"). D3 and D4 filed Exceptions de Fonds alleging that there was no cause of action disclosed against them arguing (i) that the Court must find against the trustee before any action could be brought against them as directors of the trustee; (ii) that they did not owe a fiduciary duty to the Plaintiffs; and (iii) that, in the absence of advice by them or any assumption of responsibility on their part, or any reliance by the Plaintiffs, there was no liability for negligence if a duty of care was owed. In the Royal Court the Deputy Bailiff dismissed Exceptions (i) and (iii) and upheld (ii). On appeal to the Court of Appeal, it was HELD:

- (1) On the issue whether on its proper construction a director's liability under section 70 of the Law accrued only after the trust had been found in breach of its obligations, liability under Section 70 was contingent upon the finding of a breach of trust; however, the question as to whether the Third and Fourth Defendants were properly joined or not was dependent upon the proper construction and application of the Royal Court Civil Rules, 1989 as to joinder of parties. D3 and D4 had been properly joined having regard to their *potential* (emphasis added) liability under Section 70 of the Law. Although the 1989 Trust Law was not strictly a codification of the law, it did in effect seek to set up a new and powerful framework of a modern character which could be called a code in the most general sense. Accordingly, the court would discourage references to La Coûtume Normande including the Droit de Discussion.
- (2) On the question of negligence, D4 had not done anything of relevance in connection with the discharge of his duties as a director of D1 Ltd and therefore he could not be liable in negligence; and D3's actions in simply signing a cheque were those of an agent for the company and as there was no relationship giving rise to a personal duty of care to the plaintiffs there could be no breach and thus D3 had no liability for negligence.
- (3) Finally, in relation to the issue of fiduciary duty, directors of companies owed a fiduciary duty to the company itself and not to the beneficiaries of the trust. To seek to impose some equitable or other principle by which such a duty could be imposed was unnecessary when Section 70 of the Trust Law provided a perfectly adequate remedy.

The appeals of D3 and D4 in relation to section 70 of the Law were dismissed. The appeals in relation to allegations of negligence against D3 and D4 were allowed. PP's cross-appeal in relation to fiduciary duty was dismissed.

Cherub Investments Limited v Channel Islands Aero Club (Guernsey) Limited 1982, Civil Appeal Report No.11, applied; Williams v Natural Life Health Foods (1998) 1 All ER 577 and Bath v Standard Land Company Limited (1911) 1 Ch 618 followed; Moschi v Lepp Air Services Limited (1973) AC 331, Hurley & Another v BGH Nominees Pty

Ltd (1982) 31SASR 250 and Royal Brunei Airlines v Tan (1995) 2 AC 378 considered.

[Rowe & Rich v. Cross & Cross – Court of Appeal 24.7.98 (NJB/StJAR)]. For full report of judgment of Court of Appeal, see paragraph 85.

Intention to create- investment in company – liquidation - whether funds available to liquidator - intention of directors

62. GET was a Guernsey registered company which had been set up by local fiduciaries on the request of Mr Simon who was to manage the company. By 30 June 1995 the directors of GET had become concerned that GET was soliciting funds from investors unlawfully and/or fraudulently misapplying such funds. The directors caused all funds received after 30 June 1995 to be paid into a separate account ("the suspense account"). In July 1995 the applicants ("BKNK") paid the sum of US\$100,000 to GET to be invested and it was subsequently transferred to the suspense account in accordance with the practice established in June 1995. BKNK were informed that their money was being held in a separate account and would be returned to them if they so requested. BKNK requested the return of their money. In reply a director of GET advised BKNK that until the investigation of Mr Simon had been completed, BKNK's money would not be repaid. Subsequently GET went into liquidation and BKNK applied to the Court under Section 63 of the Trusts (Guernsey) Law, 1989 as amended, for (inter alia) the following:

- (a) a declaration that GET held the sum of US\$100,000 in trust for BKNK;
- (b) an order that the sum together with interest accrued be returned to BKNK.

In the Royal Court the question to be decided was the status of the monies in the suspense account. Were they part of the monies of GET which would be available to general creditors and liquidators' expenses or were they part of a fund which would not be available in the general liquidation but which must be returned to the investors on the basis that they were subject to a trust in their favour? The Application of BKNK was based on a principle in the case of In re Kayford Limited [1975 1 All ER 604 which concerned a company to which customers would send money for goods. The company suffered financial difficulties, and opened a separate bank account to which all further sums of money sent by customers for goods not yet delivered should be paid. In that case Megarry J found that the intention was that there should be a trust. There was no doubt as to the existence of the three certainties, and the question was whether in substance a sufficient intention to create a trust had been manifested. GET sought to distinguish Kayford from the present case on the basis that the intentions of the directors were not as clear as they were in Kayford. There was some confusion as to the intention of the directors when they opened the bank account. The testimony of the directors on this point was somewhat equivocal. BKNK also relied on the case of re Chelsea Cloisters Limited 1980 P&CR 98 CA, in which there was a clear intention as to the purpose for which the monies in the separate account were being held at the time the account was created. GET further sought to rely on re Multi Guarantee Company Limited 1987 BCLC 257 CA in which it was held that sufficient intention to create a trust had not been shown. In that case the money had been returned to the party who had originally placed it in the account. If Multi was to be applied to the facts of the case the money would be returned to the investors. It was HELD by the Deputy Bailiff that the directors of GET had made a conscious decision not to accept the

money for investments on the terms that had been offered to the investors but rather to "ring fence" monies until such time as GET's position could be clarified. The original purpose of BKNK making the payment to GET was frustrated (no investment had taken place), and there was a resulting trust in favour of BKNK in respect of the balance of the US\$100,000 it had paid. It was right that directors of companies engaged in accepting money for investment should be encouraged to act cautiously and defer acceptance of new investments if in doubt until the position is clarified. BKNK's money, therefore, was not available to the general body of creditors and was to be returned to BKNK with any interest earned thereon. (deVGC).

[In the matter of Global Energy Technologies Limited (In Compulsory Liquidation) : Kennedy & Kodell v. Global Energy Technologies Limited – Ordinary Court 27.8.98 (NJB/JMW)].

ALDERNEY

BUILDING AND DEVELOPMENT CONTROL

63. Ordinance: The Building and Development Control (Designated Area) (Alderney) Ordinance, 1998. - Designates the Alderney green belt, within which development permission may not be granted, for the purposes of the Building and Development Control (Alderney) Law, 1975.

Ordinance of the States of Alderney of 16.12.98.

COMPANIES

64. Ordinance: The Companies (Alderney) Law (External Companies) Ordinance, 1998. - Provides that an external company (being any body corporate other than an Alderney registered company or one prescribed by regulations of the Policy and Finance Committee) may not establish a place of business in Alderney or have an established place of business in Alderney unless registered in the Register of External Companies. The Ordinance makes provision as to the formalities for registration, for the revocation of registration, for registration fees, for controlling the names under which external companies can carry on business and otherwise as to the use of company and business names, and for the service of documents on external companies. External companies have until 1st April, 1999 to comply provided that they have submitted an application for registration.

Ordinance of the States of Alderney of 4.11.98.

CONSTITUTIONAL LAW

65. Ordinance: The States Committees (Transfer of Functions) (Alderney) (Amendment) Ordinance, 1998. - Transfers functions under the Hawkers (Amendment) (Alderney) Law, 1963 to the Policy and Finance Committee and functions under Part V of the Building and Development Control (Alderney) Law, 1975 (which concerns the removal of vehicles and

boats) to the General Services Committee.

Ordinance of the States of Alderney of 2.9.98.

CRIMINAL LAW AND PROCEDURE

Money laundering

66. Order in Council: The Money Laundering (Disclosure of Information) (Alderney) Law, 1998. – See 25.GLJ.53.

Royal Sanction 21.7.98. Registered and in force 21.7.98. (No. VII of 1998).

EUROPEAN COMMUNITIES

67. The European Communities (Euro: Miscellaneous Provisions) (Alderney) Ordinance, 1998. - Incorporates into Alderney domestic law certain provisions of Council Regulation (EC) 1103/97 relating to the introduction of the euro. Replaces references in legal instruments to the ECU by references to the euro. The introduction of the euro does not discharge or excuse performance under any legal instrument.

Ordinance of the States of Alderney of 4.11.98.

HEALTH AND MEDICINE

Public health

68. Ordinance: The Public Health (Amendment) Ordinance, 1998. – Section 3 of this Ordinance provides that the Public Health (Amendment) (Guernsey) Law, 1998 (see paragraph 25) and the Public Health (Amendment) Ordinance, 1998 (see paragraph 26) shall have effect in Alderney.

To come into force on the same day as section 8 of the Public Health (Amendment) (Guernsey) Law, 1998. (Ordinance of the States of Guernsey No. XVIII of 1998).

INDIRECT TAXATION

Leasehold duty

69. Ordinance: The Duty on Long Leases (Variation of Ratio) (Alderney) Ordinance, 1998. - Modifies section 2 of the Duty on Long Leases (Alderney) Law, 1994 (see 17.GLJ.50) by varying the ratio in which leasehold duty is to accrue, respectively, to the States of Alderney

and the States of Guernsey.

Ordinance of the States of Alderney of 2.9.98.

Transfer duty

70. Ordinance: The Duty on Share Transfers (Variation of Ratio) (Alderney) Ordinance, 1998. - Modifies section 2 of the Duty on Share Transfers (Alderney) Law, 1994 (see 17.GLJ.51) by varying the ratio in which transfer duty is to accrue, respectively, to the States of Alderney and the States of Guernsey.

Ordinance of the States of Alderney of 2.9.98.

INTERNATIONAL LAW

Yugoslavia and Serbia

71. Ordinance: The Yugoslavia and Serbia (Freezing of Funds and Prohibition on Investment) (Alderney) Ordinance, 1998. - Incorporates into Alderney domestic law the provisions of Council Regulations (EC) 1295/98 and 1607/98 concerning the freezing of funds held abroad by the governments of the Federal Republic of Yugoslavia and the Republic of Serbia, and the prohibition on new investment in the Republic of Serbia. The States of Alderney Policy and Finance Committee is empowered to grant authorisations for release of funds pursuant to Council Regulation (EC) No. 1607/98, and to require the production of information for the purpose of ensuring compliance with the EC Regulations.

Ordinance of the States of Alderney of 4.11.98.

RATING

72. Ordinance: The Occupiers' Rate (Level for 1999) Ordinance, 1998. - Sets the occupiers' rate for the calendar year 1999 on property at 164 pence in the pound of rateable value.

Ordinance of the States of Alderney of 7.10.98.

WATER

73. Projet de Loi: The Alderney Water Supply (Amendment) Law, 1998. - Amends the Alderney Water Supply Law, 1954 by setting out the powers of the States General Services Committee power to undertake works on private land for the supply of water. Compensation is payable which, in the absence of agreement, is to be fixed by arbitration. Establishes a statutory duty to supply water for domestic purposes. Excludes the States' liability for loss caused by restrictions or interruptions of the water supply.

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

74. Ordinance: The States Water Supply (Rates of Charge) (Amendment) (Alderney) Ordinance, 1998. - Sets an annual water rate for any fixed bath at zero as from 1.7.98.

Ordinance of the States of Alderney of 1.7.98.

SARK

CONSTITUTIONAL LAW

75. Ordinance: The Deputies of the People (By-Election) Ordinance, 1998. – Provides for a by-election for the office of Deputy of the People.

Ordinance of the Chief Pleas of 22.7.98.

GUERNSEY STATUTORY INSTRUMENTS

76. 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 Financial Services Commission (Fees) (Amendment) Regulations, 1998	7.7.98	7.7.98	17.
The Licensees (Financial Resources, Notification, Conduct of Business and Compliance) Rules, 1998 (see Paragraph 8)	7.7.98	27.7.98	18.
The Milk (Retail Prices) (Guernsey) Order, 1998	24.8.98	30.8.98	19.
The Health Service (Pharmaceutical Benefit) (Restricted Substances) Regulations, 1998	16.9.98	16.9.98	20.
The Guernsey Airport Duty Free Order, 1998	29.9.98	2.10.98	21.
The Parking Places (Amendment) (No. 5) Order, 1998	7.10.98	9.10.98	22.
The Prohibited and One-Way Streets (Amendment) (No. 2) Order, 1998	19.10.98	19.10.98	23.
The Social Insurance (Unemployment, Sickness and Invalidity Benefit) (Amendment) Regulations, 1998	22.10.98	26.10.98	24.
The Financial Services Commission (Fees) Regulations, 1998	27.10.98	1.1.99	25.
The Investment Exchange (Notification) Rules, 1998	3.11.98	13.11.98	26.
The Social Insurance (Contributions) (Amendment) Regulations, 1998	6.11.98	1.1.99	27.

The Social Insurance (Increase of Benefit) Regulations, 1998	6.11.98	4.1.99	28.
The Health Service (Medical Appliances) (Amendment) Regulations, 1998	6.11.98	1.1.99	29.
The Income Tax (Guernsey) (Valuation of Benefits in Kind) Regulations, 1998	19.11.98	1.1.99	30.
The Impôts (Temporary Variation of Rates) Order, 1998	19.11.98	1.1.99	31.
The Health Service (Payment of Authorised Appliance Suppliers) (Amendment No. 2) Regulations, 1998	2.12.98	1.1.99	32.
The Health Service (Payment of Authorised Suppliers) (Amendment No. 2) Regulations, 1998	2.12.98	1.1.99	33.
The Income Tax (Pensions) (Contributions Limits and Tax-free Lump Sums) (No. 2) Regulations, 1998	17.12.98	1.1.99	34.
The Water Charges Order 1998	17.12.98	1.1.99	35.

UNITED KINGDOM STATUTORY INSTRUMENTS

77. 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 in the Journal.

	<u>S I Number</u>
The Civil Aviation (Investigation of Air Accidents and Incidents) (Guernsey) Order, 1998	1503
The Wireless Telegraphy (Guernsey) Order, 1998	1511
The Angola (United Nations Sanctions) (Channel Islands) Order, 1998	1756
The Transfer of Prisoners (Restricted Transfers) (Channel Islands and Isle of Man) Order, 1998	2798

JUDGMENTS OF THE GUERNSEY COURT OF APPEAL

78. [CRIMINAL DIVISION – APPEAL NO. 227]

A

13th OCTOBER, 1998

THE LAW OFFICERS OF THE CROWN

v.

SHANE JOHN PARSONS

Before: SOUTHWELL (PRESIDENT), BAILHACHE and SMITH, JJ.A

B

Sentence – assault

See paragraph 13.

C.A. Tee, for the Appellant

P. Robey, for the Crown

C

THE PRESIDENT: Mr. Shane John Parsons was convicted by the Royal Court on 24th April 1998 of an assault on Miss Georgina Mary Mourant, committed on 18th July 1997. The circumstances of the assault were these. Mr. Parsons and Miss Mourant had known each other well for some time, and Miss Mourant had given birth to a daughter, Charis, whose father was Mr. Parsons, and who was about 4 years old at the time of the assault. Miss Mourant also had an older daughter, Ruby. In July 1997 Miss Mourant and Mr. Parsons were not living together.

D

Shortly before midnight on 17th July 1997, Miss Mourant returned to her home at No. 34 Cornet Street, and then released her baby sitter. She went to bed at about 12.30 a.m. on 18th July 1997. She was sleeping in her room on the second floor with her daughter Ruby. Sometime after that, about 1 a.m. according to Mr. Parsons and after 2.30 a.m. according to Miss Mourant, Mr. Parsons entered the house. It seems that he was able to do so because he had retained a key to the house. He entered uninvited and without Miss Mourant's permission.

E

Mr. Parsons went up to Miss Mourant's bedroom and entered it, waking up Miss Mourant. He explained to Miss Mourant that, despite the hour, he wanted to talk to her about a pending criminal case in which he faced a charge of assaulting Miss Mourant, because he wanted Miss Mourant to withdraw the charge against him. Not surprisingly in view of the hour, words passed between them. Mr. Parsons then hit Miss Mourant on the face. This was the assault of which Mr. Parsons was convicted by the unanimous verdict of the Jurats.

F

Following this assault further events took place which became the subject of a more serious charge against Mr. Parsons, of which he was acquitted. Accordingly, this Court is not concerned with any of those subsequent events.

Miss Mourant was examined by a general practitioner, Dr. Maryse Ash, at 10.30 a.m. on 18th July 1997. She found that Miss Mourant had sustained injuries to her head. There was bruising on the lower jaw causing discoloration. There was swelling above that injury. Bruising ran across the line of the mouth, with a cut inside the mouth, and swelling in the lip and on the cheek bone. The doctor's evidence was that these injuries were consistent with a blow by the hand to Miss Mourant's face.

G

Both Miss Mourant and Mr. Parsons had been in public houses (but different ones) before this incident took place. Miss Mourant's evidence was that she had not drunk any alcoholic drinks. Mr. Parsons' evidence was that he had drunk two pints of cider, but no more.

A

The assault viewed merely as a blow to the head was by itself not a major assault, but there were these serious features which the Royal Court, and this Court, have to take into account:-

(1) Mr. Parsons entered Miss Mourant's house without invitation or permission at an hour in the early morning when he knew Miss Mourant and her children were likely to be asleep. Nothing in the past or existing relationship between them justified such an unlawful entry into the house.

B

(2) Mr. Parsons, having unlawfully entered the house, went into Miss Mourant's bedroom again without invitation or permission.

(3) His conduct, including but not limited to the assault, inevitably caused considerable fright to Ruby, the elder daughter, who was sleeping in her mother's bed.

C

Mr. Parsons was sentenced by the Royal Court to imprisonment for 1 year to run consecutively to the sentence which he was already serving. Mr. Parsons has sought leave to appeal to this Court against the sentence, which is described in his Notice of Appeal, dated 14th May 1998, as "manifestly excessive", and as taking into account factors which the Royal Court ought not to have taken into account.

D

Before considering the factors placed before this Court by Advocate Tee on Mr. Parsons' behalf, I should refer to two other matters:-

First, Mr. Parsons has a long record of previous convictions. He is now aged 22, and was 21 years old at the time of the assault. The convictions run from the age of 12 to shortly before this assault. They include not a few convictions for assault, for drunken or disorderly conduct, for burglary, criminal damage, offences concerning cars, as well as other offences. This is a sad record of anti-social conduct.

E

Second, there is an excellent Probation Service Report, prepared by Mr. Stuart Crisp, and dated 11th May 1998. This shows the following: (1) Mr. Parsons has displayed no remorse for his attack on Miss Mourant, and stated when asked, that he did not feel sorry for Miss Mourant (but this was, no doubt, because of the more serious charge of which he was acquitted). (2) His relationship with Miss Mourant has been very volatile and there have been violent episodes in the past. No doubt such episodes have been induced or aggravated by the taking of alcohol. (3) The majority of his offences appear to have been committed while under the influence of alcohol, and he has been and appears to be a problem drinker. He has also used cannabis. (4) Mr. Parsons has failed properly to appreciate that he is prone to be violent and that he has a problem with alcohol.

F

Miss Tee made a comparison with the case of Mr. K.J. Osborne who was sentenced by the Royal Court in November 1993. Osborne was acquitted of rape but received a 6 month sentence for an unprovoked attack on a woman in a public place. The woman and Osborne did not know one another. It is difficult to compare the facts of individual cases in this way, but the sentence passed on Mr. Parsons is arguably out of line with that passed in Osborne's case.

G

Miss Tee referred to English Court of Appeal decisions. Usually, such decisions are not material, being based on different sentencing practices and different social conditions, though guideline decisions may be of some assistance in Guernsey.

A

In general, reference to the sentencing in previous Guernsey cases is also of limited help, except guideline decisions.

Miss Tee, amongst other points also submitted that the Jurats must have taken too much account of Mr. Parsons' regrettably long record of criminal offences, and that the Jurats should have taken greater account of the relatively slight injuries suffered by Miss Mourant.

B

This Court has no doubt that a sentence of imprisonment is appropriate, particularly in view of the factors already mentioned, including the uninvited entry into the house in the early hours, the uninvited entry into Miss Mourant's bedroom, the potentially serious fear that Miss Mourant's elder daughter will have suffered as a result of this incident, the striking of Miss Mourant in these circumstances, and Mr. Parsons' past record of violence.

During his time in prison it is to be hoped that Mr. Parsons will take advantage of both training in control of anger and help in avoiding the adverse effects of alcohol.

C

In all the circumstances however, this Court is satisfied that the sentence imposed by the Royal Court was too long. It agrees with Miss Tee that the appropriate sentence was imprisonment for 6 months.

Accordingly, leave to appeal is granted, and the appeal is allowed to the extent of substituting a sentence of 6 months imprisonment consecutive to the sentences already imposed on Mr. Parsons in respect of other assaults.

D

79.

[CIVIL DIVISION – APPEAL NO. 220]

24TH JULY, 1998

KATHLEEN EDNA SMITH

v.

GORDON LAWSON SLAWTHER

Before: COLLINS (PRESIDENT), BELOFF and NUTTING, JJ.A

E

Land law - boundary dispute – rights of way – loss of rights through non-user – proprietary estoppel – interference with decision of Jurats after Vue du Justice

F

See paragraph 35.

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

THE PRESIDENT: This is a dispute between the owners of two adjoining properties in the Petit Bot Valley in the Parish of the Forest, such properties having at one time been in common ownership.

G

A The Respondent, who is the Plaintiff, and to whom I shall so refer, is the owner, and, together with his wife, the occupier of a bungalow and a plot of land known as "Troussel de Bas" and then (by change of name) "Belmont de Bas." The bungalow was built in late 1961 or thereabouts on land which had been the subject of a sale in 1937 under a conveyance which constitutes a common instrument as between the Plaintiff/Respondent and the Defendant/Appellant to the extent that it conveyed land to the predecessors in title of the Plaintiff, and described the boundary between the land so conveyed and land retained by the vendors, the predecessors in title of the Defendant, as well as reserving certain rights over the land so conveyed for the benefit of the land so retained by the predecessors in title of the Defendant.

B The land so retained was described as a jaonière or furze brake and, in particular, as "La Jaonière du Bordage"; it appears that at one time it was the practice in the Island to harvest the furze off such property and use it for fuel in a furze oven. It was conveyed to the Defendants' parents and then after her father's death to her brother and another who conveyed the same to the Defendant in 1991.

C The conveyance of 11 September 1937:

D The common ownership of the two properties, namely, the land on which the bungalow came to be built (at that time a field known as "Le Pré du Bordage") and the Jaonière, came to an end on 11 September 1937, on which date Mr. and Mrs. De La Rue sold "Le Pré du Bordage" to a Mr. and Mrs. Marshall. By the time that Mrs. Marshall (who after being widowed became Mrs. Howitt by a subsequent marriage) came to sell to the Manor Hotel Limited in 1963, the bungalow had been built; the approval for its construction as stamped on the plan submitted to the authorities is dated 11 September 1961, and it had been constructed by the date of the purchase by the Manor Hotel Limited from Mrs. Howitt in November 1963. Thereafter in 1986 or 1987 the Plaintiff had a conservatory built at the back of the house, that is to say at the north-east aspect, which is the aspect which faces or bounds on the Defendant's property. Outside the conservatory a purpose built pathway with a little retaining wall was constructed.

E The portion of the land sold to Mr. and Mrs. Marshall in September 1937 was described as: "un pré appelé 'Le Pré du Bordage'"; its relevant boundary was described by reference to its neighbouring property as follows:-

"... une jaonière appelle 'La Jaonière du Bordage' appartenant aux dits Bailleurs ... le fossé et la banque entre deux étant réservé aux dits Bailleurs."

F For the benefit of this retained land the sale was subject to the reservation of a right of way in these terms:-

"... droit de passage de pied et avec brouette par dessus le pré de ce bail et ce le long de la dite banque et du dit fossé pour aller et venir toutes fois et quantes entre la dite ruelle et leur dite jaonière."

The ruette referred to was the lane called "La Ruelle Pierre Benest."

G It is this conveyance which is common to the parties in that it provided for the severance and was entered into by the predecessors in title to both parties. That is not the case in the case of the

subsequent conveyances by the terms of which the above provisions were sought to be interpreted and applied.

The conveyance of 25 March 1960:

By that conveyance title passed to:-

"... une Jaonière appelé "Le Bordage" ... [lying to the north-east of] ... pré appelé "Le Pré du Bordage" appartenant aux dits Marshall et femme, le fossé et la banque de terre entre deux appartenant de ce bail; et auront les dites Preneurs les hoirs du survivant d'eux et ayants cause droit de passage de pied et avec brouette par dessus le dit pré des dits Marshall et femme et ce long de la dite banque de terre et du dit fossé pour allet et venir toutes fois et quantes entre la dite ruelle et les dites premisses de cet item..."

The conveyance of 27 March 1986:

The conveyance from Manor Hotel Limited to the Plaintiff (expressed in the English tongue which had by then become the practice in the Island), included these terms:-

"... That the premises hereby conveyed are bounded on or towards the north by La Ruelle Pierre Benest; on or towards the east by a furze brake known as 'La Jaonière du Bordage' owned by Edward Smith and wife, the hedge and bank between belonging to the said Smith and wife..."

And so far as the reservation of the right of way was concerned as follows:-

"... The Purchaser shall have all such other rights and shall be subject to all such other servitudes as heretofore granted or reserved insofar as such rights and servitudes subsist, and in particular shall allow the said Smith and wife a right of way on foot and with a wheelbarrow over the premises hereby conveyed along the side of the said hedge and bank to come and go between their said furze brake and the said road."

The reference to "Smith and wife" was a reference to the parents of the Defendant, to whom title to the Jaonière was passed by conveyance from Mrs. De La Rue, dated 25 March 1960.

The proceedings:

Trouble having broken out between the parties, centred upon the identification of the boundary and the continuance or nature of the right of way, the Plaintiff commenced proceedings with the intention of bringing an uncomfortable matter to a finality. It was indeed uncomfortable enough for the dispute to emerge into the Magistrate's Court on one occasion.

By these proceedings, the Plaintiff in effect sought a declaration, so as to determine the line of the boundary and the existence or otherwise of the alleged right of access. In the body of the pleading it was alleged that the right of way claimed by the Defendant was void for uncertainty, not properly delineated or unnecessary or had lapsed due to non-user.

This was amplified by the Plaintiff's skeleton arguments, which referred to the conveyances to which I have already referred, asserting that the right of way alleged by the Defendant was created by the conveyance of 11 September 1937, but limited to that set out in the conveyance of 25 March 1960. It was said that the layout of the land was now different and that the purpose of

A the reservation of the right of way was then undoubtedly different and that a continued right of way was unnecessary or unacceptable. It was submitted that servitudes have to be construed narrowly and in the light of modern conditions. Reference was made to a plan prepared by Mr. Robert Le Page, an architect, who gave evidence as to its terms, which had set out a number of possible boundaries. Non-user was to be a matter of evidence.

B By a supplemental submission it was alleged that in the construction of the conveyance and of the terms of the right of access the contra proferentem rule was to be applied. It was further asserted that the Defendant's predecessors in title had not objected to the building of a cess-pit in the position shown on the plans or to the construction of the conservatory.

A skeleton argument put in on behalf of the Defendant denied the matters alleged and referred to Mr. Le Pages' plan, alleging that the boundary ran along the line coloured orange on the plan. This is a line which runs parallel to the wall of the house and cuts through the centre of the conservatory- I return to it a little later.

C Evidence was given by Mr. Le Page and by the Plaintiff and his wife and by the Defendant, and there was a view by the Jurats in the course of the proceedings and a further view after they had given their decision, to enable them to fix the boundary line with precision so that it could be drawn by Mr. Le Page.

D The questions put to the Jurats by the Deputy Bailiff, and their answers, can be summarised as follows. The first question related to the boundary, and the Jurats answered that they could define the boundary and wished to have a further site visit to enable an accurate plan to be made.

Then they were asked about the area of the cess-pit, and was it different to the extent that a part of the rock face had been excavated, and whether Mr. and Mrs. Slawther own the area concerned by reason of twenty years prescriptive title, and to that the answer was in the affirmative.

E Then they were asked about the conservatory and the passageway, and had it been constructed on Miss Smith's side of the boundary, and to that they answered "No".

With regard to the right of way, they were asked questions as to whether the right of way had been lost by twenty years non-user, and to those questions the answers were that the access on foot was not lost but in effect the access by wheelbarrow had been lost; and they were asked to define the route which Miss Smith and her successors should be required to take in order to exercise the right reasonably, and the Jurats said they had a route in mind, but they would prefer to return to the site to consider it in detail.

F There then followed the further site visit and in consequence of these answers and that visit, the Act of Court of 28 September 1995 was drawn up which set out the boundary as found by the Jurats, shown as a red line, a boundary which was generally well away from the bungalow and followed certain features in the ground, and in green set out the limits of access which it was held could reasonably be afforded to the Defendant by the right over the Plaintiff's land.

G The Appeal:

By her revised Notice of Appeal the Defendant raised grounds of appeal against both the finding as to the boundary and the finding as to the right of way. Her grounds of appeal were that the Deputy Bailiff summed up the evidence incorrectly and/or failed to remind the Jurats of the

evidence in sufficient detail and that the decision of the Jurats was not supported by the evidence or was perverse. The boundary for which she contends was illustrated on a drawing attached to her amended Notice of Appeal, and at that time ran through the conservatory with the right of way lying to the side of it and running along the paved area and the greater part of the conservatory. The Appellant modified this in the course of her argument before this Court and placed the boundary line running along the outside of the conservatory and the access through the conservatory. On her case therefore the construction of the conservatory constituted a substantial interruption of her right of way.

A

These grounds are amplified and explained in the Appellant's case which criticises, first, the finding of the Jurats as to the line of the boundary, in that it is alleged that it should pass along the foot of the earth bank and hedge and cliff face, and it is further alleged that it was inconsistent with the ownership by the Defendant of the boundary feature and, secondly, it was alleged that the summing up by the Deputy Bailiff as to the use of a wheelbarrow on the right of access during the twenty years, and as to the issue of encroachment on her right of way by the building of the conservatory, was inaccurate and incomplete.

B

The terms of the conveyance of September 1937 quoted above are not easy to construe. Two questions arise, neither of which appears to have been developed in any detail at the hearing. The first such question relates to the definition of the boundary and the second to the right of way.

C

By way of preface, it was held by the Deputy Bailiff at the trial that there is no principle of proprietary estoppel in Guernsey law, and that conclusion is not challenged before this Court. Thus, it is not open to the Plaintiff in such a case as this to raise a defence based on acquiescence by the Defendant or her predecessors in title in the construction of the conservatory over her land or her right of way, if these are established.

D

Further, in connection with the right of way, such a right can only be created by title. A right of way cannot be established or enhanced by prescription in Guernsey law. The nature of the rights of the parties fall therefore to be determined by the construction of the Deed of September 1937. Finally, such rights can be lost by non-exercise over a consecutive period of twenty years or more, and this was the basis of the question (b)(1) of the Deputy Bailiff's questions to the Jurats which I have quoted above.

E

The first question relates to the terms of the conveyances to the fossé and the banque. The Deputy Bailiff directed the Jurats that fossé in Guernsey denoted a boundary, hedge or bank; it does not necessarily denote a boundary. Thus it was left to the Jurats in Sparkes v. Lancaster 27 May 1992, in the Royal Court, by the Deputy Bailiff in a direction approved by the Court of Appeal, 13 GLJ 44, whether a fossé in that case was a boundary. Reverting to the instant case, the Deputy Bailiff had more difficulty with a banque in that he directed the Jurats that the normal meaning was a beach/river bank. This is supported by a reference in the Dictionnaire Franco-Norman pertaining to Guernsey, by Georges Métivier (London and Edinburgh, 1870). However, it is clear that in the absence of a marine environment the terms in this instant were in my judgment correctly interpreted in the 1960 conveyance to the parents of the Defendant as a "banque de terre." What then of the words "Le fossé et la banque entre deux étant réservé au dits Bailleurs." I find that the words "entre deux" refer to the two properties, Le Pré de Bordage, the property conveyed, and La Jaonière du Bordage, remaining of course the property of the predecessors in title of the Defendant.

F

G

A It has been suggested that the fossé and the banque may have in effect been in line as distinct from running parallel. It may be that, as was argued before us, there was some point at which they were in a straight line, but it is difficult on the information before us to find some area in which there was nothing which could be described as a banque; this can be seen illustrated by the photographs which indicate that there are varying levels of banque along the whole length of the property.

