

# GUERNSEY LAW JOURNAL

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# **GUERNSEY LAW JOURNAL**

## **TWENTY-EIGHTH ISSUE**

References to this issue in future issues will be cited using the figure and letters 28.GLJ. followed by the paragraph number.

### **Editorial Committee**

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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, de V G Carey (deVGC); the Deputy Bailiff, A C K Day (ACKD); and Lieutenant Bailiff and Assistant Magistrate, A R W Hancox (ARWH).

### **Committees of the States of Guernsey**

Readers should note that this issue contains references to States' Committees which were in existence during the relevant period. These Committees were abolished and the various functions transferred to the new States' Departments created with effect from 1st May 2004.

Compiled from sources including all Orders in Council, Ordinances, Projets de Loi and subordinate legislation and selected cases and other relevant material which became available during the months January to June 2000. 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

### ADOPTION

1. **Projet de Loi: The Adoption (Amendment) (Guernsey) Law, 2000.** – Further amends the Adoption (Guernsey) Law, 1960 so as to permit adopted persons, after counselling, to obtain disclosure of their birth records and to establish an Adoption Contact Register so as to facilitate contact being made between adopted persons and their relatives where mutually desired.

A new section 20A will require the Registrar of Births and Deaths to provide an applicant who is aged at least 18 with information enabling the applicant to obtain a copy of the record of his or her birth which is held by the Registrar, subject to compliance with the counselling requirements of section 20B. If the applicant is below the age of 18 but intends to marry in Guernsey, the Registrar is required only to inform the applicant whether his or her prospective spouse would be within the prohibited degree of relationship.

Under a new section 20B, an adopted person cannot be given the information necessary to obtain a copy of his or her birth record unless the applicant has attended a counselling interview arranged by the Children Board. If the applicant is not in Guernsey, the information can be supplied to other persons whom the Board is satisfied can undertake the counselling rôle on its behalf. Should the applicant so wish, the Board is obliged to provide ongoing counselling to him or her. Similarly, if a relative of the applicant seeks counselling, the Board will be obliged to provide it.

By virtue of a new section 20C, the Registrar is required to maintain an Adoption Contact Register, which will be divided into two Parts. Part I will contain details of adult adopted persons who wish to be included in it, having previously been supplied with information consequent upon an application under section 20A. Each entry will indicate one of three options, namely whether the adopted person wishes to make contact with all his or her relatives, just a selection of them (who must be specified) or none of them. Part II of the Register will contain details of adult relatives of adopted persons whom the Registrar is satisfied already have sufficient information for them to obtain a copy of the adopted person's birth record. Each entry in this Part will state whether or not the relative wishes to make contact with the adopted person. Before making entries in either Part, the Registrar must inform the person concerned whether there are entries in the other Part indicating that the adopted person or the relative, as the case may be, does not wish to make contact.

Section 20D provides that, where there is an entry in Part I of the Register indicating the wish of an adopted person to make contact with all or a selection of his relatives and an entry in Part II showing that a relative or one of those expressly listed also wishes to make contact, the Registrar shall disclose that fact to the adopted person. No other disclosures of information are permitted and the Register will not be open to public inspection or search. Section 20E enables the Register to be kept by computer and requires the Registrar to amend or remove entries where the person concerned gives him notice. It also permits the Board to prescribe a fee for making an entry in the Register.

Approved by the States 31.5.00. Awaiting Royal Sanction.

## ADVOCATES

### Conduct at trial – appeal against conviction – whether conduct of counsel such that conviction should be set aside

2. See Law Officers of the Crown v. Holliday, paragraph 16.

## AGENCY

### Powers of attorney - enduring power of attorney – application for recognition

3. A held a power of attorney in England on behalf of a donor who subsequently became of unsound mind. A had then taken the steps required of him in England to register the power of attorney with the Court of Protection, thereby confirming it as an Enduring Power of Attorney (“EPA”). A sought an order recognising the EPA within Guernsey and directing information relating to the donor’s bank account to be provided by R. HELD by the Bailiff, in Lomax v. Robertson (Royal Court - 5.11.99, unreported), the Court had recognised the title of a receiver under the supervision of the Court of Protection to seek information relating to the patient’s funds held in Guernsey. The Court would follow Didisheim v. London and Westminster Bank (1900) 2 Ch. 15 (CA) and the Rules on Conflict of Laws as set out in Dicey & Morris Conflict of Laws 13<sup>th</sup> edition, rule 107, giving the Court discretion in these matters to recognise the present application as if the money had been deposited in the country of domicile of the donor.

Obiter: if the donor’s estate extended to realty, or to items of personalty requiring a local guardian to be appointed to administer them, the rights of that guardian to call in all the estate, including monies, would override the rights of the holder of the EPA.

Direction: in cases of this nature A must file an affidavit deposing:

1. that no guardian has been appointed in Guernsey for the donor and there is no intention to appoint one;
2. that the donor is resident and domiciled in England and Wales;
3. as to the extent of the estate of the donor in Guernsey. (deVGC).

[Greenwood v. NatWest Offshore Ltd - Ordinary Court 4.2.00 (JER/AJA)].

## APPEALS

### Privy Council - appeal to Judicial Committee from Court of Appeal – grounds under which Judicial Committee can review findings of fact by Jurats that were upheld by Court of Appeal

4. R and R1, respectively a director and company secretary of A Ltd, a manufacturer of windows, fitted such windows in Guernsey. They were also authorised signatories of its

accounts. A, by its managing director, alleged that RR made certain unauthorised payments, actioning them for £16,720. At trial in 1994, the Deputy-Bailiff gave a full and careful summing up and the Jurats dismissed A's claim but, in accordance with the practice of the Royal Court, did not give reasons. A appealed unsuccessfully to the Court of Appeal (see 10.GLJ.66) but that Court gave leave to appeal to the Judicial Committee (see 23.GLJ.52). A argued that the findings of the Jurats were perverse. The Judicial Committee dismissed two points of law raised by A and then examined A's arguments on the findings and concluded that there was evidence to support the findings and therefore no miscarriage of justice. HELD, on the strict view of the appeal the Court of Appeal was correct in holding that the assessment of factual evidence was a matter for the Jurats and there had been sufficient evidence before them to support the conclusions that they had reached. Since concurrent findings of fact had been reached in the Royal Court and the Court of Appeal, there was no reason for the Judicial Committee to review the evidence for the third time. Devi v. Roy (1946) A.C. 508 applied. Appeal dismissed with costs.

[Vekaplast Windows (C.I.) Limited v. Jehan and wife, Privy Council Appeal No. 65 of 1997, 13.12.99]. Order in Council registered 21.3.00. For full report of judgment of the Judicial Committee, see paragraph 64.

## **CLAMEUR DE HARO**

### **Intangible rights over property – whether remedy of Clameur de Haro applicable**

5. A raised a Clameur de Haro in relation to his interest in the prospective proceeds of sale of real property. In the course of matrimonial proceedings, the property had been vested in A's wife with a direction for sale, the proceeds to be used to discharge the family debts and to provide an alternative home for the wife and children. Any balance remaining was subject to order of the Court of Appeal. After hearing from A, the Deputy Bailiff declined to register the Clameur, holding that there was binding authority to the effect that a person cannot use the remedy of a Clameur to recover the possession of property once that possession has been lost. Referring to two Court of Appeal cases of Clameur brought by Kirk (see 1.GLJ.60 and 7.GLJ.11), the Deputy Bailiff concluded that A no longer had any possession of or legal interest in the property to protect, and that the raising of the Clameur in the circumstances was not appropriate. The Court of Appeal HELD, confirming the decision of the Deputy Bailiff and refusing A's appeal, that it was clear that a Clameur was not available in respect of a right such as monies becoming available under a judgment. The Clameur de Haro was a remedy for the protection of possession of property in circumstances involving imminent or actual threat to such possession. Even if A could be said to be in possession of his rights under the matrimonial court order, there was no actual or threatened interference with such possession. The sale of the property would not deprive or interfere with any possession of A's. Leave to appeal to the Privy Council would be refused.

[In re C's Clameur de Haro – Court of Appeal 5.4.00 (unrep)].

## CONSTITUTIONAL LAW

### Electoral expenditure

6. Ordinance: The Electoral Expenditure Ordinance, 2000. – Sets the maximum expenditure permitted by candidates at elections for Deputies, Constables, Douzeniers, Procureurs and Overseers of the Poor.

In force 23.2.00. (No. II of 2000).

### Priests-in-Charge

7. Order in Council: The Priests-in-Charge (Assimilation to Rectors) (Guernsey) Law, 1999. – See paragraph 15.

## COURTS

### Royal Court - jurisdiction – accident in Sark – parties resident in Guernsey and England – whether Guernsey or Sark was the forum conveniens – whether Sénéchal's Court has exclusive jurisdiction

8. P1 and P2 were workmen, both of whom were principally resident in the United Kingdom. P1 and P2 suffered serious injuries as a result of accidents which occurred when they were employed by D, a Guernsey company, to build a castle on the Island of Breqhou. P1 and P2 each brought proceedings against D in Guernsey. In each case D raised Exceptions de Fond, alleging that, as the alleged incident occurred in Breqhou which is, in relation to civil matters, within the exclusive jurisdiction of the Court of the Sénéchal in Sark, the Royal Court should decline jurisdiction. P1 and P2 argued that there is a concurrent jurisdiction vested in the Royal Court. In rejecting D's submissions and dismissing the Exceptions de Fond, the Bailiff HELD: (referring to the decision of the Royal Court in Law Officers of the Crown v Alderney Meat Products and Another (1977) and section 23 of the Reform (Sark) Law, 1951):
- (i) There is one court of law in Sark and it has unlimited jurisdiction in civil matters. From it there is a right of appeal to the Royal Court in all matters.
  - (ii) Whilst the Court of the Sénéchal has unlimited jurisdiction in Sark matters, it does not have exclusive jurisdiction.
  - (iii) Even if the Bailiff was wrong in his interpretation of the law, he would be minded to let the matter proceed in Guernsey as the Court of the Sénéchal is a wholly unsuitable place to conduct personal injury litigation of such complexity. (deVGC).

[Matthews v Monaghan & R G Falla Ltd; Woodward v. R G Falla Ltd – Ordinary Court 8.5.00 (JJLM/PTRF)].

## CRIMINAL LAW AND PROCEDURE

### Drug trafficking

9. **Projet de Loi: The Drug Trafficking (Bailiwick of Guernsey) Law, 2000.** – Enables the Bailiwick to join with other countries in implementing fully the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances signed in Vienna on 20<sup>th</sup> December 1988, to make further provision in relation to drug trafficking and to consolidate the Drug Trafficking Laws (see 7.GLJ.22 and 14.GLJ.14).

Part I makes provision for the making by the Royal Court of confiscation orders, in relation to persons who are being sentenced in respect of drug trafficking offences and have benefited from drug trafficking, when requested so to do by HM Procureur or, where there is no request, if it considers it appropriate to do so. Provision is made for assessment of the proceeds of drug trafficking, determination of the amount to be recovered under a confiscation order; valuation of property; the circumstances in which a gift is caught by the Law, enforcement of confiscation orders; and various ancillary provisions. It also makes provision for restraint orders, prohibiting persons from dealing with any realisable property; realty charging orders over real property situate in the Bailiwick for the purpose of securing the payment to the Crown of the amounts due under confiscation orders; and personalty charging orders over specified descriptions of personal property for the same purpose. Part I also specifies how for the purpose of satisfying a confiscation order property is to be realised under the Law; how the proceeds of such realisation are to be applied; the manner in which the powers of the Court and HM Sheriff are to be exercised; makes provision for the exclusion of property subject to a restraint order from the estate of a person “en désastre” or from the liquidator of a wound up company. It also provides for the enforcement and registration in Guernsey of external confiscation orders made in recognised foreign jurisdictions.

Part II creates the offence of manufacturing or supplying a substance (specified in Schedule 1) knowing or suspecting that the substance is to be used in or for the unlawful production of a controlled drug and empowers the Board of Administration to make regulations about certain matters involving scheduled substances. It also provides that anything that would be a drug trafficking offence if done in the Bailiwick constitutes a drug trafficking offence when done on a ship registered in the Bailiwick and creates an offence of possessing or being knowingly concerned in the carrying or concealing of a controlled drug on an unregistered ship or a ship registered in a Vienna Convention state. Offences under Part II shall be treated as if they had taken place in the Bailiwick and process and other documents in respect of drug trafficking offences which have been issued in a Convention state may be served in the Bailiwick. Arrangements may be made for a summons or order to be issued or made by a Bailiwick Court for service outside the Bailiwick under arrangements made by HM Procureur. The Bailiff is empowered to issue a letter of request for evidence to be obtained in a Convention state for subsequent use in an investigation into, or proceedings before a Bailiwick court in respect of, a drug trafficking offence. HM Procureur is empowered to give effect to comparable requests from Convention states to obtain evidence in the Bailiwick for use in that Convention state’s investigation into, or proceedings in respect of, a drug trafficking offence. The Bailiff may issue a warrant authorising an officer of police to search for and seize material which could be relevant to the investigation of, or criminal

proceedings for, a drug trafficking offence at the request of the Convention state where the investigation or proceedings is taking place. The States may make an Ordinance providing for the enforcement in the Bailiwick of forfeiture orders made in Convention states specified therein.

Part III deals with importing or exporting drug trafficking money. Where HM Procureur has consented, and there are reasonable grounds for suspecting that money exceeding the prescribed sum (currently £10,000) being imported into or exported from the Bailiwick represents the proceeds of drug trafficking or is intended for use in drug trafficking, it may be seized and detained. The Ordinary Court may, on HM Procureur's application, order forfeiture of such detained money, subject to a right of appeal by way of rehearing.

Part IV deals with offences in connection with proceeds of drug trafficking. The following offences are created: concealing, disguising, converting, transferring or removing from the Bailiwick the proceeds of drug trafficking; assisting another person to retain the benefit of drug trafficking; the acquisition, possession or use of the proceeds of drug trafficking; failure to disclose knowledge or suspicion of drug money laundering; and "tipping-off", whereby information is disclosed to another person likely to prejudice an investigation into drug money laundering.

Part V, which deals with miscellaneous and supplemental matters, provides, *inter alia*, for orders to be made by the Bailiff to make material available for the purpose of investigating whether a person has benefited from drug trafficking; details the procedure for the issue of search warrants by the Bailiff for the same purpose; creates an offence of prejudicing an investigation where such an order or warrant made by the Bailiff has been made; and details the procedure for the disclosure of information held by States departments.

Approved by the States 31.5.00. Awaiting Royal Sanction.

### **Misuse of drugs**

10. Order in Council: The Misuse of Drugs (Amendment) (Bailiwick of Guernsey) Law, 2000. – (See 27.GLJ.12).

Royal Sanction 15.3.00. Registered 11.4.00. In force 1.5.00. (No. III of 2000).

### **Sentence – drug trafficking offences– confiscation orders**

11. A applied for leave to appeal out of time in respect of confiscation orders and a sentence of imprisonment in default imposed following his plea of guilty to two counts of importation of a Class B drug (cannabis resin). At trial, a drug trafficking statement was prepared and the Royal Court heard evidence to establish whether A had benefited from drug trafficking and the value of the proceeds which he had received, which may be recovered under a confiscation order. A disputed whether certain assets (vehicles) were realisable and challenged their purported value, but did not contest the Crown assessment of the proceeds of the drug trafficking, and did not cross-examine on the value attributed to the vehicles.

A was sentenced by the Royal Court to 10 years' imprisonment concurrent on each count,

together with a confiscation order in respect of unexplained cash found at his Brighton address, and a further confiscation order in respect of the value of the vehicles, which if not paid would result in six months' imprisonment consecutive to the ten years already imposed. A then appealed against sentence, which was reduced by the Court of Appeal from ten years to eight years concurrent on each count. He did not seek at that stage to challenge the confiscation orders, the basis for them, or the prison sentence in lieu.

The Court of Appeal, rejecting the application for leave to further appeal out of time, HELD that-

- (1) since at both his trial and the appeal, A had through his Advocate accepted the drug trafficking statement (subject to the points argued about the vehicles), he could be treated under section 3(3) of the Drug Trafficking Offences (Bailiwick of Guernsey) Law, 1988, as amended, as accepting every allegation in the statement, save for those relating to his benefiting from the trafficking;
- (2) in order to have any chance of succeeding, he would have to produce evidence disputing the drug trafficking statement, and deal with why the statement had not been challenged by his Advocates at either trial or upon appeal;
- (3) since he had not done so, it was not appropriate to give a third opportunity for points to be canvassed which could and should have been raised at trial or before the Court of Appeal on the appeal against sentence.

The Court would not consider an application of this kind so long out of time without seeing proposed evidence and a full explanation of the circumstances as to how the failure to put the challenges had come about. The Court also considered that in future, it may be wiser for a formal judgment to be given by the sentencing court in respect of the findings on drug trafficking orders.

[Law Officers of the Crown v. Ribeyre - Court of Appeal 5.4.00 (CMF/PR)]. For full report of judgment of Court of Appeal, see paragraph 59.

### **Sentence – misuse of drugs – importation of Class A drug**

12. A, a divorced man aged 44 with adult children, appealed against a sentence of 6 years' imprisonment for importation of 33.4 grams of diamorphine (heroin), with an approximate Guernsey street value of between £6,500 and £10,000. He was detained upon arrival at Guernsey airport and later produced three packets of heroin which had been concealed internally. He told customs officers that he had purchased the heroin in London for £900 and intended the drugs for his own use over a four or five week period. He claimed that although he was visiting Guernsey for a period of two or three days for a short rest, he did not want to leave the heroin at his address on the mainland. He accepted through his Advocate and to the Probation Officer that if someone had offered him money for the drug then he may well have sold some on, but that was not his intention when he brought the drugs in. Mitigating factors included a guilty plea, his tragic personal circumstances resulting in a six year addiction to heroin, his health problems, family bereavements and a declared intention to reform. He had numerous previous convictions, including an offence of conspiracy to rob

for which he received three years imprisonment, more recently his convictions were for offences of possession of drugs.

A argued that the Royal Court failed to give sufficient weight to the fact that he was not principally importing for profit but for his own consumption, and should have held a 'Newton hearing' to establish the extent of his admissions. It was also argued that the evidence of street value was wrongly admitted because of the absence of evidence that A intended to sell the drugs on. A further submission was that the Bailiff had paid insufficient heed to the personal circumstances of the appellant.

The Court of Appeal, in dismissing the appeal, HELD that the nature of the admission made by A to the Probation Officer was not by its nature susceptible to amplification, and that in these circumstances there was nothing to be gained by holding a 'Newton hearing'. Referring to its decision in the case of Cooper and Mather (see 27.GLJ.19), the Court reiterated that '..the issue as to what will happen to the drugs is of marginal relevance in cases of importation..' Whilst it may be appropriate to vary the sentence for reasons personal to the individual, the principles upon which the Court should approach the sentencing process are the same whether the importer was acting as courier for a consumer or whether the importer was a consumer who may also supply.

The Court also rejected the argument that the evidence of street value was wrongly admitted, saying that such evidence was helpful in highlighting the difference in the cost of the drug between the United Kingdom and Guernsey, and in providing a measure of the gravity of the offence and the potential mischief of the importation.

In considering whether sufficient weight had been given to the personal circumstances of the appellant, the Court said that no sentencing process must become a mechanical exercise in which the type of offence, the classification and amount of the drug, and the nature of the plea become the exclusive considerations of the sentencing court. It would be wrong to derive from the corpus of sentencing decisions any precise formula designed to reflect aggravating or mitigating features. Although sentencing was not an exact science, the value of the guidelines set down in the case of Oren (see 18 GLJ 13) for the starting points for drugs offences was that they gave the sentencer the appropriate freedom to make due allowance for aggravating or mitigating features. In the present case, these factors were canvassed extensively before the Bailiff and the Jurats, and were taken into account when assessing sentence. Given the facts outlined by the Crown and conceded by A, the appropriate starting point in this case was not less than seven years imprisonment. Having regard to the aggravating feature and the mitigating factors, the Court could not fault the sentence passed in this case.

[Law Officers of the Crown v. Harward – Court of Appeal 31.1.00 (JER/PR)]. For full report of judgment of Court of Appeal, see paragraph 61.

### **Sentencing – misuse of drugs – importation of Class A drug**

13. A pleaded guilty to the importation of 292 Ecstasy tablets of a total Guernsey street value of between £7,300 and £8,700 and was sentenced by the Royal Court to six years' imprisonment, against which sentence he appealed. The facts were that A, a 27 year old man

from Paisley, had arrived in Guernsey from Poole on the ferry at 11pm. He was detained and subsequently produced three packages containing the Ecstasy tablets which he had been carrying internally. In interview he insisted that the tablets were for his own use during his continued stay on the Island, where he had been working temporarily as a gardener for three months since separating from his wife and young child. He said that he had purchased the drugs in England, where they cost approximately £1 each. He later admitted to the Probation officer that he was acting as courier for which he hoped to earn £350. He had numerous previous convictions for matters of dishonesty, but this was the first drug related offence.

On appeal, A sought to argue that the sentencing bracket was too high, given the mitigation before the court and by comparison to sentences passed in similar cases on the mainland. The Court of Appeal HELD that comparison of sentencing brackets elsewhere was not appropriate. Sentencing policy in relation to drug offences in Guernsey was clearly set out in a number of cases, most recently in Cooper and Mather (see 27.GLJ.19). The courts were entitled to take a serious view of the effects of the drug menace in a relatively small community, and sentences tended to be marginally higher than in England. However, in view of the available material before the sentencing court, the proper sentence here was 5½ years' imprisonment and to that extent the appeal was allowed.

[Law Officers of the Crown v. Sheehan – Court of Appeal 5.4.00 (PTRF/PR)]. For full report of judgment of Court of Appeal, see paragraph 62.

#### **Sexual offences – age of consent**

14. Order in Council: The Sexual Offences (Amendment) (Guernsey) Law, 2000. – Royal Sanction 19.4.00. Registered 23.5.00. In force 24.5.00. (No. VI of 2000).

#### **ECCLESIASTICAL LAW**

##### **Church of England – Priests-in-Charge**

15. Order in Council: The Priests-in-Charge (Assimilation to Rectors) (Guernsey) Law, 1999. – (See 27.GLJ.27).

Registered 17.1.00. Deemed in force on 1.9.00.

#### **EVIDENCE**

##### **Accomplice evidence – corroboration - conduct of Advocate at trial**

16. A was charged with others with being concerned in the importation of 247 grams of cannabis resin, of an approximate Guernsey street value of between £1,725 and £2,218. The principal evidence against him was that of the female courier, who said that A had given her the drugs in Jersey to bring into Guernsey for him. On appeal against his conviction, A argued that the conviction should be set aside because the accomplice evidence was not credible, and because of the way his defence had been conducted by his trial Advocate. It was further

submitted that there was inadequate evidence of corroboration of the accomplice's evidence.

The Court of Appeal HELD, dismissing the appeal, that the inconsistencies in the accomplice's evidence had been clearly drawn to the attention of the Jurats with appropriate directions by the then Deputy Bailiff as to how to approach accomplice evidence. In relation to the conduct of the trial Advocate, the Court referred to its decision in Rodney (see 27.GLJ.29) and said that the question was whether the conduct complained of was such as to have caused the trial to be unfair. In making remarks that could have been regarded as unflattering to his client, the defence Advocate was conducting a legitimate exercise as part of his advocacy rôle. The remarks were plainly intended to distance A from being portrayed as a calculating and experienced drug trafficker, and the decision to do this was taken with the interests of his client fully in mind. The omission by the trial Advocate to put particular items in cross-examination was a matter for the professional judgment of the Advocate to decide to what extent, and in what way such matters should be dealt with. There was nothing that could be said to be demonstrable misconduct on the part of the defence Advocate that would render the trial unfair.

