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CONTENTS

HERALD

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TWENTY-SEVENTH ISSUE

References to this issue in future issues will be cited using the figure and letters 27.GLJ. followed by the paragraph number.

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 (from 29.3.99), de V G Carey (deVGC); the Deputy Bailiff, A C K Day (ACKD); Lieutenant Bailiff and Assistant Magistrate, A R W Hancox (ARWH); and Lieutenant Bailiff, R D Harman (RDH).

Reporting of sensitive decisions

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 The full judgment of the Court of Appeal may not be published.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

Compiled from sources including all Orders in Council, Ordinances, Projets de Loi and subordinate legislation and selected cases and other relevant material which became available during the months January to December 1999. 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.

Percy Ozanne – 1917 to 1997

Percy was born in 1917 in St. Pierre du Bois, the second of 3 children. His father James was an Ecrivain, being one of the last group of law clerks admitted by the Royal Court in 1914 to that now extinct profession. Percy's paternal great-great grandfather was Band Master of the Irish Regiment, which was stationed in the 1850s at Fort Richmond, whence stems the considerable musical talents of the Ozanne family. Percy attended, firstly, St. Peters' Infants and Primary Schools, and at the age of 8 went to Elizabeth College, as a boarder, in order to learn English, because Guernsey patois was ordinarily used at home. This facility with patois was to prove extremely useful in his subsequent professional career.

Percy from an early age had decided to become a lawyer. He obtained an LLB at London University and was admitted as an English Solicitor, serving his Articles with a small firm which still exists in St. Martin's Lane, just off the Strand. He also studied French law under the legal adviser to the French Consul in London, and was thus able to foreshorten his studies at Caen University where he obtained a Bachelier en Droit. Being unable to return to Guernsey on completion of his academic and professional training because of the Occupation, he enlisted in the Royal Air Force, and was commissioned as a Flying Control Officer, at which he served throughout the War. On his return to Guernsey shortly after the Liberation he acted as such at both Guernsey and Jersey Airports.

He was called to the Guernsey Bar by the Royal Court on 21st September, 1945 wearing his Royal Air Force uniform, and uniquely took his seat on the Advocates' benches unrobed. On demobilisation a month later, he set up in practice at 6 Court Row in offices adjacent to those of his father, where he practised until the firm moved to 1 Le Marchant Street. At that time there were only 4 Advocates actively practising in Guernsey; when Percy ceased to be an Advocate at the end of 1988, there were 44.

Percy was a popular and successful member of the Bar, and demonstrated all the best traditions of a family lawyer, dispensing cautious but sensible and practical advice to all, disdaining cant and pettifoggery. He accepted the challenge posed by the emergence of Guernsey as a finance centre, and his common sense graced the boardroom just as much as it served his country clients. By nature tolerant and mild, he had not the temperament for contentious litigation, but when occasion demanded could be forensically effective.

In his non-professional life Percy was an exemplar to Guernsey's community. He was a St. Peter Port Douzenier for 24 years, and served as Douzaine Representative in the States for a period. He sat on several States Committees, including the Board of Health and the Legislation Committee. He was deeply interested in feudalism, and besides being a Seigneur, served in various capacities in some feudal courts.

HEADINGS USED IN THIS ISSUE

GUERNSEY

ADMINISTRATIVE LAW

Orders of certiorari and prohibition – Production Notice – serious fraud

1. See Bassington Limited et al v. H M Procureur and related appeals, paragraph 23.

ADVOCATES

Execution of Affidavits etc

2. The Affidavits, etc. (Execution before Advocates) Rules, 1999 and Practice Direction: See paragraphs 30 and 31.

APPEALS

Appeal to Court of Appeal from Royal Court – application for extension of time – appeal against judgment for payment of costs relating to previous proceedings – issue of fresh proceedings

3. A sought leave to appeal out of time against the judgment of the Deputy Bailiff for a sum representing two awards of costs against her in relation to proceedings emanating from a boundary dispute (see 26.GLJ.5). She had issued notice of appeal within the relevant time limits but had failed to lodge the necessary documents as required by the Court of Appeal (Civil Division) (Guernsey) Rules, 1964. Her reason for delay was that she had issued fresh proceedings against the Respondents and wished the further proceedings to be disposed of before prosecuting her appeal. HELD by the Court of Appeal, whatever the outcome of the subsequent proceedings A would remain liable to pay the costs of the earlier proceedings therefore this was not a reason upon which she could properly rely in her application for leave to appeal out of time. Further, there was no merit in her appeal because she sought to appeal against the fact that she had been ordered to pay costs rather than the quantum thereof.