B The Defendant asserted in this Court that some small plantation on photograph 1 constituted the line of the fossé, but her evidence before the Royal Court was that she could not say where the fossé was in 1960. If she could not say where it was in 1960, it is difficult to see how anyone could tell where it once was when the hearing took place in 1994. In these circumstances I do not consider that the Deputy Bailiff erred in concentrating on the banque in his summing up, leaving any further reference to the fossé unspoken.

C The Defendant told us of a further continuance of the part of the hedge or plantation to which she referred before us and of a continuation on neighbouring land. She said that she had wanted her advocate to present such a case. We cannot speculate as to why he did not do so; it may have been an oversight or he may have seen some difficulty in presenting the case in that way. It is not open to this Court to go behind the evidence given at the hearing and, indeed, an application to call further evidence of a documentary character was dismissed by this Court on 20 March 1998 on the ground that it was available at the time of the trial before the Royal Court.

D The Defendant in presenting her case as a litigant in person found it understandably difficult not to put herself in the position of, in effect, giving evidence to us as distinct from referring to the evidence before the lower Court. I hope though that by now she understands that we have to consider only the evidence as it was presented in the Royal Court, in the absence of any order of this Court to the contrary. We are bound by law to act in that manner.

E Finally, in this context, in her response to the Plaintiff's submission she drew our attention to passages in the transcript relating to the positioning of a pole for a washing line on the banque. As to that, there was an issue of fact on the transcript which it is not possible for us as an Appellate Court to resolve. In any event recourse to the marking put on the Court copy of the Le Page plan by the Plaintiff's wife and comparison with the boundary plan as marked out by the Jurats indicated that in fact the Jurats did not extend the boundary to cover the position of the pole high up on the banque as marked by the witness; the matter therefore is, in my view, academic.

F The Deputy Bailiff correctly directed the Jurats to try to determine, first, what the original boundary would have been had Mr. and Mrs. De Le Rue and Mr. and Mrs. Marshall been anxious to define the boundary by marks on the ground; and secondly, he correctly directed them to determine whether undisturbed possession of any part of the ground on the De La Rue side of the boundary for twenty years or more had given title to the Marshalls and their successors over land otherwise retained by the Defendant's predecessor in title. He referred to the cess-pit and the oil tank as having been constructed in 1960 or 1961 and as being candidates for a finding of adverse possession over twenty years in those instances.

G In view of the complex nature of the site as it now stands and as illustrated on the plan and photographs and of the evidence generally, I see nothing to criticise in the learned Deputy Bailiff's direction that Miss Smith's case that the boundary was to be found "along the foot of the banque as it originally was" begged the question as to which particular banque was being referred

to. Again, as already stated, he rightly asked the Jurats to ask themselves what would have been the intention of the parties in 1937 as to the position of the boundary line, subject of course, to any later title through adverse possession which might add to the property on the Plaintiff's side of the line.

A

The Jurats had the advantage of two Vues du Justice, one fairly early on in the proceedings and one at the end when they supervised the marking out of the boundary as they found it to be established. They clearly allowed for the position of the cess-pit and oil tank at one end of the site and for certain contours from a number of different sources marked on the map prepared by Mr. Le Page at the other, skirting various features between the two. It is, by now, well established that this Court will only interfere with a decision as to fact of the Jurats if this Court is satisfied that there was no evidence before the Jurats on which they could reasonably have arrived at the findings under challenge in the appeal or that for some other reason their findings were perverse. I refer in that connection to Guille v. MacKay 14 June 1967. I would add that this Court would be all the more reluctant to interfere when the Jurats have made their findings after a Vue du Justice. I conclude therefore that there is no warrant for us to interfere with the decision of the Royal Court as to the location of the boundary.

B

I now turn to the case with regard to the right of way.

C

This right was created by the conveyance of 1937, and it is the wording of that conveyance which falls to be interpreted. The approach to be adopted in doing so is expressed thus in Clerk & Lindsell on Torts 16th Edition, para 23-31:-

"The extent of the right depends on the true construction of the grant but it may be necessary to look at the surrounding circumstances to arrive at the true construction."

D

The relevant words I have read already:-

"Droit de passage de pied et avec brouette par dessus le pré de ce bail et ce le long de la dite banque et du dit fossé pour aller et venir toutes fois et quantes et contre entre la dite ruelle et leur dite jaonière."

E

Now it was common ground that this created a valid right of way, and the issue was as to whether it was lost by the lapse of twenty years prior to the hearing in 1994. The case for the Plaintiff was that both the right to pass on foot and the right to take a wheelbarrow along the way had been lost due to non-user over twenty years. As stated above the answer from the Jurats was that the right to pass on foot had not been lost and could reasonably be exercised in the manner shown on the plan, a finding which I would endorse.

F

The words used by the Jurats were: "Access with a wheelbarrow - she has no access with a wheelbarrow." It is to be borne in mind that they were used in answer to the question as to whether the right had been lost and such words have to be so construed.

The ground of appeal advanced by the Defendant appeared at first to be a formidable one in that the Deputy Bailiff in his summing up to the Jurats said: "There has, however, been no evidence that the wheelbarrow has been taken over the site for the last twenty years." He had harked back to Miss Smith's evidence that her father used to take it up there when they had the furze oven, but this was in the 1950s before they had a Rayburn oven installed in 1962 or 1963, and ceased to use the furze oven.

G

A At an interlocutory hearing on 29 September 1994, after the matter had been decided, Miss Smith pointed out to the Deputy Bailiff that he had confused the old days, when they used to collect furze long ago in a two wheeled cart, with her evidence as to the use of a wheelbarrow much more recently when she went to cut the hedge. Miss Smith was a small girl when her father first had possession of the Jaonière and this was before indeed he bought the property in 1960. She described how he used to wheel her about as a child and how he used the hand-truck to get the furze which they used as fuel for the furze oven while it was still in use. Miss Smith was born in 1948 or thereabouts and these events were in the early 1950s and ran just into the 1960s when they were gathering furze before the installation of the Rayburn.

B Then and later she accompanied her father when she picked daffodils and he cut the hedges. Her father would have a beer with Mrs. Marshall and she would gather primroses and daffodils and the like. Then her father took goats along the track. These were activities which I find they enjoyed through the kindness of Mrs. Marshall; they could not affect the nature of the right of way which did not, I find, contemplate or permit the passage of animals, any more than they would cover climbing up the banque after flowers and the like. If these simple pleasures are to be burdened by legal analysis I would say that they would fall into the category of licenses revocable at will, at least in English parlance.

C Miss Smith gave evidence that when she was 17 or 18 in 1966, she became interested in other things and started with a job and driving a car. There are then a number of passages which are identified in the Appellant's case before this Court in which Miss Smith did refer to her user of the wheelbarrow. Some of those instances refer back to the early days to which I have referred, but in more than one case she said that she had come on to the right of way with the wheelbarrow to cut hedges. In fact, she said she did in 1985 and 1986 when the Slawthers were there and she brought the wheelbarrow on to the land to cut the hedges and to talk to "Danny" their gardener. She also referred to cutting hedges in 1988.

D It is unfortunate that the Deputy Bailiff did not remind the Jurats of this evidence or at least refer to it. The actual words used by him were that there was no evidence that the wheelbarrow had been taken "over the site in the last twenty years." It could be that the learned Deputy Bailiff was intending to refer to the use of the wheelbarrow along the length of the right of way and for the purpose of gaining access to the Jaonière at the other end of the property, but his reaction when the matter was raised in the interlocutory proceedings does not appear to me to support this. Accordingly I find that there was in substance a misdirection.

E In order for this to affect the validity of the findings of the Jurats which followed, the misdirection has to be a material misdirection. For it to have constituted such a misdirection the user ignored must have been the user which itself fell within the terms of the right of way. I have come to the conclusion that it did not so fall; this is because of the nature of the right as I find it to be. I hold that, on a proper construction of the right of way, it is limited to gaining access from the Ruelle Pierre Benest, now Bull Lane, through to the Jaonière at the far end of what used to be the field. This I find to be the plain meaning of the words which refer in terms to the length of the banque and fossé and give the starting and finishing points with precision.

F Furthermore, insofar as it is legitimate to have regard to the surrounding circumstances, I note that in 1937 it was still the custom to use furze ovens as did the Defendant's family until the early 1960s as above. The purpose behind the grant as to the brouette was, I find, that furze and other crops could be obtained from the Jaonière at the far end of the property and brought along the

side of the field. I do not find that the cutting of a hedge was a necessary incident of such a right and I bear in mind also the fact that at that time this was merely an empty field and therefore the bungalow was not present. For the above reasons I would dismiss this appeal.

A

M.J. BELOFF, QC: I agree.

J.G. NUTTING, QC: I agree.

ADVOCATE PETER FERBRACHE: Sir, may I make an application in respect of costs but limited solely to the appeal proceedings.

B

MISS SMITH: Could I just ask you one question, sir?

THE PRESIDENT: Well I'm not certain, it depends on the question.

MISS SMITH: There is in fact- there's two rights of way. There's also a right of way over the Manor car park, so there could only be that one hedge.

C

THE PRESIDENT: Yes, yes. I think you're being asked now to deal with the question of costs. Are you saying that there is any reason why you shouldn't pay the costs?

MISS SMITH: No, I shouldn't pay sir, because Advocate Ferbrache has known the right of way all along because he's the advocate of the hotel and that was passed through Court in 87, and the right of way is over the Manor car park as well, so it can only be that one hedge, because it's partly owned by- the land in front of it is partly owned by the Slawthers and partly owned by the hotel, so there's no way it can be any other hedge, sir, so you have misdirected as well sir, because I've given you that Deed in 91.

D

THE PRESIDENT: Thank you. We order the costs as requested.

Appeal dismissed; costs awarded to Respondents

E

F

G

80.

[CIVIL DIVISION – APPEAL NO. 237]

15th OCTOBER, 1998

KATHLEEN EDNA SMITH

v.

VINCENT ROGER HELMOT and SONIA HELMOT

Before: SMITH (PRESIDENT), BAILHACHE and SOUTHWELL, JJ.A.

Appeal to Court of Appeal in civil matters – power of Court to order re-trial – ex parte injunction – circumstances in which appropriate – full indemnity costs – whether properly granted

See paragraph 5.

R.J. Collas for the Appellant.
D.G. Le Marquand for the Respondents.

THE PRESIDENT: The judgment I am about to deliver is the judgment of the Court.

This is an appeal by Kathleen Edna Smith ("the Appellant") against an order of the Royal Court in favour of Vincent Roger Helmot and Sonia Elizabeth Helmot ("the Respondents") in which the Royal Court declared that the boundary between the Appellant's premises known as "Rock View" and situate at Petit Bot Valley, Forest, and the Respondents' adjoining premises known as "Le Videclin" (formerly "Virginia") is as shown running between points A and B on a plan lodged with Her Majesty's Greffier and ordered that the Appellant (the Defendant in the action) pay the costs of the Respondents (the Plaintiffs in the action) on a full indemnity basis.

The issue between the parties - the line of the western boundary of the Respondents' property - was simplified by two facts which were not in dispute. First, the position of point A, and, secondly, that the boundary ran for its whole length in a straight line from point A. The crux of the dispute was the position of the other end of the boundary line. The Respondents contended for point B on the map and the Appellant for a point somewhat to the east of point B.

The trial took place on 28/30th April 1997. In the course of it the learned Bailiff and the Jurats conducted a Vue de Justice of the lands. The Respondents gave evidence in support of their case. Corroborative evidence was given by a Mr. Rodney Peter William Brouard (a predecessor in title of the Respondents - although not their immediate predecessor) and a Mr. Colin Charles Guilbert, a conveyancing clerk who had been involved in the transfer of Le Videclin to the Respondents in 1982. The Appellant was not represented at the trial. She gave evidence on her own behalf but called no witnesses.

The Respondents' case was based on references in conveyances of each of the properties to "the wire fence." Thus, in the conveyance of Le Videclin in 1975 to predecessors in title of the Respondents, it is stated that "... the premises hereby conveyed are bounded ... on or towards the west by a dwelling house called 'Rock View' and land owned by Brian Clark Watson, the wire fence between belonging to the premises hereby conveyed." And in the 1975 conveyance of "Rock View" to the Appellant the premises are described as "... bounded ... on or towards the east

by a dwelling house called 'Virginia' and land owned by Richard Harry Simon and his wife, the wire fence between belonging to the said Simon and wife..."

The Respondents contended that a green chicken wire fence running from point B in the direction of point A was the fence described in the conveyances. This fence does not, however, run to point A. It only runs for a distance of between one-third and one-half of the boundary. The land rises steeply between point B and point A and beyond the end of the chicken wire, the topography and vegetation are such that the actual line of the boundary becomes difficult to discern.

Further, the fence line is not straight but takes the shape of a dog-leg. From point B it follows the line of what the Respondents assert to be the boundary. It then turns 90° east to run along the back of a shed constructed by the Respondents and then takes a further right-angled turn in the general direction of point A.

According to the Respondents the dog-leg was a creation of the Appellant, she having moved posts in an easterly direction onto what the Respondents claimed is their property and then having added chicken wire.

The Appellant's case was that the green chicken wire fence did not mark the boundary line. Rather the line was marked by blackthorns and a wall for part of its distance and ran from a granite pillar at one end to point A at the other. She denied moving the fence to create the dog-leg.

At the end of the evidence the Bailiff summed-up the respective cases to the Jurats and they found for the Respondents.

The Appellant has appealed the decision of the Royal Court and has set out her grounds in a Notice and amended Notice of Appeal. Further, she sought leave to adduce additional evidence, an application which in the event has not been pursued.

Shortly before the hearing of the appeal the Appellant instructed Advocate Collas. This meant that the arguable points available to the Appellant were accurately identified and presented to us lucidly and succinctly. This also meant that the points made to us on the

Appellant's behalf were rather different from those raised in the appeal documents drafted by the Appellant herself. This gave rise to a degree of difficulty for Advocate Le Marquand who appeared for the Respondents, but he addressed Mr. Collas' arguments in a most competent and comprehensive manner. We are indebted to both counsel.

Mr. Collas sought a re-trial on the Appellant's behalf. The power to grant a re-trial is contained in S.14 of the Court of Appeal (Guernsey) Law 1961, which (as far as is material) reads as follows:-

"For all the purposes of and incidental to the hearing and determination of any appeal ... the Court of Appeal ... shall have power, if it 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."

Rule 13(1) of the Court of Appeal (Civil Division)(Guernsey) Rules 1964, provides, again, as far as is material, that:-

A "A new trial shall not be ordered -

(a) on the ground of misdirection; or

(b) on the ground of the improper admission of evidence, ... unless, in the opinion of the Court, some substantial wrong or miscarriage has been thereby occasioned."

B Mr. Collas argued that the Appellant had not received a fair trial. He put a number of matters before us. He suggested that although any one of them might not of itself justify a finding that a substantial wrong or miscarriage had been occasioned, nevertheless, taken cumulatively they met the requirements of Rule 13(1).

C The first of these matters was that the Appellant had been taken by surprise at the trial by the allegation that she had moved the chicken wire fence and created the dog-leg. Mr. Collas drew attention to the fact that this allegation is not made in the Respondents' Cause and to portions of the transcript of the trial. At p.58 the Appellant is recorded as saying "... if they're going to say that I've excavated that land and I've moved the fencing, then I will ask for an adjournment..." The Bailiff replied "Nobody has said that, so we can leave that point, Miss Smith." And at p.82 the Appellant complained that "... the first I knew about they were bringing up this cock-and-bull story was at the Vue du Justice (sic), so I mean I haven't had any witness to contradict what they've said..." In an affidavit sworn on 17th July 1997, the Appellant refers to two potential witnesses, that is to say a Mr. Marshall and a Mrs. Renee Jehan.

D Mr. Le Marquand argued that the real issue in the case was whether the boundary line ran from point A to point B or to the granite pillar. The witnesses the Appellant had identified would deal with this issue and not with whether or not the Appellant had moved the fence. They could have been but were not brought forward to corroborate the Appellant's evidence at the trial. What was really determinative in this case was what the Jurats made of what they saw at the Vue du Justice.

E We found that there was an element of surprise in this case. It was accepted by counsel for the parties, and it is our judgment, that surprise can be a ground on which a new trial may be ordered and that the principles set out in para. 59/11/15 of Vol. 1 of the Supreme Court Practice 1999, are as applicable in Guernsey as they are in England and Wales. These include a requirement that the Applicant shows that a substantial miscarriage of justice has been occasioned. We return to this factor later in this judgment.

F The second matter advanced by Mr. Collas was that the proceedings were conducted on the Respondents behalf in an oppressive way. He complained of the obtaining by the Respondents of an ex parte injunction on 2nd May 1996, of proceedings for contempt of Court for alleged breach of the injunction by the Appellant, of the alleged misuse by the Respondents of the procedure whereby a date for trial may be fixed before all interlocutory matters have been sorted out, and of the failure of the Respondents to make proper discovery, in particular of Carey Langlois' conveyancing file.

G As to the application for the ex parte injunction, this Court has already had occasion to criticise the misuse of the procedure for obtaining injunctive relief by the bringing of ex parte applications in its unreported decision in M v. M delivered on 3rd June 1998 and we take this opportunity to

reiterate that as the granting of an injunction is an infringement of the liberty of the citizen, where possible, and unless there is extreme urgency, the party to be enjoined should be put on notice of the application. Further, we consider that the practice of granting orders which are indefinite in time on foot of ex parte applications should cease, and that where the Court sees fit to grant an injunction ex parte it should invariably give appropriate directions, including the limiting in duration of the injunction until a specified date on which the Plaintiff as well as the Defendant may appear and be heard on the question as to whether or not the injunction should be continued, the burden in this respect being on the Plaintiff to justify the grant of the ex parte order and its continuation.

A

Notwithstanding that it was unfortunate that an ex parte injunction was sought and granted, we do not accept that it can fairly be said that the Appellant was the victim of oppressive conduct. The injunction was obtained long before the trial took place. The contempt of Court application was not concluded and was adjourned sine die. We accept Mr. Le Marquand's argument that the use of the trial fixing procedure was appropriate in a case involving an unrepresented party unable to complete interlocutory steps.

B

The next matter canvassed by Mr. Collas involved criticisms of the way the hearing before the Royal Court was conducted. He made a number of points with which we deal in turn. He drew attention to an exchange recorded at p.17 of the transcript in the course of which the Appellant sought to argue that the boundary could be established from the presence of blackthorns, and she purported to quote a Mr. Hugh Lenfestey. Mr. Le Marquand objected to the Appellant giving hearsay evidence of what Mr. Lenfestey had allegedly said. The Bailiff ruled that the significance of the blackthorns was a matter of law and not of evidence. Mr. Collas argued that there had been a misdirection as the Bailiff did not, in the event, deal with this matter of law in his summing-up to the Jurats.

C

D

Strictly speaking Mr. Collas' point is well taken. However, we note that the Bailiff did remind the Jurats of the Appellant's assertion that the boundary was marked by blackthorns and although it was put to the Jurats in terms of fact rather than law, they were clearly reminded to have regard to the position and potential significance of any blackthorns visible to them on the Vue du Justice.

E

Mr. Collas complained that Mr. Le Marquand adduced hearsay evidence from Mr. Helmut and that the Bailiff had failed to intervene. The evidence in question was of conversations between Mr. Helmut and predecessors in title of the Respondents which favoured the Respondents' case. Mr. Collas also complained of Mr. Le Marquand leading one of the witnesses, Mr. Colin Charles Guilbert, in relation to the line of the boundary as observed by him in 1982. Again, in relation to Mr. Guilbert, Mr. Collas drew our attention to his failure to disclose the identity of his employers and to Mr. Le Marquand's description of him in his closing speech as "independent." We are not persuaded that all of the evidence identified by Mr. Collas was hearsay, but some of it was, and it is unfortunate that it was not identified as such and excluded.

F

Mr. Le Marquand argued that the leading question to Mr. Guilbert was merely summarising evidence the witness had already given. This does not, however, justify the asking of the question in the form in which it was put and it would have been better if the Bailiff had either intervened or directed the Jurats to the effect that the answer was valueless. We agree with Mr. Collas that evidence as to who employed Mr. Guilbert ought to have been adduced and that he ought not to have been described as "independent." On the other hand, both counsel accepted that the Jurats would have known who employed the witness.

G

A Mr. Collas drew attention to references at the trial to the existence of the injunction and criticised the Bailiff for not directing the Jurats that the fact that the Royal Court had granted the injunction did not constitute a finding against the Appellant. We agree that it would have been preferable if the injunction had been the subject of a specific direction to the Jurats that the injunction was of no relevance to the boundary issue.

B The final matter Mr. Collas invited us to consider was whether the learned Bailiff had put the Appellant's case adequately to the Jurats. It is trite law that non-direction is as much a misdirection as wrong direction. Further, we remind ourselves of the obligation on a trial judge to identify the case made by a party and fairly submit it to the Jurats, reminding them of the main features of the evidence on which that party relies (see Bray v. Ford [1896] AC 44 at p.49 and Gallienne v. Douglas, the latter a decision of the Guernsey Court of Appeal given on 14th November 1990).

C Mr. Collas argued that on summing-up the Bailiff was not clear as to aspects of the Appellant's case, particularly in relation to a previous owner of Rock View permitting one of the Helmut's predecessors to construct the driveway partly on Rock View land. This, Mr. Collas continued, would explain the dog-leg and the chicken wire fence in a way consistent with the Appellant's case.

D We do not accept this criticism of the Bailiff. It is clear from the transcript of the evidence at the trial that the Appellant herself made a number of inconsistent assertions as to the construction of the driveway. None of these was based on evidence as the work predated the Appellant's involvement with Rock View (which predated her ownership) and she called no witnesses. We do not consider it to have been improper for the Bailiff to have drawn attention to the Appellant's inconsistent assertions and we observe that he very clearly put to the Jurats the point that lay at the core of the Appellant's contentions that the boundary line ran from point A to the granite pillar. Further, although he did not direct the Jurats to the effect that the dog-leg in the fence might be explicable by the introduction of the driveway, it is noteworthy that the Appellant herself did not articulate this point and, indeed, it has to be said it is somewhat surprising that she did not attempt to deal with the important question of when and by whom the chicken wire fence was constructed, given that she put it to one of the witnesses (Mr. Brouard) that when Rock View was bought for her in 1971, the only part of the boundary which was fenced was that portion over which the driveway was constructed.

F So the net result in our analysis of the Appellant's case is that there were instances of surprise, misdirection, the irregular admission of evidence, and other irregularities at the trial. However, as we have already said, to enable us to order a new trial on the ground of surprise the Appellant must demonstrate that a substantial miscarriage of justice has occurred.

G Similarly in relation to misdirection and the improper admission of evidence, the rules require that the Court must be of the opinion that some substantial wrong or miscarriage has been occasioned. It has been held in England in relation to a similarly worded rule that once a misdirection is established the party supporting the verdict must show that no substantial wrong or miscarriage has occurred (see the Supreme Court Practice 1999, vol. 1, para. 59/11/4 and the authorities there referred to). "Some substantial wrong or miscarriage" means that the Appellant has lost a chance of success which was fairly open to him (see the same reference to the Supreme Court Practice para. 59/11/24 and Bray v. Ford [1896] AC 44).

Having anxiously considered the test we have identified we are satisfied that the Appellant was not deprived of a chance of success which was fairly open to her. The crucial aspect of the trial was what the Jurats saw or did not see when they visited the properties on the Vue de Justice. We are satisfied that had they observed blackthorns or other features there suggestive of a boundary line consistent with the Appellant's case they would not have been deflected from making a finding in her favour irrespective of what happened or did not happen in Court. We are satisfied that the element of surprise did not go to the essence of the matter, and overall we are persuaded that the trial was a fair one and that the verdict should stand. Accordingly we dismiss this substantive part of the appeal.

A

Judgment on Application for Full Indemnity Costs

B

THE PRESIDENT: We are satisfied that the Appellant was entitled to dispute the alleged boundary between the properties. We are further satisfied that there was a serious issue to be decided at the trial. The Court determined that issue in favour of the Plaintiffs, and Miss Smith must naturally pay the costs of the trial. There were no circumstances which, in our view, brought the case within Rule 48(1)(a) or (b), so that the effect of that conclusion is, we allow the Appellant's appeal against the costs order. We quash the order for indemnity costs and we substitute an order that the Appellant pay the Respondents' taxed costs of the proceedings below, but not including the injunction or contempt proceedings. Is that clear?

C

ADVOCATE COLLAS: That's on the ordinary recoverable costs basis, sir?

THE PRESIDENT: Yes, on the ordinary recoverable costs basis, that is correct, yes.

D

THE PRESIDENT: Now, that brings us to the question of the costs of the appeal, has anyone anything to say on that issue?

ADVOCATE LE MARQUAND: Certainly sir-

THE PRESIDENT: Well you're applying for costs of the appeal?

E

ADVOCATE LE MARQUAND: I'm applying for costs of the appeal yes, sir.

THE PRESIDENT: But not presumably in the light of our ruling, you're not going to press us that it should be on an indemnity basis?

ADVOCATE LE MARQUAND: Not for indemnity costs no, sir.

THE PRESIDENT: Thank you. Well then Mr. Le Marquand, if we can perhaps just ask Mr. Collas- has he anything to say before you address us?

F

ADVOCATE LE MARQUAND: Well sir, one comment I would make and, of course, the Court has the power not only to grant full indemnity but partial indemnity and it would be that I would be asking the Court to take account that they do have that power, effectively a middle ground, and the submissions I will be making with regard to delays et cetera is just that there maybe factors that I will be asking on that, not just a straight recoverable basis but for some discretion there.

G

THE PRESIDENT: Well you still have to bring it in for a (inaudible) don't you?

ADVOCATE LE MARQUAND: Yes sir, indeed.

A THE PRESIDENT: I mean, I think that perhaps I-

ADVOCATE LE MARQUAND: The reason I'm saying it sir, is particularly because of the points of the change of the appeal and a lot of other expenses that have been incurred. It's not just a straight matter of an appeal. Of course, the appeal only changed yesterday and we've been answering something else. The appeal originally is in a completely different form. Sir, do you wish me to make submissions on these points sir?

B THE PRESIDENT: I think if you're going to say that there are special circumstances, you'd better identify what they are.

C ADVOCATE LE MARQUAND: Yes, sir. Of course, there is a discretion - we've got the discretion of the appeal itself, we've also got two hearings leading up to the appeal. The first hearing, of course, in July 1997 at divider 5, that hearing came about because first of all the Appellant- the Appellant sir, in divider 5, sought an application to stay the appeal which she was unsuccessful on, and to which on my applications for security for costs was granted. On that application sir, I will be asking for nothing more than reasonable costs, it was a standard application and one to which I'm not pushing anything more further than that, sir. But costs, if the Court makes an award of costs in favour of my clients, but for this appeal, that that also includes that hearing. At divider 6-

D R.C. SOUTHWELL, QC: This is 23rd July?

ADVOCATE LE MARQUAND: This is 23rd July 1997-

ADVOCATE COLLAS: When my friend says reasonable costs, does he mean the ordinary recoverable costs?

ADVOCATE LE MARQUAND: Well yes, sir.

E ADVOCATE COLLAS: I wouldn't oppose that, sir.

R.C. SOUTHWELL, QC: What is the technical term?

ADVOCATE LE MARQUAND: It's recoverable costs- In accordance with the Costs and Fees Rules, it's just recoverable costs.

F R.C. SOUTHWELL, QC: With tax costs or ordinary costs or what?

ADVOCATE COLLAS: Even indemnity costs may have to be taxed sir, so I'm not sure that tax costs necessarily identifies anything-

ADVOCATE LE MARQUAND: I think I'd just be referring to recoverable costs, sir.

G THE PRESIDENT: Yes, I had a look at some of the orders that we had on our papers this week and it seems, I got the impression, that where the ordinary costs are being awarded, it's just an order for costs.

ADVOCATE LE MARQUAND: Yes sir.

ADVOCATE COLLAS: Yes, I think that's what it is unless the Court directs otherwise.

A

THE PRESIDENT: And because we've got- we've introduced this confusion of full and partial indemnity costs it's as well that you reminded us to make it absolutely clear for the record what we were awarding as far as the trial is concerned. Now, you're saying, Mr. Collas, that as Miss Smith really lost the 23rd July 1997 application, you can't resist an order for costs on the ordinary basis?

ADVOCATE COLLAS: On the ordinary basis yes, sir.

B

(Pause for discussion amongst Appeal Court judges)

R.C. SOUTHWELL, QC: We next look at 20th March.

ADVOCATE LE MARQUAND: Similarly sir, again this application, although the application for strike out was unsuccessful, there was a general order of the Court because the Appellant had not proceeded on with her appeal, indeed, she had breached effectively Rule 8-

C

R.C. SOUTHWELL, QC: But are you saying that's the same basis as the previous hearing?

ADVOCATE LE MARQUAND: Well again sir-

R.C. SOUTHWELL, QC: This one to be included?

D

ADVOCATE LE MARQUAND: Yes sir.

R.C. SOUTHWELL, QC: Well I can't imagine Mr. Collas is going to resist that, is he?

ADVOCATE COLLAS: The only thing I'd point out on 20th March 1998 sir, the Court seems mainly to be concerned with an application by my friend for a strike out of the appeal on the grounds that it was frivolous and vexatious and that was something that the Court rejected on that occasion, so my friend wasn't wholly successful.

E

R.C. SOUTHWELL, QC: Well the application to strike out was stayed, if you look at the end of the hearing.

ADVOCATE COLLAS: But the Act of Court says refused the application to strike out the appeal.

F

R.C. SOUTHWELL, QC: I know, they don't appear to be in accordance with each other.

ADVOCATE LE MARQUAND: It was of course stayed sir because I think they had set her a direction that she had to amend her Notice of Appeal and of course if she hadn't done that, then we were (inaudible). So again sir, I would be asking for them on a recoverable basis, on the ordinary costs basis.

G

A Turning to the appeal itself, it is my submission that the Court has already seen the Respondents' case, and my clients have of course incurred a large amount of costs in respect of preparing that case. My clients not only, in dealing with a litigant in person, and indeed if it hadn't been for the Respondent filing all the documents before the Court, in assisting the Court, I put everything in and done further work when dealing with a litigant in person, I've gone a step further in assisting that litigant. I then had to prepare a Respondents' case with very little to go on, on what was effectively a case which was never even proceeded upon by the Appellant.

B It is my case sir, that for the- it would be my submission sir, that for the work carried out in preparing for the appeal that the Court should give some allowance on whether on a partial indemnity basis for the fact that they were responding to- guessing what they were responding to- had to respond as a duty to the Court to then have to, a day before the actual hearing, despite I accept she did take legal advice at the last minute, but then had to respond to a different case. As regards the appeal itself in view of the comments made, I won't be disputing there should be ordinary costs on the appeal but that some allowance may be given in the preparation of the case, or even an actual figure given for the fact that we were responding to something we never had to and, of course, we then had to prepare a fresh case albeit in very quick time, expeditiously, but we've had to do all that work effectively for nothing. In fact, we prepared two cases now for one appeal that never did- so I just ask for some allowance in view of the Court's decision on the appeal itself, in view of the fact that it did find certain criticisms with the lower Court proceedings, I won't be asking for any indemnity costs on that, and indeed, for the proceedings of yesterday and today, but just for an allowance for the fact that there was a withdrawal of the appeal effectively and substituted with a new appeal.

D ADVOCATE COLLAS: Sir, in reply to that, having looked at my friend's printed case much of what is contained in there are points that, in fact, we covered yesterday as we went through the Lamb and Marshall principles, issues on the Court's powers in respect to the admission of further evidence, the Court's powers in respect of ordering a fresh trial, so I don't accept that the work that he did in respect of the old appeal, if one is to call it that, is as entirely wasted as he's trying to submit to you.

E THE PRESIDENT: Well, I think there's no doubt that a great deal of professional work, and I mean professional as a compliment to Mr. Le Marquand, because I find it a very impressive Respondents' case, and I was very conscious of the difficulties that he had, because we all shared it, of trying to make sense of Miss Smith's written submissions or written documents. I think that if it shortens the thing, I think that we would be extremely reluctant to in effect penalise a lay person in such a way that the word goes out that really lay people, personal litigants, should not come before the Court of Guernsey, that they're to be driven into the hands of lawyers. I think we'd be extremely reluctant to countenance that, and also these are the points that you are about to make, it is perhaps another tribute to Mr. Le Marquand's professionalism that notwithstanding a rather revamped case, a clarification of the case that could probably be made on Miss Smith's behalf, he was able to cope with it so competently on Tuesday, I think it was.

ADVOCATE COLLAS: That's because- Although it was a revamped case...