On corroboration, the Court said it was the cumulative impact of factors that counted, and the fact that evidence is capable of an innocent explanation did not make it incapable of amounting to corroboration. In this case, there were seven items of corroborative evidence which tended to support the evidence of the accomplice, the Deputy Bailiff's direction could not be faulted and the Jurats were evidently satisfied. The appeal would therefore be dismissed.

[Law Officers v. Holliday - Court of Appeal 17.1.00 (MAT/PR)]. For full report of judgment of Court of Appeal, see paragraph 60.

### **Electronic evidence**

17. Projet de Loi: The Electronic Transactions (Guernsey) Law, 2000. – See paragraph 38.

## **FINANCE BUSINESS**

### **Banking supervision**

18. Statutory Instrument: The Banking Supervision (Bailiwick of Guernsey) (Amendment) Regulations, 2000. - Repeals paragraph 6 of Schedule 1 to the Banking Supervision (Bailiwick of Guernsey) Law, 1994. The Channel Island Co-Operative Society Limited thus ceases to be an exempted person for the purposes of that Law.

G.S.I. 2000 No. 3. In force 31.3.2000.

### **Electronic transactions**

19. Projet de Loi: The Electronic Transactions (Guernsey) Law, 2000. – See paragraph 38.

## **FIREARMS**

20. Order in Council: The Firearms (Guernsey) (Amendment) Law, 2000. – (See 27.GLJ.33).  
Royal Sanction 15.3.00. Registered and in force 11.4.00. (No. II of 2000).

## **HEALTH AND MEDICINE**

### **Public health – tattooing etc**

21. Order in Council: The Tattooing, Piercing, Acupuncture and Electrolysis (Guernsey and Alderney) Law, 2000. – (See 27.GLJ.40).  
Royal Sanction 15.3.00. Registered 11.4.00. In force 1.5.00. (No. V of 2000).

## **HUMAN RIGHTS**

### **European Convention on Human Rights - Article 6(1) - right to a fair trial – application for planning permission under Island Development Committee Law refused due to provisions of Detailed Development Plan No. 6 – subsequent appeal dismissed by Royal Court – presiding judge also presided over States of Deliberation when DDP6 adopted – whether violation of Article 6(1)**

22. A made several unsuccessful applications to the Island Development Committee (IDC) to permit residential use of land. He moved into a converted packing shed on the land. Subsequently, Detailed Development Plan No. 6 (DDP6), which proposed zoning of A's land as agricultural and prohibited development, was adopted by the States, presided over by the then Deputy Bailiff, Mr Graham Dorey. A further application for change of use was rejected on the ground that the Committee's written statement of policy under DDP6 for Developed Glasshouse Areas made no provision for the form of development proposed. A appealed on the grounds that, notwithstanding the provisions of DDP6, the IDC had taken an unduly narrow view of what it could allow. The Bailiff, Sir Graham Dorey, presided over the Royal Court when it unanimously dismissed the appeal. A alleged that this violated Article 6(1) of the European Convention on Human Rights, which provided "...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...". The Government's preliminary contention that A's case was inadmissible due to his alleged failure to exhaust domestic remedies by appealing to the Guernsey Court of Appeal (on the basis of the decision in Bordeaux Vineries v. States Board of Administration – 16.GLJ.85) was rejected on the ground that the Government was estopped from raising such an objection because it had not raised such submissions before the Commission. The European Court HELD, on the question of compliance with Article 6(1), the mere fact that the Deputy Bailiff presided over the States of Deliberation when DDP6 was adopted was capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of law in the case, the applicant's planning appeal. That doubt, however slight its justification, was sufficient to vitiate the impartiality of the Royal Court. Accordingly, there had been a breach of Article 6(1) in the particular circumstances of the

case, the court making no general criticism of the principle of a holder of judicial office presiding over the legislature. A was awarded costs but no compensation.

[McGonnell v. The United Kingdom – European Court of Human Rights 8.2.00]. For full report of judgment of Court see paragraph 65.

## **INCOME TAX**

### **Computation of income**

23. Order in Council: The Income Tax (Year of Computation) (Guernsey) Law, 2000. – (See 27.GLJ.43).

Royal Sanction 15.3.00. Registered 11.4.00. In force 1.1.02. (No. IV of 2000).

## **PRACTICE AND PROCEDURE (CIVIL)**

### **Acts of Court – Practice Direction**

24. A new streamlined procedure will change the way in which certain standard Acts of Court are produced in order to eliminate unnecessary delay and staff time. The new system will involve the application of a prominent stamp to the front page of the Cause. This will normally be placed at the head of the Cause and Members of the Bar should ensure that the Cause layout leaves sufficient space for the stamp. This stamp will be signed by the Deputy Greffier attending Court, sealed and forwarded to the Advocate concerned. Initially this streamlined procedure will be applied to Judicial Separations, Vesting Orders, Company Change of Name, Registration of Wills and Liquor Licence Applications. It will be extended to other categories of Cause in the light of experience. Traditional Acts will still be drawn up where needed e.g. when the Order of the Court differs from, or adds to, the terms of the application.

[Practice Direction No. 1 of 2000].

### **Cause of action –formalities for lodging amended cause – time when the lodging is effective**

25. R commenced 2 actions against A, one on 23 January 1989 (“the Loveridge Action”) and one on 2 August 1990 (“the Le Poidevin Action”). On 27 February 1997 R applied for leave to consolidate the Loveridge and Le Poidevin Actions in one action, and to add further claims for damages (“the Paine Action”). At a hearing on 19 May 1997 the Deputy Bailiff refused R’s application for consolidation of the actions and ordered R to re-draft the pleadings and file 3 separate Causes, relating to the 3 leads of action, within 4 weeks. After agreeing an extension of time with A, R sent the 3 Causes, being the redrafted Loveridge and Le Poidevin actions and the new Paine Action, to HM Greffier under cover of a letter dated 18 July 1997, copied to A. No further action was taken until 29 July 1999 when R applied for leave to proceed with the 3 actions (as they were preempt) and for the actions to be

entered onto the Rôle des Causes à Plaider. On 3 September 1999 the Bailiff granted the application. A appealed on the grounds that: (i) R had failed to comply with the provisions of the Royal Court Civil Rules regarding the issue and service of a Summons; (ii) that, although the formal requirements for service could be waived, A had not waived those requirements; (iii) that the Bailiff was not entitled to treat R's lodging of the Causes with HM Greffier on 18 July 1997 as tabling or "placing" of the Cause before the Court; and (iv) it was only on 23 September 1999, when a Summons was issued by R and served on A by HM Sergeant, that the new Paine Action was commenced and was therefore prescribed. HELD by the Court of Appeal, dismissing the appeal: (i) that the new Paine Action was commenced on 18 July 1997 when the Cause was lodged with HM Greffier and copies supplied to A; (ii) that A had waived its right to insist on formal compliance with the Royal Court Civil Rules. It was incumbent upon A to insist on the formal issue of the Summons and formal service of the Summons and Cause; (iii) (obiter) if there is an understanding between the parties to an action that the formalities in the the Royal Court Civil Rules in relation to the issue of process are not going to be complied with, such understanding should be formally and clearly recorded in writing at the time.

[States of Guernsey v Bordeaux Vineries Limited & Paine – Court of Appeal 5.4.00 (PTRF/CMF)]. For full report of judgment of Court of Appeal, see paragraph 63.

#### **Costs – Costs and Fees Rules**

26. Order of the Royal Court: The Royal Court (Costs and Fees) Rules, 2000. – Re-enacts with amendments the Rules of 1990 (see 10.GLJ.70). Makes provision for Court fees, recoverable Advocates' fees and witness allowances in civil and criminal proceedings and for the procedure governing taxation of costs and appeals against taxation decisions.

In force 18.4.00. (ORC No. I of 2000).

#### **Costs - indemnity Costs – appeal from Court of Sénéchal – principles to be applied – power of the Royal Court to award costs**

27. A had appealed successfully from a decision of the Court of the Sénéchal (see 27.GLJ.128). She subsequently applied for full indemnity costs both in respect of the original hearing before the Sénéchal and of the appeal. HELD, by the Bailiff, the Royal Court had power to order full indemnity costs following the binding decision of the Court of Appeal in Laughton v. Main (see 20.GLJ.79) which held that that court had the power to award costs generally under the wording of section 18(1) of the Court of Appeal (Guernsey) Law, 1961. The wording of section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969 had identical wording and could not have a different interpretation. The test for making an order for full indemnity costs was set out in Rule 48 of the Royal Court Civil Rules 1989 and had been considered in the cases of Hotel Dunchoille Ltd v. Old Government House Hotel (1984) Ltd. (see 23.GLJ.53), Quin v. Brooman (see 23.GLJ.54) and Smith v. Helmot (see 26.GLJ.5). On the facts, there were a number of serious points that justified R in resisting the appeal and indemnity costs were not appropriate. Costs would be awarded on a recoverable basis both in the Court of the Sénéchal and in connection with the appeal to the

Royal Court. (deVGC).

[De Carteret v. Surcouf – Ordinary Court 25.2.00 (NJB/SJAR)].

**Costs – indemnity costs – detinue – unjustified resistance to a request for delivery up of documents – taxation by the Court.**

28. D was a firm of fiduciaries whose chief officer was a chartered accountant with long involvement in fiduciary operations. It had a long-standing professional relationship with a firm of Geneva lawyers (ET) that instructed it in the affairs of Ina Services Limited (ISL). ISL had two nominee shareholders and its directors were two Sark residents. It became apparent to D that P was the ultimate principal rather than ISL, P itself being owned by a major company that was publicly listed in France and New York. ET's management of ISL on behalf of P terminated following difficulties between P and ET. A New York Attorney assumed control of P and so advised the Sark directors who referred the matter to D. P, through the Attorney, sought information from D and, as a result of D's refusal to provide documentation, a summons was issued. Subsequently the court ordered that D deliver up to P books, documents and accounts relating to ISL. P then sought full indemnity costs. HELD by the Bailiff, on the facts D had no justification whatsoever for resisting the proceedings that were in effect an action in detinue and he was satisfied that this was a case for indemnity costs. Applying E.M.I. Records v. Ian Wallace Ltd. [1983] Ch. 59, it was now necessary for him to explore the extent of the costs in respect of which the order would be made. P was to provide a draft bill and further submissions would be heard. (deVGC)

[Inalux S.A. v. Old Crown Trust Limited – Ordinary Court 16.6.00 (MGF/StJAR)].

**Costs – indemnity costs - interpretation of Rule 48 Royal Court Civil Rules**

29. In an action between A (the tenant) and R (the landlord), it had been held that R had been unreasonable in withholding consent for structural modifications proposed by A. A applied for costs on a full or partial indemnity basis on the grounds that R had been unreasonable in defending the action. HELD by the Deputy Bailiff: it was for A to prove on the balance of probabilities that R had unreasonably defended the action. The word “unreasonably” must be given its normal meaning. The Court gave R the benefit of the doubt over its conduct during the initial stages of the action and costs were awarded for that period on the recoverable basis. However, after that time, R's defence of the proceedings had been unreasonable and costs were ordered on the full indemnity basis for the remaining period, including the costs of the costs hearing.

Obiter: After the Jurats had given their verdict on the substantive issue, the Deputy Bailiff had informally confirmed with the Jurats his impression that R had acted unreasonably in defending the action. The decision on the award of costs was however one for the DB alone. (ACKD)

[Saromaje Ltd v. Janet Holdings Ltd – Ordinary Court, 11.1.00 (PTRF/RJC)].

### **Costs – indemnity costs - interpretation of Rule 48 Royal Court Civil Rules**

30. A had successfully applied to strike out R's claim for want of prosecution and delay causing prejudice to A. A applied for full indemnity costs. HELD by the Lieutenant Bailiff, Rule 48(4) of the Royal Court Civil Rules is expressed disjunctively: the Court may order full or partial indemnity costs under any of the six criteria set out in that rule. The Court found that, under sub-paragraph (a) of Rule 48(4), no "special circumstances" had been put forward by A; that, under sub-paragraph (b) of Rule 48(4), the test for "scandalous" pleadings had not been satisfied; A's claim that the case had been brought "vexatiously" to frustrate parallel proceedings had not been made out; but that R's failure to give further and better particulars had been "unreasonable" and amounted to an "abuse of process". R was ordered to pay A's costs on half the full indemnity basis together with the recoverable costs of the action insofar as those were not duplicated by the order for partial indemnity costs. (ARWH).

[Zekavica v. Stefani – Ordinary Court April 2000 (JPG/unrep)].

### **Judgment – power of Court to order amendment**

31. P Ltd successfully brought two actions for rent arrears and for an order for eviction in respect of a property. It subsequently transpired that A Ltd, another company in the same group, was the owner of the property in question. A Ltd applied for its name to be substituted on the two Acts of Court. Although the respondent company had not appeared H M Sheriff was able to advise the Court that it did not oppose the application. HELD, by the Bailiff, that, unlike the English Rules set out in the White Book, the Guernsey Rules did not specifically permit amendments to judgments and writs after they had been issued. In the present circumstances, and provided that A Ltd filed an explanatory affidavit, the application would be permitted. However, he stated that, in other circumstances, where such an application was opposed, he might be persuaded that it should not be granted or that the Court did not have the power to make such an order. (deVGC).

[Oscar Holdings Ltd v. Sovereign Windows (C.I.) Ltd – Ordinary Court 14.4.00 (TLWL-M/unrep)].

### **Pleadings- further and better particulars - interpretation of rule 37 Royal Court Civil Rules**

32. P applied for further and better particulars of D's counterclaim, on the grounds that the particulars provided were inadequate to enable P effectively to plead its defence. The Royal Court Civil Rules were found to be for the most part silent as to what particulars might be required in the pleadings and the Court was referred to Order 18, Rule 12 of the Rules of the Supreme Court in the White Book 1999.

HELD by the Deputy Bailiff, dismissing the application, the White Book made it clear that the fundamental purpose of the pleadings was to identify clearly the issues which were to be in contest between the parties and which had to be investigated by the Court. The burden was on P to satisfy the Court that, in accordance with Rule 37(2) of the Royal Court Civil Rules, an order for further and better particulars was necessary or desirable to enable P to plead, or for any other special reason. P had failed to do so, the particulars provided to date

by D having sufficiently identified the issues between the parties such that P would not be in an unfair or impossible position to serve its defence to the counterclaim. (ACKD).

[Tulip Holdings Ltd v. Orthocenter N.V. – Ordinary Court 28.6.00 (CAT/AJA)].

**Witness summons – failure to attend – arrest order – application to lift arrest order**

33. In April 1997, in matrimonial proceedings, a witness summons had been served by P on the mother of R, to whom P believed certain assets had been transferred. The witness was leaving the island and failed to attend Court. The Bailiff's predecessor had made an order for the arrest of the witness should she set foot again in the island. The witness had written to the Bailiff direct seeking his assistance in lifting the arrest order. P's Advocate was called before the Court and addressed the Bailiff on the reasons for the issue of the summons and the request for the arrest order. He stated that, although the financial proceedings of the divorce had been concluded, the matters between P, R and the witness could be re-opened. HELD by the Bailiff:

1. This was a matter where, exceptionally, the Bailiff could intervene.
2. He was satisfied that the Arrest Order should be lifted. If P wished to bring the witness's conduct to the notice of the Court, this could be done if and when the witness was in the island. (deVGC).

[Garwood v. Garwood – Matrimonial Court, 28 Apr 00 (MGF/unrep)].

**ROAD TRAFFIC AND PUBLIC TRANSPORT**

**Driver licensing**

34. **Projet de Loi:** The Motor Taxation and Licensing (Guernsey) (Amendment) Law, 2000. - Amends the Motor Taxation and Licensing (Guernsey) Law, 1987 by enabling the Traffic Committee by regulation to provide for the categories of driving licences; the fees chargeable for driving licences and driving tests; the conditions attaching to driving licences; and the age requirements and staging requirements for the grant of driving licences. Also debars a person disqualified from driving from applying for a driving licence until the last month (in the case of an application for a provisional driving licence) or the last two months (in the case of an application for a full driving licence) of the period of disqualification.

Approved by the States 23.2.00. Awaiting Royal Sanction.

35. **Ordinance:** The Driving Tests and Driving Licences (Increase of Fees) Ordinance, 2000. – Increases the fees for public service vehicles permits, driving tests and driving licences.

In force 1.5.00. (No. III of 2000).

## **SOCIAL SECURITY**

### **Social insurance**

36. **Projet de Loi: The Social Insurance (Guernsey) (Amendment) Law, 2000.** - Effects minor amendments to the Social Insurance (Guernsey) Law, 1978. Removes the rôle of the States Education Council and Labour and Welfare Committee in notifying available employment to unemployed persons (and removes other otiose references to that Committee); amends section 111 which relates to the disclosure of information; and changes the definition of "accident" for the purpose of benefit for industrial injuries.

Approved by the States 28.6.00. Awaiting Royal Sanction.

### **Supplementary benefit**

37. **Ordinance: The Supplementary Benefit (Implementation) (Amendment) Ordinance, 2000.** - Amends the Supplementary Benefit (Implementation) Ordinance, 1971 by providing that in calculating, for the purposes of supplementary benefit, the resources of a person residing in a residential home, a nursing home or the Guernsey Cheshire Home there shall be disregarded any payment made by a third party to the home on behalf of that person in respect of the home's fees.

In force 2.6.00. (No. IV of 2000).

## **TRADE AND INDUSTRY**

### **Electronic transactions**

38. **Projet de Loi: The Electronic Transactions (Guernsey) Law, 2000.** – Establishes an appropriate legal environment to facilitate electronic business and commerce, primarily by ensuring that electronic and physical forms of information and communications have similar legal status. It is intended that the proposed legal infrastructure should retain the flexibility of traditional methods whilst encompassing modern technology and its future development so as to engender the necessary certainty, security and trust to facilitate electronic business and commerce.

Sections 1 to 7 provide that information, contractual provisions and evidence thereof, declarations, statements etc, signatures etc and documents etc are not to be denied legal effect, validity, enforceability or admissibility solely because they are in electronic form nor are they to be denied legal effect solely because information is referred to, but not contained in, other information in electronic form. These sections do not prevent denial of legal effect for other reasons.

Sections 8 and 9 deal with requirements of form. Section 8 adapts legal requirements concerning the making, attestation and retention of documents so as to accommodate documents in electronic form; permits the giving, producing, serving, sending or delivering of information or documents in electronic form; and clarifies that those provisions apply

whether the legal requirement is in the form of an obligation, or results from consequences imposed by law if it is not met. Section 9 provides that (subject to a power for the States of Guernsey to prescribe under sub-section (2) by Ordinance circumstances in which a person is obliged to do so) section 8(2) does not compel anybody to accept anything in electronic form or by electronic means; the effect of section 9(3) is to ensure that this does not apply to something which is not in itself in electronic form but has been wholly or partly created by something else in such form.

Sections 10 and 11 deal with conditions and exemptions. Section 10 empowers the States Advisory and Finance Committee to attach conditions to the operation of the Law in specified respects by making an Order to that effect. Such Orders must be laid before, and may be annulled by, the States. Section 11 empowers the Committee to exclude specified classes of transactions, persons, matters or things from specified provisions which would otherwise apply.

Section 12 empowers the States by Ordinance to make provision in respect of the deemed time and place of service, productions etc of information or documents in electronic form or by electronic means. Section 13 empowers the States by Ordinance to make provision in respect of the sending and receipt of information by electronic means; and also as to the circumstances in which people are to be bound by electronically constituted or communicated information and how they may indicate intention not to be so bound. Section 14 empowers the States to provide by Ordinance for the legal effect of actions carried out by means of an electronic agent, which means something that automatically initiates action in response to electronic information without review or action by a natural person. Section 14(2) gives examples of the provision which may be made by such an Ordinance, such as the circumstances in which legal consequences (including the creation of a contract) will be produced by the actions of an electronic agent, or by the interaction of an electronic agent with a natural person, with information in electronic form, or with other electronic agents.

Sections 15-18 are intended to clarify the liability of those who provide services such as storage and onward transmission of information for others. Sections 15 and 16 deal with "service providers" as defined by section 17. By section 15(1) such service providers are not to be subject to any criminal liability, or liability to damages, arising out of information which they have transmitted, provided they establish that they took no active rôle in the transmission. Section 15(2) makes it clear that this does not affect the powers of Courts and other authorities to impose requirements pursuant to other legal instruments or principles. Section 16 extends this immunity (subject to the same caveat) to cover temporary storage by service providers when undertaken for the sole purpose of improving the efficiency of their transmission services and where they can establish the criteria specified in subsection (1). Section 17 defines a "service provider". Section 18 clarifies the liability of hosts, defined as any person who provides a service of storing information provided by another in electronic form. A host is not subject to criminal liability in respect of or arising out of information which he so stores if he establishes either that he had no actual knowledge that the information or any activity arising out of its storage was unlawful, or that upon obtaining such knowledge he acted expeditiously to remove or disable access to the information. Subsection (2) makes similar provision as respects liability for damages save that, in order to fulfil the "no knowledge" limb of the exemption test the host must also establish that he was not aware of facts or circumstances from which the unlawfulness of the information or

activity was apparent. Subsections (1) and (2) do not apply where the stored information was provided by somebody acting under the authority or control of the host; and those provisions apply whether or not the host provides access for other persons to the stored information. There is a saving for the powers of Courts and other authorities in the same terms as sections 15(2) and 16(2). A person is not treated as a "host" by reason only of storing for another person information which is not itself in electronic form but in the production of which electronic means have been employed.

Section 19 declares for the avoidance of doubt that it is not unlawful for a person to use any means of encryption or decryption for any lawful purpose solely by reference to the bit size or other measure of strength of the means of encryption or decryption. This does not affect any enactment or rule of law rendering an act or omission unlawful for any other reason nor does it prejudice the operation of the import and export control legislation.

Section 20 replaces the section of the Interpretation (Guernsey) Law 1948 dealing with the meaning of "writing" so as to differentiate between new and existing enactments so that, unless the contrary intention appears, reference to writing in new enactments will be taken to include all manner of "information" as defined. A further amendment provides a general definition, unless the contrary intention appears, of the phrase "physical writing" as writing which can be perceived directly by the human senses.

Approved by the States 28.6.00. Awaiting Royal Sanction.

## **TRUSTS**

### **Applications under Trusts (Guernsey) Law, 1989 – "Beddoe" application – procedure**

39. In two similar but separate cases in which P instituted proceedings against D, the trustees of their respective trusts, D applied, *inter alia*, for general permission to defend the substantive proceedings until discovery and inspection of documents had been completed, for liberty to bring application for directions concerning their future involvement with the trusts and to be indemnified on a full indemnity basis out of the assets of the Trusts in respect of those applications and the subsequent proceedings up to and including discovery. The question arose how this "Beddoe" application should be determined. HELD by the Deputy Bailiff, granting the applications:
- (1) In the circumstances of the present cases it was appropriate that he should hear the applications without Jurats. The issues were a mixture of law and procedure and he did not have to reach any definitive view on the facts. However that was not to say that in other cases it would necessarily be right for him to sit alone.
  - (2) Having considered the authorities referred to in the White Book, paragraph 85/2/2, where a Trustee found himself compelled to ask for directions whether or not certain proceedings should be taken against certain parties, those parties should not be present when the matter was debated in Chambers; accordingly, D's application should be made *ex parte*, although in each case P was given a copy of DD's affidavit, appropriately edited, and given the opportunity of submitting a written statement.

- (3) Following Midland Bank Trust Co. Ltd. v Green (1978) 3 All ER p. 555, the “aura of confidentiality” which surrounded such an application meant that a fully reasoned judgment in open court should not be given. He would limit his explanation for his conclusion in each case to saying that he must act as though he were an adviser to the Trustees and that he was satisfied that, at least until discovery and inspection, in order to preserve the interests of a third party and to protect the position of D, the application should be granted.
- (4) Full indemnity costs would be granted from the date the Beddoe application was originally filed until the completion of discovery and inspection. (ACKD).