[Smith v. Helmot – Court of Appeal 29.11.99 (unrep/DGLeM)]. For full report of judgment of Court of Appeal, see paragraph 146.

Appeal to Royal Court from Magistrate's Court – criminal case – constitution of Royal Court – whether Court should sit with Jurats

4. In considering an appeal against conviction in the Magistrate's Court the Royal Court had occasion to revisit the question as to the composition of the Royal Court in dealing with appeals against conviction under the Magistrate's Court Appeals Law, 1988. Following the judgments of the Court of Appeal in Diment (16.GLJ.86) and Whales (16.GLJ.87) it was HELD by the Lieutenant Bailiff that, as there was no statutory provision as to the constitution of the Royal Court except when sitting as a Full Court, and as it was now the practice for the Bailiff, Deputy Bailiff or Lieutenant Bailiff to sit alone except in cases where there were

matters of fact for Jurats to consider, an appeal on the grounds of a miscarriage of justice, which was an alternative third ground of appeal under Article 25 of the Court of Appeal Law 1961, should not be viewed as a means of obtaining an appeal with Jurats to decide matters of fact when the reality was that no such issues were present in a particular case. In the present case A's position fell within the first of the three alternative grounds in Article 25 and the Lieutenant Bailiff would therefore sit alone. (RDH).

[Law Officers of the Crown v. Blondel – Full Court 11.5.99 (RJMcM/AMM)].

CONSTITUTIONAL LAW

Election of People's Deputies

5. Ordinance: The General Election Ordinance, 1999. – Prescribes 12.4.00 as the date for the general election of People's Deputies.

In force 30.6.99. (No. IX of 1999).

Electoral Roll

6. Ordinance: The Electoral Roll Ordinance, 1999. – Provides for a new electoral roll to be compiled for the electoral year commencing on 1st March 2000, and for the continued entitlement of people inscribed in that roll to be similarly inscribed for the electoral years commencing in March 2001, 2002 and 2003.

In force 28.7.99. (No. XV of 1999).

States of Deliberation – replacement of Conseillers

7. Order in Council: The Replacement of Conseillers (Consequential Provisions) (Guernsey and Alderney) Law, 1999. – See 25.GLJ.17.

Approved by the States of Alderney 5.5.99. Royal Sanction 21.7.99. Registered17.8.99. In force 1.5.00.

CONTRACTS

Construction – accountancy term – definition – whether to be interpreted as at date of contract or by reference to subsequent changes in accounting practice

8. AA, who were directors of a company, applied to the Court for directions as to the construction of a Put/Call Agreement under which AA were entitled upon leaving the company to compel R (a trust company) to purchase their shares in the company. The Agreement contained the procedure for calculating the option price at which R was obliged to purchase the shares of AA. The issue centred on the construction of the Agreement as to whether or not a figure for "extraordinary items" (a technical accounting term) should be included in the company

accounts for the calculation of the Option Profits which were used to calculate the Option Price (the fair value of the shares). If "extraordinary items" were to be treated as they were at the date of the Agreement and in accordance with the accounting standards of that date, this would mean that a lump sum would be payable for the shares. However, if "extraordinary items" were to be treated in accordance with the accounting standards as revised for the relevant financial year in question, this would mean a totally different sum would be payable. The effect of the different accounting standards was to bring the Option Price from a higher one to a relatively low one. AA argued that the meaning of accounting standards should be fixed as of the date of the Agreement. The Bailiff held that the proper accounting standard to be taken was to be found in the definition of the "Group's Accounts" in the Put/Call Agreement which referred to the accounts of the company for the relevant financial year audited in accordance with accounting standards approved in the UK and so far as consistent with the audited accounts of the company in previous financial years. This meant that so long as the accounts continued to be kept in accordance with current accounting standards and, subject thereto, with previous accounts, they were in order. Clearly the parties to the Agreement intended that current accounting standards would be adopted as and when they were revised. AA's submission that 'extraordinary items' were to be treated as they were at 1987 would be rejected. Their subsequent appeal to the Court of Appeal was dismissed.

[Corbin and Duquemin v. The Throgmorton Trust PLC – Court of Appeal 21.7.99 (JMW/JPG)]. For full report of judgment of Court of Appeal, see paragraph 145.