G THE PRESIDENT: Yesterday-

ADVOCATE COLLAS: ... I think much of the law and the arguments are to facts that he'd had to prepare were relevant to the case I presented yesterday. I accept I went into additional issues, but I don't accept that the work he'd done was as entirely wasted as he suggests, and indeed, he

mentioned that he has had to file additional documents to the Court, there's provision for that under the Rules, and there's normally a rate of so much per page for photocopying and things like that, so he will be paid under the Rules Book.

A

THE PRESIDENT: Yes, I think as far as the Court was concerned the points that you made were as it were within the four corners of what we had already considered in the light of- as best we could understand the points Miss Smith was making, and Mr. Le Marquand's response on behalf of the Helmts.

(Pause whilst Appeal Court judges confer)

B

ADVOCATE COLLAS: Could I make one submission? The one submission I'd like to make is that what we've now reached at 3.45 on Thursday afternoon is what I'd offered to my friend on Tuesday evening, namely, that if the appeal as to costs could proceed then my client would not pursue the appeal as to the merits of the matter.

THE PRESIDENT: I don't think the Court could have contemplated that Mr. Collas. Ingenious and attractive as it was, had you pressed us to permit you to prosecute your appeal on costs and then seek that Mr. Le Marquand reply, without his consent, I don't think that the Court would have contemplated that.

C

ADVOCATE COLLAS: But even if the parties had agreed between themselves, which is what the Court asked us to do on Tuesday evening, if the parties had agreed to proceed on that basis would the Court have defined?

D

THE PRESIDENT: If it had been agreed between the parties that the only issue was costs, if you had agreed- I'm not quite sure what you- just if you'll talk me through what you are suggesting might have been agreed.

ADVOCATE COLLAS: Sir, nothing was agreed.

THE PRESIDENT: Yes, I appreciate that.

E

ADVOCATE COLLAS: That's why we're- but the proposal I'd put was that if the Court would deal with the indemnity costs issue first, then- and if that succeeded- Miss Smith would not pursue her application on the merits-

R.C. SOUTHWELL, QC: But if it failed, then the main appeal would go ahead.

ADVOCATE COLLAS: If it failed, I indicated at that stage I didn't feel prepared to pursue the appeal myself but I take Mr. Southwell's point.

F

R.C. SOUTHWELL, QC: But it was open to you Mr. Collas, wasn't it, to abandon your appeal against- on the substantive point and to then trust the arguments on the costs.

ADVOCATE COLLAS: Subject to the instructions I had sir, and those are the instructions I had, sir.

G

(Pause for Judges to confer further)

A THE PRESIDENT: Thank you. We order that the Respondents have the costs of the appeal, and that includes the two previous hearings on the ordinary costs basis. Now, does that deal with all the matters before the Court?

ADVOCATE LE MARQUAND: Yes, sir.

Substantive appeal dismissed; order for recoverable costs substituted for full indemnity costs

B 81. [CIVIL DIVISION - APPEAL NO. 243]

24th JULY, 1998

COLIN BROWN

v.

C MATTHEW BRIAN GOULD

Before: COLLINS (PRESIDENT), BELOFF and NUTTING, JJ.A

Torts - personal injury – proceedings incorrectly brought in another jurisdiction – prescription – Law Reform (Tort) (Guernsey) Law, 1979 – Motor Insurers Bureau

D See paragraph 58.

J.M. Wessels, for the Appellant
St J.A. Robilliard, for the Respondent

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

E This is an appeal, with leave, from a judgment of the Bailiff of 5th June 1997, whereby he exercised jurisdiction under S.8 of the Law Reform (Tort)(Guernsey) Law 1979, to disapply the time bar imposed by S.5 of the same law in respect of an action for damages for personal injuries brought by the Respondent in Guernsey. The Respondent is, of course, the Plaintiff in the action and it is in that capacity to which we shall refer to him hereafter. The provisions contained in these sections are identical to those first introduced in England by way of amendment to the Limitation Act 1939 by virtue of the Limitation Act 1975 and now contained in Ss. 11 and 33 of the Limitation Act 1980. The interpretation and application of such provisions has been the subject of a considerable corpus of judicial material of an appellate nature and it is appropriate that the courts in this Island should follow such authorities both in the House of Lords and the Court of Appeal.

F The action was brought in 1996 arising from an accident alleged to have taken place on the Fish Quay in St. Peter Port. The Plaintiff, Mr. Gould, and the Appellant in these proceedings, Mr. Brown (to whom hereafter for convenience we will refer to as the "Defendant") were visiting Guernsey at the time as part of the crew of a fishing boat.

G On 16 July 1990, the Plaintiff was standing on the quay near a wire barrier when it is alleged that a motor car, driven by the Defendant, collided with the barrier causing the Plaintiff to fall some

distance on to a pontoon below. The injuries alleged are severe and the damages claimed comfortably exceed £1,000,000.

The bare outline of the events which followed the accident and preceded the commencement of the proceedings in England can be shortly stated and then amplified by evidence given by the Plaintiff and his solicitor before the Bailiff on 22 April 1997. The Plaintiff, who lives in England, instructed solicitors in England and through them commenced those proceedings by writ in the High Court on 28 April 1992, within the English limitation period of three years, which of course, expired on 16 July 1993.

It was known that the Defendant, who also lives in England, was uninsured, and so on 30 April 1992 the Plaintiff's solicitors, Messrs. Wickham & Edwards of Weymouth, gave notice of the commencement of those proceedings to the Motor Insurers Bureau. The notice was expressed to be given "pursuant to the agreement dated 21 December 1987" (the reference to 1987 being an error for 1988 and no point being taken on this), this being the agreement with the Secretary of State, the Uninsured Drivers Agreement, which related to liabilities in respect of which a policy of insurance must insure a person under the English road traffic legislation. This agreement is separate and distinct from The Agreement (Compensation of Victims of Uninsured Drivers) dated 4 April 1990 between the States of Guernsey and the Bureau, which is applicable in the case of drivers uninsured for liability in respect of which a policy of insurance must insure a person in order to comply with the Guernsey road traffic legislation.

The letter of 30 April 1992, did not enclose the writ nor did it disclose the fact that the accident had occurred in Guernsey. By their reply of 7 May 1992, the Motor Insurers Bureau reserved the position with regard to notice and made certain enquiries. Then, by a further letter of 15 May 1992 the Bureau accepted notice as required by Clause 5(1) of the Uninsured Drivers Agreement and asked for a copy of the writ or Plaintiff Note. By letter of 11 June 1992, Messrs. Norris, solicitors in England, wrote to the Plaintiff's solicitors advising that they had been instructed by the Bureau to act on behalf of the Defendant and referred to a conversation between Mr. Montrose of the Plaintiff's solicitors and Mr. King of the Bureau. Mr. Montrose's evidence before the Bailiff was not altogether clear in that he at first confused the order in which these two letters were sent, but in the end it appears that he was saying that he spoke to Mr. King after the second letter and that Mr. King wished to investigate. This is consistent with the Norris letter and with Mr. Montrose's affidavit.

At this time therefore it must have been known to the Bureau or its solicitors that the accident in question had occurred in Guernsey as indeed appears from that affidavit. The matter was then allowed to proceed on the basis that the notice to the Bureau was a valid one, albeit that it was accepted under the English Agreement. A Defence was served on 8 December 1992, by Messrs. Norris on behalf of the Defendant, on the instructions of the Bureau, which admitted the accident but denied negligence and asserted that the Plaintiff had been supervising the Defendant and had caused or contributed to the accident by his own negligence. At the time of the service of that defence the Plaintiff's action was not statute-barred either in England or in Guernsey.

Thereafter, in November 1994, the Bureau applied to be joined to the proceedings and as the Second Defendant served its own Defence on 11 November 1994, raising an issue as to whether the Fish Quay was a road within the meaning of the relevant provision of the Road Traffic Act, which for convenience, I will hereafter refer as the "road" point. No issue was taken on the notice and the pleading proceeded on the basis that any obligation which might otherwise have arisen would have arisen under the Motor Insurers Bureau Agreement of 21 December 1988. No

A reference was made to the Guernsey Agreement, (to which hereafter we will refer as the "agreement" point). Although if the Bureau had wished to rely upon the fact that the appropriate agreement, if any, was the Guernsey Agreement, it should have been pleaded.

B It is clear to us that matters were proceeding on the mistaken basis by all parties that this was a matter to be governed by the English Agreement and, indeed, it continued so to proceed both before and after the limitation period had expired. We acquit the Bureau of any intention to conceal or mislead. The plea raised by the defence of the Bureau as Second Defendant led to an order being made by consent on 23 November 1994, that the following issues be tried as preliminary issues:-

Was the Fish Quay, St. Peter Port in the Island of Guernsey a road within the meaning and for the purposes of Part VI of the Road Traffic Act 1972?

C In the event that the Plaintiff obtained judgment against the (First) Defendant and such judgment remained unsatisfied for a period of 7 days would the Second Defendant be under an obligation to satisfy such judgment?

D The case lodged by the Bureau in support of their appeal to this Court asserts that from the time of the delivery of the defence in the terms summarised above it would have been open to the Plaintiff to commence proceedings in Guernsey having regard to the denial that the Fish Quay was such a road and that there was no liability on the Bureau to satisfy any judgment in those proceedings. This is however an incomplete picture in that the pleading in making this denial expressly refers to the English Agreement without, as we have noted above, making a case that the proper Agreement was the Guernsey Agreement, and this against the background that the notice under the English Agreement had been accepted as good notice by the Bureau.

When the matter came before Kennedy, J., at Winchester on 3 May 1995, the first issue identified above was revealed, to use the words of the judge as:-

E "a nonsense, because in no circumstances is the Fish Quay a road within the meaning and for the purposes of the Road Traffic Act 1972, because it is not in Great Britain, it is in Guernsey."

F Clearly no one can have thought the matter through on either side because there can never have been a triable issue as to the Quay being a road within the meaning of the English legislation so as to be a fit subject for a consent order for the trial of a preliminary issue by a judge of the High Court. The judge, who had counsel before him, including Mr. Lamb, QC on behalf of the Bureau, said this:-

F "But the point that was sought to be raised when Mr. Lamb came into this case last week was as to the applicability of the agreement between the States of Guernsey and the Motor Insurers Bureau which came into effect on 9 March 1990."

G The judge, rightly in our view, criticised the parties for failing to appreciate the significance of the "road" point and the "agreement" point sooner. The history of the matter before the English courts is briefly completed; in May 1996, the action in England was stayed by the order of Mr. Justice Tuckey. We would add to what Kennedy, J. said by stating that in our view all this was a waste of time for which responsibility must be shared between the parties who can be taken to have had the user rather than the geographical position of the road in mind when they agreed to the triable issue and indeed when the Defence was served.

The Defendants must bear responsibility for accepting the validity of the notice citing the English Agreement and for failing to intervene until after the limitation period had expired. That the Plaintiff's advisers bear some responsibility appears from the evidence given before the Bailiff. The initial choice of England as the forum was dictated by the availability of Legal Aid in England and its absence in Guernsey, where the Plaintiff would have been required to put down £800 in respect of costs as an advance payment which would have been well beyond his means, and the availability of compensation from the Criminal Injuries Compensation Board in England and the absence of any equivalent body to pay compensation in Guernsey. Furthermore, Mr. Prentice, the Guernsey advocate, who was consulted on 24 October 1990 by the Plaintiff's solicitors, made no reference at that time to the separate agreement. The skeleton argument from Mr. Lamb, QC, delivered shortly before the hearing before Kennedy J., was the first that Mr. Montrose claimed to know of the availability of the "agreement" point. It should have been known or easily ascertainable by the Plaintiff's advisers that Guernsey being a separate jurisdiction was likely to have its own road traffic law. It is clear that in late December 1994 Mr. Montrose was on notice that there was a separate Motor Bureau Agreement for Guernsey, both by the terms of a letter from Mr. Prentice, the Guernsey advocate who had been advising him, dated 23 December 1994, and by the enclosures of that Agreement with that letter.

A

B

C

Mr. Prentice in commenting on the terms of the Bureau's Defence stated that the Road Traffic Act 1972 is not applicable to Guernsey which has its own road traffic legislation. The letter also dealt with the factual position as to whether the Quay was a road, the point which was uppermost in Mr. Montrose's mind. This letter could, had sufficient thought been given to it, have given rise to doubts at least as to the availability of the defence taken by the Bureau at the trial of the preliminary issue a few months before the exchange of skeleton arguments, but at a time when the action was well statute-barred in Guernsey, subject to the discretion of the Court.

D

Section 5 of the Law Reform (Guernsey)(Tort) Law 1979 provides a limitation period for personal injury actions of three years. Section 8 states:-

"8. (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which-

E

- (a) the provisions of section five or six of this Law prejudice the plaintiff or any person whom he represents, and
- (b) any decision of the court under this sub-section would prejudice the defendant or any person whom he represents,

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

F

(2) The court shall not under this section disapply subsection (2) of section six of this Law except where the reason why the person injured could no longer maintain an action was because of the time limit in section five of this Law.

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to-

G

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;

- A (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section five or as the case may be six of this Law;
- (c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- B (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- C (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

D The first issue for us is whether, given that the Plaintiff has here instituted proceedings in England within the three years prescribed by the Guernsey limitation period, he is prevented in limine from seeking the exercise of the Court's discretion to extend the time for his Guernsey action. The Defendant relies on the decision of the House of Lords in *Walkley v. Precision Forgings Limited* (1979) 1 WLR 606. In our view, the principle in *Walkley* has no application to the present case at all. In *Walkley*, in bare outline, a Plaintiff started proceedings in England within the limitation period, discontinued them, and thereafter sought to institute fresh proceedings in England outside the limitation period in reliance on section 5(d) of the (English) Limitation Act 1975, now S.33 of the (English) Limitation Act 1980, which is identical in terms to the Guernsey Statute S.8. It was held that he could not do so.

E It should be noted that the first set of proceedings in that case was in the same jurisdiction, i.e. England, as the second set of proceedings, i.e. England. In this case the first set of proceedings was in a different jurisdiction, i.e. England, to the second set of proceedings, i.e. Guernsey. The reasoning of the House of Lords decision in *Walkley* is found in the speech of Lord Wilberforce at page 609 D to E, the speech of Viscount Dilhorne page 614 A to C and the speech of Lord Diplock page 618 H to 619 G, and as expanded by him in the case of *Deerness v. Keeble* (1983) 2 LLR 260. At page 262 of his speech in the latter case, Lord Diplock said:-

F "Walkley's case was one of discontinuance of proceedings and as the example I gave is perhaps more accurately characterised as an estoppel from relying on S.11 of the Act rather than a disapplication of that Section upon a direction of the Court made in the exercise of the discretion conferred upon it under S.33, in the making of which direction the Court must have regard to the matters specified in S.33(3). Whether a Defendant is estopped or not is a question of law, it is not a matter of discretion for the judge. Sir John Donaldson, Master of the Rolls, pointed this out in his judgment in the instant case. The rationale of the rule laid down by this House in

G *Walkley's* case did not logically admit of any exceptions."

And at page 263 he continued:-

"My Lords, none of the five matters relied upon by Mr. Justice Comyn as exceptional circumstances can overcome the fatal obstacle to the Plaintiff's solicitors' insurers that is presented by the fact that the solicitors did cause a writ to be issued within the primary limitation period. As Lord Wilberforce succinctly put it in Walkley's case, after setting out the wording of what has now become S.33(1)(a) of the Limitation Act 1980:-

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"The provisions of S.11 are those which require an action for personal injury to be brought within three years. So Sub-S.1(a) must be contemplating a case in which because the three years have expired without an action being brought S.11 applies to the prejudice of the Plaintiff. But if the Plaintiff has brought his action within the three years, how has he been prejudiced by S.11? This I fail to understand. If this argument is sound the Respondent's case fails in limine. He brought his first action within the normal limitation period and if he has suffered any prejudice it is by his own inaction and not by the operation of the Act."

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The essence of these two authorities appears to us to be capable of summary as follows:-

(1) There is a primary limitation period for a Plaintiff in a personal injury action of three years.

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(2) If a writ is issued within that primary limitation period that primary limitation period is not the cause of any prejudice to the Plaintiff, on the contrary he had complied with it.

(3) The writ referred to in (2) above can only be a writ in the same jurisdiction in which the limitation period operates, and not a writ or other process in some other jurisdiction which ex hypothesi, would not be affected by the primary limitation period.

D

(4) If, on the other hand, such a writ is not issued within the primary limitation period, the primary limitation period is the cause of prejudice to the Plaintiff, because unless the primary limitation period is displaced, he cannot even institute proceedings.

In both the cases cited, (Walkley and Deerness), and in Chappell v. Cooper (1980) 2 All ER 463, per Roskill, LJ, as he then was, page 467 H to 468 H, the vocabulary used by the judiciary as to the nature and incidents of the "first action" is only applicable to an English action, there is no hint that it could be an action instituted in a foreign jurisdiction. The same conclusion would be reached by application of the presumption that all legislation is territorial in its reach except where otherwise stated, (R. v. Paramount Airways (1993) Ch. 223). The same approach as obtained in England must, mutatis mutandis, apply to the Guernsey legislation. Walkley, we repeat, represents the views of an authoritative tribunal on a matter of statutory construction where there is no reasonable basis for saying that the same language means one thing in Guernsey and another thing in England. It cannot sensibly be argued that just because the statutory regimes in Guernsey and in England are for this purpose the same, nor, a fortiori, because Guernsey and England are geographically approximate, that the Walkley principle should be extended to a different set of facts by analogy. For England, Guernsey is a foreign land and vice versa. Moreover, the reasoning of the House of Lords does not permit such extension. No violence is done to common sense or public policy by such a construction which appears to us to be linguistically compelled. The fact of the institution of proceedings in respect of the same cause of action and its sequelae are clearly relevant to the exercise of discretion and, adversely to the Plaintiff, is part of "the reasons for the delay" - S.8(3)(a) of the Guernsey Statute. We merely hold that they are not a bar to its exercise in the first place. We do not accept

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A however that if Walkley applied, the Plaintiff can rely on exceptions to it. In Walkley, Lord Diplock envisaged exceptions as constituted by misrepresentations or improper conduct by the defendant only. In Deerness he refined this to a position where there were no exceptions as such, but only an estoppel against a defendant whose conduct inhibited his reliance on the bar to the Plaintiff's use of the statutory gateway.

B Two decisions of the Court of Appeal create further exceptions, but in both cases the common thread was that the first actions were not properly constituted at all. In White v. Glass C.A. (unreported), 17 February 1987, the action was brought against an un-incorporated association, eo nomine, rather than by way of representative action. Kerr, LJ, said at 12 G to H of the judgment:-

"I found myself on the consideration that there was no subsisting properly constituted action in being at the time when the application under S.33 was made, contrary to the position in both Walkley and Deerness. This is not a case of a mere repetition of an identical action which had been instituted during the limitation period."

C In Re Workvale Limited (1992) 1 WLR 416, the action was brought against a dissolved company. Scott, LJ, said at page 423 D to G:-

D "In my opinion, however, the present case is not on all fours with Walkley v. Precision Forgings Limited..." and then he gives the citation: "... the action that was started within the primary limitation period in the present case was not an effective action. Unknown to the Plaintiff and his advisers the Defendant did not exist. The facts relevant to the Defendant's corporate existence did not become known to the Plaintiff or his advisers until after the primary limitation period had expired. So, as it seems to me, the Plaintiff in the present case has been prejudiced by the three year limitation period as well as, of course, by the failure of his legal advisers to find out about the state of the proposed Defendant and take the appropriate steps to remedy the position. I am fortified in this conclusion by the decision of this Court in White v. Glass..." and then he gives the citation "...in which Walkley was distinguished on the ground that there was a properly constituted action. An ineffective action commenced within the limitation period did not, it was held, bar an application under S.33 to commence a properly constituted action outside the limitation period. So here, in my judgment."

E Neither were accordingly effective actions: there was no proper Defendant. In this case there is a proper Defendant, that is Mr. Brown. The fact that in the English action he will not be worth suing because the Motor Insurers Bureau have an impermeable Defence does not make the action ineffective as distinct from valueless. Accordingly, it was for the Bailiff as he held for different reasons to exercise discretion. Regrettably, and by concession of both parties, it is clear that he exercised it by reference to a legally irrelevant consideration, i.e. that Guernsey was the forum conveniens.

In his judgment the Bailiff said:-

G "In the light of the foregoing there can be no doubt whatsoever that the forum conveniens, so far as this is a material issue, is Guernsey. This question then arises: can the advantage of the forum conveniens argument in favour of Guernsey by itself justify the lifting of the time-bar in Guernsey for the action to proceed here given that there is presently no time-bar in England. In my judgment it can and in the circumstances it is just that I should so order. I have a wide discretion in the matter of deciding whether or not to disapply the time-bar."

In our judgment this is neither a listed nor a statutory nor in the statute an implicit consideration. The issue in relation to discretion must be whether the action should be permitted to take place not where it should. We can and must therefore exercise the discretion ourselves. In support of his contentions that the time-bar should not be lifted the Defendants, or Appellants as, of course, they were in these proceedings, contended that there are a number of factors which should influence our decision:-

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1. The Plaintiff has had the benefit of legal advice from solicitors since July 1990, from a Guernsey advocate since October 1990 and from counsel since February 1991.

2. The Plaintiff's solicitors were aware from late 1994 that the "road" point and the "agreement" point might severally or in combination defeat the Plaintiff's claim if the litigation was maintained in England in the sense that they would be unable to satisfy the judgment.

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3. They were aware in November 1994 and in May 1995 respectively that the Second Defendant intended to advance the former and the latter points by way of Defence.

4. Notwithstanding that they were on notice of the potential problems about the success of the English litigation at those dates, they delayed issuing proceedings in Guernsey until March 1996.

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5. The appropriate remedy for the Plaintiff is not a further cause of action in Guernsey against the Defendants but a claim in negligence against his lawyers.

6. Although this is not a case where the memory of the parties or witnesses will necessarily play an important part in the proceedings, nonetheless in relation to the defence of contributory negligence any delay may create further difficulties or prejudice.

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7. The Defendants will be put to the greater expense of contesting the action here because of the duplication in costs in briefing Guernsey lawyers.

The Defendants will also be prejudiced, it is submitted, by the better prospect of a successful claim in satisfaction of judgment by the Plaintiff in this jurisdiction than in England.

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Why, we were asked, should the Defendants suffer the prejudice if the English action fails, as it may, by having to contest the case in Guernsey where it is more likely to succeed? The Plaintiff, as Respondent, submitted before us that our discretion should be exercised in favour of disapplying the time bar in relation to S.8 and he made the following points:-

1. The fault of his lawyers was understandable. This was not a case in which a rule of procedure had been ignored resulting in a statutory time limit overrunning. The failure to appreciate the difference between the jurisdictions and to discover that there are two separate agreements with the Motor Insurers Bureau, represented failures shared by all the lawyers in the case, including those advising the Bureau, until after the limitation period had elapsed.

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2. The blame for the present state of affairs must be shared between the parties because the Motor Insurers Bureau appeared to acknowledge in June 1992 that the relevant agreement was the Motor Insurers Bureau (Uninsured Drivers) Agreement with the Secretary of State rather than

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the Motor Insurers Bureau Agreement (Compensation of Victims of Uninsured Drivers) with the States of Guernsey.

A 3. The Second Defendant had not applied to be joined to the proceedings until four months after the limitation period had expired.

4. In the document headed "Defence of the Second Defendant" dated 11 November 1994, the Bureau specifically acknowledged in Paragraph 5(1) its "potential liability to satisfy a judgment" arising "under Clause 2(1) of the Agreement made between the Second Defendant and the Secretary of State for Transport on 21 December 1988."

B 5. Although this pleading raised the "road" point the Second Defendant did not seek to defend the action by reference to the "agreement" point in any pleading until the amended defence was served in November 1995, although it is conceded that the Second Defendant raised the matter in argument before Kennedy, J., in May 1995.

C 6. The prejudice suffered by the Second Defendant if an action is now commenced in Guernsey would be marginal. All the work in the preparation of the Defence has been done in the context of the English proceedings and the similar nature of the proceedings in Guernsey mean that the costs would relate to a trial here which would have to be paid for in any event in one jurisdiction; further that the trial could take place within a short period of time and would depend on the availability of a court rather than the preparedness of the parties.

D 7. The Plaintiff would suffer prejudice if the action did not take place here where the chances of a successful recovery of damages were greater than in England.

E We have to decide between these competing arguments. There can be no doubt that the sorry history of this case represents, as Kennedy, J, said at the hearing in May 1995: "A monument to not thinking things through, to the waste of costs, and to the waste of Court time." We have already recorded our view that neither side is blameless and we have set out above the circumstances of the failures by both parties to recognise these problems until, to put it neutrally, the winter of 1994/95.

F We have to ask ourselves on which side of the line our discretion should fall in the light of all the circumstances and arguments to which reference has been made. We have set out above the factors under S.8 which the Guernsey Law requires us to take into account. We have referred to what Scott, LJ, as he then was, said in *Re Workvale Limited*. He analysed the same statutory factors under S.33 of the Limitation Act 1980, which we have to apply in this case. At page 425 of the judgment he said:-

G "I will take in turn the relevant paragraphs of S.33(3). As to paragraph (a) in my opinion the reasons for the delay involve fault on both sides. As to paragraph (b) the evidence on both sides is likely to be less cogent by reason of the delay, but, since the Plaintiff must establish her case, I would regard the Plaintiff as being the party likely to suffer the higher degree of prejudice. As to paragraph (c) the insurers' solicitors implicitly represented over the period January 1987 to September 1988 that the company was in existence. As to paragraph (e) there was dilatoriness on the Plaintiff's side after September 1988 in seeking to obtain an order to restore the company to the register. The application was not made until December 1990. I would not regard this dilatoriness as heavy enough to turn the scales against the Plaintiff. Finally, it must be remembered that in September 1988 the case was virtually ready for trial with all the

interlocutory work completed. This is not a case of an action which would be started from scratch. In these circumstances it seems to me that the case for an order being made under S.33 allowing the action to be brought out of time is not simply arguable but very strong indeed."

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It is to be noted that in a case with similar factual features to the instant case *Scott, LJ*, held that a delay of 27 months through the dilatoriness of the Plaintiff's advisers in bringing proceedings was not considered fatal to the exercise of the discretion to lift the time-bar. Since we consider that the blame for the failure to bring proceedings in this case, in this jurisdiction, was shared between the parties until late 1994, we conclude that the relevant period of delay is the time between then and March 1996, a period of 16 months. Although it is obvious that the application of the time-bar cannot be applied mechanically by reference to a specific period of time nonetheless we note that in the case under consideration the period of relevant delay is a period less than that which was under consideration in *Re Workvale Limited*. We have examined what took place during those 16 months in order to satisfy ourselves that the Plaintiff and/or his lawyers did not unnecessarily increase the prejudice which is the almost inevitable result of any delay.

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It is clear that there were at least three options open to the Plaintiff during 1995; either to continue the proceedings in England or to initiate new proceedings with a notice citing the correct agreement or to commence proceedings in Guernsey. A number of matters required consideration including, for example, the question of the effectiveness of the registration of any English judgment in this Island. In the light of the judgment of Kennedy, J, of 3 May 1995, junior counsel was instructed to advise the Plaintiff in July 1995, and the advice of leading counsel was sought in November 1995. A decision was taken in the light of that advice to launch proceedings in Guernsey in December 1995 and leave was obtained from the Royal Court to serve a summons out of the jurisdiction on 22 March 1996.

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Whilst this time table does not reveal any great sense of urgency we do not consider in all the circumstances that the Second Defendant has been prejudiced to any significant extent by the period of time which the Plaintiff and his advisers took to decide how to proceed when they were put on notice of the significance of the "road" and the "agreement" points, and when they realised that these points were going to be put forward by way of defence in the action. In truth the 16 month period was a logical consequence of the discovery of the problems created in the English action. We have also noted Mr. Justice Kennedy's remark about the reality of the issues to be tried. At page 5, para. E to G of his judgment he says:-

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"I think each party has at least one witness who is physically present who is a Guernseyman who can talk about the status of the Fish Quay and whether the public have access there, but in reality it is to a large extent going to be a paper battle."

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Nothing we have heard in argument has caused us to doubt this analysis. The issues for the Court are not going to involve tests of memory, the witnesses have already provided statements and much of their evidence is not likely to be challenged to any appreciable extent. It is true that expert witnesses will have to travel to Guernsey, doctors may well be required in Court to give evidence about the Plaintiff's injuries, and an accountant may well have to be called to prove or to contradict the assessment of the Plaintiff's loss of earnings. We have considered carefully whether this factor should weigh heavily in our discretion to lift the time-bar. We have also considered what impact we should give to the fact that the Plaintiff has had access to legal advice from an early stage and that the fault lies with them rather than with the Plaintiff himself. In *Thompson v. Brown Construction (Ebbw Vale) Limited & Others* (1981) 2 All ER 296, Lord

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A Diplock considered the statutory factors in force at the material time in England by virtue of the Limitations Acts 1930 and 1975. These factors are also indistinguishable from those which we have to apply under S.8. At page 303 of his speech Lord Diplock said, at (A):-

B "Until he has obtained legal advice a Plaintiff (unless he is himself a barrister or solicitor) will not know whether or not he has a cause of action for damages against the Defendant, although under S.2(a)(6) the lack of this knowledge will not prevent the primary limitation from starting to run. The steps he has taken up to the point when he receives advice that he has a possible cause of action are dealt with in paragraph (f) whereas how promptly and reasonably he acted after receiving that advice is dealt with in paragraph (a). In contrast to paragraph (c) I think it is apparent that paragraphs (a) and (f) are referring to the conduct of the Plaintiff himself as well as that of his lawyers after he has consulted them for the first time. If he has acted promptly and reasonably it is not to be counted against him when it comes to weighing conduct that his lawyers have been dilatory and have allowed the primary limitation to expire without issuing a writ. Nevertheless, when weighing what degree of prejudice the Plaintiff has suffered the fact that if no direction is made under S.2D he will have a claim over against his solicitor for the full damages that he could have recovered against the Defendant if the action had proceeded must be a highly relevant consideration."

D We consider that the fact that the Plaintiff consulted lawyers at the earliest opportunity, and that the choice of jurisdiction in which to commence proceedings was theirs, is a factor which we are entitled to take into account in the exercise of our discretion. The Plaintiff may have a claim for damages against his legal advisers but because of possible problems of causation which were canvassed in argument the claim may not be as clear as the one for dilatoriness with which Lord Diplock was concerned in Thompson. We have considered carefully whether Lord Diplock's reasoning ought to prevent us from exercising a discretion to disapply the time-bar. We conclude that it does not. We are not persuaded that the conduct of the Plaintiff's legal advisers is an irrelevant consideration, nor are we persuaded that he and his lawyers must be considered as indivisible in blame for this purpose. We are satisfied that the Plaintiff himself acted "promptly and reasonably" and we consider in fairness to him, and by way of analogy to Thompson, that the fault of his lawyers should not "be counted against him when it comes to weighing conduct."

E We have also considered the balance of prejudice between the parties. We acknowledge that the prejudice suffered by the Second Defendant in being compelled to forego the opportunity successfully to mount a defence to the action in England or to take advantage of the stay if the action remains stayed, must be weighed against the prejudice suffered by the Plaintiff if he is denied the opportunity of bringing a case in Guernsey in which he has a reasonable prospect of success in satisfying any judgment he obtains. It is not in our judgment an irrelevant consideration that an action in Guernsey is likely to be decided on its merits with a full ventilation of the evidence and a prospect of the recovery of damages whereas the action in England may well fail with no damages recoverable for reasons which are both technical and unmeritorious. When the proceedings came before Mr. Justice Kennedy in Winchester, he analysed the issues on the merits thus:-

G "It would seem as if, when the action comes on for trial, the more lively question is going to be the Plaintiff's contributory negligence. There is quite a serious issue as to damages as well On the face of it many lawyers might think that Mr. Gould was pretty certain to recover something."

Other things being equal, the sooner that these issues are properly litigated in our view the better.

Finally, we have considered the extent of the prejudice which the Second Defendant will suffer in terms of time and cost if we disapply the time-bar. We have concluded that the extra months which will necessarily pass if the action now starts in Guernsey rather than continues in England must be a factor for our consideration as is the question of costs, but in this case we consider that these two aspects of prejudice are marginal and do not outweigh the other matters to which we have referred. On the basis of all the considerations which we have outlined above we have concluded that justice requires that the time-bar be dis-applied." A

Accordingly we dismiss this appeal.