[Heeley v. Chick & Elder; Brown v. Orion Trust Ltd – Ordinary Court 14.4.00 (AMM/MGAD)].

## **WILLS AND SUCCESSION**

### **Personalty – légitime - lifetime gifts – presumption of advancement**

40. P was the eldest daughter of K. K, who was Guernsey domiciled and resident, made a will of personalty in 1996. K died shortly after making the will. In the will, K gave the disposable share of her estate to D, the younger of her two daughters. In addition to leaving the disposable share to D, it emerged that K had made a number of substantial cash payments to D during her lifetime. A dispute arose between the daughters as to whether these payments should be taken into account in valuing K’s estate for the purposes of légitime. The Court was asked to decide this issue as a preliminary point of law. HELD by the Bailiff, who found in P’s favour -
- (i) Book 6 of Terrien makes it clear that there is a rule that one heir cannot be preferred to another. This principle is more clearly restated in Article 434 of the Coutume Reformée.
- (ii) Under the law of Guernsey there is still a presumption that payments made to one child by way of advancement should be brought into account when calculating the value of the estate of the deceased for the purposes of examining the amount of légitime. (deVGC).

[In the matter of an application by the Executor of Lily Kurzschinkel, deceased – Funk v Krombach – Ordinary Court 16.3.00 (PAA/STJAR)].

## ALDERNEY

### CHILDREN AND YOUNG PERSONS

41. Ordinance: The Alderney (Application of Legislation) (Child Protection) Ordinance, 2000. – Extends to Alderney, subject to certain exceptions, adaptations and modifications, the Child Protection (Guernsey) Law, 1972 (which relates, inter alia, to foster children and regulation of nurseries and child-minders).

In force 1.4.00. (No. I of 2000).

### FISHING

42. Ordinance: The Fishing (Conservation of Small Cetaceans) (Alderney) Ordinance, 2000. - Prohibits, in accordance with obligations imposed by the UN Agreement on the Conservation of Small Cetaceans in the Baltic and North Seas, the landing, taking, killing, etc, of small cetaceans (meaning toothed whales *Odontoceti* other than the sperm whale *Physeter macrocephalus*) and basking sharks. There are exceptions, including (for example) acts done under licence for the purpose of scientific investigation.

Ordinance of the States of Alderney of 1.3.00. In force 1.3.00.

### GAMBLING

43. Order in Council: The Gambling (Alderney) Law, 1999. – (See 27.GLJ.105).

Registered 17.1.00. (No. XIV of 1999). In force on 1.5.00: The Gambling (Alderney) Law 1999 (Commencement) Ordinance, 2000 (Ordinance of the States of Alderney of 1.3.00).

44. Ordinance: The Gambling (Betting) (Amendment) (Alderney) Ordinance, 2000. – Inter alia, increases to four the maximum number of electronic betting centre licences as may be in force at any one time.

Ordinance of the States of Alderney of 1.3.00. In force 2.3.00.

45. Ordinance: The Gambling (Betting) (Transfer of Functions) (Alderney) Ordinance, 2000. – Transfers the functions of the Policy and Finance Committee under the Gambling (Betting) (Alderney) Ordinance, 1997 to the Alderney Gambling Control Commission.

Ordinance of the States of Alderney of 7.6.00. In force 7.6.00.

## **GOVERNMENT OF ALDERNEY**

### **Amending legislation**

46. Order in Council: The Government of Alderney (Amendment) Law, 2000. – (See 27.GLJ.107).  
Royal Sanction 15.3.00. Registered 11.4.00. In force as to the greater part on 11.4.00; as to the remainder on a day to be appointed by Ordinance. (No. I of 2000).

### **HOUSING**

47. Ordinance: The Housing (Exemptions) (Alderney) (No. 3) Ordinance, 2000. - Exempts Philip Courtney and Jennifer Bax from the provisions of the Housing (Control of Occupation and Development) (Alderney) Law, 1994 thus enabling the Building and Development Control Committee to grant development permission for the construction by those persons of the dwellings specified in the Ordinance.

Ordinance of the States of Alderney of 1.3.00. In force 1.3.00.

48. Ordinance: The Housing (Exemptions) (Alderney) (No. 2) Ordinance, 2000. - Exempts George William Baron and Margery Kathleen Baron from the provisions of the Housing (Control of Occupation and Development) (Alderney) Law, 1994 thus enabling the Building and Development Control Committee to grant development permission for the construction by those persons of the dwellings specified in the Ordinance.

Ordinance of the States of Alderney of 12.4.00. In force 12.4.00.

### **PRACTICE AND PROCEDURE (CIVIL)**

#### **Powers of Court of Alderney to regulate its own procedure – Powers to order interrogatories – Powers to order admission of facts.**

49. On 16 January 1990, A was seriously injured in an accident at work and brought proceedings against his then employer by way of a summons issued on or about 6 January 1993. The insurers of R were involved and matters progressed slowly and included an interlocutory appeal to the Guernsey Court of Appeal (see 18.GLJ.70). The matter eventually returned to the Court of Alderney and on 14 October 1999 the Court of Alderney considered an application from A to serve interrogatories on R and to serve a notice to admit facts. The Court of Alderney does not have Rules of Civil Procedure although it has the statutory power to make them. After hearing submissions from both Advocates the Court ruled that it had no power to order the service of interrogatories and therefore could not grant the application under the terms sought. It also expressed its concern about the delay in bringing the case forward. A appealed against the refusal to grant the application, the grounds for appeal being that the Court of Alderney had erred in law in finding that it did not have the power to make the orders sought, that it had that power by reason of section 17(2) of the Government of Alderney Law, 1987, and that it ought to have exercised its power to grant the orders

sought. HELD by the Deputy Bailiff, the central question was whether the Court, in the absence of any specifically enacted Rule, could in any particular case order certain procedures to be followed. By Section 17(2) the Court had the ability to make Rules and also the ability to regulate its own procedure. For example, according to Hoffman JA in Cherub Investments Limited v. The Channel Islands Aero Club (Guernsey) Limited (Appeal No. 11 (Civil) 1982), the existence of Rules did not prevent a departure from them if the interests of justice so require. Accordingly the Court of Alderney had the power to make the orders sought. In view of the way in which matters had developed it was not necessary for the Royal Court to deal further with the notice to admit facts. Because of changes in the pleadings, the matter of interrogatories might need to be addressed later in the Court of Alderney. If defending proceedings in the United Kingdom or Guernsey D, in reality a large insurance company, would have to answer interrogatories. Why should P be in a worse position if he resides in Alderney? If the Court of Alderney had to address the question of interrogatories it should be guided by Rule 38 of the Royal Court Civil Rules, 1989 and by principles found in Supreme Court Practice 1999. (ACKD).

(Per curiam: (i) the absence of any specific rules relating to a specific subject matter did not preclude the Court [of Alderney] from making appropriate orders or giving appropriate directions on such matter. The Court [of Alderney] should have and has the power to do so; (ii) in general terms, the Court of Alderney did have the power to regulate its own procedure in any particular case to the effect that litigation before it should proceed by its order or direction in a specific way; and (iii) the Court of Alderney had an inherent power in principle as master of its own procedure to make orders such as those requested even if section 17(2) of The Government of Alderney Law, 1987 had not been enacted, the Court having unlimited jurisdiction in civil cases.)

[Laughton v. Main – Ordinary Court 14.01.00 (PTRF/JPG)].

### **ROAD TRAFFIC**

50. Ordinance: The Speed Trials (Alderney) Ordinance, 2000. - Closes Tourgis Hill and the Whitegates/Mannez Lighthouse road to public traffic, and disapplies certain road traffic rules (such as speed limits), for the purposes of the September speed trials.

Ordinance of the States of Alderney of 12.4.00.

## **SARK**

### **COURTS**

#### **Court of the Sénéchal – jurisdiction – accident in Sark – forum conveniens – jurisdiction of Royal Court**

51. See Matthews v. Monaghan & R G Falla Ltd; Woodward v. R G Falla Ltd, paragraph 8.

## EUROPEAN COMMUNITIES

52. Ordinance: The European Communities (Euro: Miscellaneous Provisions) (Sark) Ordinance, 2000. - Implements in Sark domestic law the provisions of Articles 2 and 3 of Council Regulation (EC) 1103/97 of the 17th June, 1997 on certain provisions relating to the introduction of the euro. The provisions of Articles 2 and 3 of the Regulation are reproduced in the Schedule to the Ordinance. Essentially, as from 1 January 1999, all references in legal instruments to the ECU are replaced by references to the euro at a rate of one euro to one ECU; and the introduction of the euro is not to have the effect of altering any term of, or excusing performance under, any legal instrument.

Approved by the Chief Pleas 19.1.00. In force 19.1.00.

## FISHING

53. Ordinance: The Fishing (Conservation of Small Cetaceans) (Sark) Ordinance, 2000. - Prohibits, in accordance with obligations imposed by the UN Agreement on the Conservation of Small Cetaceans in the Baltic and North Seas, the landing, taking, killing, etc, of small cetaceans (meaning toothed whales *Odontoceti* other than the sperm whale *Physeter macrocephalus*) and basking sharks. There are exceptions, including (for example) acts done under licence for the purpose of scientific investigation.

Approved by the Chief Pleas 19.1.00. In force 19.1.00.

54. Ordinance: The Fishing (Sark) (Amendment) Ordinance, 2000. - Amends the Fishing (Sark) Ordinance, 1996 by substituting larger minimum sizes for skate (ray), lady crabs, spider crabs and lobsters.

Approved by the Chief Pleas 19.1.00. In force 19.1.00.

## LAND LAW

### Succession – reform

55. Order in Council: The Real Property (Succession) (Sark) Law 1999. – (See 27.GLJ.129).

Registered 17.1.00. In force on 19.1.00: Real Property (Succession) (Sark) (Amendment) Law 1999 (Commencement) Ordinance 2000. (No. XIII of 1999).

## PRACTICE AND PROCEDURE (CIVIL)

### Appeal from Court of S n schal – costs – full indemnity costs – whether appropriate

56. See De Carteret v. Surcouf, paragraph 27.

## GUERNSEY STATUTORY INSTRUMENTS

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

Title	Date made	Coming into force	No.
The Identification of Bovine Animals Order, 2000	21.1.00	28.1.00	1.
The Rabies(Amendment) Order, 2000	10.3.00	13.3.00	2.
The Banking Supervision (Bailiwick of Guernsey) (Amendment) Regulations 2000 (see paragraph 18)	29.3.00	31.3.00	3.
The Social Insurance (Claims and Payments) (Amendment) Regulations, 2000	30.3.00	3.4.00	4.
The Social Insurance (Classification) (Amendment) Regulations, 2000	30.3.00	1.4.00	5.
The Post Office (Overseas Parcel Post) (Amendment) Order, 2000	19.4.00	1.5.00	6.
The Post Office (Overseas Letter Post) (Amendment) Order, 2000	19.4.00	1.5.00	7.
The Post Office (Inland Post) (Amendment) Order, 2000	19.4.00	1.5.00	8.
The Rabies (Amendment) (No. 2) Order, 2000	15.5.00	15.5.00	9.
The Rent Control (Variation) Order, 2000	23.5.00	1.7.00	10.
The Parking Places (Amendment) Order, 2000	2.5.00	29.5.00	11.
The Import and Export of Goods (Control) (Guernsey) (Amendment) Order, 2000	30.5.00	31.5.00	12.
The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Amendment) Regulations, 2000	30.5.00	5.6.00	13.

## UNITED KINGDOM STATUTORY INSTRUMENTS

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

	<u>S I Number</u>
The Carriage by Air (Sterling Equivalents) Order, 1999	2881
The Afghanistan (United Nations Sanctions) (Channel Islands) (Amendment) Order, 1999	3317
The Wireless Telegraphy (Television Licence Fees) (Amendment) Regulations, 2000	630
The Chemical Weapons Act 1996 (Guernsey) Order, 2000	743

# JUDGMENTS OF THE GUERNSEY COURT OF APPEAL

59. [CRIMINAL DIVISION – APPEAL NO. 230]

A

5th APRIL, 2000

**THE LAW OFFICERS OF THE CROWN**

v.

**PAUL RIBEYRE**

B

Before: SOUTHWELL (PRESIDENT), GLOSTER AND NUTTING, J.J.A

## Sentence – drug trafficking offences– confiscation orders

See paragraph 11.

C

C.M. Fooks for the Appellant

P. Robey for the Crown

THE PRESIDENT: Paul Ribeyre was arrested on 31st August 1997, in connection with an importation into Guernsey of a Class B prohibited drug, cannabis resin. He was charged with two counts of being concerned in the fraudulent evasion of the prohibition on the importation of such cannabis resin. On 27th February 1998 he pleaded guilty to both counts. Two other men were also involved in the importations.

D

On 30th June 1998, the matter came before the Royal Court. A lengthy drug trafficking statement had been prepared in respect of Ribeyre. Crown Advocate, Advocate Robey, indicated that the contents of this statement were disputed, and that the issues raised by the statement had to be resolved before the Royal Court could proceed to sentence Ribeyre, in accordance with Section 1(2) of the Drug Trafficking Offences (Bailiwick of Guernsey) Law 1988 as amended ("the 1988 Law").

E

The matter came next before the Royal Court on 19th August 1998. Ribeyre was represented by Advocate Jason Morgan. It was accepted that the offences to which he had pleaded guilty were drug trafficking offences within the definition of Section 26(1) of the 1988 Law. The Court then turned to the three questions to be answered under the 1988 Law:-

1. Had Ribeyre benefited from drug trafficking?
2. What was the value of the proceeds of drug trafficking received by Ribeyre?
3. What was the amount which might be realised, and which would be the amount to be recovered under a confiscation order?

F

These questions arise out of the first few sections of the 1988 Law.

G

Under Section 1(3) a person has benefited from drug trafficking if he-

A "... has at any time ... received any payment or other reward in connection with drug trafficking carried on by him or another..."

If he has so benefited, under Section 1(4)-

"... the Court shall ... determine in accordance with Section 4 of" [the 1988 Law] "the amount to be recovered..."

B The amount to be recovered is then ordered to be paid; in other words a "confiscation order" is made in that amount (Ss 1(5) and 1(7)).

Under Section 2(1)-

"(a) any payments or other rewards received by ..." a defendant "... in connection with drug trafficking carried on by him or another are his proceeds of drug trafficking."

C For the purpose of determining whether the defendant has benefited from drug trafficking, and if he has, of assessing the value of his proceeds of drug trafficking, S.2(2) permits the Royal Court to make any of the assumptions in S.2(3), except to the extent that any are shown to be incorrect. Such assumptions include the following:-

"(a) that any property appearing to the Court-

D (i) to have been held by him at any time since his conviction, or

(ii) to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him,

was received by him, at the earliest time at which he appears to the Court to have held it, as a payment or reward in connection with drug trafficking carried on by him,

E (b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him..."

F Under S.3(1) where H.M. Procureur tenders to the Royal Court a statement (a drug trafficking statement) as to any matters relevant to the determination whether the defendant has benefited from drug trafficking or to the assessment of the value of his proceeds of drug trafficking, and the defendant accepts to any extent any allegation in the statement, then the Court may, for the purposes of such determination and assessment, treat his acceptance as conclusive of the matters to which his acceptance relates.

Under S.3(2), once satisfied that a copy of the drug trafficking statement has been served on the defendant-

G

"the Court may require the defendant to indicate to what extent he accepts each allegation in the statement and, so far as he does not accept any such allegation, to indicate any matters he proposes to rely on."

A

If the defendant fails to comply with a requirement under section 3(2) he may be treated for the purposes of this section as accepting every allegation in the statement apart from (a) those in respect of which he has complied with the requirement, and

"(b) any allegation that he has benefited from drug trafficking or that any payment or other reward was received by him in connection with drug trafficking carried on by him or another."

B

Acceptance of an allegation may be orally before the Court or in writing (S.3(5)).

Section 4 of the 1988 Law provides as follows:-

"4 (1) Subject to subsection (3) of this section, the amount to be recovered in the defendant's case under the confiscation order shall be the amount the Royal Court assesses to be the value of the defendant's proceeds of drug trafficking.

C

(2) If the Court is satisfied as to any matter relevant for determining the amount that might be realised at the time the confiscation order is made (whether by an acceptance under section 3 of this Law or otherwise), the Court may issue a certificate giving the Court's opinion as to the matters concerned and shall do so if satisfied as mentioned in subsection (3) of this section.

D

(3) If the Court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the Court assesses to be the value of his proceeds of drug trafficking, the amount to be recovered in the defendant's case under the confiscation order shall be the amount appearing to the Court to be the amount that might be so realised."

E

Under S.6 the Court is empowered to impose a consecutive prison sentence to enforce an order for payment under S.1 (a confiscation order).

Under S.5 of the Drug Trafficking (Amendment)(Bailiwick of Guernsey) Law 1992 ("the 1992 Law"), where the amount ordered to be paid by a confiscation order is less than the amount assessed to be the value of his proceeds of drug trafficking, if the Royal Court is satisfied that the amount that might be realised in the case of the defendant is greater than the amount taken into account when making the confiscation order (e.g. the amount has subsequently increased), the Court shall issue a certificate to that effect, and may substitute a greater amount (but not more than the amount assessed to be the value of his proceeds) and may increase the term of imprisonment under S.6 of the 1988 Law.

F

The purpose of the adjournment from 30th June 1998 to 19th August 1998 in this case was to enable Ribeyre and his Advocate to decide whether or not to dispute the drug trafficking statement. That is made clear on page 5 of the transcript. The statement was a long and detailed one. The main elements in it were these:-

G

- A (1) From 1st January 1996 to 31st August 1997 Ribeyre's expenditure had been £11,864.13 higher than his income, and no legitimate source of funds to meet such expenditure had been identified.
- (2) On the first importation on 8th August 1997 Ribeyre's benefit from drug trafficking was to be measured by the resale value in Guernsey of the cannabis resin imported on his behalf of between £8,820 and £13,608.
- B (3) On the second importation on 31st August 1997 on behalf of Ribeyre, Ribeyre's benefit from drug trafficking was to be measured by the purchase price in England of between £10,738 and £12,348 plus the cost of travel to Guernsey of £216.
- (4) Unexplained cash, of which £4,260 was found at his Brighton address.
- (5) A number of vehicles bought by Ribeyre in Guernsey and in the United Kingdom since January 1996 for which he spent a total of £9,560, and which were valued on the statement at £9,910.
- C (6) Total liabilities of £790.
- (7) Ribeyre had benefited from drug trafficking and the value of his proceeds was a total of £53,765.99.
- D (8) The amount that might be realised under a confiscation order was £13,380 (a sum arrived at by taking the cash, plus the value of the vehicles, less his liabilities).

On 19th August 1998, once it was accepted that the offences were drug trafficking offences, H.M. Comptroller called a senior officer to prove the drug trafficking statement, Mr. Mark de Garis. Mr. de Garis reduced the value of the vehicles in his evidence by £1,000, and the amount that might be realised was reduced to £12,380.

E Advocate Jason Morgan indicated that he did not wish to question the witness.

The next matter considered was what the proceeds of Ribeyre's drug trafficking were. The proceeds were put at £53,765.99. Mr. Morgan indicated that he was not calling any evidence to challenge the statement, and that on this basis he had to accept that the proceeds were at that figure. The Deputy Bailiff pointed out to Mr. Morgan that the purpose of the finding, as to what the proceeds were, was to enable the Court to revisit the confiscation order if at a later stage other assets were found in Ribeyre's hands, and Mr. Morgan agreed.

F

The Jurats found that the proceeds were as already stated.

H.M. Comptroller then argued that the realisable amount was £12,380 and that a confiscation order should be made in that amount. This sum included the reduced figure for the value of the vehicles.

G Advocate Morgan submitted that the vehicles were not realisable, because their condition and whereabouts were not known to Ribeyre, and accordingly the only realisable asset was the cash of

£4,260. Mr. Morgan accepted that Ribeyre had taken no steps to identify where the vehicles were or to dispose of them. Mr. de Garis was called again as a witness to explain the position as to the vehicles and their value. Advocate Morgan again did not cross-examine Mr. de Garis.

A

The Deputy Bailiff gave directions to the Jurats and they accepted Mr. de Garis' valuation of the cars, and the realisable value for the confiscation order of £12,380.

No judgment was delivered in respect of the drug trafficking and these matters were dealt with relatively informally. In future cases involving drug trafficking it may be thought wiser for a formal judgment to be given in respect of the drug trafficking orders.

B

After Ribeyre's antecedent history had been given, and after Advocate Morgan's speech in mitigation, there was a fairly long discussion between the Deputy Bailiff and Her Majesty's Comptroller as to the relationship between what Mr. Morgan had said in mitigation and the nature of the drug trafficking operation in which Mr. Ribeyre had been involved.

When the Deputy Bailiff finally stated the Royal Court's conclusions on sentencing, these were-

C

- (1) 10 years' imprisonment concurrent on each count.
- (2) A confiscation order of the cash of £4,260.
- (3) A further confiscation order for £8,120 in respect of the vehicles, and if that sum was not paid, 6 months imprisonment in default consecutive to the 10 years imprisonment.

D

Ribeyre appealed against sentence, being represented on the appeal by Advocate Riddiford. The Court of Appeal on 15th March 1999 reduced his sentence from 10 years to 8 years concurrent on each count. The last sentence of the Court of Appeal judgment was:-

"The alternative sentence of 6 months imprisonment in relation to the realisation of motor car assets has not been raised before this Court on behalf of Ribeyre and is not affected."

E

In fact, no submissions were made by Advocate Riddiford on behalf of Ribeyre in relation to the amount of the proceeds, or the realisable value of the vehicles, or the prison sentence in lieu.

On 19th April 1999 Ribeyre wrote to Her Majesty's Greffier, Mr. K.H. Tough, complaining that no such submissions had been made, and asking for "an appeal hearing out of time in respect of the 6 month term of imprisonment."

F

As a result, Advocate Fooks was engaged to represent Ribeyre. Leave to appeal out of time was refused by me as a single judge, so that the question of leave could be considered by the full Court.

What Ribeyre sought to appeal out of time in his written grounds of appeal were the confiscation orders and the sentence in default only. The determination of the proceeds of drug trafficking at £53,765.99 was not then challenged. But in the course of her oral submissions Miss Fooks did seek to challenge this determination as well.

G

The application for leave raised these main points; it was alleged that-

- A (1) there was no benefit arising from either of the drug importations, and the figures in those respects should not have been included;
- (2) the figures relating to travel were disputed;
- (3) the value of the vehicles was not adequately established, and should not have been included in his realisable assets at all, or at any rate at so high a figure;
- B (4) the prosecution had failed to establish the relevant facts to the appropriate standard of proof (which is the criminal standard), despite the burden of proof being on the prosecution.

Ribeyre's application for leave faces a number of major difficulties:

- C (1) At the trial his counsel, Advocate Morgan, accepted the drug trafficking statement, subject to the points argued in relation to the vehicles.
- (2) No attempt was made to challenge the figures in the statement, either by denying that the figures were correct, or by offering evidence to the contrary effect. So Ribeyre could be treated under S.3(3) of the 1988 Law as accepting every allegation in the statement, except any allegation that he had benefited from drug trafficking or that any payment or other reward was received by him. Further, the assumptions in S.2(2) and (3) of the 1988 Law could validly be made against him.
- D (3) In order to have any chance of successfully appealing it would be necessary for Ribeyre (a) to produce in the form at least of a witness statement or statements the evidence challenging the drug trafficking statement which he wished the Court to consider, and (b) to deal adequately with why he thought Advocate Morgan had not challenged the drug trafficking statement at trial.
- E (4) He would also have to deal with the express decision apparently conveyed to the Court of Appeal by Advocate Riddiford that he did not wish to raise any challenge on appeal to the six month prison sentence in lieu of payment.
- (5) He would thus have had to explain to this Court's satisfaction how it had come about, both at trial and on appeal, that his Counsel had presented no challenge and no evidence.
- F On the hearing of his application for leave to appeal out of time, he offered through Miss Fooks no evidence either as to why the drug trafficking statement was wrong in any respect or as to why no challenge had been made by his Counsel at trial or on appeal.