Specific performance – non-availability in Guernsey Courts

9. See R G Phillips Limited v. Hill and Hill, paragraph 71.

CRIMINAL LAW AND PROCEDURE

Dangerous driving – appeal against conviction – tests to be applied

10. A was convicted by the Magistrate of driving a motor vehicle on a public highway in a manner dangerous to the public. W, the principal prosecution witness, was driving a car along a major road after dark. He observed a cyclist approaching him in the opposite direction. The car driven by A started to overtake W who pulled to his nearside. A did likewise and struck both W's car and the cyclist. The latter received serious injuries. A appealed on the ground that the Magistrate had misdirected himself as to the tests to be applied.

The Deputy Bailiff, sitting alone, dismissed the appeal and HELD that the Magistrate had identified the tests set out in R v. Evans [1963] 1 QB 412 and applied them correctly to the facts. His conclusions were supported by the evidence. (ACKD).

[Law Officers of the Crown v. Simon – Full Court 23.7.99 (PR/AMM)].

Directions to Jurats – accomplice direction - experienced judges of fact – repetitive directions and warnings unnecessary

11. See Law Officers of the Crown v. Rodney, paragraph 29.

Misuse of drugs

12. Projet de Loi: The Misuse of Drugs (Amendment) (Bailiwick of Guernsey) Law, 1999. –

Enables a variety of subsidiary legislation under the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 as amended to be made by Order of the States of Guernsey Board of Health rather than by Ordinance of the States of Guernsey. Also updates the definitions of "medical practitioner", "dentist", "veterinary surgeon", and "pharmacist" in the Law of 1974.

Approved by the States of Guernsey 24.2.99; by the States of Alderney 5.5.99; and by the Chief Pleas of Sark 6.10.99. Awaiting Royal Sanction.

Proceeds of crime - legislation

13. Order in Council: The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999. - Creates a regime for the restraint and confiscation of the proceeds of criminal conduct not associated with drug trafficking, the creation of offences connected with money laundering, the obtaining of information for the purposes of investigation and for the issue of regulations requiring financial services businesses to have proper procedures to prevent money laundering.

Part I

Section 1 defines criminal conduct. Sections 2-12 detail the procedure to be followed when making a confiscation order following conviction before the Royal Court. Sections 13-18 allow the Royal Court to reconsider the amount to be paid under confiscation orders in the event of further information coming to light. Sections 19-24 set out what the Royal Court should do in the event of a defendant absconding or dying. Sections 25-28 allow for the restraint of property which may eventually be the subject of a confiscation order and the making of realty and personality charging orders. Section 29-31 permit the appointment of Her Majesty's Sheriff to act as a receiver to gather in assets to satisfy a confiscation order. Sections 32 and 33 are concerned with the solvency of defendants. Section 34 restricts the liability if Her Majesty's Sheriff when acting as Receiver. Sections 35 and 36 provide for the designation of countries and territories for the purposes of the enforcement by the Royal Court of confiscation orders made overseas. Section 38 is the interpretation section for Part I.

Part II

The following offences are created - concealing or transferring the proceeds of criminal conduct (section 38); assisting another person to retain the proceeds of criminal conduct (section 39); acquisition, possession or use of proceeds of criminal conduct (section 40); "tipping off" a person as to the existence of a money laundering enquiry (section 41). Sections 42-44 relate to the onward disclosure of information given to the law enforcement authorities.

Part III

Section 45 allows for a production order to be issued by the Bailiff for the production of material. Section 46 allows for the Bailiff, if certain conditions are met, to issue warrants to

search premises. Section 47 creates the offence of prejudicing an investigation. Section 48 sets out the procedure for the disclosure of information held by States Departments. Section 49 allows the Advisory and Finance Committee to make regulations in respect of the duties and requirements to be complied with by financial services businesses for the purposes of money laundering. Sections 50-52 deal with the interpretation of the Law.

Section 53 is concerned with the constitution of the Court for the purposes of Part I. Section 54 gives general provisions as to subordinate legislation. Section 55 is the citation and commencement section. The Schedule defines those persons or businesses which are financial services businesses.

Approved by the States 31.3.99. Royal Sanction 22.6.99. Registered 17.8.99. In force 1.1.00: The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (Commencement) Ordinance, 1999. (No. VIII of 1999).

14. Ordinance: The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Amendment) Ordinance, 1999. - Adds a subsection (6) to section 44 of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (see paragraph 13) and provides that "investigation", in relation to crime, includes the prevention of crime and also the detection of crime.