We add for completeness that there was also before us an application to adduce fresh evidence. For the reasons which appeared in argument and which we will not lengthen this judgment by repeating, we declined to admit the material. B

ADVOCATE ROBILLIARD: The usual application for costs, sir, in this Court and the Court below.

ADVOCATE WESSELS: Well I can't resist the order for this Court, I think the normal order in relation to a S.8 application is for costs to be in the Court in relation to the original application, i.e. if the Plaintiff loses his claim he shouldn't have the costs of starting it in the first place. C

THE PRESIDENT: Because it's regarded as a form of indulgence, is that the reasoning?

ADVOCATE WESSELS: Yes, that's the argument. That's been the order that the Royal Court has made before. D

ADVOCATE ROBILLIARD: I wouldn't disagree with that, sir.

THE PRESIDENT: Very well, costs on Court below- costs to the Respondent in the Court of Appeal.

Application for leave to adduce fresh evidence dismissed; appeal dismissed; costs to the Respondent in Court of Appeal; costs in Royal Court to be in the cause. E

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24th JULY, 1998

ANTONY ALAN MATHESON
v.
STATES HOUSING AUTHORITY

Before: COLLINS (PRESIDENT), BELOFF and NUTTING, J.J.A

B

Housing - control of occupation – application for housing licence – appeal to Court of Appeal – factors to be taken into consideration – applicant previously resident in open market accommodation - questions of law and fact – Jurats' role

See paragraph 28.

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St. J.A. Robilliard, for the Appellant
H.M. Procureur, for the Respondent

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M.J. BELOFF, QC: This is an appeal by Anthony Alan Matheson against a decision of the Guernsey Housing Authority, represented in these proceedings by the President as Respondent, dismissing the Appellant's appeal against the refusal by the Respondent Authority to grant him a housing licence. The correspondence before the Court shows that the Appellant has been seeking a housing licence since 12 August 1992. This appeal is concerned only with the refusal of 28 August 1997.

The facts which form the background to this appeal were agreed and are contained in an agreed summary of facts which I now recite:-

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"1. The Appellant is 54 years of age and has resided in Guernsey since 1977. The Appellant has resided throughout his time in Guernsey in 'Open Market' accommodation, mostly rented. He is not, and is not likely to become, a qualified resident.

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2. The Appellant has three children, namely, Charles (aged 21) Arabella (aged 18) and Primrose (aged 12). All three children are qualified residents under the provisions of the Housing (Control of Occupation)(Guernsey) Law, 1994 ("the 1994 Law"). All three hold Status Declarations. All three children reside with the Appellant. Primrose still attends school at Blanchelande College.

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3. The Appellant has brought up the children on his own since his wife left the matrimonial home in 1988.

4. The Appellant is not in good health and has been diagnosed as suffering from an illness which is broadly described as "ME", which is a debilitating illness.

5. The Appellant has no means which would enable him to purchase or rent "Open Market" accommodation.

6. The Appellant has no family connections of any substance outside of the Island of Guernsey.

7. The Appellant owned with his former wife an Open Market property known as "Fond du Val", Le Coudré, in the Parish of St. Peter-in-the-Wood, from November 1986 until February 1991. The property was in substantial need of repair when purchased and the Appellant occupied it with the children from only late 1988 until it was sold, due to financial necessity, early in 1991 (the Appellant's former wife having conveyed her interest to the Appellant in 1988).

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8. The Appellant has for a number of years rented subsidised Open Market accommodation at a reduced rate. He was forced to vacate the same at the wishes of the owners in January of 1998.

9. As the Appellant owned for a short period an Open Market property he is unable to occupy as a member of the household of his children (who possess Local Market qualifications under the 1994 Law) without a housing licence because of the provisions of S. 53 of the 1994 Law.

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It should, however, be emphasised that the Appellant's application was to occupy a dwelling in his own right."

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The legislative regime is embraced within the Housing (Control of Occupation)(Guernsey) Law, 1994. Part 1 of the 1994 Law deals with the control of occupation of dwellings, S.1 provides that occupation is prohibited without a housing licence. Section 2 deals with applications for housing licenses, S.3 gives the Authority power to grant or refuse a licence and, if to grant it, then to grant it for such period as the Authority may in its absolute discretion think fit.

Section 6 provides the machinery for application and determination. So far as material it specifies as follows:-

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"6.(1) 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."

Sub-section (2) deals in para. (a) with an application by a person to occupy a dwelling so that he may undertake employment in Guernsey. It is common ground that that is not material to this particular case. Paragraph (b) provides in any other case, that is to say other than an employment application case, the Authority shall consider all or any of the following matters:-

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"(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 granting of a housing licence;

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

I make three observations upon those provisions: Firstly, they specify considerations which it is mandatory for the Authority to take into account; secondly, the matters listed under (b)(ii) do not qualify or limit the consideration to be given to the matters listed under (b)(i); and thirdly, that the circumstances of residence referred to in (b)(ii) make a relevant but not a decisive or overriding factor in the equation, the status of residence of the applicant.

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A Sub-section 6.(5) provides for factors that the Authority may take into account. Paragraph (a) is concerned with matters personal to the applicant; (b)(c) and (d) are concerned with factors relating to policy or plans of the Island of Guernsey; and (e) (which I quote in full) refers to "such other factors as it [that is to say, I interpolate, the Housing Authority] may deem necessary or expedient."

Part 2 of the Law deals with persons who do not require a housing licence and in particular qualified residents not to require a housing licence are defined by the provisions of S.10.

B Part 3 deals with a circumstances in which a housing licence is not required, and S.19 which has been developed subsequently in the same legislation, defines in effect persons who are open market residents who fall within or whose circumstances fall within the definition of Part 3.

C Sections 53 and 54 are located in Part 5 of the 1994 Law and deal with the restrictions on occupation by certain persons. It is unnecessary to set those provisions out in full. Suffice it to say that it is common ground that they contemplate the possibility of what I may describe as an "open market resident" becoming the grantee of a licence to occupy local market property.

The Law vests in the Housing Authority considerable powers, and it is at all times useful for those responsible for the exercise of those powers to bear in mind the observations of this Court in the case of Perkins v. The States Housing Authority in 1995, 20 GLJ 36. Those observations are to this effect, and I quote from the judgment delivered by Mr. Southwell, QC, a Judge of the Court of Appeal, at p.66 D, with which the other members of the Court agreed:-

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

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Notwithstanding those words, I recognise that it is a well established principle of public law, applicable to Guernsey, that a public authority such as the Respondent Housing Authority, can have a policy as long as two conditions are satisfied. The first is that the policy conforms with the law; a policy cannot modify, extend, still less contradict such law. The second is that those who apply the policy are prepared to listen to reasons why it should not be applied in a particular case and in consequence, in appropriate circumstances, to make exceptions to it. This was accepted by the Procureur for the Respondents and not disputed by Mr. Robilliard for the Appellant, although he chose to put emphasis upon an equally well established and indeed associated principle of public law, namely that a discretion under statute cannot be fettered.

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The area of dispute in this regard was helpfully narrowed still further by the respective advocates. The Procureur accepted for his part that the fact that an applicant is not a potentially qualified resident under S.10 of the 1994 Law cannot automatically rule him out of consideration under S.6(ii)(b). Mr. Robilliard accepted for his part that the fact that such an applicant is an "open market" person and hence not a potentially qualified resident under S.10 is a relevant factor for consideration under S.6(ii)(b). The case therefore focuses primarily, if not exclusively, on the

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meaning given to the Housing Authority's statement of reasons in their letter of refusal and the treatment of that letter and those reasons by the Bailiff in his directions to the Jurats.

Mr. Robilliard subjected the letter of refusal to meticulous analysis. It is necessary to bear in mind that public authorities in the exercise of statutory powers enjoy a presumption of regularity, that the burden lies upon the citizen aggrieved by any such decision to displace it, and that a decision letter of this kind is not to be construed as a statute but, as has been said, in bonam partem. On the other hand, where a public authority explains its decision in a letter such as this, its decision must be judged by reference to the principles and policies as they are there recorded and not by an advocate's gloss or amendment. I am compelled to conclude for my part that the Housing Authority in its decision fell into material error. It is clear from at least two passages that it considered that the fact that an applicant was not a potential qualified resident under S.10 inasmuch as his or her residence had hitherto been in open market housing, was itself a factor which dictated refusal of his or her application, whatever its other merits.

I turn now to the text of the letter:-

The first passage to which I refer is at the second page. Having recited the Appellant's connections with Guernsey the Housing Authority stated, and I quote:-

"However these connections are not considered sufficient to justify the grant of a housing licence in view of the fact that neither Mr. Matheson nor either of his parents were born in Guernsey and he is not a potential qualified resident."

I cannot for my part read that passage, as the Procureur invited us to read it, as a free-standing decision that the Appellant's familial connections with Guernsey were insufficient, on account of the extra- territorial birth of himself or his parents, to justify the grant of a licence given the specific linkage in that passage of those facts by the Respondent Authority with the Applicant's lack of potential satisfaction of the S.10 criteria.

I quote now from a further passage at the same page of the same letter:-

"Occupation of an Open Market dwelling as an adult whether as an owner or tenant, does not lead to residential qualification, and in the Authority's view such a circumstance of residence outweighs other factors such as strength of connections and periods of residence."

I for my part cannot read that passage as the Procureur invited us to read it, as an appropriate balancing exercise of facts peculiar to this Appellant. It is phrased unambiguously as a general principle or rule applicable to all cases. In these and in other passages, for example, where at the same page the Authority referred to circumstances of residence, and I quote "... as a key factor in its consideration...", the Respondent Authority appears to allow the S.6(2)(b)(ii) criteria to trump the S.6(2)(b)(i) criteria, even though S.6(2)(b)(ii) is expressly prefaced with the words: "without prejudice to the generality of [S.6(2)(b)(i)]" and then to extract a particular circumstance in 6(2)(b)(ii), that is to say, occupation of Open Market housing, as overriding all others. Hence, in my judgment, the Respondent Authority clearly misdirected itself in law.

I return now to the appeal machinery that is prescribed by the legislation. That is set out in Part 6 of the Law and in particular in S.56. Sub-section (1) provides, subject to certain immaterial provisions:-

A "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."

In Sub-S. (4) it is further provided:-

"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."

B The proper interpretation of these provisions was considered by this Court in the case of Walters v. The States Housing Authority on 23rd July 1987. If I may quote from the judgment which I delivered in that case [with which other members of the Court concurred], the analysis was this:

C "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 the Authority in a licensing application. (Contrast the unrestricted powers of appeal under SS. 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:-

D (1) That it is the Bailiff's view that the power was exercised ultra vires in a way other than Wednesbury unreasonable 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).

E (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 would have themselves come to a different decision had they been the Authority.

F In the case of In re W (1971) AC 682, Lord Hailsham, Lord Chancellor, said at p. 700 D:

"...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 its own."

G Mutatus mutandis, it seems to us that this is the approach 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 of 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.

A

(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).

B

The observations of the Court might in an appropriate case amount to a direction, for example, that a particular condition 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)."

C

In this matter the appeal to the Royal Court was on the ground of unreasonableness only, (see the initiating instrument or summons at page 21 of the bundle dated 10 November 1997), and not on the ground of ultra vires. This was, we were informed, a tactical decision designed to avoid, if possible, a split appeal potentially involving two hearings, one with the Bailiff alone and the other with the Bailiff accompanied by the Jurats. We were further informed that since the Walters case a practice has developed in Guernsey of having such split hearings, that is to say, vires issues to be determined by the Bailiff alone and any surviving issues of unreasonableness short of Wednesbury unreasonableness or irrationality to be dealt with by the Bailiff and the Jurats. No doubt where the only ground of appeal is ultra vires (other than that the decision was Wednesbury unreasonable or irrational), it is unnecessary for the Jurats to be present; they can have no role to play in determining matters of pure law. But where there is a double ground of challenge, that is to say ultra vires and/or unreasonable, a fortiori where, in such circumstances, the ultra vires challenge is that the decision was Wednesbury unreasonable or irrational, the course apparently adopted seems to me not to be necessary and certainly not to be mandated by the Walters decision. As long, in my judgment, as the respective and distinctive roles of Bailiff and Jurats are kept well in mind throughout, I would trust that considerations of justice and convenience will decide the most appropriate way of dealing with S.56(1) appeals in any particular case. Walters, I repeat, did not purport to prescribe any particular procedural formula.

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In relation to this appeal however, we are not constrained by the form of summons. It is clear from a reading of the Bailiff's directions that in oral argument and without objection submissions were brought out that the Respondent Housing Authority had indeed erred in law, that is to say, acted ultra vires in the broad sense vouched for by Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147, a decision whose principles I consider to be applicable in Guernsey. Further the Procureur said, with characteristic good sense, that it would be absurd if we were to form the view that the Respondent Authority had acted ultra vires and misdirected itself in law but were unable, because of the form of pleadings, to deal with its decision on that

G

A basis. The issue of vires is manifestly not that sensitive. Granted that, as already explained, I consider that the Respondent Authority acted ultra vires by misinterpreting the relevant statutory provisions, the Bailiff should, in my judgment, have allowed the appeal without reference to Jurats at all (alternative (1) in Walters). What follows in this judgment is without prejudice to that fundamental and general point.

Not only however, did the Bailiff refrain from holding, as in my view he should have done, that the Respondent Authority had acted ultra vires; he endorsed their decision as proper and indeed even enhanced it.

B I identify four significant matters from his directions:-

1. The Bailiff indeed interpreted the Respondent Authority as saying, in my judgment wrongly, that unless an Applicant for a housing licence under S.6 was potentially qualified under S.10 as someone who did not need a licence, he should be refused on that basis alone. I quote in support of that conclusion the following passage, p. 3 B of his summing up:-

C "One point that the Housing Authority has made in this letter is that it really only considers this, that is say strength of familial connection, where a person is on the way to acquiring time as it were towards building up his strength to make a local market application, that's 6(2)(b) really."

I emphasise the word "only".

I stress in additional support a second passage from the same page at G:-

D "The Authority does not regard this factor, [that is the factor that the Applicant was no longer able to afford rented open market accommodation] of itself as sufficient to justify the grant of a housing licence. The Authority is of the opinion that where the circumstance of residence is non-qualifying, for the purposes of S.10(2), occupation of open market dwellings, as either owner-occupier or tenant, that factor outweighs the strength of connections and periods of residence and justifies rejection of the application to occupy a controlled dwelling."

E I emphasise the phrase: "justifies rejection".

At a further passage of his summing-up at page 4, the Bailiff quoted from a passage in an earlier letter from the Housing Authority to the Applicant, dated 31 July 1997, but whose sense is the same as a passage in the subsequent decision letter to which I have already referred.

F " "The Authority is of the opinion that where circumstances of residence is 'non-qualifying' ... occupation of open market dwellings, as either owner/occupier or tenant, that factor outweighs the strength of connections and periods of residence and justifies rejection of the application to occupy a controlled dwelling." "

He goes on to say that the Authority could be "trusted" to exercise that policy in an ethical and sensible manner. I stress that the Bailiff appeared accordingly to consider that the policy that he has described and quoted is a lawful policy. For reasons already deployed I consider that that is wrong.

G 2. The Bailiff repeatedly referred in his summing-up to the lack of right or expectation of an "open market" resident to graduate to becoming a "local market" licensee without pointing out

that S.6 does indeed provide a route by which he or she can acquire that status. In support of this conclusion I quote the following passages from his summing-up, at page 2 C:-

"The position of somebody who comes over to live in an open market house is, I won't say precarious, but is- a person should really take note of the fact that if he fails, or if he no longer maintains his financial affairs, continues to pay for what he is living in, let us say open market accommodation, the policy is that the person who comes with that risk over his head really only has himself to thank."

And from the same page at F:-

"The policy of the Housing Authority is that people should not be able to move from open market to local market because that would, if you like, if it was easily achieved or achievable as a matter of law, that would devalue the value of open market accommodation and the object of having open market strictly controlled would be depreciated."

However, contrary to the Bailiff's implication that particular status is indeed achievable under S.6.

I quote finally from the passage at page 4 D of the summing up:-

"I come back again and say that you have to bear in mind that the law is designed to put in jeopardy people who come over to the Island and find themselves short of means to maintain themselves in the open market accommodation and against that there is an issue of justice and fairness which the Authority has to consider in every case."

This is, with respect, an incomplete description of the policy of the 1994 Law which has its enabling as well as its excluding elements.

3. The Bailiff at one juncture appears to suggest that the Jurats either cannot or certainly should not override a policy of the Housing Authority.

I quote again from page 4 where he has recited the policy in terms to which I have already referred, and then says this:-

"The law such as this, cannot cover every possible contingency, and has to be governed by policy of the Authority which hopefully is applied in accordance with the wish of the States. Whether that is so or not is a matter we can refer to today, but we have to trust the Authority to use its discretion to act with wisdom in the exemplification of its policy - in the statement of its policy to come to ethical and sensible decisions to enable life to be conducted in this Island in a civilised way."

However, in my judgment if the Jurats consider that such a policy in general or its application in a particular case is unreasonable they have the right, indeed the duty, to override it.

4. Insofar as the Bailiff elsewhere allowed for the possibility that the Jurats could exercise such a power, he did not formulate the basis upon which they could so exercise it correctly. I quote from page 3 C:-

A "The statute confers on the Authority the power to reach a conclusion on that point..." (that is to say, the strength or sufficiency of familial or like connections with Guernsey to justify the grant of a housing licence). I resume the quotation:-

"... and this, in a way, is a virtue of this law and our judicial system where the Jurats can, if they feel the Housing Authority is going over the top in its strict interpretation of reasonableness, this Court can interfere and has done on occasions."

B I make three observations; firstly, "over the top" is not a recognised legal expression. This is in itself not fatal since the apt use of vivid language can often be of assistance to the Jurats. However, the phrase "over the top" is an imprecise and ambiguous expression. Secondly, in its emphasis such a phrase suggests to the Jurats an exclusive test of Wednesbury unreasonableness or irrationality, and not the less strenuous test of reasonableness by which they can assess in point of fact the Housing Authority's decision under S.6; and thirdly, the formula does not make appropriate use of the guidance given by this Court in Walters to which I have already referred. I cannot for my part accept the Procureur's submission that any vice in such direction is cured by the concluding words of the summing-up which I quote:-

C "It is a matter for you to decide whether the refusal is fair and reasonable in all the circumstances, and in relation to the law, and the policy which is conferred on the States, and the policy of the Authority in exercise of their functions."

Such a formula would in the overall context of the summing-up serve in my judgment to confuse and not to clarify.

D I do not however find sustainable the additional assertion made on the Appellant's behalf that the Bailiff did not adequately direct the Jurats as to the merits and facts of the Appellant's case. I reiterate that it is not the function of the Bailiff to recite all the evidence which may be fresh in the Jurats' minds or to remind them of every detail in a short case which, such as this one, lasts for only one day's sitting. As to fact the Bailiff can paint with a broad brush as long as his strokes are accurate. As to the law, however, as the President said in the course of argument, he cannot be wrong.

E I, therefore, would allow this appeal and remit the matter to the Housing Authority to re-determine the application in accordance with the ruling of this Court. In essence the fact that an Applicant is "an open market resident" is a relevant but not an overriding factor in the assessment of his application under S.6(2)(b) and that any potential incapacity to achieve S.10 status as a qualified resident requiring no housing licence is not conclusive against him. The Authority is obliged to take account of the factors set out in S.6(2)(b) and is entitled to take into account the factors set out in 6(5) including as per para. (e), such other factors as it may deem 'necessary or expedient.'

F If the Housing Authority so directs itself in this manner unencumbered by legally unjustified preconceptions and otherwise in accordance with the law, then, subject only to an appeal on unreasonableness under S.56(1), its decision, whatever it is, will stand. It is not for this Court to express any view on what would or would not be a reasonable decision on the facts of this case and I accordingly refrain from so doing.

G J.M. COLLINS, QC: I agree with the order which has been directed by Mr.Beloff and I agree also with his reasons for so determining.

J.G. NUTTING, QC: I too agree with the order and agree with his reasons.

ADVOCATE ROBILLIARD: Can I make the normal application for costs in this Court and the Court below, sir? A

H.M. COMPTROLLER: Sir, may I first of all say that I appear in the absence of the Procureur who has a long standing commitment at the Home Office today sir, with good grace I accept the application, the Appellant should have his costs, sir.

J.M. COLLINS, QC: We're grateful both for your presence and the good grace with which you bow to the inevitable. Thank you very much. B

Appeal allowed and matter remitted to Housing Authority; costs awarded to Appellant

83. [CIVIL DIVISION – APPEAL NO. 249]

15th OCTOBER, 1998 C

MONUMENT TRUST COMPANY LIMITED

v.

HERBERT FREDERICK GAUDION

and

RUTH ADA GAUDION D

Before: SOUTHWELL (PRESIDENT), BAILHACHE AND SMITH, J.J.A

Judgments – stay of execution – matters to be taken into consideration – arrest of shares – application to confirm and permit sale – whether to be made “inscrite” – whether sale appropriate

See paragraph 46. E

St J.A. Robilliard, for the Appellant
A. D. Laws, for the Respondents

THE PRESIDENT: Most of the history relevant to this appeal was set out in the judgment of this Court in the proceedings brought by Weardale Limited against Mr. and Mrs. Gaudion, which I delivered on 4th February 1998. I do not propose to repeat all that history, and accordingly this judgment, to be fully understood, needs to be read in the light of the judgment of 4th February 1998. For the purposes of this appeal I set out only a brief summary. F

(1) In November 1993, the Gaudions transferred their real property to an off-the-shelf company, Weardale Limited, at a gross under-value. They did so in circumstances in which they were intended to retain the beneficial interest in the realty. The shares in Weardale were, and still are, held by the present plaintiff, Monument Trust Company Limited (Monument), and by another company, Consulting and Secretarial Services Limited (CSSL), as nominees and in trust for the Gaudions. Both Monument and CSSL were and are companies formed and wholly controlled by the accountancy firm Ernst & Young of Guernsey. The directors of Weardale G

were from, or provided by, Ernst & Young including one of the partners most involved in advising and acting for the Gaudions, Mr. Stephen Harlow.

A (2) The transfer of the realty to Weardale was in connection with a moneylending transaction at an extortionate rate of interest between Sigmat Inc. and the Gaudions entered into in November 1993.

B (3) Ernst & Young, and in particular Mr. Stephen Harlow, and also an advocate, Advocate Dadd of Ferbrache & Co., acted on both sides of the transaction. Mr. Harlow gave a partial guarantee to Sigmat in return for a fee of £1,500: the Gaudions allege that this was without their knowledge.

C (4) In December 1994, the Sigmat loan to the Gaudions was replaced by a fresh moneylending transaction whereby Monument (apparently acting on behalf of another client of Ernst & Young, Mr. Erb) lent money to the Gaudions at a high rate of interest. The capital amount of the loan was £800,000: this figure had been reached because of the excessive interest charged on the Sigmat loan to the Gaudions, and similar excessive interest charged on an earlier moneylending transaction with a Mr. Neuman. Ernst & Young and Advocate Dadd again acted on both sides of the transaction, and Monument, Ernst & Young's company, was in the unusual position of lending the large sum to the Gaudions while at the same time holding a share in Weardale in trust for the Gaudions.

D (5) The Court of Appeal by the judgment of 4th February 1998, held that Monument obtained no security either over the realty held by Weardale for the Gaudions or over the shares in Weardale held by Monument and CSSL in trust for the Gaudions.

(6) Following Monument's loan to the Gaudions the directors of Weardale were, and still are, another partner in Ernst & Young, Mr. C.F.L. Legge, and also an English solicitor, Mr. T.S. Howarth, who then acted and apparently still acts on behalf of Mr. Erb.

E (7) Both Mr. and Mrs. Gaudion were (and are) elderly and in poor health. They were therefore persons most in need of independent and firm advice so as to ensure that they were not inveigled into moneylending transactions on disadvantageous terms.

F (8) This Court, like the Royal Court, is most reluctant to criticise the conduct of persons involved in litigation before the Court, particularly where those persons are not directly parties to the litigation. But this Court took a serious prima facie view of the conduct of Ernst & Young, and its relevant partners and other personnel, and of Advocate Dadd, in acting on both sides of the relevant transactions, both for and against the interests of the Gaudions, and apparently failing to give appropriate advice to the Gaudions. This Court accordingly expressed criticisms of that conduct, and called for speedy and efficient investigation of that conduct by the relevant regulatory bodies.

G (9) Weardale, under the direction of those acting for Monument, and therefore acting contrary to the interests of the Gaudions (for whom the shareholders and directors of Weardale were under a duty to act) brought proceedings against the Gaudions seeking their eviction from their property. This Court, by the judgment already referred to, set aside the order for eviction made by the Royal Court on 28th January 1997, and ordered that the costs of those proceedings be paid by Monument. The primary ground for this Court setting aside the eviction order was

that by bringing the proceedings those who purported to act for Weardale were acting in breach of their duty to the defendants, the Gaudions.

(10) Meanwhile, Monument had brought proceedings against the Gaudions seeking recovery of the money lent to the Gaudions. On 10th June 1996 the Bailiff, sitting in the Royal Court, refused to grant summary judgment against the Gaudions for the principal of the loan for which Monument had applied. In refusing such relief the Bailiff foresaw many of the issues which were later decided by this Court in the Weardale proceedings.

(11) On 18th October 1996, this Court (differently constituted) gave summary judgment for the principal of £526,103 in favour of Monument against the Gaudions. The reasoning of the Court of Appeal can be summarised in this way: either -

(a) Monument is entitled to recover the principal of its loan pursuant to the relevant agreement; or

(b) even if the agreement was void or otherwise unenforceable, Monument was entitled to recover the equivalent sum outside the scope of the contract under Guernsey law (relying in this regard on the decision of the English Court of Appeal in *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1994] 4 All ER 890); and

(c) the Gaudions had not succeeded in showing to the satisfaction of the Court of Appeal that they had any reasonably arguable defence to a claim by Monument put in these alternative ways.

That is, in bare outline, a summary of the previous history of this matter. Before coming to the issues directly involved in this appeal, I make the following preliminary observations:-

(i) In this Court's judgment of 4th February 1998, the Court called, as I have already stated, for a speedy and efficient investigation of the conduct of Ernst & Young and Advocate Dadd. It is a matter of concern that the Institute of Chartered Accountants of England and Wales appears not to have taken effective steps in the furtherance of such investigations. Any such investigations may now have to await resolution of the proceedings recently brought by the Gaudions against the partners of Ernst & Young, including Mr. Harlow and Mr. Legge, and against the partners of Ferbrache & Co., including Mr. Dadd. But the failure of this regulatory body to take prompt action before February 1998, or even in response to what this Court said in February 1998, cannot be allowed to pass without further comment. It seems to me that unless the Institute of Chartered Accountants is prepared in future to exercise its regulatory functions with due speed and effectiveness, it may be appropriate for the States of Guernsey to consider fresh means of regulating the conduct of accountants practising in Guernsey. It will also be desirable for the *Chambre du Discipline* to review its procedures to ensure that it is able to pursue investigations into the conduct of advocates efficiently.

(ii) It is a matter of equal concern to find that despite this Court's criticism of Ernst & Young for having acted on both sides of this and previous moneylending transactions, and for having acted contrary to the duty owed to the Gaudions by bringing proceedings in the name of Weardale, Monument and CSSL have not taken steps to put the shares they hold in Weardale into the names of the Gaudions, and Mr. Legge and Mr. Howarth remain the directors of Weardale. It is said on behalf of Monument that the arrest of the Weardale shares at the instance of Monument in February 1998, prevented these changes being made. I do not agree.

A These changes could have been made before the arrest, alternatively, an application could have been made to the Court for leave to make these changes. It is much to be regretted that Ernst & Young should again have failed in this manner to comply with their obligations owed to the Gaudions which were spelled out clearly in the judgment of the Court of Appeal of 4th February 1998.

With this background, I now turn to the issues arising on this appeal.

B On 18th October 1996, when this Court gave summary judgment against the Gaudions, no application for a stay of execution was made on their behalf. Thereafter, as I have indicated, Monument engaged, through its control of Weardale, in attempting to show that it had relevant security and to obtain an order for eviction against the Gaudions. That set of proceedings ended when the second judgment of this Court was given on 4th February 1998, and this Court held (inter alia) that the shares of Weardale were held in trust for the Gaudions as beneficial owners.

C In February 1998, Monument caused H.M. Sheriff to arrest the two shares of Weardale by way of execution of the judgment of 18th October 1996. Monument then applied to the Royal Court for confirmation of this arrest and for permission for the sale of the Weardale shares to satisfy the judgment plus interest and costs, which at that stage amounted to £558,515.26.

The application came before the Bailiff on 23rd March 1998 (Mr. Gaudion appearing on his own behalf). On 27th March 1998, the Bailiff delivered judgment. He adjourned the hearing of the proceedings (I quote from the Court's order):-

D "to await the report of the investigation into the action of Advocate R.J. Dadd and Mr. S.J. Harlow, which was ordered by the Court of Appeal in its judgment ... issued on the 4th day of February 1998."

Monument appeals from that decision to adjourn, and seeks from this Court permission for the sale of the Weardale shares.

E The Gaudions, by a Respondents' Notice, seek to have the decision to adjourn affirmed on a number of additional grounds, and in the alternative seek a stay of execution of the judgment.

F With regard to the words I have quoted from the Court's Order, in my judgment the Bailiff's decision cannot be supported. The Court of Appeal did not order investigations into the conduct of Ernst & Young or Advocate Dadd. This Court made a strong recommendation to the relevant regulatory authorities that such investigations should be undertaken as a matter of immediate priority. In any event the existence of such investigations was not a ground for adjourning the hearing of Monument's application.

G There is, however, a more general reason of principle why adjournment of the application is not the appropriate step. Such an adjournment, for more than a relatively short period, would have the effect of a stay of execution of the judgment. It is not appropriate to avoid consideration whether a stay should or should not be granted by granting such an adjournment. The question raised for determination, in particular by the alternative relief sought in the Respondents' Notice, is whether or not it is right for the Court to grant such a stay. That is the fundamental question which this Court has now to determine.

Before coming to that question, there are two points which I should dispose of first:-

(1) It is said on behalf of the Gaudions that Monument's application was premature, because the Gaudions wish to defend it, and it should have been made inscribe on the Rôle des Causes à Plaider pursuant to the Royal Court Civil Rules 1989, Rule 13. It is not necessary to decide this point, which has been vigorously argued by Advocate Laws for the Gaudions and Advocate Robilliard for Monument. It seems to me probable that whether pleadings should be ordered to be served, where an application to confirm an arrest is made and challenged, must depend on the particular circumstances and the nature of the challenge. If, for example, a third party claims ownership of arrested goods, then in a complex case pleadings may be necessary, whereas in a relatively simple case the issues may be defined by the parties' affidavits.

(2) Monument seeks authority for the sale of the two Weardale shares. In my judgment that would not in any event be appropriate. It is far from clear that the Weardale shares could or would be sold at a price representing the value of the realty transferred by the Gaudions to Weardale. Indeed, it seems not improbable that if Her Majesty's Sheriff sold the shares, a purchaser might acquire them for a price representing a substantial discount to the market value of the realty. So in any event what Her Majesty's Sheriff would have to be directed to do would be first to sell the realty itself, in the course of liquidation of Weardale, so as to ensure that the price obtained represented the market value of the realty directly. Mr. Robilliard appeared to accept that this would be the appropriate course, and a permissible one.

I now turn to the question whether a stay of execution of the Court of Appeal's judgment of 18th October 1996, in respect of the Weardale shares should or should not be granted by this Court.

The power to order such a stay arises, in my view, in two ways. First, the Court of Appeal has an inherent power to stay execution of judgments. This is a power which is not infrequently exercised by this Court when an appeal to the Judicial Committee of the Privy Council is in prospect. Secondly, the Royal Court has power to order the stay of execution of judgments (at whatever level such judgments have been made) in the ordinary course of controlling such execution. This power may arise under Rule 21 of the Royal Court Civil Rules 1989, or under the inherent jurisdiction of the Royal Court. From such an order of the Royal Court, or a refusal of such an order, an appeal may lie to the Court of Appeal.

By the Respondents' Notice, the Gaudions seek a stay of execution and rely on three broad heads:-

First, as a general matter of doing justice between the parties, having regard to the history set out in the judgment of 4th February 1998, to the relative positions of the Gaudions on the one hand, and Monument and Ernst & Young on the other, and to the oppressive conduct of Ernst & Young (directly or through Monument) vis à vis the Gaudions.

Secondly, because of the action which the Gaudions have already commenced against the partners in Ernst & Young and the partners in Ferbrache & Co.