This Court could not consider an application of this kind so long out of time without seeing the proposed evidence challenging the drug trafficking statement, and either the proposed evidence or a full explanation of the circumstances in which Ribeyre's Counsel at trial did not put forward any such challenge, and his Counsel on the appeal similarly put forward no such challenge.

Miss Fooks towards the end of her submissions, appreciating that she lacked the necessary material, asked for an adjournment of the hearing to enable evidence to be assembled covering these various aspects.

A

This Court has come to the conclusion that Ribeyre has had ample opportunity on the previous appeal to raise all these matters if he and his then Counsel thought that an appropriate course. Even assuming that these matters were not raised at first instance because of a misunderstanding between Ribeyre and his then Counsel (a most unlikely event, given that he and his Counsel were allowed six weeks specifically for the purpose of deciding whether or not to challenge the drug trafficking statement), it is not credible that on appeal Ribeyre and his Counsel did not consider together whether to challenge the statement, or the conclusions of the Royal Court including the sentence of six months imprisonment in lieu of payment. If this point had not been mentioned in the Court of Appeal, there might have been some slight possibility of a misunderstanding having prevented the point being raised on appeal (though that would be hardly credible). But the point was specifically mentioned in the Court of Appeal as one which Ribeyre's Counsel was specifically not taking. There cannot, therefore, have been any misunderstanding.

B

In the judgment of this Court it would not be appropriate to give a third opportunity for points to be canvassed which could and should have been raised before the Royal Court, or before the Court of Appeal on the appeal against sentence. Leave to appeal out of time is accordingly refused.

C

60. [CRIMINAL DIVISION – APPEAL NO. 237]

D

17th JANUARY, 2000

**THE LAW OFFICERS OF THE CROWN**

**v.**

**KRIS HOLLIDAY**

E

Before: SOUTHWELL (PRESIDENT), CLARKE AND SUMPTION, JJ.A

**Evidence - accomplice evidence – corroboration - conduct of Advocate at trial**

See paragraph 16.

M.A. Torode for the Appellant

P. Robey for the Crown

F

THE PRESIDENT: The judgment of this Court is the judgment of the whole Court. It has, however, been prepared by each of the three judges who will read that part which they have prepared and agreed with their colleagues.

In this case Mr. Holliday was charged with being knowingly concerned between 1st and 12th July 1998 in the fraudulent evasion of the prohibition on the importation of cannabis resin, a controlled

G

A drug of Class B (such prohibition being imposed by Section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended) contrary to the relevant provisions of the Customs and Excise (General Provisions)(Bailiwick of Guernsey) Law 1972, as amended.

On 11th July 1998 Miss Nicola Cole was arrested as she left the Condor Ferry from Jersey, carrying a bag which contained, wrapped in a towel, a clear plastic bag containing pieces of cannabis resin, weighing in total 247 grams, and having the potential Guernsey street value of between about £1,725 and £2,218.

B Initially she claimed to have been acting alone. But in the course of her interviews with Customs Officers she soon implicated Mr. Holliday as having been the person who had given her the drugs in Jersey to bring to Guernsey and to return to him in Guernsey once clear of the ferry port. Mr. Holliday had been a passenger on the same ferry from Jersey as Miss Cole. He was also arrested in the Lower Vauvert in St. Peter Port, the same afternoon.

C The case against Mr. Holliday depended almost entirely on the evidence of Miss Cole. There were old style committal proceedings in the Magistrate's Court in which Miss Cole was extensively cross-examined by Advocate Peter Ferbrache, representing Mr. Holliday. Mr. Holliday was committed for trial in the Royal Court. The trial took place between 18th and 22nd January 1999 before the Deputy Bailiff sitting with a bench of Jurats, and the Jurats delivered a unanimous verdict of guilty. Mr. Holliday was sentenced to a term of imprisonment and his appeal against sentence has been withdrawn. He now appeals against his conviction.

D It is not necessary for this Court to set out fully the history of the relationship between Miss Cole and Mr. Holliday, as it appeared from her evidence. In brief, they had first met in Egypt in February 1996, and then again in Jersey in April 1996. There had been quite extensive correspondence from then on, principally letters from Miss Cole in which she appeared to indicate that there was a close relationship between them and almost certainly a sexual relationship. They met again in early June 1998 in Jersey. Mr. Holliday returned to Jersey in late June 1998, and was due to leave on about 12th July 1998. He stayed in Jersey at the Pine View Guesthouse run by Mrs. Colatoni.

E On Thursday 9th July 1998, Miss Cole found herself without accommodation. She appeared to have arranged to share Mr. Holliday's room in the guesthouse for that night and the night of Friday 10th July. She alleged that on the evening of Thursday 9th July 1998 Mr. Holliday asked her to take the cannabis to Guernsey for him on Saturday 11th July, and she agreed to do this, being at that time embarrassed by some debts.

F It seems that though they were together on the evening of Friday 10th July, the subject was either not discussed further or only briefly touched on. Miss Cole went to bed before Mr. Holliday returned and was asleep when he returned.

On the morning of Saturday 11th July 1998 Mr. Holliday rose and breakfasted first. She claimed that he put the drugs in the bag for her to bring to Guernsey, and he told her that he would be on the same ferry but she was not to acknowledge him. She took the drugs with her on the ferry and was arrested when she left the ferry, as already described.

G At the close of the Prosecution's case, in the course of the trial, Mr. Ferbrache submitted that the Deputy Bailiff should hold that there was no case to answer, because Miss Cole's evidence was

riddled with inconsistencies, she accepted that she had told lies, and her evidence was so intrinsically lacking in credibility that it ought not be put to the Jurats. This submission, which was put with care and skill, was rejected by the Deputy Bailiff. Mr. Holliday then elected not to give evidence as he was fully entitled to elect. He was convicted as already stated.

A

Advocate Torode appeared for Mr. Holliday on the appeal against conviction. He took four fundamental points which were set out clearly and succinctly in his written skeleton argument and briefly and cogently argued in his oral submissions.

The first point was in a sense a reiteration of the submission that there was no case to answer, although there was no formal appeal against the Deputy Bailiff's ruling that there was a case to answer. Mr. Torode submitted that the evidence of Miss Cole was not intrinsically credible, and drew attention to a large number of inconsistencies in her evidence, to lies which she admitted having told, and generally to many aspects on which her evidence was suspect.

B

The Deputy Bailiff had directed the Jurats that the evidence of Miss Cole was that of an accomplice, and that as the evidence of an accomplice it should be most carefully assessed before being accepted (if it was accepted) by the Jurats. He gave directions as to corroboration in the form usual before the decision of the Privy Council in Attorney General of Hong Kong v. Wong Muk Ping [1987] 1 AC 501. This involved two stages. First, the Jurats were to consider whether Miss Cole's evidence was by itself capable of being credible, and secondly, only if the Jurats so decided, were they to go on to consider the matters said to amount to corroboration. The decision in the Hong Kong case was that there should be only one stage, involving an assessment of the accomplice's evidence in the light of the admissible corroborative matters for its credibility or otherwise. The Deputy Bailiff's direction was more favourable to Mr. Holliday than one in accordance with the Hong Kong case, and so it is unnecessary in the instant case to decide which of these two approaches should be adopted in Guernsey, not least because the choice of approach may depend on the facts of the particular case.

C

D

We do not consider it necessary to go in detail through each of the 33 points on Miss Cole's evidence which Mr. Torode raised. Though on many peripheral matters Miss Cole's evidence was open to attack (as it was skilfully attacked by Mr. Peter Ferbrache), she never wavered on the matters at the core of her evidence, that Mr. Holliday had asked her to take the drugs into Guernsey, and had given her the drugs so that she could take them, as she did. The Deputy Bailiff was therefore clearly right to decide that there was a case to answer, and that it was for the Jurats, as the decision makers on the facts, to decide whether or not to accept her evidence.

E

In his summing-up the Deputy Bailiff gave impeccable directions to the Jurats, and drew attention to most of the inconsistencies and lies in Miss Cole's evidence. Miss Cole's evidence was put to the Jurats very fairly, and indeed with some indication that the Jurats might conclude that her evidence was not to be accepted. The Jurats unanimously accepted the core of her evidence in convicting Mr. Holliday.

F

In the judgment of this Court there is therefore nothing in this first point put forward on Mr. Holliday's behalf. The defects in Miss Cole's evidence were squarely put to the Jurats. Nevertheless the Jurats accepted what was the core of her evidence. It would not be for this Court to substitute its own assessment of her evidence, and in any event this Court is satisfied that the Jurats were entitled to reach the conclusion they did on her credibility.

G

A The second ground of appeal, as stated, was to the effect that the conviction should be set aside on the basis that defence counsel, Advocate P.T.R. Ferbrache, was either flagrantly incompetent, or alternatively conducted Mr. Holliday's defence in a manner which no reasonable counsel could have done. This ground of appeal was supported, in the event, by reference to only two specific matters in respect of which Advocate Ferbrache's conduct is criticised on behalf of the Appellant.

B Before turning to consider those two matters we should deal, first of all, with the law in relation to such questions. This Court has very recently in the appeal of Rodney (27.GLJ.29) addressed the question- what is the correct approach in dealing with allegations of incompetence on the part of a defence Advocate as a ground of appeal. After reviewing certain of the English authorities on the subject, the Court said at page 6:-

C "Once again, whilst recognising that the English law is not applicable in Guernsey, we have considered these statements of principle against the possibility of a miscarriage of justice. We have asked ourselves the question whether Mr. Torode's judgment was so far wrong as to have caused the trial to be unfair. We need only say that we do not regard this to be a tenable argument."

In his skeleton argument, Counsel for the Appellant referred to the earlier decision of this Court in The Law Officers of the Crown v. Collins (8.GLJ.16), where it was stressed that, although the conduct of Counsel is capable in some instances of giving rise to a ground for setting aside a conviction, such cases are indeed rare.

D Counsel for the Appellant pointed out that until very recently the accepted test in England, which had to be met before such a ground of appeal might succeed, was that the conduct of Counsel conducting the trial was such as to involve "flagrant incompetence". In obiter remarks in the case of R. v. Naveed Ullah (Court of Appeal) 14th October 1999, Rose LJ had however stated:-

"It may be, although we express no final and considered view on this aspect of the case, that it is a proper and convenient approach to apply a Wednesbury test to the decision which is complained of, i.e. was it one which no reasonable Counsel or Solicitor could have reached?"

E For our part, we are content simply to follow the approach of this Court in the case of Rodney by asking ourselves the question whether the conduct by Counsel complained of was such as to have caused the trial to be unfair.

The first of the two matters complained of was as follows:-

F In his speech to the Jurats, Advocate Ferbrache said of his client that:-

G "To describe him as an international businessman, I think is slightly over egging the pudding. Mr. Holliday (and even though he hasn't given evidence, and I will come to that in a moment or two) clearly from the tenor of the interviews you have read is, and I don't mean in this disparagement to him, is something of a 44 year old 1960s hippie. The duffle coat, sleeping on someone's bedsit when they've been to a party, he's that type of individual. That, I am sure from considering the interviews, and hearing Miss Cole, and reading all the bits of paper that you have read, will be the impression that probably will be the one that sticks with you."

Counsel for the Appellant accepted that the role of counsel for the defence was not simply to act as a mouthpiece for his client. In course of his submissions he furthermore conceded that the remarks just quoted were no doubt made by Advocate Ferbrache as a tactic to assist his client. His complaint was that these remarks should not have been made without first having obtained the agreement of the Appellant. They were remarks that could have created an unfavourable impression of the Appellant in the minds of the Jurats. The fact that they were seized upon by Press reporters in their reporting of the trial demonstrated this.

A

We are of the clear view that there is nothing in this point. It is plain that in making these remarks in the course of his closing speech, Advocate Ferbrache was seeking to distance his client from an image of him being a calculating and experienced drug trafficker. That, in our view, was a legitimate exercise in the circumstances of his advocacy role, taken with the interests of his client fully in mind. It was not a matter which he required the prior consent of his client to say, but was a matter for his professional judgment. In no way can we see how these remarks rendered the trial unfair.

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The second matter complained of was a failure by Advocate Ferbrache to put two exhibits to the witness, Miss Cole, in cross-examination. These exhibits were two notes written by the Appellant to Miss Cole and found in her wallet. The relevance of these notes, it was contended, was that their content pointed to the existence of a sexual relationship between the Appellant and Miss Cole. In interview Miss Cole, when shown these notes, had denied the existence of a sexual relationship between herself and the Appellant, notwithstanding the terms of the notes. The existence of a sexual relationship between the Appellant and Miss Cole was, however, the subject matter of detailed cross-examination by Advocate Ferbrache, under reference to a large number of items of correspondence, which were in the possession of the Appellant, and which were written by Miss Cole. The terms of that correspondence could, in our view, have enabled the Jurats to reach the view that there had been a relationship which went beyond the platonic, between the Appellant and Miss Cole. Miss Cole, however, maintained throughout her evidence that the relationship was never of a sexual character. Counsel for the Appellant contended that if the two items of correspondence, found in her possession, had been put to her in cross-examination and she had maintained her denial of a sexual relationship, this would have put her credibility in even greater doubt in the minds of the Jurats. On the other hand had she been forced to admit that the relationship was a sexual one, which was now over because the Appellant had terminated it, the Jurats might have come to the view that she was seeking to incriminate the Appellant because of a grudge she had against him for ending the relationship.

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In our view it was for the professional judgment of Advocate Ferbrache to decide to what extent, and in what way, he should deal with these matters in cross-examination. He clearly spent a considerable amount of time putting before the witness Cole a large amount of material which was suggestive of more than a platonic relationship between herself and the Appellant. That he decided, in his professional judgment, that it was inappropriate or unnecessary for him to put the other items of correspondence, found in her possession, to her in cross-examination cannot, in our view, be said demonstrably to amount to misconduct on his part, which rendered the trial unfair. It follows that the second ground of appeal fails.

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What is more, in our view, the allegations of flagrant incompetence or unreasonable conduct, which were made against Advocate Peter Ferbrache should not have been made.

G

Advocate Torode's third and fourth points, both concern the evidence that was relied upon as amounting to corroboration of Miss Cole's evidence.

A The Deputy Bailiff directed the Jurats that there were seven matters which were capable of amounting to corroboration. They were (1) the association between Miss Cole and Mr. Holliday at the Pine View Guesthouse in Jersey, (2) the fact that Miss Cole and Mr. Holliday were on the same ferry to Guernsey, (3) the fact that six clear sachets containing traces of cannabis were found after his arrest in the room which he had used at the guesthouse, (4) the fact that a knife was found with them which was shown by scientific evidence to have been used to cut the block of cannabis resin found on Miss Cole, (5) the fact that £2,625 in English bank notes was also found with the sachets and the knife, (6) various lies which Mr. Holliday told Customs Officers at the time of his arrest, and (7) the fact that when arrested he was found in possession of a small set of electronic scales, which he admitted having carried in his jacket pocket. Having identified these as matters capable of amounting to corroboration, the Deputy Bailiff briefly summarised the evidence about them and made some remarks concerning their weight. Advocate Torode's third point is that three of the seven matters, the association at the guesthouse, the sachets and the money, were incapable in law of amounting to corroboration. His fourth point is that assuming that they were admissible, the Deputy Bailiff's directions as to their materiality were inadequate in relation to all seven.

C There is no dispute about the relevant principles. In *Baskerville* [1916] 2KB 658, Lord Reading formulated the classic definition of corroborative evidence as "independent evidence which affects the accused by connecting or tending to connect him with the crime". In our judgment all seven matters relied on as amounting to corroboration were capable of doing so in law. It is, we think, important to bear in mind two general points about the corroborative evidence in this case. The first is that the offence was not a "single act" offence; it consisted of the fact of being "concerned in" a fraudulent evasion of the prohibition on the import of drugs. The concern of Mr. Holliday in the offence is said by the prosecution, on the basis of Miss Cole's evidence, to have extended over a period of two days, from his agreement with Miss Cole in Jersey on the evening of 9th July 1998 until his arrest in Guernsey on the afternoon of 11th July. The corroborative evidence must tend to support Miss Cole's evidence connecting him with her conception and execution of the plan to import the cannabis into Guernsey over those two days. Secondly, although it is convenient for the purpose of presentation to divide the corroboration up into seven matters, we must not lose sight of the fact that it is their cumulative impact on the case which counts, not necessarily the impact of any one factor alone. Ultimately this is a matter of common sense which does not admit of excessively elaborate analysis. In our judgment, the seven items of corroborative evidence, taken together, did tend to support Miss Cole's evidence connecting Mr. Holliday with the conception and execution of the plan to import the cannabis. It was capable of being regarded by the Jurats as evidence tending to show that Mr. Holliday was engaged in drug dealing, that the two of them had been together for much of the period when Miss Cole claimed that the plan had been conceived, and that Mr. Holliday had something to hide.

E Turning to the three particular items of corroborative evidence of which the Appellant complains, Miss Cole's evidence was that Mr. Holliday handed the cannabis to her at the guesthouse. As a matter of common sense, the fact that there is independent evidence that the two of them shared a room at the guesthouse at the time, in which room a locked suitcase belonging to Mr. Holliday was later found with the cash, the knife and the sachets inside it, must tend to confirm that evidence. Of course, it is not conclusive, as Advocate Torode points out. Mr. Holliday and Miss Cole might have been together at the guesthouse for entirely innocent purposes unconnected with their subsequent

journey on the same ferry to Guernsey, and Miss Cole's importation of the drugs into the Island. As to the sachets, there was no evidence that the cannabis, traces of which were found in the sachets, was the same as the cannabis that Miss Cole carried into Guernsey, and Mr. Holliday told Customs Officers that he had used the sachets to hold cannabis which he had legally consumed in Amsterdam. As for the cash, it could have been lawfully come by, and even if it represented the proceeds of drug dealing, it was clearly not the proceeds of the cannabis which Miss Cole imported since Miss Cole was arrested before the cannabis could be sold and the money remained in Jersey when the two of them took the ferry. All of these points affect the weight which can be placed on these particular matters of corroboration. But the fact that individually or even cumulatively, evidence is capable of an innocent as well as a sinister explanation, does not make it incapable of amounting to corroboration at all. It only makes it desirable that the Jurats should be cautious before concluding that material which is capable of amounting to corroboration actually does so. It is the duty of the judge to tell them this in his summing-up, as the Deputy Bailiff did in this case. It was then a matter for the Jurats what they made of it.

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Once Advocate Torode's third point falls, as it must do, his fourth point cannot survive for reasons which can be shortly stated. The trial judge is not bound to remind the Jurats of every detail of the evidence nor to describe for them every possible alternative explanation of the evidence relied on by the prosecution. In this case, the Deputy Bailiff accurately summarised the corroborative material, and invited them in terms to consider alternative, innocent explanations given by Mr. Holliday to the Customs Officers who interviewed him. He told them that the material was capable of amounting to corroboration, but that it was for them, approaching the matter with appropriate caution, to decide whether it actually did provide independent support for Miss Cole's evidence. His directions on the point cannot be faulted. The Jurats were evidently satisfied.

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Mr. Holliday's appeal must therefore be dismissed.

61. [CRIMINAL DIVISION – APPEAL NO. 246]

5th APRIL, 2000

**THE LAW OFFICERS OF THE CROWN**  
v.  
**CHRISTOPHER LEONARD HARWARD**

E

Before: SOUTHWELL (PRESIDENT), GLOSTER and NUTTING, J.J.A

**Sentence – misuse of drugs – importation of Class A drug**

F

See paragraph 12.

J.E. Roland for the Appellant  
P. Robey for the Crown

SIR JOHN NUTTING, Bt, Q.C.: This applicant appeared before the Bailiff and Jurats on 7th January 2000. He pleaded guilty to an indictment containing one count of importing 33.4 grams of

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heroin contrary to Ss. 23(1) and 23(1A) of the Customs and Excise (General Provisions)(Bailiwick of Guernsey) Law 1972, as amended. He was sentenced to six years imprisonment.

A On 7th February 2000, he filed notice of his intention to apply for leave to appeal to this Court against the imposition of that sentence on the grounds of its severity. Leave to appeal and legal aid was granted by a single judge on 22nd March 2000.

The circumstances which gave rise to his conviction were these. On 30th October 1999 the applicant was stopped by Customs Officers at Guernsey Airport and detained. Later he passed 33.4 grams of heroin, which he had concealed internally in three packets.

B He told the Customs Officer that he had purchased the heroin in London for £900 and that it was intended for his own use over a period of four to five weeks. He claimed that although he was visiting Guernsey for a period of two or three days, he had not wanted to leave the heroin at the address where he was living on the mainland. He also claimed that he had come to the Island for a short rest, but gave no satisfactory answers in relation to the friend whom he claimed to be visiting.

C The evidence before the Bailiff was that the street price of a gram of heroin is three times the cost here compared to the mainland. The street value of this consignment was £6,500. An alternative method of calculation would have produced a figure of £10,000. However, street value is not a very stable guide to price in Guernsey because the value fluctuates considerably depending on availability at any given time.

D The applicant gave little if any assistance to Customs Officers and the account he gave as to the intended use of the heroin seemed as unlikely to the officers as it did to the Royal Court. Indeed, in reflection of its inherent implausibility his Advocate accepted at his trial in his submissions to the Court that during the applicant's stay in Guernsey, if "somebody had offered him some money for the drug then ... he may well have sold some on but that was not his intention when he brought the drug in." This concession was an echo of what the applicant had told the Probation Officer who had prepared a report about him for the benefit of the Court.

E The applicant is a man of 44 years with adult children and a wife from whom he is divorced. In 1993 he suffered a car accident which caused him to stay in hospital for eight months and to be confined to a wheelchair for two years thereafter. He now suffers from a heart condition. He has been addicted to heroin for the last six years. Indeed, his antecedent history which includes convictions for numerous offences of dishonesty, including an offence of conspiracy to rob, for which he served a sentence of three years imprisonment in the early 1970s, has been restricted in the last five years to offences involving the possession of drugs, usually heroin.

F The applicant's addiction to heroin allows him to claim that he was not a dealer who exploited the addiction of others for significant gain to himself. But the cost of satisfying the addiction from which he suffered made it difficult for the Bailiff to accept that the applicant would have been entitled to any reduction in sentence on the grounds that none of the significant quantity which the applicant imported would have found its way on to the streets of the Island.

G Moreover, the well recognised habits of heroin addicts such as the applicant (and the Probation Report described him as "deeply entrenched within his local drug culture in the UK") would tend to indicate the likelihood of some sale or distribution of a part of this consignment; and the applicant's

concession by his Advocate made it impossible for the Bailiff to treat the applicant as someone whose importation, if successful, would have affected no one but himself.

Miss Roland, in her first submission, claimed that the Bailiff in the sentence he passed had failed to give sufficient weight to the fact that the applicant was not importing heroin for profit but for his own consumption, and that the Bailiff should have held a Newton Hearing for the purposes of determining the extent to which the applicant's admission that he might have been tempted to sell some of the consignment might deprive the applicant of the mitigation that he was not a dealer.

We do not believe that it was incumbent on the Bailiff to conduct such an enquiry. The nature of the admission made by the applicant to the Probation Officer was by its terms and by its nature not susceptible of amplification, and it is inherently unlikely that the Bailiff would have been in a better position to sentence the applicant at the end of such a hearing than at the beginning.