In force 24.11.99. (No. XXVIII of 1999).

15. Ordinance: The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) Ordinance, 1999. - Designates those countries and territories for which confiscation orders made in their jurisdiction can be enforced by the Royal Court. It provides for the proof of overseas orders and makes certain modifications to the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 for the purposes of obtaining restraint orders in connection with overseas proceedings and the enforcement of overseas orders.

In force 1.1.00. (No. XXXIII of 1999).

Sentence – assault and assault with intent to rob

16. A was convicted in the Royal Court of one offence of common assault and one offence of assault with intent to rob. He was sentenced to 18 months' and 2 years' imprisonment consecutive, having spent two and a half months in custody pre-trial. The offence of common assault arose from a dispute with a taxi driver over a fare which A alleged was too high, the taxi driver having taken an incorrect route. Having offered the driver £6 of the £6.20 requested, A punched the driver several times in the face resulting in injuries requiring hospital treatment. The second offence resulted from A demanding money from a stranger while threatening to stab him, pushing something sharp into his chest. A subsequently admitted both offences. Although A had a criminal record this was his first appearance in Court for offences of any real seriousness. A appealed against the sentences. HELD by the Court of Appeal, having considered Foster (1982) 4 Cr. App. Rep. 101, and Lee (1995) 16 Cr. App. Rep. 343, the sentence for the common assault would be reduced to 9 months on the basis of the background to the offences; the fact that had it been tried in the Magistrate's Court (which it

would have been were it not for the other offence) the maximum sentence would have been 12 months; and having regard to the overall length of the sentences. In relation to the second offence, the Court considered that 2 years was the correct sentence in the circumstances.

[Law Officers of the Crown v. O'Reilly – Court of Appeal 19.7.99 (PR/DGLeM)]. For full report of judgment of Court of Appeal, see paragraph 136.

Sentence – burglary – robbery – assault

17. A, who had no recent convictions of relevance, pleaded guilty in the Royal Court to four charges, namely burglary (when he entered a house which he had viewed posing as a prospective purchaser and subsequently removed kitchen appliances and sold them); robbery (when he obtained money from a shop assistant after threatening her with a knife); and burglary and assault (following an incident in which he hid in a person's room and attacked him with an ornament, intending to obtain details of the victim's pin number of his bank account and the combination number of the safe at the restaurant where they both worked). A admitted that his motives were financial. A appealed against his total sentence of 7 years' imprisonment on the grounds that the Royal Court had erred in passing consecutive sentences for counts 3 and 4 (burglary and assault) and that he had been given insufficient discount for his guilty pleas. The Court of Appeal HELD that, although a single charge of assault with intent to rob might have encompassed the mischief described in counts 3 and 4, the Crown had chosen to charge the burglary and assault in two separate charges describing separate criminal activities and it could not be said that the Royal Court had erred in imposing consecutive sentences. However, bearing in mind the discount to which A was entitled on account of his plea of guilty, the totality of the sentence should have been 6 years. In order to achieve that, as a matter of discretion, the sentence on count 4 would be made concurrent with that on count 3.

[Law Officers of the Crown v. Sims – Court of Appeal 22.7.99 (PR/MGAD)]. For full report of judgment of Court of Appeal, see paragraph 137.

Sentence – misuse of drugs – importation of Class A drug

18. AA imported (internally) 300 tablets of Ecstasy, which constituted the largest importation of Ecstasy into Guernsey at the time, and 7.2 grams of heroin. They were each sentenced to six years' imprisonment for importing the ecstasy and to 18 months' for the importation of heroin, the sentences to be served concurrently. They appealed to the Court of Appeal against the length of the sentences. HELD, approving the approach of the Jersey Court of Appeal of 4.4.95 in Campbell (in contrast to the approach of the English Court of Appeal in Aranguren (1994) 16 Cr App R which abandoned reference to the street value of the drug in favour of a formula related to weight and purity) the Court would have regard to both the weight and the street value. There was no evidence that in Guernsey, where the purchaser was relatively unsophisticated and would buy what was available, irrespective of purity, the street price would be affected by the amount of the active constituent. The essential gravity of an offence lay with the quantity. The Court also found that it was impossible to disregard the scale of the Ecstasy importation, which was a larger amount than would have been required by AA during their intended stay in Guernsey. The appeal would be dismissed.

[Law Officers of the Crown v. Scragg & Osborne – Court of Appeal 16.3.99 (HMC/ADL/ADNH)]. For full report of judgment of Court of Appeal, see paragraph 134.