Thirdly, because of the action which the Gaudions propose to bring for themselves and for Weardale against (inter alios) Monument.

I consider these three heads in reverse order.

A When hearing of this appeal commenced, this Court had only the barest outline of what proceedings the Gaudions and Weardale might wish to bring against Monument, to be gathered from Mr. Laws' written submissions and from references in the Cause against Ernst & Young. As a result of urging by this Court, Mr. Laws produced overnight a brief statement of the basis on which it is intended to found the proposed proceedings.

B These appear to consist of four allegations of conspiracy between Monument, Mr. Harlow of Ernst & Young, Sigmoid Inc., and others unspecified, in relation to (1) the making of the loan agreement dated 22nd December 1994; (2) the making of the novation agreement of the same date; (3) the attempted eviction of the Gaudions through the misuse of Monument's de facto power over Weardale; and (4) the refusal to permit a sale of the realty in and from 1995. In each case the unlawful means relied on is the breaches of fiduciary duties and duties of care owed by Ernst & Young to the Gaudions, which are already pleaded in the action against Ernst & Young. These allegations of conspiracy are not to be found in the pleaded case against Ernst & Young, and in the brief statement of the case against Monument there is no suggestion that Ernst & Young's partners are proposed to be included as defendants as well as Monument. There is no proper statement of what damage is alleged to have been sustained and to be recoverable from Monument as one of the conspirators.

C Rule 21 of the Civil Rules 1989, indicates that a stay of execution may be ordered, when a summary judgment has been given:-

"until after the trial of any counterclaim set up by the defendant in the action or of any separate action commenced or to be commenced by the defendant against the plaintiff."

D Mr. Laws submitted that the proposed action by the Gaudions against Monument would fall within Rule 21, or alternatively under the general inherent jurisdiction of the Court.

E Mr. Robilliard made forceful submissions to the contrary effect. One particular point which he raised was this. Monument, he said, was acting as a nominee on behalf of Mr. Erb: see the judgment of 4th February 1998. The benefit of Monument's judgment against the Gaudions is Mr. Erb's, not Monument's. He relied in this regard on section 66 of the Trusts (Guernsey) Law. The proposed claim against Monument would be based on wrongful conduct of Monument, not of Mr. Erb. No complaint of wrongful conduct could be made against Mr. Erb personally. Mr. Erb could not be made vicariously liable for Monument's wrongful conduct. Accordingly, any action against Monument would not meet the claim against the Gaudions on which judgment has been obtained.

F In my view this is not a good point. Mr. Erb was, according to the material before the Court of Appeal on the last occasion, an undisclosed principal for whom Monument was acting as agent (while purporting to act as principal) in making the loan to the Gaudions. It is possible that Mr. Erb would be held liable as such a principal for the wrongful acts of his agent, but it is not necessary to decide this. Mr. Erb, having chosen to act secretly in the name of Monument, cannot now be heard to dissociate himself from Monument. The claims by Monument and against Monument, if made in the same action, could be set off the one against the other, not least because they both arise out of one transaction. That being so, Monument cannot treat its claim as being of a different kind, because the Gaudions' cross-claim is made in a separate action. Furthermore, the principles of identity between two different parties which I consider below in relation to Monument and Ernst & Young would apply a fortiori to Mr. Erb and Monument.

The true answer to Mr. Laws' reliance on a potential claim against Monument lies in the very substantial lack of any particularity in the statement of the causes of action in conspiracy, and almost total lack of any specific description of the loss alleged to have been suffered by the Gaudions and the damages alleged to be recoverable. Neither of the advocates referred this Court to any text book or case law of Guernsey (or any other jurisdiction) as regards the alleged causes of action in conspiracy. There was no adequate explanation why the conspiracy claims (describing conspiracies to which Mr. Harlow and Ernst & Young are said to have been parties) have not been made, and are apparently not proposed to be made, against Mr. Harlow or Ernst & Young. As Mr. Robilliard submitted, it is incumbent on a defendant seeking a stay of execution at some considerable time after a judgment has been given, on the basis of a proposed cross-claim, to come forward with a substantial explanation of what the cross-claim is and what damages are claimed. That is essential if justice is to be done both to the plaintiff who has an enforceable judgment no longer subject to appeal, and to the defendant belatedly seeking a stay.

A

B

On the material now before this Court, a stay of execution could not be granted based on the proposed claim against Monument. I do not exclude the possibility that a viable cross-claim against Monument could be established, but at present that stage has not been achieved.

C

I turn next to the second head relied on, the existing action already on foot against Ernst & Young. Mr. Robilliard pointed out that the judgment is Monument's, whereas that action is against a different party. Accordingly, he submitted, that action could not avail the Gaudions as a basis for seeking a stay of Monument's judgment.

This led Mr. Laws to cite two English cases in which the English Court of Appeal has considered the circumstances in which a cross-action against a related party (but not the party which has obtained the judgment) may enable a defendant to obtain a stay of execution of the judgment. These two cases are:- *Canada Enterprises Corporation Ltd. v. McNab Distilleries Ltd* (1976), reported at [1987] 1 WLR 813M, and *Burnet v. Francis Industries Ltd.* [1987] 1 WLR 802.

D

In *Canada Enterprises* the cross-claim was by the parent company of the defendant against which the judgment had been obtained, and its cross-claim was against the same party, i.e. the plaintiff which had obtained the judgment. The question whether there should be a stay arose under RSC Order 47, rule 1(1)(a), a specific English procedural rule of which the only equivalent in Guernsey is the inherent jurisdiction of the Court to which I have already referred. The English Court of Appeal held that the near-identity of parties was sufficient to enable the defendant subsidiary to be granted a stay of execution in reliance on the cross-claim by its parent.

E

In *Burnet* the English Court of Appeal refused a stay. But the importance of the decision lies in the helpful analysis by Bingham, L.J. (now L.C.J.) of factors which should be taken into account in a case of this kind. I propose to take each of Lord Bingham's factors in turn and to consider each in the light of the material now before this Court, making necessary adjustments for the difference in the facts, in that Monument and Ernst & Young occupy a different position to that occupied by the related parties in *Burnet*.

F

Lord Bingham's first point, however, is not relevant and I therefore go straight to his second point. This involves the identity as between Monument and Ernst & Young. In my judgment the identity is very close indeed. Monument is a trust company vehicle of Ernst & Young, and completely owned and controlled by Ernst & Young. The directors are Ernst & Young partners, including Mr. Harlow. Everything which Monument does is to further the interests of Ernst &

G

Young and of Ernst & Young's clients. The identity is at least as close as that of parent company and wholly owned and controlled subsidiary, and in my view even closer than that.

A The third point is the inter-relationship between Monument's claim against the Gaudions and the Gaudions' claim against Ernst & Young. Monument's claim is for repayment of the loan. The Gaudions' claim is in respect of Ernst & Young's alleged breaches of contractual and tortious duties of care and of fiduciary duties, arising to a large extent out of the circumstances in which the loan agreement with Monument was entered into, and to a lesser extent out of the circumstances relating to the previous loan agreement.

B Looking at the second and third points together, Lord Bingham's observation that:-

"The more closely they are identified, the more like a true counterclaim C's independent claim against A becomes"

fits well the circumstances of this case (despite the identity of parties arising at a different end of the equation).

C The fourth point is the strength of the Gaudions' claim against Ernst & Young. As Lord Bingham said:-

"The more obvious it appears that A will have to pay C eventually, the less likely it is that he will be prejudiced by a denial of the fruits of his judgment against B in the short term."

D Here, as I have said, the circumstances are different. Monument has the judgment: Ernst & Young are defendants to the cross-claim. But the principle underlying Lord Bingham's fourth point applies, in my judgment, equally here. If the claim against Ernst & Young is a strong one, then the likelihood is that money will become payable to the Gaudions which will enable Monument to be paid. In effect Ernst & Young will, via the Gaudions, be paying money to their own company.

E In my judgment the claim against Ernst & Young is a strong one (subject to the question of damages to which I will come later). Prima facie Ernst & Young were in serious breach of their fiduciary duties and their duties of care owed to the Gaudions. In this regard I refer to the prima facie conclusions about their misconduct reached in the judgment of 4th February 1998.

The fifth point is that it is relevant to consider the size of the Gaudions' claim relative to the judgment. Lord Bingham said:-

F "That will rarely, if ever, be decisive, but it is I think a matter worthy of consideration."

For my part, in the circumstances of this case I would put the point more strongly. The Gaudions have to show that prima facie they have a sufficiently substantial claim against Ernst & Young to justify the Court in granting a stay.

G For my part again, it is at this point that real difficulty arises. Damages are not pleaded with any particularity in the Cause against Ernst & Young. This Court was told by Mr. Laws that the reason for this is that money has not yet been available to enable the Gaudions to obtain professional expert assistance in working out what their damages are. The damages are suggested to be about £1 million. But it is clear to me that in saying this on the Gaudions'

behalf, Mr. Laws is largely making a stab in the dark. This is a serious point, and one to which I must return after considering Lord Bingham's other points.

The sixth point is that it is relevant to consider the likely delay before the merits of the Gaudions' claim against Ernst & Young will be decided by the Royal Court. If both sides actively work towards an early date for a trial, I have no doubt that the delay can be kept to a minimum. I would not grant a stay of execution unless the Gaudions undertook to use their best endeavours to press their action forward to an early trial with as much expedition as reasonably achievable. It would be for Ernst & Young to co-operate in achieving an early determination.

The seventh point is that it is relevant to consider the extent of the prejudice to Monument (and through Monument to Mr. Erb) if it is denied the fruits of its judgment until the Gaudions' claim against Ernst & Young is determined. This Court has no evidence before it as to prejudice, but common sense indicates to me that for a party to be kept out of a sum in excess of £500,000 plus judgment interest for more than a relatively short period is clearly prejudicial to that party. Further, as Mr. Robilliard pointed out, the Gaudions could incur further substantial debts (e.g. to lawyers) which might mean that in the end Monument would recover less than the full amount of the judgment. This prejudice has to be balanced against the likelihood of the Gaudions succeeding against Ernst & Young, as already indicated.

The eighth point is to consider the risk of prejudice to the Gaudions if they are compelled to pay under the judgment to Monument. The prejudice consists of these two matters:-

(a) The Gaudions who, as I have said, are elderly and in poor health, will lose their home of many years.

(b) The Gaudions will lose their home in circumstances in which it seems likely that substantial recovery will be made from Ernst & Young which could go to pay Monument.

There is also a clear risk of the fruits of the judgment disappearing from Guernsey. Monument would no doubt pay over to Mr. Erb, and Mr. Erb (who lives outside Guernsey) would be likely to transfer the money to another jurisdiction. But in my view this is not of much relevance in the present case, since there would almost certainly be no question of Monument (or Mr. Erb) having to repay the money.

Finally, I come to the first head argued by Mr. Laws, namely the general ground of doing justice to the parties. Whatever may have been the regrettable aspects of the conduct of Ernst & Young and Monument vis à vis the Gaudions, the Courts of Guernsey are not entitled to stay the execution of judgments no longer subject to appeal on some vague general ground of doing justice between or to the parties. This head is accordingly not an arguable basis for ordering a stay of execution.

Having reviewed all these factors, I reach the conclusion, based solely on the existing action against Ernst & Young, that a stay of execution on suitable terms would be appropriate, subject however to the damages problem. Suitable terms would include the undertaking to press on with the action against Ernst & Young, and a suitable undertaking to prevent the Gaudions dealing with the Weardale shares or their realty, but I am not satisfied that this Court has received any sufficiently clear statement or explanation of the damages recoverable from Ernst & Young. In the absence of this I would not order a stay of execution, at all events at this stage.

A The alternative courses are (1) to deny the Gaudions a stay of execution, or (2) to give the Gaudions a limited further period within which to return to this Court with a considered statement and explanation of their damages claim. Mr. Robilliard has made cogent submissions in support of the first course; but having regard to my assessment of the various factors I consider that this Court should give the Gaudions and their newly found legal advisers some further time within which to come back with the necessary statement and explanation of their damages claim. In saying this, I take particularly into account my assessment that, on liability, the Gaudions prima facie have a strong claim against Ernst & Young. It would be open to Ernst & Young to short-circuit this matter and to make available an appropriate sum for the purposes of ensuring that Monument is paid but that is naturally a matter for them and their advisers to consider.

B I would therefore adjourn the hearing of this appeal for a suitable period, and would wish to hear the advocates' submissions as to the length of period to be set. Though naturally Monument would wish the period to be as short as possible, I observe that the period must be of sufficient length to enable the Gaudions to obtain the necessary expert assistance.

C In the course of this judgment I have tried to deal with all the main points raised by both advocates, and I wish to express my indebtedness to both of them for their assistance.

SIR PETER BAILHACHE: I agree, and I have nothing to add.

PETER SMITH, QC: I agree and I have nothing to add.

D THE PRESIDENT: Now, Mr. Laws I think the ball is in your court, and you must now tell the Court what period you think will be necessary within which to come back to this Court if you wish, if your clients wish to come back to this Court, with a considered statement of the damages. May I say this, if you would like a little time to consider that with your client, then of course, you may have that.

(Counsel address Court on a time period)

E Yes, the Court will sit, if it can sit, on 8th January 1999. The Court directs that the evidence and any further pleading is to be filed with the Court and served on the other party by 23rd December.

THE PRESIDENT: ... and then Mr. Robilliard's clients are to file any counter evidence by not later than 4th January. May I say again I am very grateful to both of you for all your submissions.

F ADVOCATE LAWS: Sir, there is still the question of the directors. Did the Court want to make an order there in that regard, or is the Court merely saying it would like the matter resolved.

THE PRESIDENT: Well I assume that you will discuss it between yourselves. It can't present any problems if it's agreed, unless you desire an order of the Court?

G ADVOCATE ROBILLIARD: We would prefer sir, obviously, it could be termed "a poisoned chalice" in bringing in neutral people and therefore it's probably, with the Court's permission, a matter that I could resolve with my friend.

THE PRESIDENT: Well that's what we thought is a much, much better way of dealing with it, yes. So that concludes our business, I think. I'm grateful, gentlemen.

ADVOCATE LAWS: Thank you very much, sir. I assume sir, costs are reserved?

THE PRESIDENT: Costs must naturally be reserved, yes.

Appeal adjourned; costs reserved

84. [CIVIL DIVISION – APPEAL NOS. 252 and 240]

4th SEPTEMBER, 1998

MATHESON SECURITIES (C.I.) LIMITED

v.

SARAH LYNN HULME

and

MATHESON SECURITIES (C.I.) LIMITED

v.

SARAH LYNN HULME & DOUGLAS HULME

Before: COLLINS (PRESIDENT), HARMAN and SOUTHWELL, J.J.A

Cause of action – application to strike out – costs – full indemnity costs

See paragraph 39.

M.G. Ferbrache, for the Appellant

P.T.R. Ferbrache, for the Respondents

R.C. SOUTHWELL, QC: This is an appeal by the Plaintiff, Matheson Securities (Channel Islands) Limited against the decision of the Deputy Bailiff of 17th March 1998, whereby he struck out an action brought by the company against Mrs. Sarah Lynn Hulme on the ground that a superior court, namely, this Court, had already adjudicated upon the substantive issues.

The nature of the claim raised by the Cause in this action is that a series of declarations are sought by the Plaintiff in relation to an agreement entered into by Mrs. Hulme's husband, Mr. Douglas Hulme, dated 29th July 1996, and to the registration and ownership of shares in a company, Middlesex Holdings PLC. These remedies are sought on the ground that the agreement of 29th July 1996, was fraudulently procured by Mr. Hulme by reason of breaches of duty which had not been disclosed by Mr. Hulme prior to the date of that agreement. This is the third action to have been brought in relation to the subject matter in question, one action having been brought by the same plaintiffs against Mr. Hulme, and another action brought by Mrs. Hulme against Matheson.

A In the case of the action against Mr. Hulme, Matheson sought and obtained a Mareva order against him, which included "any interest whether legal and/or beneficial in Middlesex Holdings PLC." This was taken to cover 3.45 million shares in that company which had been registered by Matheson under the name of their nominees, Chardon Nominees Limited. Mr. Hulme applied to have the Mareva order set aside, and after considering numerous affidavits, the Deputy Bailiff refused the application, save in one immaterial particular. Shortly afterwards, an application was made on the intervention of Mrs. Hulme in the same action under which she sought the release of those 3.45 million shares, her effective application being dated 25th October 1996. Numerous further affidavits were sworn and the matter came before the Deputy Bailiff who heard and refused her application on 29th October 1996, his revised judgment giving reasons for that refusal being dated 29th November 1996. He concluded that the application raised an issue as to Mrs. Hulme's ownership of the shares, an issue partly of fact which was in that respect a matter to be tried by the Jurats. Certain observations by the Deputy Bailiff led to the institution of separate proceedings by Mrs. Hulme, but these were treated as a dead letter, and have now been withdrawn.

B
C The facts which underlie the dispute between these parties are complex, and are fully stated in the judgments of this Court dated 16th October 1997, and 6th November 1997. It would serve no purpose to rehearse them in detail again in this judgment. Mr. Hulme, having been suspended from his duties as an associate with Matheson on 15th July 1996, on account of an abortive deal with a Captain Ismael which resulted in the purchase of 8.2 million shares in Middlesex by Matheson with a substantial loss on resale, the agreement recorded in a letter dated 29th July 1996 was entered into by Matheson and Mr. Hulme under which a total of 4.2 million shares, previously dealt in and "rolled over" on behalf of Mr. and Mrs. Hulme and others would be paid for and would be registered in Mrs. Hulme's name. It is relevant to note here that there were two options open to the Hulmes, either to take up the shares and pay for them in full, or alternatively, to close the roll overs by sales and to pay the resulting differences.

D
E Payment was made in a number of tranches to Matheson from early August to early September 1996. Matheson registered the shares in the name of their own nominee company, Chardon Nominees Limited, as they were paid for, and not that of Mrs. Hulme. Payment was made on the understanding that the shares were being registered in Mrs. Hulme's name and it is clear that payments would not have been continued had the Hulmes been informed of this. The source of the funds to pay for the shares is shown by a document dated 27th July 1996, which was an agreement under which a Mr. Heron, a friend of the Hulmes, lent the sum of £300,000 to Mrs. Hulme for the purpose of paying for the shares against the security of those shares. It was addressed to Mrs. Hulme alone and required the deposit of 4.2 million shares with blank transfers duly executed by Mrs. Hulme. Though it is alleged by Matheson that Mrs. Hulme acted as agent for her husband, it is in any event clear that Mrs. Hulme accepted personal liability to Mr. Heron to provide the shares as security and to repay the loan.

F
G This Court by its judgment of 16th October 1997, allowed the appeal and reversed the decision of the Deputy Bailiff, thereby releasing the 3.234 million shares in Middlesex from the Mareva. This Court's decision was based on its finding that Matheson had not made full and frank disclosure of all relevant facts. The Court expressed itself in strong terms and awarded indemnity costs against Matheson.

Clearly, a mere order releasing the shares from the Mareva order was not sufficient to meet the justice of the case, in that they would remain registered in the name of Chardon Nominees, a

nominee company of Matheson. Therefore, for the reasons set out towards the end of the judgment of 16th October 1997 (and elaborated in the subsequent judgment of 6th November 1997) this Court directed that the 3.234 million shares be transferred into the name of Mr. Heron for the benefit of Mrs. Hulme and to meet the obligations she had undertaken to Mr. Heron by the agreement of 27th July 1996.

A

It was this direction which gave rise to further argument, and led to the second judgment of this Court, namely the judgment of 6th November 1997, after hearing argument from Mr. Mark Ferbrache as to the jurisdiction of the Court in that respect. The Court affirmed its jurisdiction and the order which it had made thereunder.

B

In giving the judgment of the Court, issued on 28th November 1997, I said this:-

"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 be 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 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 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."

C

D

And I further went on later in the judgment to say as follows:-

"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 29th 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."

E

Application was made for leave to appeal to the Judicial Committee of the Privy Council, and the Court was invited not to follow Havilland Estates v. Channel Islands Ceramics Limited (No.2)(1993) 15 GLJ 50 which had decided that this Court had no jurisdiction to grant leave in interlocutory cases. This Court refused to entertain the application on that ground, thus making clear the nature of the matter before it.

F

As I have indicated, the learned Judge gave his judgment of 17th March 1998 in relation to the fresh proceedings brought by Matheson against Mrs. Hulme. In those proceedings Matheson allege (inter alia):-

G

A (1) that the agreement of 29th July 1996 was procured fraudulently by Mr. Hulme by not disclosing to, or deliberately concealing from, Matheson certain breaches of the duty which Mr. Hulme owed to Matheson, and Matheson are entitled to rescind that agreement;

(2) that the agreement of 29th July 1996 would not have been entered into if Matheson had known of the breaches of duty, and Matheson would not have agreed to register the shares in Mrs. Hulme's name;

B (3) that as the agreement is not binding on Matheson, Mr. Hulme remained personally liable to pay for the shares;

(4) that the shares were in fact paid for by Mr. Hulme or by Mrs. Hulme as agent for Mr. Hulme, and Mrs. Hulme had and has no interest in the shares;

C (5) that with respect to the 216,000 of the shares registered in Chardon's name and not ordered by this Court to be transferred to Mrs. Hulme or to Mr. Heron for Mrs. Hulme's benefit, these shares anyway remain the beneficial property of Mr. Hulme.

The learned Judge struck out the action against Mrs. Hulme. He held that the Court of Appeal in its previous judgments had made a final finding of fact (which he held to be decisive against Matheson), that Mr. Heron had financed Mrs. Hulme's purchase of the shares in accordance with the 29th July 1996 agreement (and accordingly the Court of Appeal had ordered the shares to be released to Mr. Heron as security for the loan which he had advanced to Mrs. Hulme).

D Matheson appeal against this striking out order. Matheson contend that the Court of Appeal in deciding on Mrs. Hulme's interlocutory appeal in respect of the Mareva order:-

(1) made no binding findings of fact;

(2) if they made any findings, did not make any which were res judicata between the parties;

E (3) did not even address the issue whether the 29th July 1996 agreement was procured by fraud, and certainly did not decide this issue;

(4) did not find whether the funds used to pay for the shares were Mr. Hulme's or Mrs. Hulme's, but merely that the funds had been lent to Mrs. Hulme;

(5) did not decide the questions of agency raised by Matheson.

F Accordingly, Matheson contend that the action against Mrs. Hulme should not have been struck out.

With regard to the 216,000 shares, it is common ground that Mrs. Hulme makes no claim to these shares, and no further question need arise between these parties about these shares. This Court is concerned only with the 3.234 million shares.

G The basis on which the action brought by Matheson against Mrs. Hulme was struck out in the Court below was, in my judgment, not well founded. This Court in its judgments of 16th October 1997 and 6th November 1997 did not make any findings of fact binding on the parties as to whether the agreement of 29th July 1996 was procured by the fraud of Mr. Hulme (it is not

suggested that Mrs. Hulme was in any way responsible for any fraud on Matheson), alternatively, by the fraud of Matheson (a central issue not decided by this Court in October/November 1997 was whether Matheson had secured the agreement with the dishonest intention not to register the shares in Mrs. Hulme's name). Equally, the Court made no finding of fact binding on the parties as to whether or not Mrs. Hulme was acting in any relevant respect as agent for her husband, or whether or not Mrs. Hulme was entitled to the beneficial interest in the 3.234 million shares.

A

But the matter does not end there. In his written and oral submissions, Advocate Peter Ferbrache, who appeared for Mrs. Hulme, put forward a number of further reasons why the action brought by Matheson against Mrs. Hulme should not be allowed to proceed.

B

Before considering these further reasons I must note that to strike out an action brought in the Royal Court of Guernsey requires strong grounds and such an order is not lightly to be made, and is to be made only where the Court is fully satisfied that there is disclosed no reasonably arguable cause of action, or for some other reason pursuit of the action is an abuse of the Court's process.

The first point is that the central issue in this action is whether Matheson is entitled to rescind the agreement of 29th July 1996, on the ground of Mr. Hulme's alleged fraud. Rescission for misrepresentation has to be sought against the other contracting party, here Mr. Hulme, a point to which I will return. Rescission will not be granted unless the party seeking to rescind (Matheson) can put the other parties to the contract into the status quo which existed before the contract was made. Advocate Mark Ferbrache who appeared for Matheson argued that restitution of the sum of £300,000 or thereabouts paid to Matheson could be achieved by way of set off, for example, against the claim for over one million pounds made by Matheson in their action against Mr. Hulme. But as the Court pointed out in the course of argument, this took no account of the options which were available to the Hulmes at the end of July 1996: it is not possible now, in September 1998, to restore the Hulmes to the position in July 1996 in which they had the options already mentioned, in particular the option not to take up the rolled over shares and merely to pay differences. It seems to me that the inability to put the parties back in their position in July 1996 may be an answer to any claim by Matheson to rescind the 29th July 1996 agreement. But this point by itself might not be regarded as sufficient to justify striking out Matheson's claim.

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The second point is this. In their action against Mr. Hulme, Matheson merely claim the amount of debts not paid by clients, pursuant to the express indemnity imposed on Mr. Hulme by the engagement contract between Matheson and Mr. Hulme. In that action Matheson make no allegation concerning the 29th July 1996 agreement, and no allegation of fraud. In the new action Matheson allege fraud inducing that agreement by Mr. Hulme but in an action brought against Mrs. Hulme alone. Quite apart from the basic legal requirement that rescission must be sought against the other contracting party (which I have already mentioned) the way in which Matheson have chosen to pursue their actions results in what was described in argument as the "Kafka-esque" situation, that the alleged fraudster, Mr. Hulme, has no allegation of fraud against him, whereas the admitted innocent party, Mrs. Hulme, has an allegation of fraud against Mr. Hulme included as the central issue in the claim against her.

F

The allegation of fraud, as Mr. Peter Ferbrache submitted, is not properly particularised. But in my judgment Matheson cannot be permitted to pursue against Mrs. Hulme an allegation based on fraud by Mr. Hulme which Matheson have not made against Mr. Hulme in their action against him. Mr. Mark Ferbrache made some rather vague submissions to the effect that Matheson might amend to meet this point, but given the passage of time and the fact that this present action

G

has deliberately been brought against Mrs. Hulme alone, I do not consider that Matheson should be given further opportunity to amend their claim in this action.

A In the absence of a viable case based on fraud, the action against Mrs. Hulme involves no more than an allegation that Mrs. Hulme was acting as agent for her husband, but in my judgment if the scope of the action is reduced merely to seeking a declaration of agency, that would not by itself avail Matheson, because Mrs. Hulme in any event by her agreement with Mr. Heron placed herself under substantial personal obligations to make available the shares as security for the loan and to repay the loan of about £300,000.

B The third point involves examination of what is sought to be achieved by Matheson in bringing this action against Mrs. Hulme. The declarations sought by Matheson do not lead, in the Cause as pleaded, to any concrete relief sought against Mrs. Hulme. It is plain that the only purpose which such declarations would serve for Matheson would be to establish that the shares placed with Mr. Heron as security were not Mrs. Hulme's, not to enable Matheson to claim any right over or interest in the shares of their own, but merely to enable Matheson to seek a further Mareva order in respect of such shares on the basis of Mr. Hulme's interest in the shares. I am doubtful whether an action against Mrs. Hulme, the sole purpose of which is to try to ascertain assets of Mr. Hulme over which a Mareva order might be sought, is an action which Matheson can properly bring against Mrs. Hulme, but it is not necessary to decide this point, which was not fully argued, in view of my conclusion on the second point.

C Mr. Peter Ferbrache for Mrs. Hulme made a number of other points including in particular, as a fourth point, an attack on Matheson's conduct from July 1996 as being oppressive in relation to Mrs. Hulme and on that ground an abuse of process, this new action being merely the latest episode in the continuing saga of oppression. In my view, Matheson's conduct vis à vis Mrs. Hulme can properly be described as oppressive. That was one reason why an indemnity costs order was made by this Court in respect of the Mareva proceedings affecting Mrs. Hulme. It is also one reason why this Court is making the further indemnity costs order as explained later in this judgment. But this oppressive conduct would not by itself be a ground for striking out the action without more.

E The fifth point arose in the course of Mr. Mark Ferbrache's reply. Matheson gave a cross-undertaking in damages when obtaining the Mareva order in respect of the 3.234 million shares. Mrs. Hulme is seeking damages pursuant to the cross-undertaking and an enquiry has been ordered by the Royal Court. Mrs. Hulme is claiming about £100,000 apparently made up of two elements:-

- F
- (1) interest which she had to pay Mr. Heron;
 - (2) loss sustained by not being able to sell the shares when their market price had reached its peak, which was between the judgments of this Court on 16th October and 6th November 1997.

G Matheson oppose this claim apparently (but this Court has not been shown the relevant documents) inter alia on the same grounds as are sought to be put forward in the action against Mrs. Hulme. Initially the suggestion that the questions of fraud and agency might be decided in this enquiry, making the action otiose, seemed to have some attraction. But on further consideration I consider that for Matheson to run the same case in the enquiry is open to the same objections as is the present action against Mrs. Hulme. In particular, Matheson are seeking to run their case against Mrs. Hulme, though the allegation of fraud concerns only Mr. Hulme and

the question of agency closely involves Mr. Hulme. Further, in considering the right of Mrs. Hulme to claim the damages sought in the enquiry, the Royal Court will have to bear in mind that Mrs. Hulme by her agreement with Mr. Heron placed herself under the personal obligations to deposit the shares as security and to repay the loan, which I have already mentioned. It seems to me probable that (1) the allegation of fraud and other allegations involving Mr. Hulme should not be permitted to be run as a case solely against Mrs. Hulme; and (2) in any event, even if those allegations were correct, Mrs. Hulme might be nevertheless entitled to recover damages under the cross-undertaking, having regard to the personal obligations she undertook to Mr. Heron. These are matters with which the Royal Court will have to grapple in the course of the enquiry, a proceeding which should be brought to as early a hearing as possible.

A

It follows from what I have said in this judgment that the order of the Royal Court should be upheld but on different grounds, and Matheson's claim against Mrs. Hulme should be struck out as an abuse of the Court's process.

B

I now turn to the other matter for decision by this Court. As indicated in the judgment of 16th October 1997, Mrs. Hulme was led into bringing a separate action against Matheson as a result of urging by the Deputy Bailiff with which Matheson tacitly agreed. That was an entirely unnecessary step. All that was needed was for Mrs. Hulme to intervene in the action against Mr. Hulme. The appeals were heard in relation to that intervention and not her separate action. Mrs. Hulme was given indemnity costs of the intervention.

C

As a result of her bringing a separate action Matheson applied for joinder of the two actions. After lengthy argument they failed before the Deputy Bailiff. They then appealed. The appeal was brought on for hearing at the same time as Mrs. Hulme's appeal in her intervention. As a result of this Court's decision on her intervention, the joinder appeal was adjourned sine die, and subsequently withdrawn by consent. Matheson accept that Mrs. Hulme must have the costs of the joinder appeal. The issue is whether or not these should be indemnity costs.

D

Mr. Mark Ferbrache for Matheson, very fairly, indicated to this Court that if the Court concluded that Mrs. Hulme's separate action was unnecessary, then there could not be any question of joinder of the actions being appropriate, and this Court might consider that the attempt by Matheson to achieve joinder was a waste of the parties' time and costs. This Court has already expressed the view that Mrs. Hulme did not require to start a separate action and did so only as a result of the urging of the Court with which Matheson concurred. That was an entirely unnecessary step. No question of joinder need have arisen. Accordingly the considerable expenditure of time and money on the joinder appeal was simply wasted. In these circumstances, having regard to the principles governing indemnity costs orders which this Court set out in the judgment of 6th November 1997, I reach the conclusion that the appropriate order is that Mrs. Hulme should have the costs of and occasioned by the joinder appeal to be paid on a full indemnity basis because Mrs. Hulme should not have been put to the expense of incurring any of such costs.

E

F

I end with my thanks to both Advocates Ferbrache for their succinct and helpful submissions, both oral and written.

J.M. COLLINS, QC: I agree with the judgment delivered by Mr. Southwell and I have nothing to add.

G

R.D. HARMAN, QC: I agree.

A ADVOCATE PETER FERBRACHE: Sir, there is one further application. I hope I will be just as succinct as the Court has kindly said that we were yesterday; which is for the costs and on an indemnity basis, a full indemnity basis, in relation to the strike out appeal, because the Court, of course, has made no order in relation to the joinder appeal, but if the Court wishes me to add anything I will, but I believe that the circumstances are well set out.

ADVOCATE MARK FERBRACHE: Mr. President, I've heard what's been said by the Court and I've got nothing to say sir.