In any event, the thrust of Miss Roland's point ignores the basis on which Courts in this Island have approached cases of importation of drugs. This Court has recently emphasised the proper approach to sentencing in cases of importing Class A drugs. In seeking to underline what the Deputy Bailiff, as he then was, said in Redhead (RC 7.6.1998), this Court in John Mather and Peter Stuart Cooper (27.GLJ.19), a consolidated appeal, said:-

"It must be born in mind that the issue as to what will happen to the drugs is of marginal relevance in cases of importation. The mischief at which the Customs & Excise (General Provisions)(Bailiwick of Guernsey) Law 1972, as amended, is directed is to the importation of drugs simpliciter. The gravity of the offence depends on the nature and quantity of the drugs imported and to an extent, and by extension, to their street value. We accept that an importer who brings drugs into the Bailiwick for his own consumption may use that fact to mitigate his conduct. But the larger the quantity the less likely it is that the drugs will be used by the importer alone and the more likely it is that the drugs will be supplied to one or more persons within the jurisdiction"

Later the Court in discussing the role of the courier said:-

"If the quantity is small, the courier may also plausibly claim that he had reason to believe that it was for the consumption of one individual, but he should be sentenced on the basis of the amount imported. A courier may claim that he believed that the drugs, though in substantial quantity, were for personal consumption rather than commercial supply. The resolution of the truth or otherwise of such a claim is not in our view essentially germane to the offence which, as we have observed, depends on the fact of importation and on the amount and class of the drug involved. Certainly the courier's belief, which may or may not be plausible, and may or may not be justified, should not entitle him to a discount in sentence because he has chosen to believe what may be implausible and may well be unjustified."

We can see no warrant in cases of importation for the Court to approach the case of an importer who is a courier for one consumer or several differently from an importer who is a consumer but who may also supply. It may be appropriate to vary the sentence for reasons personal to the individual, but the principles on which the Court should approach the sentencing process are the same, whatever role the importer was playing at the time of importation.

A The Royal Court and this Court must play their part in reducing the amount of hard drugs entering this Island. On many occasions these Courts have emphasised this as their lodestar. We need not lengthen this judgment with a recital of those judgments whose imprecations will be only too familiar to those who for whatever reason have followed the decisions of the Courts in Guernsey in drug cases.

It is for these reasons that we reject the first ground of Miss Roland's application.

B Miss Roland's second ground can be disposed of more shortly. She suggested to us that the Bailiff was wrong to entertain evidence of the street value of the heroin in Guernsey because of the absence of evidence that the applicant was selling on a commercial basis. We do not accept this submission. Evidence of the street value was helpful in this case in two ways - firstly, to highlight the difference between the cost of heroin in the United Kingdom and in Guernsey, and secondly, to provide some yardstick of the value of the consignment itself. Such evidence is invariably given in drug cases particularly involving Class A drugs, and taken together with the quantity of the drugs concerned, provides a measure of the gravity of the offence and the potential mischief of the importation.

C Miss Rowland's third submission was that the Bailiff had paid insufficient heed to the personal circumstance of the applicant. Her submission throws into relief the requirement to approach each case individually and not to allow the process of sentencing to become too mechanical an exercise based on similar reported cases. Such circumstances are always a matter which the Court must weigh with care. No sentencing process must become a mechanical exercise in which the type of offence, the classification and amount of the drug, and the nature of the plea become the exclusive considerations of the sentencing Court. But it will be recognised that the need to deter others plays a significant part in sentencing those who have committed this particular offence; and offenders must face the fact that the scope for leniency is necessarily limited.

In the case of Oren (18 GLJ para 13), the Bailiff laid down guidelines for the starting points in drug cases. He said:-

E "Turning to cases involving larger quantities where the inference is to be drawn that the offender is engaged in trafficking, the starting point for sentences will be ... in the case of Class A drugs, four years. The lower sentences will be reserved for cases where there are guilty pleas and the quantity of the drug found in the possession of the offender is at the lower end of the range in both amount and value. As to the lower end in value, the Court would at the present time be regarding this as £1,000 or less on the streets of Guernsey ... Larger quantities of drugs for the Guernsey market will attract sentences of up to twice those indicated as starting points."

F Since 1994 it is a depressing fact of life within the Bailiwick that there have been a large number of cases involving Class A drugs concerning importation and supply. During 1999 at least eight such cases had come before the Royal Court by the end of November.

G As a result there has grown up a corpus of sentencing decisions which are useful in guiding Courts to consistency of approach. But we desire to emphasise that these cases provide no more than a guide and it would be wrong to derive from them any precise formula designed to reflect such aggravating features such as quantity or street value or such mitigating features as absence of relevant convictions or acknowledgement of guilt.

It should be remembered that sentencing is not an exact science, and a comparison of the ages of different offenders, the type and quantity of drug and street value, and other features necessarily present in such cases are only of marginal use in assessing what is the appropriate sentence for a given offender. A

The value of a starting point as identified in Oren is that it gives the sentencer the appropriate freedom to make due allowance for aggravating or mitigating factors. The risk of comparison to other broadly similar cases is the freedom of manoeuvre may become reduced and the parameters of variability may necessarily be decreased.

In relation to Miss Roland's submission, it is clear from an analysis of the facts of this case that there was one aggravating feature, that is the method of concealment. There were a number of mitigating features which included:- B

(i) The plea of guilty, though it must be acknowledged that the applicant had no effective alternative than to plead guilty and little credit should be given for this.

(ii) The tragic personal circumstances which resulted in his addiction to heroin. C

(iii) His current health problems.

(iv) The family bereavements which have obviously affected him deeply, in particular the death of his brother on whom he had become almost totally reliant as a result of the car crash, and more recently the death of his father whilst the applicant was awaiting trial. D

(v) The hopeful indications for the applicant's future and his apparent determination to take advantage of his enforced deprivation of the drug to which he was addicted at the time of his arrest, manifest in the last paragraphs of the Probation Report.

All these factors were canvassed extensively before the Bailiff and the Jurats by Advocate Torode who was then appearing on behalf of the applicant.

The Bailiff in passing sentence indicated that the Court had taken these matters into account. Moreover he indicated clearly that the Court had given due weight to the guidelines in Oren. He did not identify the starting point but manifestly the facts of this case fell within the eight year bracket defined in that case. The facts outlined by the Crown and conceded by the Applicant, in our view, established that the appropriate starting point for sentence in the applicant's case was not less than seven years imprisonment. E

Having regard to the aggravating feature and the mitigating features relating to the offender described above, we cannot fault the sentence which the Bailiff and the Jurats passed in this case. It follows that the third ground of appeal also fails. F

This appeal is accordingly dismissed.

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5th APRIL, 2000

**THE LAW OFFICERS OF THE CROWN**

v.

**WILLIAM McCARRON SHEEHAN**

B

Before: SOUTHWELL (PRESIDENT), GLOSTER and NUTTING, JJ.A

**Sentencing – misuse of drugs – importation of Class A drug**

See paragraph 13.

J.E. Roland for the Appellant

P. Robey for the Crown

C

SIR JOHN NUTTING, BT, QC: On 3rd February 2000 this Appellant appeared before the Bailiff and Jurats on an indictment containing one count of importing 292 Ecstasy tablets into Guernsey contrary to Ss 23(1) and 23(1A) of the Customs & Excise (General Provisions)(Bailiwick of Guernsey) Law 1972, as amended. He pleaded guilty and was sentenced to six years imprisonment.

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On 4th February 2000 he submitted a notice of application for leave to appeal. The grounds are set out in the appropriate notice filed with the Court on that date. On 22nd March 2000 leave to appeal was granted by the single judge.

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The Crown case was that on 17th July 1999 the Appellant, a 27 year old man from Paisley, arrived in this Island from Poole on the Condor Ferry at 11 p.m. He was travelling alone and was apparently returning to Guernsey where he had been working temporarily as a gardener. He was stopped at the Customs and questioned. His answers caused the Officer further to detain him and during the course of the next four days, the Appellant passed three packages containing nearly 300 Ecstasy tablets which he had been carrying internally.

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During his interviews he insisted that the tablets were for his own consumption and claimed to have purchased them on the mainland. An Ecstasy tablet in Guernsey cost £25 at that time; the equivalent price in England was £1. The Applicant told the Officer that he intended to use the tablets during his continued stay on the Island where he had been living and working during the previous three months since his separation from his wife and 5 year old son, who suffers from cystic fibrosis.

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His antecedent history reveals the Appellant to be someone born with few advantages. His childhood was spent in childrens' homes in Edinburgh, Glasgow and Greenock; and a later period of stability in the Territorial Army during his late teens was brought to an end because of his appearances before Courts. His criminal record reveals the commission of numerous offences for dishonesty, sometimes accompanied by violence.

Every modern method of punishment and rehabilitation has been tried on this Appellant without any lasting effect. This offence was, however, the first occasion on which he has appeared before a

Court in connection with drugs. Although it is clear from the Probation Report that he has abused drugs for a number of years.

To his credit, the Appellant admitted to the Probation Officer that his own propensity for taking drugs was not the true reason for his attempt to smuggle Ecstasy to this Island. He acknowledged that he had lied to the Customs Officer in this connection and that his real motivation was the opportunity to earn £350 as a courier for the drugs.

The evidence before the Bailiff was that this consignment of Ecstasy would have fetched between £7,300 and £8,700 if sold on the streets of this Island.

At his trial his Advocate, Advocate Peter Ferbrache, who also appeared before us, described the Appellant as a small time offender who had stupidly allowed himself to become involved in drug smuggling; and although he accepted that a custodial sentence was inevitable, he urged the Bailiff to limit the sentence to between 3½ and 4 years imprisonment.

In his submissions to us Advocate Ferbrache adopted the same sentencing bracket and submitted that the Bailiff and Jurats had failed to give sufficient weight to certain matters in mitigation which had been placed before them in writing.

We have carefully considered those matters and the submissions made forcibly to us by Advocate Ferbrache on behalf of the Appellant.

The policy of the Royal Court and of this Court in relation to drug offences in this jurisdiction has been made perfectly clear in a number of cases and most recently by this Court in John Mather and Peter Stuart Cooper (C of A 22.7.99) a consolidated appeal.

In that case the Court echoed and approved what had been said by Sir Philip Bailhache, Bailiff, in the five judge Court of Appeal of Jersey in the case of Campbell v. The Attorney General (1995 JLR 136 at p.144):-

"The policy of the Courts in this jurisdiction in relation to the sentencing of offenders who import or deal in drugs on a commercial basis ... is that offenders will receive condign punishment to mark the peculiarly heinous and anti social nature of the crime of drug trafficking."

Sir Louis Blom-Cooper, QC (JA) in delivering the judgment of this Court in Louise McDonald (20.GLJ.16) emphasised that

"Where the importation fell short of a commercial enterprise but is designed to supply third parties with illicit drugs, the Court will still take a serious view of the deliberate act of spreading the use of controlled drugs among the populace of the territory, in this case, the Island of Guernsey."

Advocate Ferbrache justified the sentencing bracket for which he contended by comparison with some cases to which he referred us decided on the mainland. We are not attracted by that approach. In Mather & Cooper this Court emphasised the particular problem which the drug menace presents to a relatively small community of people and their determination to combat it as effectively as possible.

A "In recent years both the Royal Court and the Court of Appeal have endeavoured to adopt policies in sentencing which are consistent and which reflect the determination of the Courts to reduce this evil trade as far as they can. In order to combat the drug menace Judges have been astute to ensure that those who import or supply drugs in this jurisdiction are sentenced to periods of imprisonment designed to deter others. Sentencing policy is harsh and for good reason."

B In our view sentences for drug offences, including the importation or supply of Class A drugs in this jurisdiction, tend to be marginally higher than those passed in England. It may well be that sentencing policy in the Bailiwick has a greater element of deterrence than that which exists on the mainland.

We do not regard the sentencing bracket for which Advocate Ferbrache contends as appropriate to this case; nor do we consider, having carefully reviewed other cases involving the importation of the same drug, that such a bracket corresponds with sentences passed for importing and supplying drugs in this Island.

C Having said that, there was material before the Bailiff and the Jurats in this case which would have justified a lesser sentence than the one passed by the Court. We are mindful of the need in any appellate jurisdiction to avoid merely tinkering with a sentence but having considered all the available material we take the view that the proper sentence here was one of 5½ years imprisonment. To that extent this appeal is allowed.

D 63. [CIVIL DIVISION – APPEAL NO. 277]

5<sup>th</sup> APRIL, 2000

E THE STATES OF GUERNSEY  
v.  
BORDEAUX VINERIES LIMITED  
and  
FREDERICK JOHN MICHAEL PAINE  
and  
SHEILA MARY GEARY PAINE

F Before: SOUTHWELL (PRESIDENT), GLOSTER and NUTTING, JJ.A

**Cause of action –formalities for lodging amended cause – when lodged effectively**

See paragraph 25.

G P.T.R. Ferbrache for the Appellant  
C.M. Fooks for the Respondent

MISS E. GLOSTER, QC: 1. This is an appeal, with leave, by the Defendant, the States of

Guernsey ("the States"), against an interlocutory judgment given by the Bailiff on 3rd September 1999. In that judgment the Bailiff held that an action ("the New Paine action"), brought by Bordeaux Vineries Limited ("Bordeaux") and Mr. and Mrs. Paine against the States-

A

(1) was in effect "placed before the Court" when, on 4th July 1997, Advocate Fooks lodged at the Greffe (with a copy sent to Advocate Ferbrache for the States) a cause entitled "New Combined Action 4.7.97", or, alternatively, when on 18th July 1997, Advocate Fooks lodged at the Greffe (likewise with a copy sent to Advocate Ferbrache) a revised version of the same cause entitled "New Combined Action 18.7.97";

(2) was in effect served on the States on 4th July 1997, when Advocate Fooks for the Plaintiffs sent to Advocate Ferbrache for the States a copy of the cause entitled "New Combined Action 4.7.97" or, alternatively, was in effect served on the States on 8th July 1997, when Advocate Fooks sent to Advocate Ferbrache a copy of the revised version of the same cause entitled "New Combined Action 18.7.97",

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(3) stood adjourned sine die by order of the Royal Court dated 19th May 1997;

(4) remained adjourned sine die since July 1997; and accordingly

C

(5) was not perempt.

2. In the light of his decision the Bailiff ordered that the New Paine Action, along with two other actions brought by Bordeaux (but not by the Paines) against the States, respectively called "the Loveridge Action" and "the Le Poidevin Action" should be inscribed in the Pleading List.

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3. It is necessary to consider the procedural history of this matter which may be summarised as follows.

4. The Loveridge Action: On 23rd January 1989 Bordeaux issued proceedings against the States in the normal way by means of a summons appending the cause which was served on the States through Her Majesty's Sergeant. These proceedings have been referred to on this appeal as "the Loveridge proceedings", because they were issued by Advocate J.D. Loveridge on behalf of the Plaintiff. The original summons was placed on the Pleading List on 26th January 1989.

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5. Bordeaux's claim was for £91,784.84 in respect of damage alleged to have been caused to three glasshouses as a result of the States refuse disposal operations at Bordeaux Quarry, which was adjacent to Bordeaux's glasshouses.

There is a dispute (not relevant to this appeal) as to the precise nature of the claims originally made by the Plaintiff in the Loveridge action, but it is common ground that the claim was based on an alleged nuisance. There is a dispute as to whether the original cause included a claim in negligence, but that is not an issue before this Court.

F

6. A summons for defences was issued returnable on 11th May 1989. On that date the action was adjourned sine die, the States having filed a request for further and better particulars in the cause and certain defences. No action was taken by Bordeaux to respond thereto until 2nd August 1990 when certain replies to defences were supplied.

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A 7. The Le Poidevin Action: On 2nd August 1990 a further action was commenced by Bordeaux against the States through the different firm of Babbé Le Poidevin Allez. These proceedings are referred to as "the Le Poidevin Action." The action was issued in the normal way, i.e. by issue and service of the summons appending the cause through Her Majesty's Sergeant. The action was placed on the Pleading List on 2nd August 1990. It was not called on the Pleading List by Bordeaux until 21st March 1991.

B 8. The Le Poidevin action is a claim for £132,849.75 in respect of damage alleged to have been caused to a fourth glasshouse as a result of the States refuse disposal operations at Bordeaux Quarry. It is common ground that the Le Poidevin action is based on alleged torts of nuisance and Rylands v. Fletcher.

C 9. A request for further and better particulars of the cause was sent on 14th May 1991. A reply was sent on 10th June 1991. The action was adjourned sine die in Court on 11th July 1991. It remained so adjourned without any action being taken to advance it, save that in May 1995 the Plaintiff issued a summons calling the action on the Pleading List. This was signed over on various occasions at the request of Bordeaux and with the consent of the Defendants. It was last signed over on 20th July 1995.

10. Subsequent Proceedings: In May 1992 the Plaintiff brought an application for an order for discovery under S.39 of the Royal Court (Civil Rules) 1989. That application was dismissed on 29th May 1992. On 19th September 1996 Bordeaux's Advocate, who by that stage was Advocate Fooks, wrote to the Defendant's Advocate. The letter stated amongst other things that:-

D "It is my intention to lodge an application with the Interlocutory Court shortly after my return from holiday on 14th October for leave to substitute the enclosed cause for those previously adjourned sine die in Court. Whilst I do not anticipate that the enclosed pleadings will be further amended, I do reserve the right to make any minor amendments..."

E The draft cause which was enclosed not only combined the existing claims in the Loveridge and Le Poidevin actions with certain amendments, but also added additional claims by Bordeaux in respect of later periods of time and a claim by Mr. and Mrs. Paine and their four sons.

11. Up until that letter, sent in September 1996, nothing appears to have been done by Bordeaux to advance the substantive determination of its claims in the two actions, although the Court was informed that during this time certain interlocutory applications for injunctions as well as contempt proceedings had been brought.

F 12. On 2nd October 1996 Advocate Ferbrache (on behalf of the States) wrote to Advocate Fooks. In that letter he stated:-

"It seems to me that it is an entirely new cause of action..."

He was referring there to the draft cause which he had been sent.

G "I assume that this cause of action is meant to replace entirely the previous causes of action.

On a careful reading of the cause by me it seems that your cause goes well beyond that...

Your application to substitute this cause for the other cause will, therefore, be strongly opposed. Please let me know when you intend to make that application to the Court." A

13. No reply was received and a further letter was sent by Advocate Ferbrache to Advocate Fooks on 21st November 1996.

14. There then followed further correspondence between the two Advocates culminating in an application to the Royal Court dated 27th February 1997 made by Advocate Fooks on behalf of Bordeaux, and on behalf of Mr. and Mrs. Paine, for leave to consolidate the Loveridge action and the Le Poidevin action in one combined action and further to consolidate those existing actions with- B

(i) further claims made by Bordeaux for damages in respect of the period 1991 to 1996; as set out in the proposed cause attached to the application; and

(ii) new claims for damages by Mr. and Mrs. Paine in respect of the same period, (although apparently relying on alleged torts in earlier years as well) also as set out in the proposed cause attached to the application. C

The proposed cause attached to the application was therefore a combined one, which was intended to combine in one composite cause all existing claims made by Bordeaux in the Loveridge and Le Poidevin actions as well as new claims intended to be made by Bordeaux and Mr. and Mrs. Paine respectively. I shall refer to this cause as "the proposed consolidated cause." D

15. This application was sent by Advocate Fooks to Advocate Ferbrache by post or by hand. No summons was issued and the application was an interlocutory matter. It is common ground that the proposed consolidated cause could not be served as a cause because leave to the Court was required to consolidate the existing Loveridge and Le Poidevin actions with the new claims by Bordeaux and Mr. and Mrs. Paine.

16. On 7th March 1997 there was a short hearing of the application dated 27th February 1997 in the Interlocutory Court when the Deputy Bailiff (as he then was) adjourned the matter until 19th May 1997. On 7th March the Court was informed by Advocate Ferbrache that he would be issuing an application on behalf of the States to strike out the existing Loveridge and Le Poidevin actions, and for security for costs. Those applications were subsequently issued. E

17. At the hearing on 19th May 1997 Advocate Ferbrache, on behalf of the States, opposed Advocate Fooks' application to consolidate the existing proceedings and the proposed new proceedings in the proposed consolidated cause, on the grounds that what was sought was not consolidation of the existing proceedings, but rather a new claim of negligence that he alleged had not previously been pleaded and that there were issues of prescription so far as the new claims by Mr. and Mrs. Paine were concerned. F

18. We were told that the hearing was relatively short, lasting some two hours. The Deputy Bailiff refused Advocate Fooks' application to consolidate the existing actions and the proposed new actions in the proposed consolidated cause, taking the view that consolidation was unsuitable. There was no formal order made on that date, nor was any judgment given by the Deputy Bailiff. The note G

made by the Deputy Greffier in the Court's records shows that the following directions were given by the Deputy Bailiff on that occasion-

A "Advocate Fooks to redraft the pleadings and present three separate causes relating to the three heads of action within four weeks. Adjourned sine die - together with applications for strike out and security for costs."

At that hearing Advocate Ferbrache in his written submissions to the Court specifically stated:-

B "If Mr. and Mrs. Paine consider that they have a cause of action against the Defendant they should institute their own proceedings."

C 19. It is common ground that the effect of the Deputy Bailiff's order was to require Advocate Fooks to incorporate the new claims of Bordeaux and Mr. and Mrs. Paine in a new cause which could only cover losses arising during the relevant six year prescription period. Advocate Fooks also seeks to place reliance on the following statement at page 14E of the transcript of the Bailiff's judgment of 26th August 1999, under appeal. In relation to the hearing which had taken place on 19th May 1997, the Bailiff said as follows:-

D "It was clear that what I was ordering was that the claims in the consolidated action other than those that were clearly in the Loveridge and Le Poidevin actions were to be incorporated into a new cause and that for prescription purposes the cut off date was February 1991. That is to say the sixth anniversary of the tabling of the consolidated cause which contained the fresh allegations. I was not holding the consolidated cause to be a nullity, I was merely directing that it be presented in a different way. At no stage was Mr. Peter Ferbrache conceding that it was appropriate to amend the Loveridge and Le Poidevin causes or that the new cause should be accepted, that was a matter for the next stage."

E Advocate Fooks seeks to argue that this statement shows that a ruling was made for prescription purposes on 19th May 1997 to the effect that Bordeaux and Mr. and Mrs. Paine are entitled to pursue claims arising from February 1991. She contends that this shows that "the (Paine) action is wholly born from the consolidation", and that, accordingly, the new action commenced from 7th March 1997 when application to file the proposed consolidated cause was first before the Court (or alternatively was commenced as at 27th February 1997, the date of the application).

F 20. I shall return to the second of these arguments in due course, but so far as the Bailiff's reference on 19th May 1997 to the "cut off date" for prescription purposes is concerned, I find it unlikely that the Deputy Bailiff was finally and determinatively ruling as to what claims for prescription purposes could be brought in any new cause by Mr. and Mrs. Paine. That would have been unlikely since (a) that new cause had yet to be drafted and served, and (b) this was not a substantive issue for determination at the hearing on 19th May 1997. In any event such a direction did not form part of the Court's record of the hearing and it is unlikely (if indeed such a direction had been made effecting the substantive rights of the parties) that there would have been no formal order to such effect. However, the issue as to whether the appropriate cut off date for prescription purposes in relation to the new Paine action is February 1991, or some later date, is not an issue for this Court.

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21. There was a telephone conversation between Advocate Fooks and Advocate Ferbrache on 12th June 1997 in which it was agreed that Advocate Fooks could have an extension of time for complying with the Deputy Bailiff's order. It is common ground that in the course of that telephone conversation Advocate Ferbrache said words to the effect that he reserved his rights or his position, generally.

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22. In compliance with the directions of the Deputy Bailiff given on 19th May 1997 (the four week time period having been extended by agreement) Advocate Fooks sent to Her Majesty's Greffier under cover of a letter dated 4th July 1997, with copies to Advocate Ferbrache-

- (1) Original and amended versions of the actions (or causes) in the Loveridge and Le Poidevin actions, and
- (2) A new cause entitled "New Combined Action 4.7.1997", which was the cause relating to the new claims by Bordeaux and Mr. and Mrs. Paine not previously included in the existing Loveridge and Le Poidevin actions. In that letter Advocate Fooks stated that she would lodge an application for directions shortly.