B R.C. SOUTHWELL, QC: Mr. Peter Ferbrache, this Court orders that your client has the costs of this appeal on the strike out on a full indemnity basis.

ADVOCATE PETER FERBRACHE: Thank you, sir.

Appeal against Royal Court Order dismissed; indemnity costs awarded to Mrs Hulme

C 85. [CIVIL DIVISION – APPEAL NO. 253]

24th JULY, 1998

RICHARD GEORGE ROWE & GRAHAM OWEN RICH

v.

D **BETTY EILEEN CROSS & HARRY CROSS**

Before: COLLINS (PRESIDENT), BELOFF and NUTTING, JJ.A

E **Trusts – breach of trust - liability of directors of corporate trustees - fiduciary obligations - directors of corporate trustees as guarantors - section 70 of the Trusts (Guernsey) Law, 1989**

See paragraph 62.

N.J. Barnes, for the Third and Fourth Defendants
St. J.A. Robiliard, for the Plaintiffs

F THE PRESIDENT: The judgment which I am about to give is the judgment of the Court.

This is an appeal from the decision of the Deputy Bailiff of 6 April 1998, whereby he dismissed certain of the Exceptions de Fonds raised by the Third and Fourth Defendants in an action brought by the Plaintiffs against a trust company and three of its directors. Application was made for leave to appeal and this was granted on 17 April.

G By this action which is brought against Benitrust International (C.I.) Limited, a trust company, to which I shall refer as the "First Defendant" and three of its directors, the Plaintiffs, an elderly couple, seek to recover compensation in respect of money lost by them in consequence of a disastrous loan made by them allegedly on the advice of the Second Defendant through the

agency of the First Defendant for whom the Second Defendant was acting, the loan being advanced to a Mr. Sadeque.

A
B
A substantial sum had been placed by the Plaintiffs with the First Defendant and it was from those funds that with the consent of the Plaintiffs, they having received the advice to which I have referred, the loan was made. There are issues as to the relevant Trust Deed and to its validity, which are not material to the present appeal. Put shortly, the Plaintiffs allege that the Second Defendant on behalf of himself and all other Defendants, gave disastrous advice as to the utilisation of the major part of the trust fund in that he recommended a loan to Mr. Sadeque of the sterling equivalent of \$300,000, that to carry the startling interest of \$100,000 on a loan period of 55 days.

C
The background was said to be that Mr. Sadeque, being a consultant actuary, had close connections with both the Sultan of Brunei and the Crown Prince of Saudi Arabia, and that due to those connections he had earned over US \$7,000,000 which he was due to receive by the end of January. The proposal is alleged to have been confirmed in a letter on the First Defendant's writing paper, signed by the Second Defendant, again alleged to have been done on his own behalf and that of all Defendants.

D
The Plaintiffs allege that they acted on this advice and that in consequence an agreement in writing was made on 15 December 1992, between the First Defendant and Mr. Sadeque in consequence of which pursuant to an instruction in writing of 15 December 1992 alleged to have been signed by the Third Defendant and a Guernsey advocate, Barclays Bank Finance Company (Guernsey) Limited paid over the sterling equivalent of the \$300,000 to Mr. Sadeque out of the trust account into which the Plaintiffs' funds or a part of them had been paid. Repayment of the loan was due on 9 February 1993. It was never forthcoming, despite prevarication on Mr. Sadeque's part and, indeed he was adjudicated bankrupt in England in 1995. The Plaintiffs have therefore lost their money and they seek to recover it in this action.

E
F
The claims against the Third and Fourth Defendants are brought under all three heads all of which are challenged in the Exceptions de Fonds. First, it is alleged that they were in breach of their fiduciary duty as directors. Secondly, it is alleged they were negligent. Thirdly, it is alleged that they are liable as guarantors under the provisions of S.70 of the Trusts (Guernsey) Law 1989. These allegations are contained in para. 16, 16(a), 16(b) and 23 of the Cause, and are in the case of the claims in respect of fiduciary duty and negligence supported by further and better particulars alleging failure to be alert to the risks of so apparently generous a deal and failure to ensure that the administration of the company was such that there were sufficient controls to ensure the ready identification of abuse and adequately to monitor affairs undertaken by the company.

The claim under the Trust Law of 1989 is of a different nature. That law provides for a form of statutory guarantee by directors of a trust company, subject to the availability of relief by the Court in certain defined circumstances, the burden of the establishment of which lies on the director.

G
By their Defences the Third and Fourth Defendants raised certain Exceptions de Fonds.

It was by an amendment that the Third Defendant raised three Exceptions de Fonds which can be summarised as follows:-

A 1. It was pleaded that in effect the action under the Trust Law was premature in that there was no potential for liability on the part of the Third Defendant to the Plaintiffs until the Court has made an award of damages or costs against the trust company.

2. It was pleaded that a director of the trust company is not under a fiduciary duty to a beneficiary. In the case of these grounds it was asserted that the Cause contained no allegations of acts done or knowledge possessed by the Third Defendant such as to give rise to such a duty as it is alleged.

B 3. It was pleaded that in the absence of advice by the Third Defendant or any assumption of responsibility on his part, or any reliance by the Plaintiffs, there was no liability in tort in that no duty of care was owed.

In substance these Exceptions de Fonds were a repetition of those already pleaded on behalf of the Fourth Defendant in his Defence.

C The Deputy Bailiff held that the Third and Fourth Defendants were properly joined in the action insofar as it relied on the statutory guarantee contained in S.70 of the Trust Law. That particular plea in the Exception was therefore dismissed. He went on to uphold the Exception however in the case of the allegation of breach of fiduciary duty on the ground that no such duty was owed, and this was later challenged by the Respondents' Notice in this appeal.

D The situation in relation to the claim in negligence is more complex. The Deputy Bailiff in his judgment referred to what he described as a previous indication that the claim in negligence against the Third Defendant "must remain in". We were told that the explanation of this was the fact of the Third Defendant's signature of instruction to the bank. It is agreed that we are free to consider the matter on its merits.

E The ground on which the Deputy Bailiff appears to have dismissed the application of the Fourth Defendant was that a director has a residual responsibility to see that sufficient controls are in place to ensure that abuses can be identified and management monitored. He referred in this case to a passage from Palmer's Company Law, and in doing so he appears to have misunderstood the situation to this extent, that the passage in Palmer's Company Law to which he referred quite clearly has to do with the duty owed by a director to the company as distinct from those with which it deals.

F By the amended notice of appeal the decision of the Deputy Bailiff as to the joinder of the Third and Fourth Defendants in the action under S.70 of the Trust Law is challenged as are his decisions as to the claim in negligence. There is, as I say, a cross notice, submitted without objection, which not merely relates to the finding that there was no fiduciary duty owed but also seeking to uphold the Deputy Bailiff's decision on the S.70 point on additional grounds.

G As to the approach to an Exceptions de Fonds we direct ourselves in accordance with an earlier decision of this Court. I refer here to Cherub Investments Limited v. Channel Islands Aero Club (Guernsey) Limited in 1982, Civil Appeal Report No. 11, a decision of this Court, in which it was said at page 4 of the report:-

"An Exception de Fonds approximates to what in the old English practice was known as a "demurrer". Essentially it is a defence which challenges the validity of the claim on a ground which requires no evidence from the Defendant, apart from such facts as may be agreed between

the parties, and which cannot be cured by any admissible evidence which might be adduced by the Plaintiff."

At page 5 it was further said:-

"As a successful Exception de Fonds obviates the need for any hearing it is obviously convenient it should be taken as soon as possible."

And at page 8:-

"Now it seems to us that the test of whether an Exception de Fonds can succeed or not is whether there are no facts which might be proved at the trial which would allow the Plaintiff ... to succeed in the action ..."

I take first the Exception de Fonds relating to S.70 of the Trust (Guernsey) Law, 1989. That section provides as follows:-

"70. (1) Where a breach of trust is committed by a corporate trustee which-

- (a) is a trustee of a Guernsey trust;
- (b) is resident in Guernsey; or
- (c) is carrying on business in Guernsey or from an address in Guernsey,

every person who, at the time of the breach, was a director of the trustee shall, subject to subsection (2), be deemed to be a guarantor of the trustee in respect of any damages and costs awarded by the court against the trustee in respect of the breach.

(2) The Court may relieve a director of all or part of his personal liability as a guarantor if he satisfies the court that he ought fairly to be so relieved because-

(a) he was not aware of the breach of trust or of the intention to commit it and, in being not so aware, was neither reckless nor negligent; or

(b) he expressly objected, and exercised such rights as he had by way of voting power or otherwise as a shareholder or director or other officer of the company, so as to try to prevent the breach of trust.

(3) For the purposes of subsection (1)-

(a) "director" includes a person occupying the position of director by whatever name called, a person in accordance with whose directions or instructions the directors of the corporation or of a corporation of which it is a subsidiary (or any of them) are accustomed to act, and a person who alone or with or through an associate is entitled to exercise or control the exercise of one third or more of the voting power at a general meeting of the corporation or of a corporation of which it is a subsidiary.

(b) "subsidiary" means a corporation in respect of which another corporation is entitled to exercise or can control the exercise of one third or more of the voting power;

(c) in paragraph (a) "associate", in relation to a person, means any relative, partner or other person who is, has been or may be influenced by that person."

A The issue which is raised is whether on its proper construction a director's liability accrues only after the trust has been found in breach of its obligations. On the premiss that such is its proper construction it is submitted that it is premature to join the Third and Fourth directors as defendants before it has been established that their liability as guarantors has accrued. Why, to put it another way, it is said, should a director be made party to proceedings when there is no present basis for asserting any liability against him? In this respect attention is drawn to the wording of S.70 which refers to an award of damages and costs as distinct from referring to a guarantee in respect of a liability underlying any such eventual judgment.

B The Trust Law was introduced, as Billet D'Etat IX for 1988 indicates, to clarify the previously uncertain Guernsey Trust Law. This had been customary in origin. The law was designed among other things to enable those who might be victims of a breach of trust to be readily aware of their means of redress. We do not believe that it was the intention of the legislature to preserve the complexities and complications of pre-existing law, and we approach a construction of the words of S.70 by giving them their ordinary and natural meaning.

C In our view the language of S.70 is unambiguous. The legislation might have provided that the liability of a director of a Guernsey trust company would arise upon the occasion of breach of trust by the company. In this connection it is of interest to refer to the speech of Lord Diplock in *Moschi v. Lepp Air Services Limited* (1973) AC 331, and in particular at p.348. In his speech Lord Diplock referred to long standing authority to the effect that a contractual promise of a guarantor to guarantee the performance by the debtor of his obligations to a creditor arising out of contract gave rise to an obligation on the part of the guarantor to see to it that the debtor performed his own obligations to the creditor, this being of fundamental importance in ascertaining when the limitation period starts to run.

D Section 70, as I have already said, departed from this approach in that it made a liability contingent on the finding of a breach of trust but provided for relief in certain defined circumstances. While it does not of course follow that the procedural law of Guernsey might not have provided for directors to be joined on a contingent basis it does not follow that joinder on such a basis would necessarily be valid.

E The matter seems to us however to be dependent upon the proper construction and application of the Guernsey Rules as to joinder of parties. If in any particular instance the Exception de Fonds raises an issue as to whether some one could effectively be joined or not it is clearly appropriate to look at the terms of those Rules. If a person is properly joined under those Rules then an Exception de Fonds cannot be allowed to succeed on the basis that such person should not have been joined. The Rules do not themselves expressly state the circumstances in which more than one defendant may be joined in a single action. The relevant provision is that to be found contained in Rule 34(1) of the Royal Court Civil Rules, 1989. This Rule provides as follows:-

F "34 (1) The Court may in any proceedings order that-

G (a) any person who has been improperly or unnecessarily made a party, or who has ceased to be a proper or necessary party, shall cease to be a party;

(b) any person-

(i) who ought to have been joined as a party; or

(ii) between whom and any party to the proceedings there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the proceedings which, in the opinion of the Court, it would be just and convenient to determine as between him and that party as well as between the parties to the proceedings, shall be joined as a party.

(2) No person shall be joined as a plaintiff without his consent."

Having considered the terms of Rule 34(1)(a) we have concluded that it is a necessary corollary of the terms of that Rule that it is permissible for any person to be made a party at any stage of the proceedings if he is either a necessary or a proper party in the action. Although there is no express equivalent to the English Rules of the Supreme Court Order 5 Rule 1 in the Guernsey Rule there is no rule inconsistent with the implication to be found in the corollary which we have described. We further have regard to the express terms of Rule 34(1)(b)(2) and to the power of the Court to add a person as a party in the circumstances set out. The Third and Fourth Defendants have elected to proceed by Exception de Fonds, and they raise the simple argument that in the absence of a Cause of Action, their joinder was premature. We consider this to be an over-simplification and we prefer to approach the matter by enquiring as to whether the Third and Fourth Defendants are proper parties to the action and, indeed, as to whether there exists any question or issue arising out of or relating to or connected with any relief or remedy claimed against the First Defendant which it is just or convenient to determine as between the Third and Fourth Defendants and the Plaintiffs as well as between the First Defendant and the Plaintiffs.

We have no hesitation in concluding that the Third and Fourth Defendants in the circumstances were proper parties having regard to their potential liability under S.70, and that where directors are not joined as Defendants it would be open to them indeed to apply to be so joined under the terms of the rule. There may be cases in which it is obvious or can be demonstrated that the financial strength of the trust company is such that they are never likely to be called upon under the guarantees. If so, then this is a factor which the Court can take into account when deciding whether they have been properly or improperly joined under Rule 34(1)(a) and indeed in deciding whether or not as a matter of discretion to make an order under Rule 34(1)(b)(2) in the event of a director applying to be joined in those circumstances.

The Third and Fourth Defendants cannot in our judgment be in a better position by pleading an Exception de Fonds than they would have been had they chosen to make an application under Rule 34(1)(a). In judging whether the Third and Fourth Defendants are proper parties it is further legitimate to consider whether they could have been validly joined by order under Rule 34(1)(b)(2). In order to reach a conclusion as to this aspect we would refer back to the terms of S.70 of the Trust Law. In order to establish a liability under S.70 it is necessary for the Plaintiff to satisfy the following:-

1. A breach of trust has to be proved to have been committed by a corporate trustee the identity of that trustee being such as to satisfy the requirements of S.70(1)(a)(b) or (c).

2. It is necessary to show that the person to be held liable as a guarantor was a director of the trustee at the time of the breach.

3. It is necessary to show that the damages or costs have been awarded by the Court against the trustee company in respect of the breach.

A While it is true that the guarantee does not crystallise until the damages or costs have been awarded by the Royal Court there is plainly here a common question or issue which it may usually be desirable to have decided between all parties; namely, whether there was a breach of trust at all on the part of the trust company. We conclude that if the directors are not parties to the action against the trust company a finding in such an action would not be *res judicata* as against those directors; that would be a most unfortunate situation which we do not believe could have been contemplated by the legislature.

B The Deputy Bailiff having referred to the purpose of the Trust Law as described in the Billet D'Etat IX for 1988, took a purposive interpretation of S.70 and stated that he was not persuaded that that section placed a bar on beneficiaries to prevent them from suing directors of corporate trustees until such time as they had exhausted their remedy against the corporate trustee. Accordingly, he held that the Third and Fourth Defendants were properly joined. We agree with the Deputy Bailiff, with the exception that we do not consider that the Cause served on the directors at that stage can go so far as to make a claim under the guarantee or a claim for damages as if those constituted a present liability.

C In our judgment the claim should be restricted to a claim for a determination of an issue as to the breach of trust alleged as between themselves and the directors, as to the status of the trust company as satisfying the description required by the section, and as to the position of the directors at the relevant time. Further, they can, in our judgment, seek a declaration that there is a liability under the guarantee contingent only upon the giving of judgment for damages or costs. In view of those observations we uphold the decision of the Deputy Bailiff that the directors were properly joined for the purpose of claiming such relief as we have described, and we dismiss the appeal on condition that the Plaintiff within such time as shall be determined apply to amend their case to restrict their claim to the seeking of such relief as I have described.

D Finally, we note that certain authorities bearing on the nature of liabilities under guarantees as understood by *La Coutume Normande* prior to 1789 were cited before and referred to the Deputy Bailiff. We discourage such a course taking the view as we do, that although the 1989 Trust Law is not strictly a codification of the law, it does in effect seek to set up a new and powerful framework of a modern character and which could be called a code in the most general sense. It would in our view be unfortunate if the practice were to develop of seeking to trammel the simple provisions of the Trust Law by such ancient relics as *La Droit de Discussion*.

E We turn now as to the issue as to negligence. This has been the subject of authoritative decision at the highest level of recent date. We refer to *Williams v. Natural Life Health Foods* (1998) 2 All ER 577 in which Lord Steyn identified the question in the appeal as being as to whether the director of a franchising company is personally liable to franchisees for loss they suffered as a result of negligent advice given to them by the franchising company. However, it appears to us that the principles laid down were in a general sense an application in a wide field to directors of companies *vis-à-vis* persons who had sustained loss or damage by reason of the acts or omissions of the company. The fundamental principle so established was expressed in these terms:-

G

"A director of a contracting company may only be held liable where it is established by evidence that he assumed personal responsibility and that there was the necessary reliance."

The principle indeed is founded on a broader basis than the distinction between directors and the companies of which they are directors and Lord Steyn considered the vital distinction as being one of agent and principal, and at p.582 he further expressed himself thus:-

"Thus the issue in this case is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of Hedley Byrne, which requires the existence of a special relationship between plaintiff and tortfeasor, it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself."

The Respondents relied upon the statement in Palmer's Company Law to which we have referred when discussing a director's duty of care and diligence and this was accepted by the Deputy Bailiff in his judgment. We do not propose to set that passage out because it is clearly of no assistance in that it is confined to duties, as I have mentioned already, owed by a director to a company and not by a director to a third party. Accordingly, since, as the Deputy Bailiff found, there is no allegation that the Fourth Defendant did or did not do anything of relevance in connection with the discharge of his duties as the director of the First Defendant, we conclude that he cannot be impleaded for negligence and this was recognised in fact before us by Counsel by way of concession. We have however dealt with the matter at this length out of respect for the learned Deputy Bailiff.

In relation to the Third Defendant, the case is pleaded that he was involved in that it was he who signed the authorisation to the relevant Barclays Bank that enabled the funds to be transferred from the trust to Mr. Sadeque. It is asserted to the contrary that such a signature cannot be shown to be more than that of a director performing an administrative role with the concurrence of the Defendant's legal adviser and does not support an assumption of responsibility towards the Plaintiffs. In our view the act of signature of the cheque on its own cannot be held to have involved an assumption of personal responsibility on the tests laid down in the case of Williams to which we have referred. It was the act of the agent for the company, and if there was no relationship giving rise to a personal duty of care on Mr. Rowe's behalf there could be no breach by failure to do the matters which are alleged in the pleading in his respect. Accordingly, we hold that there was no case to pursue against the Third Defendant either in the tort of negligence.

Finally, we turn to fiduciary duty; this issue arose by way of cross-appeal as to whether the Third and Fourth Defendants owed fiduciary duties to the Plaintiffs, that issue having been resolved by the Deputy Bailiff in favour of the directors. The Deputy Bailiff based himself on the majority decision in Bath v. Standard Land Company Limited (1911) 1 Ch 618. In that case Lord Cozens-Hardy at p.625 stated:-

"Directors stand in a fiduciary relation to the company, but not to a stranger with whom the company is dealing. It is of course true that a company acts through its directors. But that does not involve the proposition that if a breach of trust is committed by a company acting through its board, a beneficiary can maintain any action against the directors in respect of such breach of trust."

Then he refers to the possibility of following property, and later Buckley, LJ, at p.642 added these words:-

A "A fiduciary relation can only arise either contractually or by implication of law. The contract between Mr. Bath and the corporation is one to which the directors are not parties. No one could contend that a director is in any way liable upon or in respect of the contract of the corporation. Between Mr. Bath and the directors there exists no privity of contract. Then does there arise as between those parties any fiduciary relation by implication of law? I think not. Under circumstances such a relation might arise by implication of law but on the facts here they do not raise it."

B
C Before the Deputy Bailiff and indeed on the Case which was presented to the Court of Appeal, the somewhat bold course was taken of seeking to persuade this Court rather to adopt the dissenting judgment of Fletcher-Moulton, LJ, but that was not pursued at the hearing before us, with some wisdom if we might say so. Furthermore, we note that if one is considering what the position ought to be as a matter of modern law and practice in Guernsey the legislature has made provision for the liability of directors of corporate trustees in S. 70, to which we have referred earlier, and this further militates against the Plaintiffs' submission. Specific legislation having been passed to govern the matter in question, it would not be appropriate for the Court to search around to find some equitable or other principle by which to seek to replace or supplement such perfectly adequate legislation.

D Our attention was drawn to a Note of uncertain origin commenting upon an apparently unreported judgment of Lindsay J. in *HR v. JAPT*. Further research has disclosed that this judgment is in fact to be found reported in 1997 Pensions Reports at p.99. Both the Note and the full Report indicate that the Judge struck out a claim against a director of a trust company based (inter alia) on direct fiduciary duty, referring both to Commonwealth and English authority and refusing to depart from the general principle in *Bath v. Standard Land* (above) which he held still to be the authority to be followed in such cases. We respectfully adopt that analysis and result.

E Lindsay J. referred to the first instance Australian decision of Walters J. in *Hurley & Another v. BGH Nominees Pty Ltd* and we were provided with a report of the Supreme Court of South Australia (in *Banco*)(1982) 31 SASR 250, relied on by the Respondents, which decision upheld the earlier of two decisions at first instance, given in 1982 and 1984.

We refer in particular to the passages from the judgments in the Supreme Court quoted below as follows:-

F "The practical answer is that there is no authority which establishes that a director of a trustee company is under a fiduciary duty to the beneficiaries of the trust in respect of property held by the trustee company in its capacity as trustee. It may well be that when the issue arises the courts will hold that such a duty exists, but for the time being at least it remains to be established", per King CJ. "The duty is owed to the company ... it is and must be regarded as a separate entity (as enunciated in *Salomon's case*). This is the traditional approach and the courts have only reluctantly, if at all, moved away from the proposition that the duty is owed to the company and not to the shareholders", per White J.

G Lindsay, J., also apparently considered accessory liability on the basis of which a third party can be directly liable to the beneficiaries of a trust in circumstances where the third party has been involved himself in the breach of trust by the trustee company. In this connection we refer to

Royal Brunei Airlines v. Tan (1995) 2 AC 378. However dishonesty on the part of such third party is a sine qua non of such accessory liability and none is here alleged against the directors. There was a further matter considered by Lindsay, J. which has been called the "dog-leg claim." This is a suggestion which has been floated that beneficiaries could sue directors in respect of the asset represented by the trust company's claim against the directors for breach of duty of care owed by it in circumstances where the company elects not to sue itself; but such claim is not pleaded in the instant case and we need say no more about it than that, if it is to become a binding principle of law it still has some progress to make.

A

For the reasons given above we reject the appeals of the Third and Fourth Defendants in relation to S.70 of the Trust Law on the basis and to the extent which appears from our judgment in that respect. We allow the appeals in relation to the allegations of negligence against the two Defendants and we further reject the cross-appeal of the Plaintiffs in relation to the finding of the Deputy Bailiff that there was no fiduciary duty claimable on the pleadings in this action. Reverting to S.70 of the Trust Law, we add that we allow the appeal on the basis of an undertaking that an application is made to amend the Cause in the manner to which we have referred.

B

Is there any problem about your giving such an undertaking?

C

ADVOCATE ROBILLIARD: No there is none sir, and I think with regard to costs in this instance in all of the circumstances an appropriate order would be costs in the Cause, sir.

ADVOCATE BARNES: Sir, I have an application because, if the original summons had included a claim for a declaration as to whether there had been a breach of trust, I can't say what I would have advised, but I reckon I would have said: "Fair enough, we'll continue with these proceedings and not seek to..."

D

THE PRESIDENT: You have succeeded on the fiduciary point.

ADVOCATE BARNES: I have effectively succeeded on all three points in logical terms.

E

THE PRESIDENT: Yes, you have succeeded on the fiduciary point; the negligence point you've succeeded on as well by concession in the case of one Defendant and by the finding of the Court on the other, and we have removed the damages claim.

ADVOCATE BARNES: Yes, sir.

THE PRESIDENT: So in substance you say that you've won?

F

ADVOCATE BARNES: Yes sir, not so much winning as saying it's an appropriate case to order the costs of the proceedings prior to this and in this Court because if they had been pleaded in the manner that- the Court has found a solution to the S.70 problem, if that solution had been offered at the beginning of these proceedings all of this would have been unnecessary.

ADVOCATE ROBILLIARD: Sir, what I would mention is that my friend did not raise the declaration point in the Court below, neither did he raise the point in his written case.

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THE PRESIDENT: But nonetheless the substance of what the directors must have been apprehensive of is being involved in proceedings that at the end of which there would have been

A some kind of financial order made against them. That's, after all, how the Deputy Bailiff interpreted it. I can quite see the force of what's being said at the moment but had it been put in this way, really they probably wouldn't have troubled about the issue. The Deputy Bailiff took it as "two to one", didn't he?

ADVOCATE ROBILLIARD: Yes, sir.

THE PRESIDENT: In our case it's two and three quarters out of three. Yes, the Defendants will have their costs in the Court below and in this Court.

B ADVOCATE BARNES: I'm obliged, sir.

Appeals of D3 and D4 in relation to section 70 of the Law dismissed; appeals in relation to allegations of negligence against D3 and D4 allowed; PP's cross-appeal in relation to fiduciary duty dismissed; costs in Royal Court and Court of Appeal awarded to DD

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14th DECEMBER, 1998

- (1) BASSINGTON LIMITED
 (2) UNITED ENERGY SYSTEMS OF UKRAINE
 (3) UNITED ENERGY INTERNATIONAL LIMITED
 (4) YULIA V TYMOSHENKO
 (5) OLEKSANDR GRAVETS
 (6) OLEKSANDR G TYMOSHENKO
- v.
 HER MAJESTY'S PROCUREUR

A

B

JUSSI UOTI

v.
 HER MAJESTY'S PROCUREUR

C

PAVLO LAZARENKO and PETRO KIRITCHENKO

v.
 HER MAJESTY'S PROCUREUR

Before: COLLINS (PRESIDENT), HARMAN and SOUTHWELL, JJ.A

D

Appeal to Court of Appeal in civil matters – jurisdiction of Court of Appeal to hear appeals and grant leave in administrative matters – jurisdiction as successor to Court des Jugements et Records

Serious fraud – jurisdiction of Court of Appeal to review H.M. Procureur's decision to investigate

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See paragraphs 4 and 14.

R.I.C.E. Harris, for the Applicant in Appeal 256
 N.J. Barnes, for the Applicants in Appeals 257 and 258
 H.M. Procureur and P. Robey, for Her Majesty's Procureur

THE PRESIDENT: Three applications for leave to appeal have been presented to this Court, in each case being for leave to appeal against the decisions of the Deputy Bailiff rejecting applications made before him for various forms of relief in connection with two notices issued by Her Majesty's Procureur under the terms of the Criminal Justice (Fraud Investigation)(Bailiwick of Guernsey) Law 1991, to which we will refer as "the Investigation Law of 1991".

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Of those notices, the second in point of time was addressed to Credit Suisse Trust Limited ("CST") at their St. Peter Port office and required that company to answer questions or otherwise furnish information to the Procureur's nominees with respect to matters relevant to the investigation of "suspected offences of serious or complex fraud", the Procureur declaring

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himself satisfied that there was good reason to exercise the powers conferred on him for the purpose of investigating the affairs of the persons, entities or companies under investigation.

A That Notice, which was dated the 2nd July 1998, named eight persons, entities or companies, namely Bassington Ltd, two Ukrainian companies and five Ukrainian nationals. Of these Ukrainian nationals, Mr Lazarenko and Mr Kiritchenko were until comparatively recently the Prime Minister of the Ukraine and his adviser respectively. They made a separate application from the other persons named and have been separately represented. The companies are said to have close political connections with the other applicants or some of them. Proceedings on behalf of the companies and the applicants other than those two gentlemen sought orders staying and restraining the Procureur from taking any further steps pursuant to the Notice and from disclosing any part of such documents and information as he should receive or have received to any third party and in particular to the General Prosecutor's Office of the Ukraine or any agent or agency thereof. We were informed that by the time the proceedings were launched certain documents had been delivered up by CST.

C The Deputy Bailiff held that he had no power to intervene and that he was not able to go behind the decision of the Procureur, in which context he referred to "the Century Case" (referred to in detail below) and expressed himself as unwilling to express any view other than he had in that case. He refused leave to appeal in view of the fact that this Court had held that it had no jurisdiction to hear such appeals under the terms of The Court of Appeal (Guernsey) Law 1961 ("the Appeal Law of 1961"). Mr Lazarenko and Mr Kiritchenko sought similar relief, which application met with the same result, the judgment of the Deputy Bailiff being common to both sets of applications.

D Secondly, we mention but more briefly the earlier Notice issued on the 24th March 1998 again under the Investigation Law of 1991 and again on Credit Suisse Trust Limited to produce documents relating to the affairs of (inter alia) Mr Uoti at the request of the Finnish Prosecuting Authorities. This was satisfied and was followed by a further request expressed to have been by way of an undated letter to which exception is taken by Mr Uoti. He sought a stay and a declaration. It appears from the judgment of the Deputy Bailiff on this application handed down on the 15th July 1998 that Mr Barnes in that instance was not challenging the decision of the Royal Court in the Century Case but no point was taken on this before us. The Deputy Bailiff rejected the application, and said that it would have been open to CST to apply for a declaration as to the meaning of the Notice if it was unclear, but that he was not prepared to go behind the Procureur's Notice, and he rejected the suggestion that there was anything in the European Convention for the Protection of Human Rights and Fundamental Freedoms to assist the application.

F In Century Holdings -v- HM Procureur, an unreported decision of this Court dated the 16th April 1997, this Court decided that it had no jurisdiction under the Appeal Law of 1961 to hear appeals (and therefore to grant leave to appeal) in proceedings brought to challenge the validity of notices issued by the Procureur under the Investigation Law of 1991. In so holding it followed the decision of the Jersey Court of Appeal in McMahon -v- Attorney General (1993) JLR 108, where it was sought to challenge a notice under the equivalent investigation law in Jersey, namely the Investigation of Fraud (Jersey) law 1991. In view of the Court's decision as to the lack of jurisdiction to hear appeals it did not in either case consider the terms of the judgments appealed against. In his judgment in McMahon (1993) JLR 35 Sir Peter Crill, then the Bailiff of Jersey (sitting with two Jurats), recognised a limited power in the Royal Court to enquire into the

exercise of its power, but the Deputy Bailiff in Guernsey refused to follow the same path in Century (1997/98 OFLR p.220).

The advocates acting for the present applicants have sought to persuade us that these two previous decisions were wrong and that the Courts of Appeal both here and in Jersey acted per incuriam. These contentions having been raised by their Notices of Appeal and by their written Cases it was decided that we would hear the arguments as to jurisdiction first and then consider whether, on the assumption that we had jurisdiction, the Court should grant leave. Two further circumstances arose in the course of the hearing; first, it became apparent that in order to consider the approach adopted in the arguments advanced on behalf of the Applicants to the matter it would be necessary to consider the jurisdiction of the Ordinary Court and the Cour des Jugements et Records (the jurisdiction of the latter being the basis of the jurisdiction of this Court); secondly, the Crown Advocate on behalf of the Procureur conceded that, if the Court were to decide the question of jurisdiction in favour of the Applicants, it was an appropriate matter in which to grant leave to appeal.

Before turning to the detailed arguments raised on behalf of the Applicants as to jurisdiction it is appropriate to refer to the authorities touching upon the power of this Court to depart from its previous decisions. The root of modern authority on the point is to be found in the judgment delivered by Sir Godfray Le Quesne in Smith -v- Harvey (1981) 14th May No.9 Civil:

"By virtue of section 13 of the Court of Appeal (Guernsey) Law 1961 the appellate jurisdiction in civil matters which was formerly vested in the Royal Court sitting as a Cour des Jugements et Records is now vested in the Court of Appeal. In terms of section 14 of that Law this Court has all the power, authority and jurisdiction which vested in the Royal Court sitting as a "Cour des Jugements et Records". That Court does not appear to have been bound by its own decisions. This Court is not bound by its own decisions or by decisions of the Cour des Jugements et Records".

This authority has more recently been followed and applied in the decisions of this Court in Morton -v- Paint (9th February 1996; 21 GLJ p.36) and Walters -v- States Housing Authority (23rd July 1997).

The decisions of both the Jersey and the Guernsey Courts of Appeal were based upon their construction of the respective appeal laws in the two Islands, which laws were in the same terms so far as affects these issues.

In both Laws, in the respective Parts II and III, reference is made in the headings to "civil matters" and "criminal matters", and the approach taken in the appellate Courts in both Jersey and Guernsey has been to determine whether the matter in question in the appeal fell into the one or the other category. The relevant provisions in the Guernsey Appeal Law of 1961 read as follows:-

"PART II

Appeals in Civil Matters

13. (1) On such day as shall be appointed in that behalf by Ordinance of the States there shall be vested in the Court of Appeal the appellate jurisdiction in civil matters which

immediately before that day was vested in the Royal Court, sitting as a "Cour des Jugements et Records".

A (2) Any civil matter pending in the Royal Court, sitting as a "Cour des Jugements et Records" immediately before the day appointed under subsection (i) of this section shall on such day be transferred to the Court of Appeal and, subject to such directions as the Court of Appeal may think fit to give in relation thereto, proceedings thereon shall be continued as if the matter had originated in and the previous proceedings had been taken in the Court of Appeal.

B 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 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.

PART III

C Appeals in Criminal Matters

24. A person convicted on indictment or summarily convicted in the Royal Court sitting as a Full Court on or after such day as shall be appointed in that behalf by Ordinance of the States may appeal under this Part of this Law to the Court of Appeal-

D (a) against his conviction. on any ground of appeal which involves a question of law alone: and

(b) with the leave of the Court of Appeal or upon the certificate of the judge who presided at his trial that it is a fit case for appeal against his conviction, on any ground of appeal which involves a question of fact alone. or a question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal: and

E (c) with the leave of the Court of Appeal, against the sentence passed on his conviction, unless the sentence is one fixed by law."

F Having considered Articles 13,14 and 24 this Court in Century described the pre-existing jurisdiction of the Cour des Jugements et Records as having been essentially civil in nature, the Court having no criminal jurisdiction. Indeed prior to the introduction of the Appeal Law of 1961 there was no right of appeal from the Full Court in criminal matters, other than to and by leave of the Judicial Committee of the Privy Council. This Court held that it was for this reason that, whereas the civil jurisdiction of the Court was transferred from the Cour des Jugements et Records to this Court, no equivalent transfer could be made from an existing Court to this Court in criminal matters.

G The essential question as it was perceived both in Jersey in the McMahon case and in this Island in the Century Case was as to whether the appeal sought to be advanced was one in a "civil matter" or in a "criminal matter". If it was in a criminal matter an appeal only lay in the event of conviction or sentence. The response to this question was, it was held, to be found in English authorities including *Amand -v- The Home Secretary* [1943] AC 147, *Carr -v- Atkins* [1987] QB 963,[1987] 3 All ER 684 CA and *re O* [1991] 2 QB 520, [1991] 1 All ER 330 CA, to which can

now be added *Cuoghi -v- Governor of Brixton Prison* [1997] 1 WLR 1346. This Court in *Century* in reliance on those authorities expressed itself in these terms:-

"...in English law the nature of the matter, criminal or otherwise, has to be treated as dependent on the nature of the act sought to be impugned or questioned and not on the means which the person adopts to complain of his private right."

This Court then went on in *Century* to give examples.

Mr Harris and Mr Barnes, the latter of whom appeared for two of the Ukrainians and for Mr Uoti, invited this Court to reconsider its decision in *Century* and to accept jurisdiction, the arguments advanced by them both not having been canvassed before this Court in 1997.

The arguments initially advanced by them can be summarised as follows:-

1. that the Court of Appeal in *Century* failed to pay due regard to the terms of s.14 of the Appeal Law of 1961;

2. that the Appeal Law of 1961 provided its own definition of what is a "civil matter" by reference to the jurisdiction of the *Cour des Jugements et Records*, it being unnecessary and out of place to advert to the English authorities on the meaning of the phrase "criminal cause or matter" in the *Armand* line of cases; this is an argument which would likewise call into question the Jersey decision in *McMahon -v- Attorney General* (above);

3. that this Court further should have distinguished *McMahon* by reason of the fact that the Superior Number in Jersey possessed both a civil and a criminal jurisdiction, whereas the Ordinary Court in Guernsey possessed a limited and, to use the phrase employed in the judgment of this Court in *Century*, "dwindling jurisdiction" in criminal matters;

4. that the sole test of jurisdiction therefore was whether the *Cour des Jugements et Records* would have had jurisdiction before its replacement by the Court of Appeal on 4th June 1964 (the date when the Appeal Law of 1961 came into force), this being dependent itself on the jurisdiction of the Ordinary Court from which the appeal lay;

5. that the Ordinary Court having unlimited jurisdiction in respect of (inter alia) cases in respect of which no specific sum was claimed, had jurisdiction in respect of such a matter as the present;

6. that although there was no system of administrative law in 1964, the provisions of the Appeal Law of 1961 as to jurisdiction by reference to the *Cour des Jugements et Records* (and incidentally therefore by reference to the Ordinary Court from which appeal lay) was not to be construed as preserving a "museum piece" without regard to the later development of the civil law in Guernsey, and that the Deputy Bailiff in his decision at first instance in *Century* erred in holding that there was no place for a system of administrative law in this relatively small community, and furthermore that the Procureur was not immune from suit in such instance;

7. that to hold otherwise would be to infringe the terms of Articles 8(1)&(2) and 13 of the European Convention on Human Rights;

8. that in cases such as those presently under consideration it is all the more appropriate that the Court should have jurisdiction because the Courts of Guernsey would have no control over

the use of such information "elsewhere" i.e. in another jurisdiction and in a criminal proceeding abroad over which the laws and practices of Guernsey have no control;

A 9. that HM Procureur (being appointed by Her Majesty and occupying a similar but clearly distinguishable position to the Attorney General in England) is not immune from process either generally or in regard to such proceedings as the present under the Investigation Law of 1991;

10. that the applicants in the Century case had not proceeded by way of Doléance and the applicants had adopted or were adopting such a course in the present proceedings;

B 11. that the Applicants have (contrary to the contentions of the Procureur) standing to bring these proceedings and make these applications.

Thereafter, a further argument was raised based on the extra-territorial effect of the Investigation Law 1991 so far as it affected these Applicants to which argument we refer later in this judgment.

C Bearing in mind that the Applicants have lodged petitions of special leave to appeal to Her Majesty in Council, and that the matter came before this Court so that the Applicants could in the event of their applications failing in this Court demonstrate that they have exhausted their local remedies, we considered it to be appropriate to deal with the totality of these submissions irrespective of the fact that the answer to any particular one could result, if adverse to the applications, in the failure of the applications, so that the Judicial Committee can be informed of our conclusions as to all the matters of potential relevance which have been raised. The nature of the arguments summarised above also required a consideration of the rights of the parties as they would have been prior to the passing of the Appeal Law of 1961. It is proposed to address the original submissions summarised above in the reverse order with the addition of the argument as to apparent extra-territorial effect in its appropriate place in this judgment.

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Before so doing it is convenient to set out the terms of s. 1(1)(2)(3) & (9) of the Investigation Law of 1991.

E "Powers of investigation

1. (1) The powers of Her Majesty's Procureur under this section shall be exercisable in any case in which it appears to him-

(a) on reasonable grounds that there is a suspected offence involving serious or complex fraud, wherever committed; and

F (b) that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.

(2) Her Majesty's Procureur may by notice in writing require the person whose affairs are to be investigated ("the person under investigation") or any other person whom he has reason to believe has relevant information to attend before Her Majesty's Procureur at a specified time and place to answer questions or otherwise furnish information with respect to any matter relevant to the investigation.

G (3) Her Majesty's Procureur may by notice in writing require the person under investigation or any other person to produce at a specified time and place any specified

documents which appear to Her Majesty's Procureur to relate to any matter relevant to the investigation or any documents of a specified class which appear to him so to relate; and-

- (a) if any such documents are produced, Her Majesty's Procureur may-
 - (i) take copies or extracts from them;
 - (ii) require the person producing them to provide an explanation of any of them;

(b) if any such documents are not produced, Her Majesty's Procureur may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

.....

(9) A person shall not under this section be required to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on any banking or fiduciary business unless-

(a) the person to whom the obligation of confidence is owed consents to the disclosure or production; or

(b) Her Majesty's Procureur has authorised the making of the requirement.

.....

The standing of the Applicants

In the case of the applicants from the Ukraine it is clear from the affidavit evidence, the correspondence and the documentation attached thereto that their substantive case is based on the particular political situation in the Ukraine. They are fearful, on their case, of the misuse for political purposes of any information divulged by CST, reference being made in that respect to proceedings in Switzerland where, it is alleged, information or documentation disclosed in that jurisdiction has been broadcast for political purposes in the Ukraine to their disadvantage in the delicate state of the present political climate in that country.

We have already mentioned the positions of Mr Lazarenko and Mr Kiritchenko as the previous Prime Minister and his adviser; it appears that they and the other personal applicants are all leading members of the main opposition party "Hromada", with which party the two applicant companies (of which one is said to be the largest privately owned company in the Ukraine) are closely associated. In the case of Mr Uoti, his case is that a substantial volume of documentation has already been disclosed, and that the application under the same notice for further documentation with reference to companies which were not named in the original Notice is either ultra vires or oppressive.

The question of standing was not raised in McMahon or Century, although the Deputy Bailiff did recognise a possible right in the recipient of the Notice to apply for a declaration as to the meaning of its terms, which could be taken as having recognised standing in the recipient alone, nor was it raised in the Doléance application in the Isle of Man to which we refer later. Advocate

Robey who appeared for the Procureur at the first hearing raised it in the present case by his written case and in oral argument.

A We are satisfied that there is no reason at this stage for us to hold that, assuming the nature of the remedy sought requires it, the Applicants in this matter lack standing. We express ourselves in this guarded way, bearing in mind that Lord Wilberforce in Reg -v- IRC ex.p. National Federation of Self-Employed and Small Businesses Ltd [1982] AC 627 at p.630 warned against the adoption of a practice of taking this as a preliminary point except in the simplest cases. We find none of these cases simple. Furthermore, the standing of the Applicants could depend on the nature of the relief sought, as Lord Wilberforce explained by reference to the old cases which survived the introduction of Judicial Review and the terms of RSC Order 35 (an Order without any Guernsey equivalent).

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C Mr Robey relied on two unreported English authorities, both being decisions of the English Divisional Court, namely Reg. -v- Director of Serious Fraud Office ex p. Wallace Duncan Smith (19th Dec. 1991) and Reg -v- Director of Serious Fraud Office (12th June 1992) in which the Court expressed itself in wide terms. In the former case, which was followed in the latter, Leggatt LJ expressed himself thus in giving the judgment of the Court in an application for judicial review to quash or render invalid notices issued under ss. 2(2) & (3) of the Criminal Justice Act 1987 (an enactment which is similar to the Investigation Law of 1991 but not identical):-

D "In essence the notice served on Coopers obliged them to produce the documents referred to in it . The fact that those documents concerned the applicant and were the subject of confidentiality as between Coopers and him cannot have entitled either of them to object to the production of the documents: Coopers, because the notice was directed to them and they had no ground for refusing to comply with it, and the applicant because the notice was not directed to him and there was nothing for him to refuse to comply with. It appears to me that if a person under investigation could prevent the production of documents by third parties on the ground that they owed him a duty of confidentiality or on the grounds of failure to comply with the procedure prescribed by the statute then the progress of any investigation would be stultified" .

E These authorities appear to have been concerned with applications singularly lacking in merit. They appear to rule out any remedy in English law in relation to the exercise of a power of this kind to an applicant, whether the bank or other body under a duty of confidentiality, or whether the person for whom they are said to act or to whom they owe a duty of confidence, on any ground and in any circumstances. We respectfully decline to follow these authorities as part of the law of this Island. We do not consider that, once a degree of control over administrative acts is accepted by the Court, the interest of pursuing criminal investigations is such as to permit the authorities (in this instance at the request of a foreign state) to exercise powers of this nature without the possibility of control by the Courts (the exercise of the same involving interference with rights of privacy which we conceive it to be the duty of the Courts to protect against an abuse or excess of power). In declining to apply the English authorities to which we have referred we draw comfort from the fact that the Royal Court in Jersey and the Courts at first instance and on appeal in the Isle of Man have not declined a remedy on the ground of lack of locus standi in relation to similar criminal investigation provisions in their jurisdictions. Our conclusion therefore is that we do not rule out the Applications on the ground of lack of standing at this stage, but this question can be revisited when we hear the substantive appeal.

G Doléance

The inhabitants of Guernsey, Jersey and the Isle of Man have certain very particular remedies each of which is named a Doléance. Both the Channel Islands and the Isle of Man have in the past considered the remedy peculiar to themselves, without apparent knowledge of the existence of a remedy similarly named in the other jurisdiction. Thus the Deemster in the Isle of Man case referred to below considered that it was unique to the Isle of Man, and there is one reference to it having been said that it is peculiar to the Channel Islands (see Bentwich - Practice of the Privy Council in Judicial Matters 3rd ed (1937), at p.54). The nature of the remedy and the means by which it is employed may differ. In the Isle of Man and Jersey it is already well established that the local Courts have jurisdiction to hear a Doléance. In Guernsey the position is much less clear. There are instances of Doléances being addressed to Her Majesty in Council; however the advocates appearing before us had no knowledge of such a remedy being addressed to the Royal Court in Guernsey or indeed to this Court. Mr Barnes however referred us to a passage from Thomas Le Marchant's *Remarques et Animadversions sur l'Approbation des Lois et Coustumier de Normandie usitées ès Jurisdictions de Guernezé* (1826 edn) Volume 2 Livre XI at p. 163, where under the heading "Qui est d'appellations et doléances en matières civiles, à sortir devant les juges sujets à la cour M. Le Marchant dealt with appeals and doléances, and in so doing stated as follows:-

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"Et notez, selon le Coustumier, distinguant entre doléance et appel, qu'appel est prins communément pour appel sur une sentence definitive, et doléance pour appel sur une sentence interlocutoire, ès cas où il est permis l'interjecter."

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This distinction between appeals from final judgments and doléances from interlocutory judgments does not appear to have been maintained as a matter of practice to the present day. Further, it appears that doléances have not been presented to the Royal Court within the memory of those now in practice at the Guernsey Bar. Thus it may well be that this remedy no longer has any place in the jurisprudence of Guernsey. However our decision on other issues does not require us to reach a final conclusion on this aspect.

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This being said, we were referred among others to three authorities in jurisdictions where the Doléance had been used as a means of introducing a form of judicial review. We refer first to the Jersey case of *In the matter of the Doléance of Harbours and Airport Committee* (1991) JLR p.316.

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This was an appeal from the Inferior Number to the Superior Number by way of a Doléance challenging a decision of the Inferior Number as to the inherent jurisdiction of the Petty Debts Court. The Deputy Bailiff delivered a full judgment tracing the history of Doléance in Jersey and at p.334 concluded as follows:-

"We were satisfied on the authorities to which we have referred that there was nothing in law or principle whereby the remedy of Doléance is to be regarded as a personal attack on the integrity or honour of the judge; it is not "odious"; it is a method of obtaining a judicial review of a decision where there is no right of appeal and it is to be allowed where the judgment contains a manifest error; it is to be compared with the prerogative writs of certiorari and mandamus; it implies no disrespect to the judge whose decision is thus reviewed; it is available as a remedy where a court makes an error of fact or law..."

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Secondly, we were referred to the earlier Jersey case of *In the matter of the Doléance of Barker* (1985-6) JLR 284 in which the Royal Court allowed a petition of Doléance setting aside a decision of the Royal Court by annulling a *dégrévement* and ordering a *remise des biens*.

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A Thirdly, we were referred to the Isle of Man case of *Re the Attorney General of the Isle of Man* of which we have reports at first instance and on appeal (1997/8) 1 OFLR p.49 and 419 respectively. This is of particular interest in that the Court was prepared to give a remedy by way of a Petition of Doléance against the decision of the Attorney General to issue notices under s.24 of the Criminal Justice Act (Isle of Man) 1990, a statutory provision in identical terms to the Investigation Law of 1991. While it is not altogether clear, it would appear that the notices in question in that case were addressed to the persons whose affairs were under investigation. In any event the Court at first instance was prepared to accept jurisdiction of a supervisory nature, having considered the constitutional position of the Attorney General, and the Court of Appeal in a judgment delivered by Mr Benet Hytner Q.C., Judge of Appeal, was prepared to exercise a jurisdiction equivalent to that attendant upon the application of the *Wednesbury* principles.

B On the hearing of that appeal the Attorney General of the Isle of Man conceded that the Court had jurisdiction to review by way of Petition of Doléance his decision in relation to the pre-conditions to the exercise of his statutory powers under the Isle of Man legislation but not in relation to the actual exercise of those powers. Such legislation is similar to the Guernsey Investigation Law of 1991.

C The Court of Appeal of the Isle of Man did not, however, accept this limited concession and expressed itself as follows:-

D "In our view however not only are the pre-conditions subject to review, but so also is the discretion exercised thereafter. In our view that discretion is subject to the normal "*Wednesbury Rules*". The Attorney General must exercise his discretion in good faith; he must take into account all relevant considerations and must not take into account irrelevant ones. He must act fairly and reasonably. Provided he does so the Court will not interfere and a Petition of Doléance will not lie".

E "Political considerations - e.g. the nature of the regime seeking assistance, the penalties for breach of the relevant law, the nature of the laws, will all be relevant considerations, and in respect of these matters the Attorney General will be answerable to Tynwald; only in exceptional circumstances would the Courts interfere".

In an earlier passage the Court underlined the distinction between an appeal and the exercise of a supervisory jurisdiction.

We shall return to these passages when we consider the availability and extent of any remedy in Guernsey and the position of H.M. Procureur in this Island.

F The position of HM Procureur

The position of HM Procureur in Guernsey is similar to that of the Attorney General in England, save that he is not answerable to the States, the legislative body for the Island. In this he and the Attorney General of Jersey differ also from the Attorney General of the Isle of Man, who has been said to be answerable to Tynwald, the latter being a proposition which we take leave to doubt.

G The Attorney General in England and Wales (and the Solicitor General) possesses various immunities of long standing, which are so well established as to have withstood recent attempts to dislodge them. Thus in *Reg -v- Solicitor General ex. P.Taylor & Taylor* (1995) 8 Admin.Law

Reports p.206 the English Divisional Court has held that the Attorney General is immune from suit in the exercise of his discretion in deciding whether or not to bring proceedings under s.7 of the Contempt of Court Act 1981 in respect of contempt of court. In giving the principal judgment of the Court Stuart-Smith L.J. reviewed the authorities, and in so doing gave his approval to an analysis effected by Popplewell J. in R -v- Attorney General ex p. Ferrante (unreported July 1st 1994). Stuart-Smith said at p.218:-

"The authorities to which I have referred which lay down the rules in relation to the Attorney General point to his unique constitutional position. If his office was invented tomorrow without the weight of precedent as to his position there would be great force in Mr Robertson's submission, but they cannot override the clearly established position. Moreover the fact that the reason for reviewability of the decision relates to the policy considerations does not mean that where such considerations do not arise in a particular case, that decision is exceptionally reviewable. There is no logic in that argument and it would be difficult if not impossible to apply in practice".

We were further referred to authorities which indicate that in England the Crown Prosecution Service and the Director of the Serious Fraud Office are amenable to judicial review. Thus in R -v- Director of Public Prosecutions ex p. C (1995) 7 Admin.L.R. p.385 judicial review was available in respect of a decision not to prosecute, and in R -v- Director of Serious Fraud Office ex p. Smith (1993) AC 1 the House of Lords upon an application for judicial review considered the extent of the powers of the Director of the Serious Fraud Office under s.2 of the 1987 Act to require the provision of information and answers to questions. While there is no authority as to the immunity of HM Procureur in Guernsey and while unlike the Attorney General in England (and perhaps the Attorney General of the Isle of Man) he is not answerable to a body of a parliamentary nature there may be matters in respect of which he is entitled to immunity. However this is not an overall immunity and we respectfully repeat and adopt the propositions expressed by Popplewell J in R -v- Attorney General ex p. Ferrante (above), which read as follows:-

"(1) Gouriet is of general application and is not limited to relator actions.

(2) The decision whether the power of the Attorney General is immune from review does not depend upon the source of those powers but on their character. Arguments as the prerogative and statutory duties are sterile.

(3) The Attorney General is acting as guardian of the public interest in applications under s.13 of the Coroners Act.

(4) ...

(5) ...

(6) The question as to whether the decision is amenable to judicial process depends on the nature of the subject matter.

(7) It is for the Courts to decide on a case by case basis whether the matter is reviewable or not...

(8) ...

A These were the propositions approved by Stuart-Smith L.J. in the Taylor Case (above). We refer in particular to propositions (6) & (7) and have therefore to consider whether having regard to the nature of the particular powers in question the Attorney General is immune from suit. We have looked to the decisions in Jersey and the Isle of Man for guidance and then have reached our own conclusion. The Royal Court in Jersey in McMahon (above) appears to have taken a line which strikes us with respect as somewhat inconsistent, in that the Royal Court (without at that time having the benefit of such later authorities as Ferrante or ex p. Smith) held that the Attorney General was immune, so that there was no jurisdiction over him, and yet at the very end of the judgment went on to hold that after all there was a specific and apparently limited jurisdiction to interfere. Once there is jurisdiction of any kind it is difficult to see how the Attorney General's position could be said to be one of immunity.

C The Court of Appeal of the Isle of Man however had no such difficulties and with the advantage of the Ferrante decision and of the judgment of Stuart-Smith L.J. in Reg -v-Solicitor General ex. P. Taylor & Taylor (above) held that there was no absolute bar preventing the Courts in that island from reviewing administrative or executive decisions of the Attorney General of the Isle of Man. We respectfully adopt the same reason so far as concerns the Island of Guernsey, adding the further factor that, whereas the Attorney General of the Isle of Man has been said (possibly inaccurately) to be answerable to Tynwald, the Procureur is answerable only to the Crown, an accountability which is in practice likely to be of little practical effect in such a matter as this.

D In so far as there is jurisdiction in the Royal Court to interfere, we find that the position of the Respondent as HM Procureur, and in effect the Attorney General of the Bailiwick, is not of itself a bar to the institution of these proceedings.

The jurisdiction of the Ordinary Court and of the Cour des Jugements et Records

E Certain important legislation of an administrative character in Guernsey provides expressly for appeals, sometimes with limited jurisdiction, to the Royal Court and to the Court of Appeal. An outstanding example is the Housing (Control of Occupation) (Guernsey) Law 1994 which by s.56(1) provides for a limited right of appeal to the Royal Court.

F A formal equivalent to judicial review or system of administrative law has been slow to evolve in Guernsey and in this respect it has lagged behind both Jersey and the Isle of Man. This may in part have originated in the fact that until 1948 the Royal Court exercised both judicial and legislative powers in the island, and that the obtaining of the ordinary remedies by way of injunction or declaration of which there is now no report were not identified as being of the character of administrative remedies.

G The development of the law in Jersey was finally established by the Court of Appeal in Lesquende Ltd -v- The Planning and Environment Committee of the States of Jersey (unreported, 5th January 1998. Hon. Michael Beloff Q.C in giving the judgment of the Court held that such a remedy exists in Jersey. There was a body of precedent in Jersey running from 1974 to which reference was made. The development of judicial review in the Isle of Man through the means of Doléance has already been noted; see Re the Attorney General of the Isle of Man (above).

The Deputy Bailiff in giving judgment in Century (above) at p.234 at first instance opted for "judicial restraint" rather than "judicial activism", to use phrases taken from de Smith Woolf and Jowell on Judicial Review of Administrative Action (Fifth Edn), Chapter 1, giving as his reasons, first, the existence of the Administrative Decisions (Guernsey) Law 1986 which set up an Administrative Board to hear complaints; secondly, the smallness of the jurisdiction; and thirdly, the fragility of its institutions, there being no government, prime minister or cabinet. He feared a concerted attack by English lawyers acting at one remove through Guernsey advocates.

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The approach of the Deputy Bailiff could not be better expressed than in the following passage:-

"However, with the smallness of our institutions what is apparently a serious failure to go about an act of government in the right way can be put right by a letter or a telephone call and not a judicially refined missile costing in time and resources an amount wholly out of proportion to the perceived wrong".

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While this approach may appear at first sight to present certain advantages, it is in our view both out of date and inappropriate for an Island which now enjoys the position of an international financial centre of importance. As to the size of the Island, it has a population in the same general order as Jersey and the Isle of Man. Such an approach would also provide an informal structure dependent very much on individual perception and open to the risk of possible prejudice, which in addition could not satisfy the requirements of Article 13 of the European Convention of Human Rights, to which Convention the United Kingdom has adhered and which was extended to Guernsey in 1953 under the terms of Article 63, "subject to local conditions". See the decision of this Court in British Broadcasting Company -v- Law Officers of the Crown: 18 November 1988: No.25 (Civil).

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The effect of the stance adopted by the Deputy Bailiff would be, first, to deprive the Applicants in this and other cases of a legal remedy; secondly, to place the bodies or officers exercising the relevant powers above the law; and thirdly, to put a complainant at the mercy of an unofficial system of private telephone calls and the like. We do not consider that this represents or has ever represented the law in this Island, once one sets aside titles such as "judicial review" or "administrative law".

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We emphasise that the submissions of the Procureur as to his own position taken with the Deputy Bailiff's observations (if accepted) would render the Procureur above the law, a situation which cannot be tolerated in a civilised community. We consider it to be a mark of a modern civilised polity that it is prepared to afford the means whereby the private citizen can challenge those administrative actions which affect his or her private rights.

We adopt the following passage from the judgment of the Court of Appeal in Jersey in Lesquende Ltd -v- The Planning and Environment Committee of the States of Jersey (above) as having equal relevance in this jurisdiction:

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"We for our part endorse the existence of a remedy by way of judicial review in Jersey. The inherent jurisdiction of the Courts to control excess or abuse of power by executive bodies seems to us to be intrinsic to the very judicial process, and vital to the rule of law. To confer upon an administrative authority limited powers only, but to provide no means for confining it within those limits would be paradoxical. There is nothing in the traditions of Norman French Law, as developed in Jersey, which appears incompatible, and much appears consistent, with our

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conclusion. It would be in principle regrettable to deny to a citizen of Jersey a form of relief available to citizens in other parts of Her Majesty's Dominions".

A The only point at which there appears to be a distinction between the situation in Jersey as described in that passage and the situation in Guernsey is that there is an absence of reported cases in Guernsey in which (special statutory provisions apart) such a remedy has been pursued in the Royal Court or its predecessor. That is not to say that there has never been such a case; the limited law reporting in this Bailiwick in the past may have omitted reference to cases which could now be labelled as of an administrative or constitutional character.

B In R -v- Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 at 641 Lord Diplock spoke of

"...that process towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English Courts in my lifetime".

We note too that in the Woolf Report on Access to Justice it is recognised that

C "As has so often been stated, the growth of public law, and in particular judicial review, has been one of the most significant developments in the English system in the last 25 years".

The exclusion of Guernsey and its inhabitants from the benefits of an equivalent to this system would be an anomaly which we would not think it right to preserve.

Finally we quote from Wade & Forsyth on Administrative Law (7th edn) p.25:-

D "An essential part of the rule of law, accordingly, is a system of rules for preventing the abuse of discretionary power".

We recognise that this development in England and elsewhere has in substance occurred since this Court took over the jurisdiction of the Cour des Jugements et Records. However, the exercise of the powers of the Court of Appeal, although equated by the Appeal Law of 1961 to the Cour des Jugements et Records, cannot be taken to be limited to the state of the law as it stood prior to 1964, the year when that Law came into effect; the law must be free to develop both in the Royal Court and in this Court in order to take into account changing circumstances and perceptions. It was not intended to be a museum piece. A recent example of a decision of this Court in which there has been such a development was Morton -v- Paint (1996) 21 GLJ 36, in which the need for the development of the law governing occupiers liability was held by this Court to match a judicial process which would be likely to have taken place over the years in the Courts in England had it not been for the passing of the Occupiers Liability Act 1957, a statute which had not been extended to Guernsey.

Submissions on Extra-territoriality

G During the hearing of these applications on 15th September 1998 Advocate Barnes with some diffidence raised the possibility of an argument additional to those already placed before the Court in writing and by way of oral submission. It was clearly a point of potential public importance, if tenable. Mr Barnes was given 7 days in which to notify the Court as to whether he wished to take this argument, and he did so notify the Greffier in the time required. A timetable had been set out by the Court which was to be followed in this eventuality, and the Court has received two sets of submissions in writing from Mr Barnes and a submission in writing from H.M. Procureur.

The first of such Cases submitted by Mr Barnes, was lodged on behalf of Mr Lazarenko and Mr Kiritchenko and Mr Uoti and the second Case has been lodged on behalf of Mr Uoti alone, all these three Applicants being represented by Mr Barnes. No written argument has been lodged on the part of the other Applicants, but it is clear that the conclusion reached on these further arguments would affect them as well.

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It is convenient first to refer to the Supplemental Case lodged on behalf of Mr Uoti, which summarises the three arguments advanced on behalf of all three Applicants (this summary being but another way of putting the arguments raised in the earlier Case). It has been adopted by Mr Harris on behalf of the Applicants, and he has made submissions in support of them.

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By the first paragraph of the Supplemental Case the following submissions are made:

First, that "the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law 1991 [the Investigation Law of 1991] is void because by convention the States do not have the competence to legislate in the area of international mutual legal assistance in criminal matters. This lack of competence arises as a corollary of the status of the Channel Islands in international law (the ultra vires argument)";

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Secondly, that "[the Investigation Law of 1991] is repugnant to the terms of the Criminal Justice (International Co-operation) Act 1990 (the 1990 Act). The prerogative power of the Crown to validate legislation in the area of international mutual legal assistance in criminal matters in the Channel Islands by Order in Council has been superseded by the enactment of section 32(4) of the 1990 Act (the prerogative power argument)".

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Thirdly and alternatively, that the Investigation Law 1991 is neither ultra vires nor repugnant because it was wholly intended to apply only among the British Islands and the words "wherever committed" in Section 1, and "elsewhere" in section 2, have that meaning (the territorial limitation argument). In that case, it is submitted, the 1991 Law cannot properly be applied in relation to investigations or prosecutions of crimes alleged to have been committed outside the British Isles.

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As we have already indicated, in these three appeals the Court of Appeal is concerned with requests addressed to HM Procureur as the Attorney-General of Guernsey by authorities in the Ukraine and Finland seeking information and documents by virtue of the Investigation Law of 1991.

The origin of this local legislation in Guernsey lies in the European Convention on Mutual Assistance in Criminal Matters of 1959 ("the 1959 Convention"), made under the auspices of the Council of Europe. The aim of the governments signatory to the 1959 Convention is "to afford each other ... the widest measure of mutual assistance in proceedings in respect of offences"punishable within the jurisdiction of the state requesting the assistance (Article 1).

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"Assistance may be refused:

- (a) if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence;

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- (b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country." (Article 2).

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It is clear from the provisions of Article 2 that the potential decisions to be made on behalf of "the requested Party" in respect of matters falling within those provisions are decisions which have to be made by governmental authorities accountable to Parliament. Such matters involve the assessment of factors outside the competence of courts, or of prosecution authorities acting alone and without government direction or guidance.

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As Lord Diplock said in *Tzu-Tsai Cheng v Governor of Pentonville Prison* [1973] AC 931 at p.946, when considering the restriction in section 3(1) of the Extradition Act 1870:

"The purpose of the restriction, as it seems to me, was two-fold. First, to avoid involving the United Kingdom in the internal political conflicts of foreign states. Today's Garibaldi may well form tomorrow's government. And, secondly, the humanitarian purpose of preventing the offender [presumably Lord Diplock meant "the alleged offender"] being surrendered to a jurisdiction in which there was a risk that his trial or punishment might be unfairly influenced by political considerations. As indicated by the inclusion of the second part of the restrictions [barring extradition where it is sought "with a view to try or punish him for an offence of a political character" it was suspicion of the motives of requisitioning states in seeking the surrender of fugitive criminals [presumably "alleged fugitive criminals"] who were political opponents of the government of that state which underlay both the requirements of [s.3(1)] of the Act."

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Similar considerations apply to Article 2 of the 1959 Convention.