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23. The figures in the new cause were not complete. Accordingly, under cover of a letter dated 18th July, a further version of the new combined action was sent to Her Majesty's Greffier. Advocate Fooks wrote "Further to my letter of 4th July (1997) I enclose two copies of my combined action with figures included for lodging." The letter and its enclosures were copied by Advocate Fooks to Advocate Ferbrache. The claim in the New Paine Action was for a total of £1.39 million, increasing the total claims in all three actions to a sum in excess of £1.6 million.

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24. Subsequently and despite the intimation in her letter dated 4th July 1997, nothing was done by Advocate Fooks on behalf of the Plaintiffs (whether by application for directions or otherwise) to progress the three actions for a period of some two years. Although we appreciate that such inaction may well have been as a result of constraints imposed on her by her own clients, this Court deprecates the appalling and persistent delay in the prosecution of these proceedings, which as I have said, were originally instituted as long ago as 1989. It is an abuse of the system and brings the whole administration of justice into disrepute if civil claims of this type are allowed to meander on apparently at the whim of the Plaintiffs. We are told that the refuse tip closed on 7th November 1992, and that Bordeaux's business itself came to an end in 1995.

D

In our view it is high time that this litigation was resolved once and for all whether by Court determination or otherwise. The proceedings should not become side-tracked by interlocutory applications. Accordingly, at the end of this judgment the Court will require both parties to apply to the Royal Court for directions as to the future conduct of this action and the imposition of a strict timetable in relation to its prosecution.

E

25. To return to the chronology of these proceedings. After a gap of some two years the actions came to life again when Advocate Fooks, on behalf of Bordeaux and Mr. and Mrs. Paine, applied by application dated 29th July 1999, for leave to proceed with the Loveridge and Le Poidevin actions and the New Paine Action in the form that had been lodged with Her Majesty's Greffier on 18th July 1997, and for the actions to be entered into the Role des Cause à Plaider.

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A 26. That application came on for hearing before the Bailiff on 26th August 1999 and he gave judgment on 3rd September 1999. I have already summarised the decision which he made in the first paragraph of this judgment. On that occasion Advocate Fooks appeared on behalf of the Plaintiffs and Advocate Roland from Advocate Ferbrache's firm, appeared on behalf of the States. By Act of Court dated 15th October 1999 the Bailiff granted leave to appeal against his decision.

B 27. By notice of appeal the States seek an order setting aside or varying the Bailiff's decision made on 3rd September 1999, and the substitution therefor of an order that the cause in the New Paine Action was not served upon the Defendants on 4th July 1997 (nor as amplified by Advocate Ferbrache in argument on 18th July 1997).

28. In summary Advocate Ferbrache's argument before this Court on behalf of the States is as follows:-

- (1) that, under Rule 9 of the Royal Court (Civil Procedure) Rules 1989 ("the Rules"), in every action a cause has to be tabled before the Court;
- C (2) that under the Rules a Plaintiff is required to give notice of his intention to do so by serving a summons upon the Defendant in accordance with Rule 10;
- (3) that such a summons has to comply with the requirements of Rule 10, including inter alia the requirements to state the date and time appointed for the tabling of the cause, to contain or have annexed to it a copy of the cause and to be signed by an Advocate;
- D (4) that, in order to comply with Rule 3, such a summons has to be served by H.M. Sergeant on the Defendant;
- (5) that, in order to comply with Rule 3, such a summons had to be served in this case on the States by H.M. Sergeant leaving it at the Chambers of the Law Officers of the Crown;
- E (6) that, under Rule 56 and for the purposes of the Rules, an action commences when the summons, (i.e. the summons giving notice of intention of the plaintiff's intention to table the cause) is handed by the plaintiff to the Sergeant;
- (7) that although Advocate Ferbrache expressly conceded that actions could be commenced in other less formal ways without the need for the issue or service of the summons on the Defendant through H.M. Sergeant, that could only happen if the formal requirements of the Rules were waved by a Defendant or if a Defendant was estopped from insisting on compliance;
- F (8) that the Bailiff was not entitled to hold as he did (at page 15 of the transcript in the appeal bundle of his judgment) that he could "safely imply from the dealings of the parties that Ozannes (Mr. Ferbrache's firm) accepted that the cause would be served on them by Advocate Fooks other than through H.M. Sergeant.";
- G (9) that, in all the circumstances, and in particular the circumstance that, for that purposes of any prescription defence, it was critical to identify upon what date the

Paines had commenced their action against the States, the Bailiff could not imply in the absence of clear evidence that the States had waived the requirement under the Rules that a summons of notice of intention to table the cause should be issued and served in the normal way through H.M. Sergeant;

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- (10) that the Bailiff was not entitled to treat Advocate Fooks' lodging with the Greffier of the cause entitled "New Combined Action 18.7.97" on 18th or 19th July 1997, as tabling or "placing" of the cause before the Court;
- (11) that it was only on 23rd September 1999, when a summons "Role des Causes a Plaidier" was issued by Advocate Fooks on behalf of Bordeaux and Mr. and Mrs. Paine and served through H.M. Sergeant that the Paine action was actually commenced against the States.

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Obviously Advocate Ferbrache amplified those principal submissions in argument before us.

29. The reason why what, at first sight, appears to be merely a technical procedural issue is of importance to the States, is that they wish to contend that claims in the New Paine Action, which arose before 24th September 1993 (i.e. more than six years before the date upon which the States contend that the Paine action commenced), are prescribed by the six year prescription period in Loi relative aux Prescriptions approved by Order in Council dated 1889 and the Law Reform Tort (Guernsey) Law 1979. The position taken by Advocate Ferbrache is that since the Bailiff's decision of 3rd September 1999 appears to be based on the premise that the New Paine Action was commenced on either 14th or 18th/19th July 1997, when the new cause was (according to the Bailiff) effectively "served" on Advocate Ferbrache by Advocate Fooks, the Bailiff's decision is not one that he can leave unchallenged.

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30. We have not received submissions as to what, for the purposes of the Loi or the Law Reform Tort (Guernsey) Law, is the precise stage at which an action is commenced under Guernsey Law so as to prevent a claim being prescribed, and indeed this may be a question that remains to be determined; see the judgment of this Court in Smith v. Harvey (Le Quesne, QC, Clyde QC and Hoffmann QC JJA), transcript dated 14th May 1981 at page 3 where, prior to the introduction of Rule 5, this Court appears to have considered (although it is not clear) that the relevant action in that case commenced either on the date on which the signed "writ" (presumably the cause or summons) was passed to H.M. Sergeant for service or on the date on which the summons or cause was actually served.

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31. It is also important to record that Advocate Ferbrache has not submitted to this Court that it is impossible under Guernsey Law for proceedings to be commenced in the absence of an issue of a summons with an attached cause or in the absence of a lodgment with H.M. Sergeant of the summons with an attached cause. He accepts, and indeed asserts, that it is possible for proceedings to be commenced where a Defendant has waived the requirement for formal issue and service of the summons and has accepted service of the summons and cause (or alternatively just of the cause) in some informal way. No submission was made to this Court (whether based on custom, institutional writers or otherwise) that the issue of a summons is required under the law of Guernsey for the commencement of proceedings. Accordingly, we have not considered that issue. Nor is this judgment directed at any broader issues, such as when proceedings are commenced or when, for service out of the jurisdiction purposes, a Court can be said to be seized of a matter.

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A 32. Advocate Fooks' primary submission, as I have already indicated, was that the New Paine Action was commenced when her proposed consolidated cause was first before the Court on 7th March 1997 at the first hearing of her application for leave to consolidate. Alternatively she seeks to uphold the Bailiff's decision that the proceedings were commenced in July 1997.

B 33. In my judgment Advocate Fooks' primary submission must be rejected. She was refused leave by the Deputy Bailiff to proceed with her proposed consolidated cause and was required to present a new cause to the Court setting out the new claims of Bordeaux and Mr. and Mrs. Paine. In those circumstances it is impossible, in my judgment, to accept the proposition that the New Paine Action (i.e. the New Cause) was commenced when the Court considered in May 1997 what was merely a draft composite pleading in respect of a proposed consolidated action which in the event was not allowed to proceed. Advocate Fooks herself conceded that she could not have served the proposed consolidated cause in May 1997, unless she had first obtained leave to consolidate.

C 34. Nor, in my judgment can the Bailiff's remarks at page 14F to G of the transcript of his judgment, in relation to the cut-off date for prescription purposes, support the analysis that the New Paine Action was commenced in February/March 1997 prior to the service of the new separate cause entitled "New Combined Action." It is clear from his remarks, which I have already quoted at page 14G to H, that no decision at all was being taken in May 1997 about the status of the proposed new cause and that Advocate Ferbrache was not conceding that the new cause should be accepted. As the learned Bailiff said, that was a matter for a later stage.

D 35. I turn therefore to consider the issue upon which the Bailiff decided the matter, namely whether in all the circumstances it was open to the States to contend that the New Paine Action had not been commenced in July 1997 because the States had not been formally served with a summons and attached cause through H.M. Sergeant, or whether the States had waived their right to insist on formal compliance with the Rules.

36. In my judgment the Bailiff's analysis that the States had waived their right to insist on a formal compliance with the Rules is the correct one. Given-

- E (1) the history of the conduct of these proceedings; and in particular the direction made by the Deputy Bailiff, on 19th May 1997, that Advocate Fooks should present three separate causes relating to the three heads of action within four weeks;
- (2) the subsequent presentation on 4th and then 18th July 1997 of those three separate causes including the cause in the New Paine Action, in compliance with that direction for "lodging"; and
- F (3) the service on Advocate Ferbrache of copies of the causes lodged with H.M. Greffier and the letters accompanying them;

G it is, in my judgement, unrealistic to regard Advocate Ferbrache's omission to complain to Advocate Fooks that the new cause had not been formally served on the States in the manner provided by the Rules, as anything other than a tacit acceptance that the new proceedings had indeed been commenced by lodgment with H.M. Greffier and a waiver of his clients' rights under the Rules to insist on formal compliance. It is clear from Advocate Ferbrache's written submissions to the Court

on 19th May 1997 that he was insisting that Mr. and Mrs. Paine should issue new proceedings, if they were going to make claims against the States. On that date the Deputy Bailiff directed not only that Mr. and Mrs. Paine should do so, but also directed the manner in which they should do so, (i.e. by presenting a separate cause within four weeks). It was therefore in my judgment clearly incumbent upon Advocate Ferbrache, if the States were insisting on a formal issue of a summons and formal service of the summons and cause, to make the position clear in July 1997 when Advocate Ferbrache received the new cause which had been lodged with the H.M. Greffier. In coming to this conclusion I pay little regard to the fact that we were told that Advocate Ferbrache frequently acts on behalf of the States' Insurer, and that therefore Advocate Fooks, as she submitted, might have been more readily led to believe that formal service through H.M. Sergeant at the Law Officer Chambers was not required. In my judgment this fact in itself adds little weight to Advocate Fooks' argument.

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37. It can, I think, be inferred that if, as she had intimated that she was going to, Advocate Fooks had indeed issued an interlocutory summons for directions shortly after service of the cause in the New Paine Action, it is extremely unlikely that this point would have been taken on behalf of the States. One is left with the distinct impression that the point is one that has been adventitiously alighted upon in hindsight.

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38. Accordingly, I would uphold the Bailiff's decision that these proceedings were commenced on 18th July 1997, when the final version of the New Combined Action 18.7.97 (i.e. the cause in the New Paine Action) was lodged with H.M. Greffier and copies supplied to Advocate Ferbrache.

39. However, I do not agree with the Bailiff's analysis that the new cause stood adjourned sine die by virtue of the order made on 19th May 1997.

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40. First, what was adjourned on that date was (a) the Plaintiff's interlocutory application for leave to consolidate the various claims and (b) the States application to strike out and for security for costs. The actions themselves, as I read the order, as recorded in the Deputy Greffier's records, were not adjourned. Second, I do not see how in the real world what was in May 1997 only a proposed action, set out in a proposed consolidated cause in respect of which leave was needed to consolidate before the pleadings could be served, and which, on any basis, had not yet been commenced, could be regarded as having sufficient existence as a separate cause to be the subject matter for an order for adjournment.

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41. It therefore follows that, in my judgment, leave was needed from the Court to permit the New Paine Cause to proceed in 1999, as no step had been taken in the action for over a year and a day. Subject to any points which the parties might wish to make as to the precise wording of the order, I would be minded to vary the Bailiff's order by substitution of an order giving the Plaintiffs leave to proceed with the New Paine Action, such order to have retrospective effect from 3rd September 1999, the date of the Bailiff's judgment, but to confirm the Bailiff's order that the action should be inscribed on the Pleading List. That order, in my judgment, should be subject to the following conditions:-

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- (1) that the Plaintiffs are within fourteen days of today's date to issue a summons returnable at the earliest reasonable opportunity before the Royal Court for directions for the future conduct of this action and the Loveridge and Le Poidevin actions,

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including directions for the imposition of a timetable to ensure a speedy resolution of all three actions; and

- A (2) that the liberty to proceed with the action is without prejudice to any points which the States may wish to raise on their strike out applications or generally in relation to the manner in which the cause has been pleaded.

B 42. Finally, I should mention two points which have concerned this Court, apart from the delay which I have already mentioned. First, in my judgment it is highly unsatisfactory that disputes of this sort in relation to whether or not there was a waiver of formal compliance with the Rules should arise at all, particularly in the context of whether proceedings have been commenced. The Rules are there to be complied with. Whether or not proceedings have been commenced should be a matter that is easily ascertainable. If there is an understanding between the parties, or an understanding on the part of one party, that the formalities in the Rules in relation to the issue of process are not going to be complied with in any particular respect, then such understanding should be formally and clearly recorded in writing at the time. If that had happened in the present case, six months delay in what is already a stale claim would have been avoided.

C 43. Second, this Court would have been greatly assisted in this case if the Advocates had provided the Court with an agreed chronology setting out the relevant dates and the procedural history of these actions. Such a chronology should set out page references in the appeal bundle where appropriate.

D In future this Court will expect to receive a chronology which should, if possible, be agreed between the Advocates on either side. The chronology should be provided to H.M. Greffier in advance of the hearing of the appeal together with the respective parties' skeleton arguments.

J.G. NUTTING, QC: I agree and have nothing to add.

E THE PRESIDENT: I agree. I would like only to emphasise the point which has been made in Miss Gloster's judgment about the necessity for the provision of chronologies. A full chronology is required in all appeals whether civil or criminal and preferably an agreed one. I would only like then to add one further point, that particularly in civil appeals the Court needs one chronological file of all formal documents in the proceedings, i.e. pleadings, orders, judgments and the like. That was not available on this appeal and therefore it was necessary to dart from one bundle to another. The same of course applies to criminal appeals where the basic documents are provided by the Greffe and if there are any missing the Advocate on each side should add whatever they consider to be required for the purposes of the appeal.

F ADVOCATE FOOKS: I'm much obliged to the Court. What is the situation regarding costs, may I apply for costs or not?

ADVOCATE FERBRACHE: I won't be opposing an application for costs sir, I think it is reasonable for my friend- at the end of the day the appeal has been unsuccessful- and if she made an application I would find it difficult to resist.

G THE PRESIDENT: I suspect that was the application you were going to make but you've been beaten to it, you will have your costs.

ADVOCATE FOOKS: I'm obliged sir, thank you.

THE PRESIDENT: Of course on the standard basis.

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**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL**

B

64. [PRIVY COUNCIL APPEAL NO. 65 OF 1997]

Delivered 13th DECEMBER, 1999

Registered by the Royal Court 21<sup>st</sup> MARCH, 2000

C

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

v.

**BARRY KENNETH JEHAN**

and

**LESLEY JEHAN**

Before: BROWNE-WILKINSON, MACKAY, NOLAN, CLYDE and HOBHOUSE, LJJ

D

**Appeals - Privy Council - appeal to Judicial Committee from Court of Appeal –  
grounds under which Judicial Committee can review findings of fact by Jurats that  
were upheld by Court of Appeal**

See paragraph 4.

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LORD CLYDE: The appellant is a Guernsey registered company (“Vekaplast”) which in 1983 and 1984 was engaged in the manufacture and sale of UPVC windows. The managing director of Vekaplast was and is a Mr Picot. He has represented the company throughout the litigation which led up to this appeal and he appeared before the Board and presented the appeal on behalf of the company. The respondents, Mr and Mrs Jehan, were respectively a director and the company secretary of Vekaplast and were authorised to sign cheques on behalf of that company. They also carried on a business in Guernsey which included the fitting of windows made by Vekaplast. That business traded under the name Aquacraft.

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Early in 1984 the respondents went on holiday for three weeks. As soon as they returned Mr Jehan was called to a meeting with Mr Picot and his accountant in Jersey. This took place on 24<sup>th</sup> March 1984. Mr Picot then asked Mr Jehan to explain a number of payments which had been made by cheques drawn on Vekaplast. Mr Picot said that he had discovered these payments while looking at the company’s records in Guernsey during the absence of the respondents. He regarded them as

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A unauthorised and unjustified. An agreement was then made in settlement of the matter whereby, among other provisions, Mr Jehan was to resign as a director of its parent company T.A. Picot (C.I.) Ltd, was to sell to Mr Picot his whole shareholding in T.A. Picot (C.I.) Ltd, and was also to come under a restrictive covenant preventing his being involved in any business of the manufacturing, selling, fixing or otherwise of UPVC windows in Guernsey for five years. Mr Jehan later claimed that the agreement had been entered into under duress and on that ground he successfully defended enforcement proceedings brought against him by Mr Picot. That action was dismissed by the Royal Court on 25<sup>th</sup> February 1986. Mr Picot then appealed against that decision. That appeal eventually failed but on 12<sup>th</sup> November 1987 while that process of appeal was under way he commenced proceedings against both the present respondents. That action was adjourned sine die on 10<sup>th</sup> December 1987. On 11<sup>th</sup> October 1990 Mr Picot commenced a second action against the respondents and eventually in 1992 these two actions were consolidated into the proceedings which have now come before the Board.

C These proceedings related to nine cheques which the respondents had signed between April 1983 and January 1984. The cheques were drawn on Vekaplast and were in some cases in favour of Aquacraft and in others in favour of persons to whom the respondents were indebted. Mr Picot alleged that the respondents had falsely and fraudulently represented that these cheques had been issued for debts and services. The payments were irregular and unauthorised and he claimed from the respondents payment of a sum of £23,958.09 as monies had and received or converted for their own use. The present action came to trial before the Deputy Bailiff sitting with three Jurats in 1994. In the course of the hearing Mr Picot modified his original claim to a figure of £16,720. The hearing lasted for a considerable number of days between June and August of that year and involved a detailed investigation of the records of work done by Aquacraft over the relevant period. The Deputy Bailiff gave a full and careful summing up to the Jurats. The Jurats retired to consider the matter and decided to dismiss Mr Picot's claim. He appealed unsuccessfully to the Court of Appeal and it is from the decision of that court that he now appeals to Her Majesty.

E Mr Picot was both clear and courteous in the presentation of his appeal. He is plainly aggrieved by the decision of the Royal Court and regretted that the Court of Appeal had not explored the whole facts and evidence afresh. The Jurats had of course not given reasons for the decision which they had reached. That was in accordance with the practice of the Royal Court. But Mr Picot expressed some bewilderment at how they could have reached a decision adverse to himself. He regarded the decision as perverse. His criticisms were advanced with restraint but his concerns were clearly sincerely felt. Since he has had so close and personal an interest in the matter and has lived with it through the successive stages of the litigations it is easy to understand the reality and depth of his concern. But his intimacy with the problem may also carry with it the very real difficulty of adopting a more objective view of it.

F Mr Picot made no criticism of the summing up by the Deputy Bailiff in the Royal Court. It was balanced and comprehensive. Copies of it were made available to the parties at the time and the opportunity was afforded to them to raise comments on it. That opportunity they took and the Jurats were recalled and given further directions in the light of those comments. The Deputy Bailiff was careful to secure, particularly where the case was being presented by a lay person, that the hearing was fairly conducted. The main thrust of Mr Picot's attack was upon the factual evidence which had been led at the hearing before the Royal Court. But it is convenient to deal first with what were presented as two points of law.

The first related to the failure by the Royal Court to admit and to listen to a tape recording which had been made of part of the meeting on 24<sup>th</sup> March 1984. Mr Picot submitted that the Jurats should have been allowed to hear the recording. He said that the recording included certain important statements made by the first respondent. He would have wished that the Jurats could have heard the recording of what was actually said. He described the words as ringing in his head and he plainly regarded the aural reproduction of them as significant for the presentation of his case. The question of the admission of the tape was raised at the outset of the hearing before the Royal Court. It appeared that the tape had disappeared for some period and had not been available, and may not even have been mentioned, at the time of the hearing in 1986 when the first respondent was submitting that he had been under duress at the meeting. It had reappeared later. Mr Picot explained to the Board that he had thought it had been disposed of but had then subsequently located it. Questions were also raised about the quality of the recording and the accuracy of such transcripts as there were. Furthermore the recording only covered the first 13 minutes or so of what was a meeting of some four hours. After some discussion the Deputy Bailiff deferred a final decision on the admission of the tape and the trial started. At a later stage during the course of the cross-examination of Mr Picot there was further discussion on the point and the decision was then reached by the Deputy Bailiff that the tape should be used to counter any denial by Mr Jehan of his having said any of the things which, in accordance with the transcript which Mr Picot had, were recorded on the tape. Mr Picot stated that he did not wish to complicate the case, accepted that the recording might be referred to if his evidence about what had been said at the meeting was challenged, and expressly agreed with the observation of the Deputy Bailiff (at p. 575G of Vol. 2 of the Record of Proceedings, described in this case as the Appellant's Volume 2) that that was "a much neater way of dealing with it". In the event, when the first r came to give evidence, he accepted in answer to Mr Picot that he had or must have said the words in question. Mr Picot made no further request to have the tape played and although on at least one occasion the Deputy Bailiff began to think that the tape would have to be played (p. 1244D of the Appellant's Volume 3) there was a sufficient acceptance by the first r of what had been said as to make that step unnecessary. The recording was potentially real evidence of an incident in the history involving two of the parties to the action and might well have been admissible on that basis, but in the circumstances of the case the decision of the Deputy Bailiff provided a reasonable and practical solution and cannot be seriously challenged, particularly when it was with the clear agreement of Mr Picot that the solution proposed by the Deputy Bailiff was adopted.

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The second point of law relates to what Mr Picot referred to as a new claim. His complaint here was that while the respondents in their pleadings had indicated that by agreement with Mr Picot they were entitled to charge for delivery costs the evidence moved on from delivery work to work of a manufacturing character, work on finishes to the windows. Mr Picot argued that this was entirely different from the case of which he had notice on the pleadings, that, particularly in light of his own lack of legal skill and knowledge, the evidence should not have been admitted, and he should have been given an opportunity to lead evidence to counter it. When the point arose in the course of Mr J's evidence the Deputy Bailiff observed (at p. 894D of the Appellant's Volume 2) "This is something totally new". That might have prompted an intervention by Mr Picot, but no objection was raised by him to the evidence and, as the Court of Appeal pointed out, he was able to cross-examine on the matter without any evident difficulty. It is not easy to see that he was taken by surprise or prejudiced. While the pleadings did refer to delivery work they also referred to the fact that some remedial work was done by Aquacraft and Aquacraft employees assisted Vekaplast employees with backlogs of orders in the factory. In any event the Deputy Bailiff (p. 1421 of the Appellant's Volume 3) reminded the Jurats that finishing work had not been mentioned in the

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A pleadings, so that in so far as the point related to credibility it was put clearly before them for consideration. The Court of Appeal also made the point that if there had been objection to the evidence an amendment to the pleadings would doubtless have been granted. Their Lordships do not consider that there is substance in this second point of law.

B It was in relation to the facts that Mr Picot put the greatest emphasis in the presentation of his appeal. In this connection he pointed out that there were a number of inconsistencies and contradictions which could be found in the evidence led by the respondents. There were time sheets which did not tally with invoices, and invoices which were not supported by any clear record. There were doubts and difficulties surrounding many of the various documentary records which were before the court. But at the heart of his argument lay the proposition that the respondents had tendered three explanations for the payments to which they claimed to be entitled, that the three explanations were inconsistent with each other, and that any such acceptance as the Jurats may have made of the respondents' defence must be perverse. The other criticisms which he was able to offer of the documentation, including an attack relating to one particular account concerned with work on the Notre Dame convent, were subsidiary to this principal attack, and indeed he accepted that without success on this main line of attack his case would not be sufficient.

C The first of the three explanations was one which appeared to emerge at the meeting in March 1984. This was to the effect that Mr Jehan had added some surcharge on to the price for the windows as charged to Vekaplast in order to help his current financial difficulties. The second was that the respondents had with the agreement of Mr Picot charged Vekaplast in respect of the cost of delivery of the windows. This explanation can be found in the pleadings in defence. The third was that the respondents had charged Vekaplast for doing finishing work to the windows, work which Mr Picot regarded as manufacturing. This is the claim which Mr Picot regarded as a new case and which has already been considered in the context of its admissibility. Some consideration is required initially of the strength of each of these propositions.

E The evidence as a whole does not lead inevitably to the conclusion that the first explanation was true or indeed complete. Mr Jehan denied in the answers on affidavit which he made to the interrogatories served upon him by Mr Picot at an early stage of the proceedings that he had said the words attributed to him on Mr Picot's transcript of the tape recording on the matter of a surcharge. In the course of his evidence at the hearing he accepted that he must have said the words if the transcript so recorded them. But the weight to be put on this suggested explanation is open to question. Mr Jehan had just returned to Guernsey from three weeks holiday abroad. He had been summoned to Jersey without warning and immediately questioned by Mr Picot and his accountant Mr Richardson about entries in his records relating to the previous year. His books and records were in Guernsey. It was his wife rather than himself who worked on the books. His skill lay essentially in his work as a craftsman. According to Mr Sharman, a former member of Mr Picot's staff who was led as a witness for the respondents, Mr Picot had so arranged the meeting in order to get Mr Jehan on his own in the hope that he would confess to what Mr Picot believed to have been a fraud. While the meeting may at the outset have been somewhat relaxed, it plainly must have developed into a far less comfortable occasion, ending in the making of a settlement later found to have been forced upon Mr Jehan under duress. When cross-examined on the point Mr J, in a passage which is not altogether easy to follow (at pp. 1201-1207 of the Appellant's Volume 3), first indicated that when the questions were asked at the meeting he was put "into a bit of a spin" and then appears to be saying that there had been no surcharges but that they had been thinking of making surcharges. G Mr J's evidence seems to be confused, but he does not appear to have been a particularly articulate

witness and the assessment of his credibility from the written record of the evidence is not easy. It certainly does not appear that the explanation for the charges made against Vekaplast as set out in the transcript of the tape-recording is necessarily correct.

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As regards the charges for delivery two distinct questions have arisen. One is whether there was, as Mr Jehan claims, an agreement with Mr Picot to make such charges. Here again Mr Picot points to the transcript of the tape recording where Mr Jehan evidently stated that "we don't charge anything at all for delivering the units". Mr Picot in presenting his appeal to their Lordship's Board submitted that Mr J's subsequent assertions that there had been an agreement to charge for deliveries constituted perjury in the Royal Court and that the Claim was unsustainable. In Mr J's evidence in the present proceedings he explained that while at the outset of the enterprise Aquacraft had not made charges for delivery it had become necessary to do so since Vekaplast was unable to provide sufficient transport in Guernsey and Aquacraft were using their own means. Mr Jehan said that Mr Picot had agreed to the charging for deliveries. The agreement had been made while they were in a van together in Jersey in January or February 1983 (pp. 893-4 of the Appellant's Volume 2). His wife, who was principally concerned with the making up of the books and making the charges, said that she was aware that an agreement had been made, although she was not present at the time when it had been made. Mr Picot on the other hand denied that any agreement had ever been made. There was thus a straight conflict on the facts which had to be left for the Jurats to resolve.

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The second question concerns the evidential support for the charging for delivery. The various records and in particular the time sheets which were available at the hearing were clearly insufficient to vouch the whole of the alleged expenditure, and there were variations in the figures involved which called for explanations. But it can be taken from Mr J's evidence that the charges were based upon rates relative to the items being delivered, qualified either upwards or downwards by considerations of the time involved in the work. On that approach the time sheets alone would not provide a complete analysis of the costs in question and it would remain a matter of fact whether the Jurats would be satisfied with the explanation which was offered.

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The third explanation was that of the so-called new claim whereby Mr Jehan explained that he had charged for finishing work on the windows. Here again there was no clear or specific record from the time sheets to identify the finishing work as distinct from the other work which was being done. Mr Picot submitted that the respondents could not have created credible invoices from the records. But on the other hand in 1983 and 1984 with the records then available it may well have been possible to prepare reliable invoices. Reconstruction of the detail at the hearing so many years after the event from such records as were produced could well be difficult or impractical.

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The critical strength of Mr Picot's attack rests upon the assumption that these three explanations were advanced successively and independently as explanations for the whole of the expenditure which was charged to Vekaplast. Presented in that way it can be seen as potentially a powerful argument against the credibility and the reliability of the respondents' case. But on investigation that does not seem to be necessarily the proper approach. It is not evident that any of the three explanations was ever put forward as an alternative explanation relating to the same expenditure. Moreover the explanations are not necessarily mutually inconsistent. Charges could be made for both delivery and finishes with or without any alleged surcharge. The Jurats may well not have been persuaded that the first explanation was sound. Without it, there only remains a question of fact whether the charges in issue were attributable to authorised work of one or other of the kinds claimed by the respondents. Moreover, even if the effect of contrary explanations was to destroy the

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A credibility and reliability of the respondents, Mr Picot had still to establish the allegations in his own case of wrongful appropriation. That task might well be easier if the evidence of the respondents was discarded, but the rejection of their evidence would not necessarily lead to the establishment of his own case.

B There was plainly evidence on which the view could be taken that Mr Picot had not made out his claim. There was evidence to support the respondents' contention that the money which they charged to Vekaplast had been employed for legitimate work carried out by Aquacraft's employees and that the payments had been authorised expressly or by implication by Mr Picot. The records, including the time sheets, were open to criticism for their relative inadequacy and obscurity. But that the charges represented work properly chargeable to Vekaplast was supported by the oral evidence not only of Mr Jehan but also his wife who, as has already been noticed, was primarily responsible for keeping the books and records. In addition evidence was given by Rodney Jehan, who was actively engaged on the work done for Vekaplast, which supported the respondents' case, although open to criticism on the detail of the records to which he referred. Mr Sharman also gave evidence generally about Aquacraft's work. Against the evidence from these sources which was led by the respondents Mr Picot only tendered himself as a witness for his own case. He was endeavouring to build up a case of appropriation and fraud on the part of the respondents essentially upon his own observations about the records which were before the court.

D It was certainly open to the Jurats to accept the broad thrust of the respondents' oral evidence that the charges had been fairly and honestly made, even if the written support was in some respects deficient. As for the authorisation of the work three issues arose. First, there was the evidence about the agreement to charge for the delivery work, which was a matter of factual dispute which they would require to resolve. Secondly, there was another factual problem in that Mr Picot stated that he had told the Jehans that Aquacraft was not to undertake work for Vekaplast without his approval. But that was denied by Mr Jehan. Thirdly, there was also a further factual dispute about the knowledge which Mr Picot may have had about the making of the charges during the course of the critical period. Mrs Jehan said that Mr Picot had made frequent visits to Guernsey, had spent considerable time with her, had always asked questions about all the accounts and had never questioned the invoices received from Aquacraft. The evidence of Mr Picot's regular examination of the books and records was also supported by Mr Sharman. Mr Picot on the other hand denied the frequency of his visits and the detail of his inquiries. Mrs Jehan regarded her husband as looking after the practical side of the business while Mr Picot looked after the financial side. It was at least open to the Jurats to conclude that the charges must have been authorised.

F On one view of the case it could be resolved into a question of the credibility of the opposing parties. The Deputy Bailiff put the case in this way to the Jurats early in his summing-up. He observed that the one side or the other must be telling lies, echoing an observation which he had made during the course of the evidence. He then told them that their first task was to consider whether they could accept any of the evidence given by Mr Picot. Only if they were satisfied that he had not agreed or condoned the payments would they require to move on to consider the justification put forward by the respondents for the payments which they had made from Vekaplast. He then stated (p. 1416 of the Appellant's Volume 2) "If you conclude at this stage that the whole thrust of Mr Picot's evidence is not credible and that there is no foundation for his complaint of the Jehans having drawn money from the company unjustifiably and without authority, you will find for the Defendants". The task for the Jurats was plainly a difficult one in assessing the quantity of material before them, guided by recollections of the witnesses who were speaking to events some twelve

years before. It may be that without the necessity of a detailed analysis of every record the Jurats were satisfied that the charges made represented work done for Vekaplast by Aquacraft and were not persuaded that Mr Picot had made out his case.

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Their Lordships have explored the case in order to identify some of the grounds on which the Jurats may well have proceeded, so as to be satisfied that there has been no miscarriage of justice. But such an exercise goes beyond the bounds of what is necessary for the disposal of the case. On a more strict view of the appeal their Lordships consider that the Court of Appeal was correct to hold that the assessment of the factual evidence was a matter for the Jurats and that there was sufficient material before them to support the conclusion which they reached. So far as their Lordships' Board is concerned it is evident that concurrent findings of fact have been reached in the Royal Court and the Court of Appeal. No circumstances have been demonstrated which would entitle the Board to depart from what is recognised as an established practice to decline to review the evidence for a third time (*Devi v. Roy* [1946] A.C. 508).

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On the whole matter their Lordships will humbly advise Her Majesty that the appeal should be dismissed with costs.

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65. EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF MCGONNELL v. THE UNITED KINGDOM

D

(Application no. 28488/95)

JUDGMENT 8 February 2000

STRASBOURG

European Convention on Human Rights - Article 6(1) - right to a fair trial – application for planning permission under IDC Law refused due to provisions of Detailed Development Plan No. 6 – subsequent appeal dismissed by Royal Court – presiding judge was President of States of Deliberation when DDP6 adopted – whether violation of Article 6(1)

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See paragraph 22.

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

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Mr J.-P. Costa, *President*,  
Mr P. Kuris,  
Mrs F. Tulkens,  
Mr W. Fuhrmann,  
Mr K. Jungwiert,  
Mrs H.S. Greve, *judges*,

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Sir John Laws, *ad hoc judge*,  
and Mrs S. Dollé, *Section Registrar*,

A Having deliberated in private on 28 September 1999, 25 January and 1 February 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

B PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 4 December 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).

C 2. The case originated in an application (no. 28488/95) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under former Article 25 by a British national, Mr Richard James Joseph **McGonnell** (“the applicant”), on 29 June 1995.

3. The Commission’s request referred to former Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 of the Convention.

D 4. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998 and in accordance with the provisions of Article 5 § 4 thereof read in conjunction with Rule 100 § 1 and Rule 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 14 January 1999 that the case would be examined by a Chamber constituted within one of the Sections of the Court.

E 5. In accordance with Rule 52 § 1, the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section. The Chamber constituted within that Section included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Articles 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr J.-P. Costa, Acting President of the Section and President of the Chamber (Rules 12 and 26 § 1 (a)). The other members designated to complete the Chamber were Mr P. Kuris, Mrs F. Tulkens, Mr W. Fuhrmann, Mr K. Jungwiert and Mrs H.S. Greve (Article 26 § 1 (b)).

F Subsequently Sir Nicolas Bratza, who had taken part in the Commission’s examination of the case, withdrew from sitting in the Chamber (Rule 28). The United Kingdom Government (“the Government”) accordingly appointed Sir John Laws to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. In accordance with Rule 59 § 2, the Chamber decided, on 8 June 1999, to hold a hearing which took place in public in the Human Rights Building, Strasbourg, on 28 September 1999.

G There appeared before the Court:

*(a) for the Government*

Mrs S. Langrish, Foreign and Commonwealth Office *Agent*,  
Sir Sidney Kentridge QC,  
Mr D. Anderson QC, *Counsel*,  
Mr G. Rowland QC, Attorney-General for Guernsey,  
Mr R. Clayton, Home Office,  
Mr P. Jenkins, Lord Chancellor's Department,  
Mrs C. Davidson, Lord Chancellor's Department,  
Mr M. Birt QC, Attorney-General for Jersey,  
Ms M. Gray, *Advisers*;

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*(b) for the applicant*

Mr B. Emmerson,  
Ms J. Simor, *Counsel*,

Mr R.A. Perrot, *Advocate*.

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The Court heard addresses by Mr Emmerson and Sir Sidney Kentridge.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

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#### A. The planning background

7. The applicant bought the Calais Vinery, Calais Lane, St Martin's in 1982. A number of planning applications were made to permit residential use of the land in the ensuing years. The applications were all refused, an appeal being dismissed by the Royal Court in July 1984. In 1986 or 1987 the applicant moved into a converted packing shed on his land.

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8. In 1988 the applicant, through an advocate, made representations to a planning inquiry which was considering the draft Detailed Development Plan no. 6 (DDP6). In his report to the President of the Island Development Committee (IDC), the inspector set out the arguments led by the applicant's advocate and by the advocate for the IDC, and concluded that a dwelling on the applicant's site would be an intrusion into the agricultural/horticultural hinterland. He supported the IDC's proposed zoning of the land as an area reserved for agricultural purposes and in which development was generally prohibited.

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9. The President of the IDC submitted DDP6, in draft, to the President of the States of Deliberation on 22 May 1990.

10. The States of Deliberation, presided over by Mr Graham Dorey, the Deputy Bailiff, debated and adopted DDP6 on 27 and 28 June 1990. The zoning of the applicant's land was not changed.

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A 11. A retrospective application for planning permission to convert the packing shed into a dwelling was rejected by the IDC on 11 July 1991 as the IDC was bound to take into account DDP6, according to which the site was zoned as a Developed Glasshouse Area where residential development was not allowed.

12. On 27 March 1992 the applicant was convicted by the Magistrates' Court on his guilty plea of changing the use of the shed without permission, contrary to section 14(1)(a) of the Island Development (Guernsey) Law 1966 ("the 1966 Law"). He was fined 100 pounds sterling, with ten days' imprisonment in default.

B 13. On 15 February 1993 the IDC applied for permission under Section 37(1)(h) of the 1966 Law itself to carry out the necessary works to remedy the breach of the planning legislation. The application was adjourned in Ordinary Court by the Deputy Bailiff on 25 February 1993 for a date to be fixed. The Deputy Bailiff was also unwilling to hear the matter on the ground of having dealt with the applicant when he was Her Majesty's Procureur.

C 14. A further application on the applicant's behalf for permission to continue living in the shed was dismissed by the IDC on 18 May 1993, and a request for the section 37(1)(h) proceedings to be adjourned was dismissed by the Bailiff on 20 May 1993. On 25 June 1993 the Royal Court comprising the Bailiff and three Jurats granted the IDC's application under Section 37(1)(h).

#### **B. The particular facts of the case**

D 15. On 10 August 1993 the applicant's current representative made a formal application for change of use on behalf of the applicant, together with a request that continued occupation be permitted pending determination of the expected appeal against an expected refusal. The application was rejected by the IDC on 26 October 1994 in the following terms:

E "I have to inform you that ... the Committee decided to reject your proposal for the following reason which is based on the considerations which the Committee is bound to take into account under the provisions of section 17 of the Island Development (Guernsey) Laws 1966-1990:-

(a) Detailed Development Plan no. 6, as approved by the States.

F The site is located within a Developed Glasshouse Area and the Committee's written statement of policy makes no provision for the form of development proposed. I enclose for your information a copy of the written statement of policy. ..."

G 16. On 6 June 1995 the Royal Court, comprising the Bailiff, by then Sir Graham Dorey, and seven Jurats, heard the applicant's appeal. The applicant's representative accepted that the written statement provided for no development other than "Developed Glasshouse" in the area, but submitted that there were nevertheless reasons in the case to permit the change of use: the external appearance of the building would not change and there would be no future prejudice to the horticultural use of the land, such that it was unreasonable for the IDC to take an unduly narrow view of what it allowed under the DDP. The Bailiff then summed up the applicant's complaints to

the Jurats, instructing them that the ultimate burden of proof was on the IDC to satisfy the Jurats that the IDC's decision was reasonable. The appeal was dismissed unanimously. The decision recites the grounds of appeal, but gives no reasons.

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## II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The Court has been referred to one recent official document relating to the Constitution of Guernsey generally. It is the States of Guernsey Administrative and Accounting Guidelines, issued in 1991 as a manual of reference and best practice for the information and guidance of civil servants. It has forewords by the then Bailiff and President of the States, Sir Charles Frossard, and by the States Supervisor, Mr F.N. Le Cheminant. The section dealing with the Constitution and law of Guernsey is taken from a pamphlet by a former Bailiff, and the part dealing specifically with the position of the Bailiff reads as follows:

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“The Bailiff is the Island's chief citizen and representative.

The Bailiff is appointed by the Sovereign by Letters Patent under the Great Seal of the Realm and holds office during Her Majesty's Pleasure subject to a retiring age of seventy years. He is President of the States of Election, President of the States of Deliberation, President of the Royal Court, President of the Court of Appeal and head of the Administration.

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The Bailiff, as President of the States of Deliberation, is entitled to speak on any matter and has no original vote but he has a casting vote if the Members are equally divided. In general, the Bailiff uses his voice to ensure a further investigation of questions on which the States are in doubt. He places measures before the States at the request of the States Committees but he can also on his own initiative place any matter before the assembly.

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He is, with the Lieutenant-Governor, a channel of communication between the Privy Council and the Secretary of State for the Home Department on the one hand and on the other, the Island authorities; and in a number of questions, as the head of the Administration of the Island, he would be expected to guide the Island authorities.

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He has been relieved of some of his administrative responsibilities by the appointment of the States Advisory and Finance Committee which is in the nature of a co-ordinating committee with advisory powers but the Bailiff may, in his own discretion, lay before the States any matter which he has previously referred to the Committee providing that he gives the Committee an opportunity to acquaint the States with its views.

While the Bailiff is responsible for arranging the business to come before the States, he is not in a position to refuse to place before the States any question of business if so requested by Members or Committees of the States. The assembly looks to the Bailiff for advice on matters affecting the Constitution of the Island.

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In the course of insular legislation or in discussions arising from communications from the Privy Council or the Home Department, it is the duty of the Bailiff to represent the views of the Island in constitutional matters.

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In the event of differences between the Crown and the States it is the historical duty of the Bailiff to represent the views of the people of the Island.”

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18. The Bailiff is the senior judge of the Royal Court. In the modern era, he has usually occupied the offices of Her Majesty’s Comptroller, Her Majesty’s Procureur (Solicitor-General and Attorney-General respectively) and, since 1970, Deputy Bailiff, before finally becoming Bailiff. In his judicial capacity, the Bailiff is the professional judge (with the lay Jurats) in the Royal Court, and is *ex officio* President of the Guernsey Court of Appeal. In his non-judicial capacity, the Bailiff is President of the States of Election, of the States of Deliberation, of four States committees (the Appointments Board, the Emergency Council, the Legislation Committee and the Rules of Procedure Committee), and he plays a role in communications between the island authorities and the government of the United Kingdom and the Privy Council. Where the Bailiff presides in his non-judicial capacity, he has a casting, but not an original, vote.

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19. The States of Election elects people to fill the vacancies which occur amongst the twelve Jurats. Jurats sit as lay members of the Royal Court. It is their function to determine the issues of fact referred to them, and to decide whether or not to allow an appeal. They also sit on certain of the States committees, either because a committee mandate requires the election of a Jurat or by reason of abilities or interests personal to them. Jurats are not, however, eligible to sit on the States Committee for Home Affairs, the Gambling Control Committee or any States committee which administers legislation the provisions of which include a right of appeal to the Royal Court against a decision of that committee.

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20. The States of Deliberation exercises its legislative power in Guernsey in the form of Laws and Ordinances. In practice, a “Billet d’Etat” is laid before the States, generally by one or other of the States committees. Having passed through the States of Deliberation, Projets de Loi (draft laws) are scrutinised by the Home Office and other relevant departments of the United Kingdom government before being submitted to the Privy Council in London for royal assent. Ordinances do not need royal assent and are made under the States of Deliberation’s limited common-law powers, or under powers delegated to the States by Guernsey laws or Acts of the United Kingdom parliament applicable to Guernsey.

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21. The States of Deliberation is not divided on party political lines; members of the States are elected as individuals, and vote in all matters according to their consciences. All members are of equal importance, and there are no time-limits on the length of speeches or debates generally. The States is scheduled to meet twelve times each calendar year. Sittings usually last one or two days.

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22. The States committees conduct the government of Guernsey. There are some fifty States committees, to which specific administrative tasks are given by statute or delegated by the States of Deliberation. Each committee is directly accountable to the States of Deliberation.

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23. None of the States committees has legal supremacy over the others, although the Advisory and Finance Committee is the most important. It oversees Treasury matters and examines all proposals and reports which are to be placed before the States of Deliberation. The committees, each of which has a Chief Officer or Chief Executive, are supported by a professional civil service of some 1,800 staff.

24. The Appointments Board, one of the States committees, appoints officials to fill certain offices in the States' service when those offices become vacant. With limited exceptions, it appoints at the level of Senior Officer Grade 8 or above. The offices include the States Supervisor and other senior civil servants such as senior medical personnel, the Prison Governor and the Chief Officer of Police. It has never appointed a Chief Executive of the IDC. The Appointments Board met twenty-four times in the ten years prior to 31 December 1998.

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25. The Emergency Council has the power to declare a state of emergency, to make emergency regulations where the population or a substantial portion of it risks being deprived of the essentials of life, and to make other essential arrangements in the case of hostile attack by a foreign power. It has met three times in the last ten years. On none of those occasions was a state of emergency declared.

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26. The Legislation Committee, which meets about once a month, reviews and revises the Projets de Loi, reviews and drafts Ordinances and, in certain cases, orders that an Ordinance shall come into force pending consideration by the States of Deliberation. The latter function has been used on sixteen occasions in the last ten years.

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27. The Rules of Procedure Committee considers the Rules of Procedure in relation to assemblies of the States of Deliberation, receives representations from the States and makes representations to the States for amendments to the Rules. It has met twenty-five times in the last fifteen years.

28. The Bailiff's role in communications between the island authorities and the government of the United Kingdom and Privy Council arises from his historical function of representing the views of the islanders to the Crown. The Bailiff represents a States committee's views outside the island when specifically requested to do so, and in accordance with a clear mandate. Representations are generally on behalf of the smaller committees. Examples of this function are the Bailiff's involvement in negotiating the level of fees payable in respect of Guernsey students attending higher education institutions in the United Kingdom, and in requesting the government to ensure that Heathrow Airport should have slots for aircraft from regional airports such as Guernsey.

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29. The States Supervisor, the Chief Officer of the Advisory and Finance Committee, is the committee's senior adviser on policy, and is also head of the Guernsey civil service. He liaises with other senior civil servants in relation to all proposals for legislation and other major administrative items submitted by the various committees to the States of Deliberation and comments on them for the benefit of the Advisory and Finance Committee's deliberations on them. He also gives guidance to the Chief Officers of other committees and attends meetings of those committees where appropriate.

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30. Section 14(1)(a) of the Island Development (Guernsey) Law 1966 provides:

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"A person shall not, without the permission in writing in that behalf of the Committee, carry out development of any land."

Section 17(a) provides:

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A "In exercising its powers under the provisions of the last preceding section the Committee shall take into account the Strategic and Corporate Plan when approved by the States and any relevant Detailed Development Plans when so approved."