It is convenient to approach the interpretation of the Investigation Law of 1991 by first considering the statutory provisions passed by the United Kingdom Parliament. In England and Wales the first relevant step was the enactment of the Criminal Justice Act 1987 ("the 1987 Act") establishing the Serious Fraud Office with its Director. Under section 2 the Director was given coercive powers of investigation. Under section 3 the Director was given the power to disclose information obtained by the Director under section 2. By section 3(4) the Director was given power to make written agreement "for the supply of information to or by him subject, in either case, to an obligation not to disclose the information concerned otherwise than for a specified purpose". Sub-sections (5) and (6) of section 3 of the 1987 Act dealt with the persons to whom and the purposes for which the information obtained by the Director might be disclosed. These included:

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- (a) to any UK government department;
- (b) to "any competent authority" defined as set out below;
- (c) "for the purposes of any prosecution in England and Wales, Northern Ireland or elsewhere" (our underlining);

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- (d) for the purposes of assisting any public or other authority designated by the Secretary of State.

The "competent authorities" for the purposes of (b) above were defined as including a number of specified persons or bodies in the United Kingdom (but not including any prosecution authority), and also

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"any person or body having, under the law of any country or territory outside the United Kingdom, functions corresponding to any of the functions of any person or body mentioned in any of the foregoing paragraphs."

It might have been argued that the words "or elsewhere" in section 3(5)(c) of the 1987 Act referred to other parts of the British Islands (or other British territories) and not to other countries, because (inter alia) the 1987 Act was not expressed to give effect to the 1959 Convention, and no provision was made for the governmental direction or guidance required for the purposes of Article 2 of the Convention, the Director of the Serious Fraud Office not being a person able or authorised to make the kinds of governmental and political judgments which Article 2 requires. But this argument would in our judgment be misconceived, for two main reasons:

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(1) "competent authorities" are expressly stated to include persons or bodies having functions "under the law of any country or territory outside the United Kingdom";

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(2) when the Bill was in Standing Committee of the House of Commons, and the phrase "or elsewhere" was under consideration, the Minister of State at the Home Office stated that:

"'Elsewhere' means everywhere other than England and Wales [our underlining]. Information should be made available at the discretion of the Serious Fraud Office because it is the only way in which we shall be able to continue to do business with other countries ... Crimes such as fraud are not confined to the borders of one country. For example, relevant information will be available on anything happening in the City of London and will almost certainly involve transactions overseas". (House of Commons Official Report: Standing Committee F, 20 January 1987, col. 158, quoted in Halsbury's Statutes, Vol. 12 (1997 Reissue), Criminal Law, page 995).

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In our judgment the use of the phrase "or elsewhere" in section 3 of the 1987 Act was intended to enable the Director (or a member of the SFO) to provide information for the purposes of a prosecution in any foreign country whatever.

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Under section 17(6) of the 1987 Act power was given to direct by Order in Council that section 2 (but not section 3) of the 1987 Act should extend, subject to modifications, if any, to any of the Channel Islands.

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The next stage is that the United Kingdom Parliament enacted the Criminal Justice (International Co-operation) Act 1990 ("the 1990 Act"). As the long title shows, one of the aims of Parliament was "to enable the United Kingdom to co-operate with other countries in criminal proceedings and investigations". This included giving effect to the 1959 Convention. Section 4 of the 1990 Act provided for the provision of UK evidence for use overseas. The Secretary of State can receive requests for assistance in obtaining evidence in the United Kingdom from courts, tribunals, or prosecuting or other relevant authorities in foreign countries. The Secretary of State (or the Lord Advocate in relation to Scotland) if satisfied

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(a) that an offence under the law of the requesting state has been committed or that there are reasonable grounds for suspecting that such an offence has been committed; and

A (b) that proceedings in respect of that offence have been instituted in the requesting state or that an investigation into that offence is being carried on there,

"may, if he thinks fit," (and we emphasise these words) nominate a court in England, Wales, Northern Ireland or Scotland to receive the relevant evidence. At that stage the Secretary of State could only nominate a court, but this was altered and enlarged subsequently in 1994. The importance of the words "may, if he thinks fit" is simply that this enables the Secretary of State to perform the task, derived from Article 2 of the 1959 Convention, of first making the assessment of the political and international implications of the request, and any response to it, which the Secretary of State, as a senior minister accountable to Parliament, is in a position to make with the benefit of all the resources of the Foreign Office, the Home Office and other Government Departments, and where appropriate, with the benefit of consultation with other ministers.

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C Provision was made in section 32(4) of the 1990 Act for the extension of the 1990 Act to Guernsey with modifications (if any) by Order in Council. The 1990 Act came into force in England and Wales in the course of June 1991.

The next step was the enactment by the United Kingdom Parliament of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"). By section 164 of the 1994 Act amendments were made to section 2 of the 1987 Act. The effect of these amendments was to enable further authorities to request the Director of the Serious Fraud Office to exercise his powers of investigation in respect of "serious or complex fraud".

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New Section 2(1A) provides that the authorities entitled to make such a request are:

"(a) The Attorney-General of the Isle of Man, Jersey or Guernsey, acting under legislation corresponding to section 1 of this Act and having effect in the Island whose Attorney-General makes the request; and

E (b) the Secretary of State acting under section 4(2A) of the [1990 Act], in response to a request received by him from an overseas court, tribunal or authority (an "overseas authority")."

Section 1 of the 1987 Act is the section by which the Serious Fraud Office is set up. This Court has not been shown any legislation of Guernsey corresponding to section 1 of the 1987 Act.

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G The reference to section 4(2A) of the 1990 Act is to that section as amended also by section 164 of the 1994 Act. The effect of section 4(2A) is to add to the existing power of the Secretary of State to nominate a court to receive relevant evidence by virtue of section 4(2), a power to refer a request from overseas to the Director of the Serious Fraud Office for him to obtain relevant evidence in response to the request, provided that it appears to the Secretary of State that "the request relates to an offence involving serious or complex fraud". The form of section 4(2A) is similar to that of section 4(2), and in particular the Secretary of State "may, if he thinks fit" exercise the power to refer the overseas request to the Director, that is to say, the Secretary of State can in a similar way make the necessary governmental assessment of the national interests of the United Kingdom as part of the process of deciding whether or not to act on the request from the foreign requesting State.

One point needs to be emphasised in relation to the United Kingdom legislation. From the outset, when the 1987 Act came into force, it had and was intended to have an international effect, because under section 3 the Director of the Serious Fraud Office was empowered to provide information obtained by the Director to foreign prosecution authorities, and to foreign investigative authorities if they fell within the definition of "competent authority" in sub-section (6). The Director was and is not in a position to assess the national interest of the United Kingdom or the other factors referred to in Article 2 of the 1959 Convention.

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The Director therefore presumably has to seek the guidance about such factors of relevant government departments if a request for information (or a request to make a written agreement for the supply or exchange of information) is received from the authorities of a foreign state. No doubt run of the mill requests coming from the USA, the Commonwealth or EU member states are covered by general rather than specific guidance, while requests from other foreign countries are the subject of specific guidance.

B

In the light of the United Kingdom legislation we turn to consider the position in Guernsey. The power given by section 17(6) of the 1987 Act was exercised in relation to Guernsey by the Criminal Justice Act 1987 (Guernsey) Order 1989. This Order came into force on 18th May 1989 and was expressed by Article 1 to cease to have effect two years from that date. It extended section 2 of the 1987 Act to Guernsey with suitable modifications, including "Attorney General" in lieu of "Director". The effect of this extension was to make possible mutual assistance between Guernsey, England and Wales and Northern Ireland in the investigation of suspected serious fraud.

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This extension to Guernsey was a temporary one for only two years, because steps were to be taken to introduce Guernsey local legislation. This was achieved by the passing on 27th February 1991 by the States of Guernsey of a Projet de Loi, with one amendment, which was approved by Order of the Privy Council on 16th April 1991, and ordered by the Royal Court of Guernsey to be registered on 21st May 1991. This was the Investigation Law of 1991, which by section 5(2) came into force on 30th May 1991, 12 days after the expiry of the Order extending section 2 of the 1987 Act to Guernsey.

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Under section 1 of the Investigation Law of 1991 the investigative powers of HM Procureur are exercisable

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"in any case in which it appears to him -

(a) on reasonable grounds that there is a suspected offence involving serious or complex fraud, wherever committed;

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(b) that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person." [our underlining]

In these appeals the true interpretation of the words "wherever committed" in section 1(a) is in issue. HM Procureur relies on these words as justifying him in engaging in investigations in Guernsey pursuant to requests from the Ukraine and Finland. The applicants contend that on their true interpretation these words do not enable HM Procureur to engage in investigations at the request of foreign states, and in the alternative, that if these words did bear such a meaning, the result would be that the 1991 Law would be wholly or to this extent outside the powers of the States of Guernsey and therefore void.

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Section 2 of the Investigation Law of 1991 reads as follows:

A "Disclosure

2. (1) Where any information is subject to an obligation of secrecy imposed by or under any enactment (including in an enactment passed after this Law) the obligation shall not have effect to prohibit the disclosure of that information to any person authorised by Her Majesty's Procureur, but any information disclosed under this subsection may only be disclosed by such a person for the purpose of a prosecution in the Bailiwick or elsewhere.

B (2) Without prejudice to his power to enter into agreements apart from this subsection, Her Majesty's Procureur may enter into an agreement for the supply of information to or by him subject, in either case, to an obligation not to disclose the information concerned otherwise than for a specified purpose.

C (3) Subject to subsection (1) and to any provision of an agreement for the supply of information which restricts the disclosure of the information supplied, information obtained by Her Majesty's Procureur or a person authorised by him may be disclosed to any person or body for the purposes of any investigation of an offence or prosecution in the Bailiwick or elsewhere. [Our underlining]

D Similar points arise on the words "prosecution in the Bailiwick or elsewhere" in section 2(1), on the power to make agreements in section 2(2), and on the words "disclosed in the interests of justice to any person or body for the purposes of any investigation of an offence or prosecution in the Bailiwick or elsewhere". HM Procureur relies on these words as entitling him to disclose information to state authorities in the Ukraine and Finland, while the applicants contend that these words do not so empower him, alternatively if they do, that the section is outside the powers of the States of Guernsey.

E We take first the question of interpretation. In our judgment the Investigation Law of 1991 has to be interpreted as enabling HM Procureur to respond to requests from any other country in the world, because (1) that is the natural meaning of the words used, and (2) viewed against the background of the United Kingdom legislation, and in particular the 1987 Act (which as we have indicated was intended to and does have the effect of enabling the Director to respond to requests from any foreign country), there is no basis for concluding that the words used in the Investigation Law of 1991 should be interpreted as having any meaning other than their natural meaning.

F Accordingly it is necessary to consider whether or not the Investigation Law of 1991 is, as the applicants contend, in whole or in part outside the powers of the States of Guernsey.

G The Court has received extensive submissions from all the parties concerning the circumstances in which legislation passed by a legislature subordinate to the UK Parliament may be held to be ultra vires, either because repugnant to United Kingdom legislation applying to the subordinate territory, or because designed to have an extra-territorial effect going beyond the proper confines of the jurisdiction of the subordinate legislature.

We take next the question of repugnancy. Reliance was placed on the decision of the English Court of Appeal in *R v Secretary of State for Home Department, ex parte Fire Brigades Union and others* [1995] 1 All ER 888. Legislation had been passed in the Criminal Justice Act 1988

providing for a new scheme for compensation for criminal injuries to take the place of an existing scheme made under the prerogative. The legislation gave the Secretary of State power to determine when the statutory scheme should be brought into force.

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A subsequent Home Secretary decided not to bring the statutory scheme into force, but instead to introduce by the prerogative a different scheme which would be less favourable to those injured by criminals. The English Court of Appeal held that, while the provisions of the 1988 Act remained unrepealed, though not in force, they remained as an enduring statement of Parliamentary will and decision, and it was an abuse of power for the Home Secretary to seek to use the prerogative to introduce a scheme wholly at variance with the statutory provisions.

B

In these cases it was argued by Advocate Barnes that since the United Kingdom Parliament had laid down a scheme for responding to requests for assistance in obtaining evidence from foreign states in the 1990 and 1994 Acts which could be extended to Guernsey by Order in Council with any appropriate modification, it was repugnant to that United Kingdom legislation for Guernsey to pass local legislation giving powers to HM Procureur inconsistent with the terms of the UK legislation.

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In our judgment this argument is not well founded, and the suggested analogy with the Fire Brigades Union case is not a valid one. The United Kingdom legislation in the 1990 and 1994 Acts does not represent legislation laying down a scheme for Guernsey, but a scheme for the United Kingdom which can, if the States of Guernsey and the Home Secretary so wish, be extended to Guernsey by Order in Council if approved by Parliament. There is no repugnancy and no abuse of power if with the assent of the Queen in Council the States of Guernsey legislate for a different scheme.

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Turning to the reliance on the inability of a subordinate legislature to legislate for acts to be carried out outside the territory within the jurisdiction of that legislature, it has to be borne in mind that the foreign and external affairs affecting Guernsey are and have to be conducted by the Government of the United Kingdom, and legislated for by the UK Parliament and not by the States of Guernsey. It is common ground that in external affairs including defence and extradition Guernsey falls under the umbrella of United Kingdom actions and legislation. Accordingly, it was argued by Mr. Barnes and Mr. Harris, the States of Guernsey has no jurisdiction to legislate for the process of responding to foreign requests for assistance in obtaining evidence for criminal prosecutions. That is for the government and parliament of the United Kingdom. If the Investigation Law of 1991 is to be interpreted as legislating for such process, it is outside the powers of the States of Guernsey and void, at least to that extent.

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The extra-territorial limitation on the powers of a subordinate legislature, though at times during the last 150 years a matter of controversy, was clearly recognised and provided for by the United Kingdom parliament when enacting the European Communities Act 1972 ("the 1972 Act"). Section 2 of the 1972 Act provides for the implementation of the European Treaties. Section 2(6) provides (inter alia) that a law passed by the legislature of Guernsey, Jersey or the Isle of Man,

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"if expressed to be passed or made in the implementation of the Treaties or of the obligations of the United Kingdom thereunder, shall not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of Parliament, passed or to be passed, that extends to the Island ... or any provision having the force and effect of an Act there (but not including this section), nor by reason of it having some operation outside the Island ...; and any such Act or provision that

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extends to the Island ... shall be construed and have effect subject to the provisions of any such law." (references to Gibraltar have been omitted: the underlining is ours)

A The words "nor by reason of its having some operation outside the Island" are clear recognition of the continuing existence of the limitation of the powers of a subordinate legislature such as the States of Guernsey. HM Procureur argued that section 2(6) of the 1972 Act governed only English law and does not have any effect as regards the law applicable in Guernsey. In our judgment, this is not correct. Section 2(6) applies by necessary implication to Guernsey. If it did not so apply, it would be open to argument in the Courts of Guernsey that Guernsey local legislation designed validly to implement the EU Treaties so far as concerns Guernsey was void by reason of its extra-territorial effect. It was precisely to prevent any such argument being run that section 2(6) was included in the 1972 Act.

B This limitation on the powers of a legislature which is ultimately subordinate to the United Kingdom has been considered in the past solely in relation to legislatures established by statute. For example, there are cases in relation to New Zealand, before by the Statute of Westminster 1931, section 3, it was declared and enacted that "the Parliament of a Dominion has full power to make laws having extra-territorial operation". There are also numerous cases concerning the relationship between the powers of the State legislatures in Australia and those of the Federal Parliament, each being established by legislation with powers expressly defined by such legislation. The principal cases are collected in Halsbury's Laws, Vol. 6 (4th ed. reissue), para. 1028. As the cases make clear, enactments of subordinate legislatures will be held to be valid, even though they have some element of extra-territorial operation, insofar as they are directed to the "peace, order and good government" of the territory: these words come from the Constitution Act of New Zealand considered by the New Zealand Supreme Court in *In re Gleich* (1879) 1 NZ Reports SC 39 per Prendergast CJ at p.42. Subsequent cases have made clear that some degree of extra-territorial operation may well be necessary for the peace, order and good government of the dependent territory, for example, in relation to deportation (*Attorney General for Canada v Cain* [1906] AC 542 PC, a decision to the opposite effect to *In re Gleich*), or to the better enforcement of customs laws of the territory (*Croft v Dunphy* [1933] AC 156 Privy Council on appeal from Canada).

C Cases in which statutes of dependent territories were held to be ultra vires because of their extra-territorial operation, and the absence of any sufficient connection with the good government of the territory, include

- *Macleod v Attorney-General for New South Wales* [1891] AC 455 PC concerning a bigamous marriage which took place in the USA.

D - *Royal Bank of Canada v R* [1913] AC 283 PC in which the Province of Alberta had legislated in respect of a debt payable in the Province of Quebec.

E - *Johnson v Commissioner of Stamp Duties* [1956] 1 All ER 502 in which the Privy Council held that a New South Wales statute (by which it was sought to impose death duties on a deceased's property outside that State on the basis that the deceased was domiciled in that State) was outside the powers of the New South Wales legislature.

F - *Welker v Hewett* (1969) 120 CLR 503 in which the High Court of Australia held that a New South Wales statute (by which it was sought to impose liability for commercial vehicle taxes on directors of companies which owned vehicles, and the company and the director

concerned were registered and resident respectively outside New South Wales) was ultra vires because beyond the territorial competence of the parliament of that State.

There were cited to us numerous other authorities, and also text books of authority including Dicey's Introduction to the Study of the Law of the Constitution, the 1924 and 1965 editions. See also Professor DP O'Connell on The Doctrine of Colonial Extra-Territorial Legislative Incompetence (July 1959) 75 LQR 318. We do not lengthen this judgment by further extensive citation, because in our judgment the principles we have already stated are reasonably clear. What are primarily in issue are these questions:

- (1) whether these principles apply at all to the States of Guernsey; and
- (2) if they do, whether the Investigation Law of 1991 has any extra-territorial operation; and
- (3) if it has such operation, whether that is no more than is necessary for the good government of Guernsey.

HM Procureur argued that these principles have no application to Guernsey, not least because the States of Deliberation of Guernsey is not a body with powers laid down by legislation, but a legislature the powers of which have been developed by Guernsey common and customary law and conventions created by continuous dealings between Guernsey and the United Kingdom government (and its predecessors before the Union) over many centuries. He also argued that even if these principles could in theory apply to Guernsey, the approval of local legislation by the Queen in Council means that any element of extra-territorial operation which might otherwise offend against these principles has received the approval of the United Kingdom, and accordingly no question of ultra vires can arise.

The constitutional relationship between Guernsey on the one hand, and the Crown and the United Kingdom parliament and government on the other, is a complex one, governed to a substantial extent in practice by well-established conventions which in practice create limitations to the extent to which the States of Guernsey and the United Kingdom Parliament respectively legislate for the affairs of Guernsey. Clearly this constitutional relationship is of a different kind from the primarily statutory relationship between the United Kingdom and its past and present colonies, or between the Federal Parliament of Australia and those of the constituent Australian States. In view of the conclusions we have reached on the remaining questions, it is not necessary for us to answer HM Procureur's first question. We simply assume that the principles concerning extra-territorial legislation enacted by a dependent or subordinate territory do apply to Guernsey, while emphasising that we have reached no conclusion on this first question and while recognising that there is much to be said in support of HM Procureur's arguments on this question.

We take the second and third questions together. In our judgment it is clear that the operation of the Investigation Law of 1991 by HM Procureur does have some extra-territorial effect, insofar as HM Procureur responds to requests coming from foreign countries, and by way of response furnishes information and copy documents to authorities in foreign countries.

The vital question is the third one - whether this relatively small degree of extra-territorial operation (bearing in mind that everything which HM Procureur does under the Law is done in Guernsey) is essential or necessary for the good government of Guernsey. To this question we consider that there is only one answer to be made, that this degree of extra-territorial operation is

A essential for the good government of Guernsey. Much crime, including fraud, drug-trafficking and money laundering, is international. The criminals involved ignore the boundaries of States in their criminal activities. To suggest that assistance by Guernsey for foreign states in the world-wide fight against crime is not, in general, essential to the good government of Guernsey is, in our judgment, misconceived. So even if it were to be the case that the powers of the States of Guernsey were limited in the manner for which Mr. Barnes and Mr. Harris so lucidly argued, it is our judgment that the Investigation Law of 1991 does not go beyond those limits and is a valid enactment.

B The relevance of extra-territoriality, however, does not stop there. We have already held that HM Procureur is not above the law, and that his exercise of his powers under the Investigation Law of 1991 is subject to judicial control in accordance with the usual Wednesbury principles.

C In exercising his powers HM Procureur holds a position similar in many respects to that of the Director of the Serious Fraud Office. Foreign relations, insofar as they concern Guernsey, are a matter for the United Kingdom Government acting on behalf of Guernsey, and not for HM Procureur. This means that, like the Director, HM Procureur is dependent on guidance from the Secretary of State for Home Affairs, as the United Kingdom minister responsible, as to the states and governments which may be assisted under the Investigation Law of 1991, and as to the requests from such states and governments to which a response by way of assistance under that Law may be made. For example, for the purposes of Article 2 of the 1959 Convention, it is the Secretary of State, not HM Procureur, who has to decide whether there is a political element in the alleged offence or whether the national interest of the United Kingdom requires that no assistance be given in answer to the request from the foreign state to HM Procureur.

D The point can be illustrated by an extreme example. Suppose that HM Procureur had received a request for assistance under the Investigation Law of 1991 from the Pol Pot régime in Cambodia concerning an offence alleged to have been committed by an opponent of that régime. It is almost unthinkable that the United Kingdom would have given any assistance to such a régime. HM Procureur could not simply give the assistance requested without considering whether there were higher interests which might dictate a refusal to assist, and HM Procureur would not himself be in a position to decide, having regard to the kinds of questions which arise from Article 2 of the 1959 Convention, whether the national interest of the United Kingdom lay in giving or refusing assistance. Accordingly HM Procureur would need to seek the guidance of the Secretary of State as to whether the assistance requested should be given, insofar as such guidance was not already available.

E The point can also be illustrated by a less extreme example. Suppose that a request for assistance were received from a state of excellent standing and a signatory to the 1959 Convention, but that it appeared from the request that the alleged offence in respect of which the request was made might have political elements such as those referred to in Article 2 of the 1959 Convention. On the questions whether or not it was a "political" offence, and whether, if it was, the requested assistance should be given, again HM Procureur would need to seek the guidance of the Secretary of State, insofar as such guidance was not already available.

F Naturally the guidance of the Secretary of State to which we are referring might be general in relation to countries such as the United States of America, the Commonwealth and states which are members of the European Union, and might need to be specific in relation to other countries, or in relation to particular requests.

There was cited to us the decision of the English Court of Appeal on section 4(2A) of the 1990 Act and Article 2(a) of the 1959 Convention in R v Secretary of State for the Home Department, ex parte Fininvest SpA [1997] 1 All ER 942. In that case the Court of Appeal held (inter alia) at page 957 that

(1) the Secretary of State was bound to consider, as a material consideration, whether to exercise his discretion by reference to Article 2(a);

(2) the Secretary of State was not bound to reach a decision as to whether or not the alleged offences were themselves, or were connected with, political offences within Article 2(a); he would be entitled to decide that, whether or not the alleged offences were or were connected with political offences, he would not refuse to give assistance to the requesting state and its authorities.

In Guernsey, and in relation to the position of HM Procureur, we are doubtful whether HM Procureur could take the course set out in (2) above. It seems to us, subject to further argument, that HM Procureur would need to obtain the guidance of the Secretary of State on this question, and therefore to reach a conclusion as to whether or not the alleged offences were "political" ones for the purposes of Article 2(a), as a necessary step towards his decision whether or not to respond positively to the request for assistance.

Whether or not the decisions of HM Procureur the subject of these three appeals are on the facts in this case open to attack by reference to the Wednesbury principles, in the light of the considerations set out in this Judgment, is a matter which will have to be decided by this court at the substantive hearing of these appeals.

Jurisdiction of the Court of Appeal

We turn finally to the question whether this Court has jurisdiction to grant leave to appeal and to hear appeals from the Royal Court in relation to decisions of HM Procureur under the Investigation Law of 1991. We have already concluded that such an appeal would have been within the jurisdiction of the Cour des Jugements et Records, the predecessor of this Court in civil matters.

However if it remains correct that the Court is to be guided by the approach to the identification of a "criminal matter" established in Amand -v- Home Secretary [1943] AC 147 as followed in the later English cases to which this Court made reference in Century we remain satisfied that such an appeal as the present would be categorised as a "criminal matter" in England, and not as a "civil matter" as for example in In re O (Restraint Order) [1991] 2QB 520 CA.

Repeating a passage from the judgment of this Court in Century:

"Some further assistance is to be derived from the English authorities which are concerned with the meaning of "criminal cause or matter" in English statutes. As has been recognised in Amand -v- Home Secretary [1943] AC 147 and leading up to Carr -v- Atkins [1987] 3 WLR 529 and Re O (Restraint order:Disclosure of assets) [above] , in English Law the nature of the matter, criminal or otherwise, has to be treated as dependent on the nature of the act sought to be impugned or questioned and not on the means which the person complaining adopts to protect his private right."

A When invited to depart from our previous decision we were referred to the legislative history of the Appeal Law of 1961. This commenced with the Suggestions and Recommendations of the Royal Court in relation to Judicial Reform which formed part of Billet d'État XVI of 1946, debated on the 26th June, 1946, and which recommended the setting up of a Court of Appeal for the Channel Islands with jurisdiction to hear appeals from both Islands. The Suggestions and Recommendations set out the then existing jurisdiction of the Royal Court of Guernsey whether sitting as a Full Court or an Ordinary Court, and form a useful summary of the relevant jurisdiction of the Courts in the Island at that time.

B In criminal cases no appeal lay as to conviction or sentence save by special leave to Her Majesty in Council.

As to the civil jurisdiction, the Full Court sitting as the Cour des Jugements et Records was described as

C "the Court of Appeal from all decisions of the Ordinary Court where the amount in dispute exceeds the sum of £25 and on points of law from those where the amount in dispute is less than the foregoing or where no amount is involved... A further appeal lies to the Judicial Committee of His Majesty's Privy Council...",

Thus there was a right of appeal within the Island as to civil matters but not from criminal convictions or sentences on indictment.

D The Full Court comprised the Bailiff or Lieutenant Bailiff and not less than seven Jurats, while the Ordinary Court, which had the original jurisdiction in all civil matters and what was described by this Court in Century at page 3 as a "dwindling jurisdiction" in criminal matters, comprised one of these Judges and two Jurats.

It follows that there was no appeal procedure in the case of serious criminal convictions and sentences, the only remedy being the expensive bringing of an application for special leave and its prosecution before the Judicial Committee.

E In civil matters there was the appeal from the Ordinary Court to the Full Court sitting as the Cour des Jugements et Records referred to above; in this case the appeal lay to the same class of judges as had sat at first instance but in greater number. Thus it can be seen that reform of the appellate procedure was badly needed.

F These defects were acknowledged and emphasised in the Report of the Committee of the Privy Council on Proposed Reforms in the Channel Islands of March 1947 (Cmd. 7074); it was there pointed out that, as has been mentioned, in the case of a civil appeal the same judge could preside both at the hearing at first instance and on the appeal, and of the seven Jurats who heard the appeal two could be the same two who had sat at first instance. Stress was also laid on the cost of pursuing an appeal to the Judicial Committee.

G Accordingly the Committee of the Privy Council recommended the setting up of a Court of Appeal for the Channel Islands to hear civil and criminal appeals. An Order in Council was made on the 31st May 1949, citing the report of the Privy Council Committee, and was registered on the 18th June 1949 but never came into effect.

However, a further report was contained in Billet d'État XVI of 1953, debated on 6th November, 1953, and by then it had been recognised that the circumstances prevailing in the two Bailiwicks were not sufficiently similar.

A

There was then a further delay which came to an end when Billet d'État I of 1961, debated on 25th January 1961, contained the Projet de Loi which became the Guernsey Appeal Law of 1961. By this time it had been finally accepted that the differences between the two islands were such as to require two separate Courts of Appeal, one for each Bailiwick.

The recitals to the Appeal Law of 1961 do not refer back to the report of the Privy Council Committee but it will be seen that it is a part of the background essential for the understanding of how the two Courts of Appeal came about and what the mischief was that they were designed to meet. Another relevant consideration was to ensure that only appeals in matters of real importance reached the Privy Council, since otherwise the Privy Council could be inundated with an excessive number of appeals in relatively trivial matters.

B

The history of the legislation, and in particular the report of the Committee of the Privy Council, indicates an intention to provide a Court of Appeal for the hearing of criminal appeals in the case of trials on indictment, and that there should be a right of appeal in civil matters to the new Court co-extensive with the pre-existing rights of appeal to the Cour des Jugements et Records. The new Court was now to be independent of the Court of first instance. The means by which this was to be achieved was by the setting up of "a Court of Appeal in the Bailiwick of Guernsey with civil and criminal jurisdiction in accordance with the provisions of this Law". (Art.1(1)), which Court could be distinguished by the addition of the words "Criminal Division" and "Civil Division" (Art.1(2)). These provisions were contained in Part I of the Law, the heading of which was "Constitution of the Court of Appeal". The heading of Part II is "Appeals in Civil Matters" and of Part III is "Appeals in Criminal Matters".

C

D

The first Article in Part II is Article 13, the terms of which are set out earlier in this judgment. By Art.13(1) there was vested in the Court of Appeal the

"appellate jurisdiction in civil matters which immediately before that day was vested in the Royal Court, sitting as the "Cour des Jugements et Records"

E

Furthermore by Art.13(2) the following transitional provision was made

"Any civil matter pending in the Royal Court sitting as a "Cour des Jugements et Records" immediately before the day appointed under subsection (1) of this section shall on such day be transferred to the Court of Appeal..."

F

Thus, there being an existing jurisdiction in the case of civil appeals the provisions of Art.13 of the Appeal Law of 1961 were drafted with the intention of transferring the appellate jurisdiction from the Court which had previously exercised that jurisdiction, to the newly created Court.

However, there being no such existing jurisdiction in the case of criminal appeals, it was necessary to start anew, and by Art.24 provision was made for an appeal "against conviction" as provided for and "against the sentence passed on his conviction...", suitable provision being made for the necessity of leave except in the case of an appeal on a ground which involved law only. It would seem that the provisions of that Article (Art.24) derived from the provisions of the English Court of Criminal Appeal Act 1907, being confined to challenging conviction and sentence.

G

A The background to this legislation, together with the terms of the transitional provisions in Art. 13(2), strongly indicates, in our judgment, an intention that the whole of the civil jurisdiction of the Cour des Jugements et Records was to be transferred to the new Court.

B However, the Court of Appeal in Jersey in McMahon -v- Attorney General (1993) JLR p.35 and this Court in Century (above) have introduced the English authorities which have interpreted such phrases as that "No appeal shall lie to the Court of Appeal..from any judgment of the High Court in any criminal cause or matter" and applied them to the interpretation of the Appeal Law of 1961. We are of the opinion that this Court has by introducing such authorities run counter to the intention of the legislature in the case of the transfer of the right of appeal from one Court to a successor Court, which in the case of the Guernsey Court was to have an equivalent jurisdiction to that of its predecessor. In the case of the Jersey Court there was, as the Applicants have urged upon us, a distinction from the position in Guernsey in that the Superior Number in Jersey had a jurisdiction which was both civil and criminal. We draw attention in particular to the effect of Art. 13(2) of the Guernsey Appeal Law of 1961; from this section it is apparent that all the appeals awaiting a hearing at the time when the law came into operation were to be transferred to the new Court. We do not think that it is in accordance either with justice or common sense to interpret the Appeal Law of 1961 in such a way that an appeal pending in the Cour des Jugements et Records at the date of the coming in to force of the Appeal Law of 1961 would be lost to the Appellant, because of the construction of a different statutory provision relating to the jurisdiction of a Court in England in an altogether different context.

D Reverting to the purpose of the legislation, we do not consider it to be realistic to ascribe to the legislature, when providing for an appeal code, an intention that such matters as those with which we are concerned should fall into a "black hole" between civil and criminal jurisdiction.

E Furthermore, if we are right in concluding that a claim for an administrative remedy is a matter which is to be treated as having been within the jurisdiction of the Ordinary Court and thus of the Cour des Jugements et Records as a civil court of appeal, there would seem to be an inconsistency in a finding that the matter in question is no longer a "civil matter" once an appeal is provided for by statute.

E Conclusion

For the above reasons we conclude that this Court does have jurisdiction to entertain the current proceedings and, on HM Procureur's concession limited to leave, we give leave to appeal against the judgment of the Deputy Bailiff appealed against.

Application for leave to appeal granted

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G