31. In the case of *Bordeaux Vineries Ltd v. States Board of Administration* (4 August 1993), a challenge was made to the participation of the Bailiff as a judge in the Royal Court in an action against the States Board of Administration, one of the major States committees. The Court of Appeal noted that the then Bailiff, at first instance, had held:

B "Insofar as the constitutional position is concerned ... my first duty is to the Crown in all matters, and I do not espouse causes of the States. ... The point has been raised as to my casting vote ... the vote is to be cast constitutionally. The way I defined that was to vote against any proposition before the States and only if that vote impinged on my conscience would I contemplate any other course."

In connection with the existence of an appeal to it, the Court of Appeal noted:

C "... the decision upon a submission that the Bailiff ... is disqualified by interest from hearing any matter should in the first place be made by the Bailiff ... From that decision an appeal lies to this Court."

As to the participation of the Bailiff, the Court of Appeal found that:

D "... the Bailiff is invested by law with duties in the Royal Court and in the States. The consequence of this dual function is that he has on occasion to take part in the exercise by the court of jurisdiction over the States. I do not think that on these occasions his responsibility in the States disqualifies him from discharging his responsibility in this Court. He can properly discharge both responsibilities because although he is a member of the States his special position there means he is not responsible for the decisions of the States or the acts of its agencies ..."

## E PROCEEDINGS BEFORE THE COMMISSION

32. Mr **McGonnell** applied to the Commission on 29 June 1995.

33. The Commission declared the application (no. 28488/95) partly admissible on 22 January 1998. In its report of 20 October 1998 (former Article 31 of the Convention)<sup>1</sup>, it expressed, by twenty-five votes to five, the opinion that there had been a violation of Article 6 § 1 of the Convention.

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## FINAL SUBMISSIONS TO THE COURT by the government

34. The Government's principal written submission was that the application should be declared inadmissible pursuant to Article 35 of the Convention. In the alternative, they submitted that there was no violation of Article 6 § 1 of the Convention.

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35. In their oral submissions, the Government contended that the complaint under Article 6 did not give rise to a violation of the Convention. In their final observations, they maintained that an appeal was available in respect of the constitutional position of the Bailiff, and was not taken.

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## THE LAW

### I. alleged violation of article 6 § 1 of the convention

36. The applicant claimed that he did not have the benefit of the guarantees of Article 6 § 1 of the Convention at the hearing of his case before the Royal Court of Guernsey on 6 June 1995. The relevant part of Article 6 provides:

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“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

37. The Government contested the claim. The Commission upheld it.

C

#### A. The Government's preliminary objection

##### *Alleged non-exhaustion of domestic remedies*

38. The Government contended that the complaint concerning the alleged lack of independence and impartiality of the Royal Court in the applicant's case should be declared inadmissible for failure to exhaust domestic remedies, pursuant to Article 35 of the Convention, which states:

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“1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

In the Government's submission, it would have been open to the applicant to appeal to the Guernsey Court of Appeal in respect of any alleged lack of independence and impartiality on the part of the Royal Court. They pointed to the case of *Bordeaux Vineries Ltd v. States Board of Administration* (see paragraph 31 above) in which the Court of Appeal found that an appeal lay to it against a decision by the Bailiff on whether he was disqualified by interest from hearing any matter. They noted that the jurisdiction of the European Court to declare an application inadmissible for failure to exhaust domestic remedies, even when such arguments were rejected by the Commission, was not in doubt. They claimed that there was no reason why the exercise of the jurisdiction should depend on the Commission having given detailed consideration to the point.

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39. The applicant contended that the Government were estopped from raising an objection of non-exhaustion, among other reasons because they had stated before the Commission's admissibility decision that “the Government concedes that it was not reasonably practicable for the applicant to have addressed any of his complaints to another authority”. He considered that in any event no domestic remedy had been available to him, as the *Bordeaux Vineries* case had decided that the Bailiff's functions as President of the States did not preclude him from sitting as a judge in actions against the States.

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A 40. The Court notes that the Government's submissions were not raised before the Commission. The Government are therefore estopped from relying on them (see, among many other authorities, the *Vasilescu v. Romania* judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1074, § 34).

### B. Applicability of Article 6

41. The parties agreed that Article 6 § 1 of the Convention was applicable to the proceedings in the present case, and the Court so finds.

### B C. Waiver

42. The Government claimed that where a legally represented applicant had failed to raise an objection to the tribunal when it was open to him to do so, he must – even if the application was admissible – be deemed to have waived his right to object to the independence and impartiality of that tribunal.

C 43. The applicant submitted that the Government's submissions were a mere repetition of their submissions as to non-exhaustion of domestic remedies, and that they should be dismissed for the same reason. He considered that the Government had not, in any event, established a waiver.

D 44. The Court recalls that in the context of a complaint concerning the absence of a public hearing in civil proceedings, it has held that “a waiver must be made in an unequivocal manner and must not run counter to any important public interest” (see the *Håkansson and Sturesson v. Sweden* judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66). No express waiver was made in the present case. The question, as in the *Håkansson and Sturesson* case, is whether there was a tacit one. The answer to the question whether the applicant ought to have taken up his complaint with either the Bailiff at the hearing on 6 June 1995, or on appeal with the Court of Appeal, depends on what was reasonable in the circumstances of the case. In assessing that reasonableness, the Court notes first that in the *Bordeaux Vineries* case referred to by the Government, the Court of Appeal found that there was no structural conflict between the Bailiff's duties in the Royal Court and in the States of Deliberation.

E Secondly, the Court notes that the argument of waiver was made for the first time before the Court: it was not raised before the Commission either prior or subsequent to the Commission's decision on admissibility.

F 45. Given the clear statement of the Court of Appeal in the *Bordeaux Vineries* case that the Bailiff's constitutional functions in connection with the States do not impinge on his judicial independence, and the fact that a domestic challenge was not only not pursued by the applicant in the domestic proceedings, but was not raised by the Government until a late stage of the Convention proceedings, the Court finds that the applicant's failure to challenge the Bailiff in Guernsey cannot be said to have been unreasonable, and cannot amount to a tacit waiver of his right to an independent and impartial tribunal.

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#### D. Compliance with Article 6 § 1

46. The applicant pointed to the non-judicial functions of the Bailiff, contending that they gave rise to such close connections between the Bailiff as a judicial officer and the legislative and executive functions of government that the Bailiff no longer had the independence and impartiality required by Article 6. As specific examples, the applicant pointed to three matters which were not referred to before the Commission. They are the facts that the Bailiff is invariably appointed from the office of the Attorney-General, that he acts as Lieutenant-Governor of the island when that office is vacant, and that the Bailiff who sat in the present case had also presided over the States of Deliberation when DDP6, the very act which was at issue in the applicant's later case, was adopted. He also claimed that the Royal Court gave inadequate reasons for its judgment.

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47. The Government recalled that the Convention does not require compliance with any particular doctrine of separation of powers. They maintained that whilst the Bailiff has a number of positions on the island, they cannot give rise to any legitimate fear in a reasonably well-informed inhabitant of Guernsey of a lack of independence or impartiality because the positions do not involve any real participation in legislative or executive functions. In particular, they underlined that when the Bailiff presides over the States of Deliberation or one of the four States committees in which he is involved, his participation is not that of an active member, but rather he is an independent umpire, who ensures that the proceedings run smoothly without taking part in or expressing approval or disapproval of the matters under discussion. In connection with the reasons for the Royal Court's judgment, the Government considered that the Bailiff's summing-up, taken together with the decision of the Jurats, gave sufficient reasons to comply with Article 6 of the Convention.

C

48. The Court recalls that in its *Findlay v. the United Kingdom* judgment (25 February 1997, *Reports* 1997-I, p. 281, § 73) it found that:

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“in order to establish whether a tribunal can be considered as ‘independent’, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence ...

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As to the question of ‘impartiality’, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect ...

The concepts of independence and objective impartiality are closely linked ...”

49. In the present case, too, the concepts of independence and objective impartiality are closely linked, and the Court will consider them together.

F

50. The Court first observes that there is no suggestion in the present case that the Bailiff was subjectively prejudiced or biased when he heard the applicant's planning appeal in June 1995. It has not been alleged that the Bailiff's participation as Deputy Bailiff in the adoption of DDP6 in 1990 gives rise to actual bias on his part: the applicant stated that it was not possible to ascertain whether there was actual bias because of the Bailiff's various functions, but he did not contend that the Bailiff was subjectively biased or prejudiced.

G

A 51. The Court can agree with the Government that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts as such. The question is always whether, in a given case, the requirements of the Convention are met. The present case does not, therefore, require the application of any particular doctrine of constitutional law to the position in Guernsey: the Court is faced solely with the question whether the Bailiff had the required “appearance” of independence, or the required “objective” impartiality.

B 52. In this connection, the Court notes that the Bailiff’s functions are not limited to judicial matters, but that he is also actively involved in non-judicial functions on the island. The Court does not accept the Government’s analysis that when the Bailiff acts in a non-judicial capacity he merely occupies positions rather than exercising functions: even a purely ceremonial constitutional role must be classified as a “function”. The Court must determine whether the Bailiff’s functions in his non-judicial capacity were, or were not, compatible with the requirements of Article 6 as to independence and impartiality.

C 53. The Court observes that the Bailiff in the present case had personal involvement with the planning matters at the heart of the applicant’s case on two occasions. The first occasion was in 1990, when, as Deputy Bailiff, he presided over the States of Deliberation at the adoption of DDP6. The second occasion was on 6 June 1995, when he presided over the Royal Court in the determination of the applicant’s planning appeal.

D 54. The Court recalls that in the case of *Procola v. Luxembourg*, four of the five members of the *Conseil d’Etat* had carried out both advisory and judicial functions in the same case (judgment of 28 September 1995, Series A no. 326, p. 16, § 45).

E 55. The participation of the Bailiff in the present case shows certain similarities with the position of the members of the *Conseil d’Etat* in the *Procola* case. First, in neither case was any doubt expressed in the domestic proceedings as to the role of the impugned organ. Secondly, and more particularly, in both cases a member, or members, of the deciding tribunal had been actively and formally involved in the preparatory stages of the regulation at issue. As the Court has noted above, the Bailiff’s non-judicial constitutional functions cannot be accepted as being merely ceremonial. F With particular respect to his presiding, as Deputy Bailiff, over the States of Deliberation in 1990, the Court considers that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue. In the present case, in addition to the chairing role as such, the Deputy Bailiff could exercise a casting vote in the event of even voting and, as the Bailiff stated in the *Bordeaux Vineries* case, there was no obligation on him to exercise his casting vote against a proposition before the States where that vote impinged on his conscience (see paragraph 31 above). Moreover, the States of Deliberation in Guernsey was the body which passed the regulations at issue. It can thus be seen to have had a more direct involvement with them than had the advisory panel of the *Conseil d’Etat* with the regulations at issue in the *Procola* case (judgment cited above, p. 12, § 25).

G 56. The Court also notes that in the *De Haan* case, the judge who presided over the Appeals Tribunal was called upon to decide on an objection for which he himself was responsible. In that case, notwithstanding an absence of prejudice or bias on the part of the judge, the Court found that

the applicant's fears as to the judge's participation were objectively justified (see the *De Haan v. the Netherlands* judgment of 26 August 1997, *Reports* 1997-IV, pp. 1392-93, §§ 50-51).

57. The Court thus considers that the mere fact that the Deputy Bailiff presided over the States of Deliberation when DDP6 was adopted in 1990 is capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of the law in the case, the applicant's planning appeal. The applicant therefore had legitimate grounds for fearing that the Bailiff may have been influenced by his prior participation in the adoption of DDP6. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the Royal Court, and it is therefore unnecessary for the Court to look into the other aspects of the complaint.

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58. It follows that there has been a breach of Article 6 § 1.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

C

### A. Damage

60. The applicant requested the Court to award a “just and appropriate sum in compensation”. In early correspondence he referred to the sum of 50,000 pounds sterling (GBP). The Government considered that there was no reason to award any sum in respect of pecuniary or non-pecuniary damage.

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61. The Court finds that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered. No specific claim for pecuniary damage has been made, and the Court finds none.

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### B. Costs and expenses

62. The applicant has submitted bills totalling GBP 20,913.90 (exclusive of value-added tax – “VAT”). The Government have not commented on them.

63. The Court awards the applicant the sum of GBP 20,913.90, together with any VAT which may be payable.

F

### C. Default interest

64. According to the information available to the Court, the statutory rate of interest applicable in England and Wales at the date of adoption of the present judgment is 7.5% per annum.

G

FOR THESE REASONS, THE COURT UNANIMOUSLY

- A
1. *Dismisses* the Government's preliminary objection;
  2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
  3. *Holds*
- B
- (a) that the respondent State is to pay the applicant, within three months, GBP 20,913.90 (twenty thousand nine hundred and thirteen pounds sterling ninety pence), together with any value-added tax that may be chargeable;
  - (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;
- C
4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 8 February 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S.Dollé J.-P.Costa

D Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Sir John Laws is annexed to this judgment.

Concurring opinion of JUDGE Sir John Laws

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- I add a few words of my own merely to emphasise that the only objective basis upon which, on the facts of this case, a violation of Article 6 § 1 may properly be found depends in my view entirely upon the fact that the Bailiff who presided over the Royal Court in the legal proceedings giving rise to this case presided also (as Deputy Bailiff) over the States of Deliberation in 1990 when DDP6 was adopted. That is the thrust of the reasoning in paragraph 57 of the judgment, with whose terms I entirely agree.
- F
- If it were thought arguable (perhaps by reference to the reasoning in paragraph 52) that a violation might be shown on any wider basis, having regard to the Bailiff's multiple roles, I would express my firm dissent from any such view. Where there is no question of actual bias, our task under Article 6 § 1 must be to determine whether the reasonable bystander – a fully informed layman who has no axe to grind – would on objective grounds fear that the Royal Court lacks independence and impartiality. I am clear that but for the coincidence of the Bailiff's presidency over the States in 1990, and over the Royal Court in 1995, there are no such objective grounds whatever.
- G
1. *Note by the Registry.* The report is obtainable from the Registry.

## Chief Pleas Dinners

by Darryl Ogier, States Archivist

The celebrated Norman Jurist Henri Basnage says somewhere that if a community requires a parson to be one of its number, it is not unreasonable that it should supply him with a house. Similarly, when “twelve of the most notable, impartial, wise, loyal and rich” men of the island – as Guernsey’s Jurats described themselves in 1441 – came to town to make and hand down the law, they might expect to be supplied with dinner, at least at the times of their attendance at the Royal Court’s more onerous sessions. And indeed this is what is found in Medieval Guernsey, where the Crown’s Receivers (predecessors in title to Her Majesty’s Receiver General) supplied the necessary meals, including following the three sessions of Chief Pleas customarily held each year after Christmas, Easter and Michaelmas.

A document of c. 1275, *les franchises que le roi dengleterre a en Guernerie et que les homes de Guernerie ont*, states that the Jurats should dine with the Bailiff on

.... the day that he holds his *harèle* and the day he views the roads and the days on which he settles the preliminaries of the assize and those of all other pleas [that] ought to be made by the Jurats. And they should also eat with the Bailiff when he holds his three Chief Pleas and when there is forfeiture and when battle is engaged and when it is fought ....<sup>1</sup>

Some alterations had taken place by the date of the next occurring record of the Court’s dinners, set out in the *extente* of Royal rights and revenues of 1331. This does not mention the assizes; the final one having taken place in the same year, attended by great disturbances in the island. Instead, we find it recorded

.... of the dinners of the Lord the King that the aforesaid Bailiff, Receiver, Clerk, 12 Jurats, Prévot, Bedell, 12 principal Bordiers, Overseers of the mills of the Lord the King [*the Seigneurs owing homage*], have and have been accustomed to have from the time of which memory does not exist three dinners at the three Chief Pleas, to wit at Christmas, the feast of Easter and the feast of Saint Michael, every dinner being at one sitting. Also the said Bailiff, receiver, Clerk, 12 Jurats, [*and*] Prévot have similar dinners when any felon abandons the Islands, whether he may have forfeited goods and chattels, life or limb, and likewise on any day on which the Royal Court taxes, etc. Which same dinners in ordinary years cost 40 *livres tournois*.<sup>2</sup>

Whilst apparently current in 1275, neither assizes nor judicial combats were mentioned in the *extente* of 1331. Already, we see the erosion in the number of judicial activities giving rise to dinners owed to the Court’s members that was to continue over the years. Those officers who were entitled to attend also varied historically. (The Bordiers, it should be said, were Crown tenants who were obliged to perform various duties, including acting as pike men at executions and guarding prisoners, in connection with their possession of certain lands).

There is no record of what was on the menu on such occasions, though it may be assumed that fare matching the consumers’ status was provided. A hint is contained in a record of c.1375, mentioning that for the sum of 25 *sols* a boat was employed to go from Jersey to Sark to capture rabbits for Chief Pleas dinner or its equivalent in the former island.<sup>3</sup> In this period, rabbits were quite a luxury.<sup>4</sup>

The *Précepte d'Assize* (1441) confirmed the Jurats' right to dinners at Chief Pleas, at abjurations, and when fines were settled.<sup>5</sup> Although abjuration appears to have been abolished about 1531 (to be revived briefly during the reign of Mary I),<sup>6</sup> well into the nineteenth century the Jurats and other members of the Court were given meals on occurrences of its modern equivalent, namely transportation, and also at the execution of criminals.

The Advocates of the Royal Court, who are first named in a record of 1323,<sup>7</sup> were not, at this period, entitled to dinners. Viscount Hatton, Governor of Guernsey, writing in the late seventeenth century, reveals that (although an ordinance of 1619 required their presence at Chief Pleas)<sup>8</sup> the Advocates were not invited to dine by that time either. He states that

.... the Gouverneur is to give a dinner to the Bailiff and Jurats and all the officers of the Court the Bordiers included, but not the Advocates, or if he thinke not fitt to provide them a dinner he may in lieu of it give every one of them something in money and tis most usuall to give to each of the Bordiers 5 sols in mony ....<sup>9</sup>

Perhaps when the number of Advocates was limited to six, in 1777, the courtesy of an invitation came to be extended to them, without punitive cost.

Some unpleasantness arose over the dinners in 1683, when the Receiver General, Jean Andros, sought not to provide them, but rather to pay a sum of money to the Court, and a mere 3 sols to each Bordier, in the manner alluded to by Hatton. The affronted Court peremptorily ordered him to supply dinner to all, *suivant leurs droicts*.<sup>10</sup> There is no reason to think that convivial relations did not mark much of the succeeding century, though a certain coolness must have attended those dinners given in the period 1793-1800, when Robert Porret Le Marchant was Receiver General, and members of the Court were in dispute with the Bailiff, William Le Marchant, his father.

In 1825, animosity relating directly to the dinners arose. It seems that the Receiver General, John Carey, had for some years invited the officers of the militia to dine at his personal table at Chief Pleas dinners. Some or all of them were, it appears, friends of his. On seeking to have their presence confirmed as of right, however, the military were informed by the Lieutenant Governor that the Crown was not obliged to invite them at all. The militia officers appear to have been particularly affronted by the fact that other persons, of low degree, were present by right. Reference was made to the *extente* of 1331. This, it was pointed out, did not refer to the advocates either. The Court thereupon referred to the authority of custom. In 1826, the matter appeared to be getting out of hand and to have been allowed to drop: perhaps it was realised that the *extente* did not refer to several other officers, and the continuance of the institution itself was threatened. From then on, the military seem no longer to have attended, however.<sup>11</sup>

About the same period, some *Seigneurs* and *Bordiers* resorted to powers of substitution with regard to their attendance. Carey reported in 1823 that "several of our hopeful youths" had been present in such a capacity at the Easter dinner that year, one of whom became "completely drunk before the cloth was removed". This custom of permitting substitutes also appears to have fallen into disuse, perhaps not surprisingly in such circumstances.<sup>12</sup> Following an Order in Council of 1857, the *Bordiers* themselves were relieved of the obligations of their offices, including attendance at Chief Pleas, and hence surrendered their right to take dinners.<sup>13</sup>

Some notes in respect of Chief Pleas dinners 1856-60 survive. Locations alternated between the establishments of H. Crousaz, at *Marshall's Royal Yacht Club*, at the Grand Carrefour, and Gardner's *Royal Hotel*. Quantities referred to in October 1858, at Gardner's, amounted to 48 "boiling pieces", 6 of suet, and 10 each of veal, mutton and beef. Wines ordered for the January dinner in the same year, held at the same place, were a dozen bottles of claret and the same of sauternes, and a dozen-and-a-half each of port and sherry. This apparently served for thirty people, giving an average of two bottles apiece, though the Receiver General noted, perhaps apologetically, that "dinner has seen 48 dining in former times". The October dinner of 1866 was a more abstemious occasion, with twenty-two diners getting through a mere twenty-eight bottles of the same wines.<sup>14</sup>

It later became customary to eat at the *Old Government House Hotel*, but by 1897 this failed to satisfy at least ten of the Jurats, who petitioned the Bailiff, drawing his attention to "the great discomfort and inconvenience caused by the lack of accommodation" there, and requesting that he use his influence with H.M. Receiver General to provide that in future Gardner's *Royal Hotel* should be favoured.<sup>15</sup> This appears to have taken effect, and Chief Pleas dinners regularly were held at the Royal Hotel throughout much of the twentieth century, until 1988.

In 1952, the Royal Court itself, having noted the expense on the Crown Revenues that the thrice-yearly dinners represented, suggested an annual substitution. The Treasury agreed this, and from then on the dinner came to be held only on the first Monday after Michaelmas in each year.

Thus things remain: given the great increase in numbers of persons entitled to attend the dinners, perhaps the quantities of meals annually provided by the Crown to the members and officers of the Court, and others, is not that different in total from those numerous dinners supplied, for a variety of reasons, some eight hundred years ago.

<sup>1</sup> H.W. de Sausmarez (ed), *The Extentes of Guernsey 1248 and 1331 and other documents relating to ancient usages and customs in that island* (Guernsey, 1934), p. 40; Cf. J. Havet, *Les Cours Royales des Iles Normandes*, (Paris, 1878), pp. 183-86. *Harèles* were presentations to triennial assizes by parish juries in respect of certain serious crimes (de Sausmarez (ed), *The Extentes of Guernsey 1248 and 1331*, p. 33).

<sup>2</sup> De Sausmarez (ed), *The Extentes of Guernsey 1248 and 1331*, p. 126, cf. p. 101.

<sup>3</sup> E.F. Carey, *Essays on Guernsey History*, (Guernsey, 1936), pp. 7-8, citing J. Le Moigne, "Du Guesclin à Jersey", *Revue Historique*, 61.

<sup>4</sup> A. Henderson, "From Coney to Rabbit: the story of managed coloniser", *The Naturalist*, 122, (1997), 101-21.

<sup>5</sup> De Sausmarez (ed), *The Extentes of Guernsey 1248 and 1331*.

<sup>6</sup> D.M. Ogier, *Reformation and Society in Guernsey*, (Woodbridge, 1996), pp. 21, 56-57.

<sup>7</sup> Havet, *Cours Royales*, p. 79.

<sup>8</sup> R. MacCullough (ed.), *Recueil d'Ordonnances de la Cour Royale de l'Isle de Guernesey*, (Guernsey, 1852), I. p. 143.

<sup>9</sup> Greffe: Greffe Collection, no. 58, pp.81-82.

<sup>10</sup> Greffe: *Ordonnances*, IV. f. 137r.

<sup>11</sup> Island Archives Service: SG 24-78, -78, -80, -81, 25-6, -7.

<sup>12</sup> Carey, *Essays on Guernsey History*, p. 8.

<sup>13</sup> E.C. Ozanne (ed.), *Recueil d'Ordres en Conseil*, (Guernsey, 1903), I, pp. 280-85.

<sup>14</sup> Island Archives Service: Receiver General's Collection, DII.3.c.

<sup>15</sup> *Ibid.*