Sentence – misuse of drugs – importation of Class A and Class B drugs – pressure on vulnerable couriers – destination of drugs – effect on sentence

19. A1 was convicted of importing 2 kilos of cannabis resin. He claimed in mitigation that the reason for the offence was that he was under pressure from suppliers who were threatening violence against his sister, who owed them money, and his family. He would have obtained no reward for the importation save for the cancellation of his sister's debt. He was sentenced to 4 years' imprisonment. A2 was convicted of importing, internally, 4.35 grams of cocaine and 300 tablets of amphetamine. He claimed in mitigation that he had become involved in drugs when he took cannabis to relieve the pain of an injury and that his house had been used by drug dealers for the storage of drugs, which drugs had been discovered and confiscated by police. His trip to Guernsey, he alleged, was by way of expunging his debt to the drug dealers, who were threatening to harm his brother, for the loss of the drugs. He also submitted that the person for whom the cocaine was destined intended to use it for his own purposes and those of two close friends. A2 was sentenced to 4 years' imprisonment for the importation of cocaine and 3 years' imprisonment for the other offence. Both A1 and A2 appealed against their sentences which were heard together. HELD by the Court of Appeal, as a matter of public policy judges should be slow to regard a suggestion of pressure falling short of duress sufficient to be a defence to the charge as a justification for reducing the sentence. Courts should also decline to permit couriers who are vulnerable either because they are themselves addicted or who need to extinguish debts to mitigate their conduct by praying in aid their vulnerability. Leniency by the Courts would inevitably result in dealers making use of couriers who might fall into these categories. Further, the gravity of an offence of importation of drugs depends on the nature and quantity of the drugs imported and the assertion that they are intended to be shared among friends rather than distributed on a commercial basis should not necessarily result in a reduction in sentence. The appeals would be dismissed.

[Law Officers of the Crown v. Cooper & Mather – Court of Appeal 22.7.99 (PR/RMcM/CMF/NLP)]. For full report of judgment of Court of Appeal, see paragraph 138.

Sentence – misuse of drugs – importation of Class B drug

20. AA imported 2.6. kilograms of cannabis resin into the island from England, having been under observation previously whilst acting as drug couriers. They pleaded guilty and were sentenced in the Royal Court to 10 years' and 5 years' imprisonment respectively, the differential being due to the greater involvement of one of them and the greater proceeds acquired by him. They appealed against the scale of the sentences. HELD by the Court of Appeal, in respect of the 10 year sentence, which had been reduced from a 15 year starting point by virtue of a plea of guilty, the appellant, though a major player, was certainly not in the top league of drug importing and hence the starting point prior to consideration of the guilty plea should have been 12 years. Based on the overall situation in the particular case the sentences would be reduced from 10 years to 8 years and from 5 years to 4 years.

[Law Officers of the Crown v. Malia & Ribeyre – Court of Appeal 15.3.99 (HMC/AMM/MJR)]. For full report of judgment of Court of Appeal see paragraph 132.

Sentence – misuse of drugs – possession of Class B drug

21. A, aged 17 and of previous good character, was sentenced in the Royal Court to 9 months' Youth Detention for supplying cannabis resin before his arrest and to 18 months' Youth Detention for possession of 116 grams of cannabis resin with intent to supply, the sentences to be served concurrently. He applied for leave to appeal against the sentences. HELD that, notwithstanding A's youth and his Counsel's argument that a custodial sentence might lead him further into the drug culture, the offences committed were so serious that a custodial sentence was necessary for the protection of the public or the prevention of crime in accordance with section 2(1)(b) of the Criminal Justice (Youth Detention) (Bailiwick of Guernsey) Law 1990. The Court did not accept the submission that the section 2(1)(b) test related primarily to cases involving violence or a sexual element. The application would be dismissed.

[Law Officers of the Crown v. Kirk – Court of Appeal 15.3.99 (HMC/JJLM)]. For full report of judgment of Court of Appeal see paragraph 133.

Sentence – perjury – delays in sentencing – offences wrongly taken into account – co-operation, guilty plea and time spent on remand to be taken into account

22. A committed perjury during a trial of a motoring offence in the Magistrate's Court. Arrested afterwards, he immediately confessed. The case took 13 months to come before the Royal Court for sentencing. In that time, A had committed a number of offences and was in breach of his bail. In reducing his sentence from one of six months' imprisonment to 83 days (such that he would be released from custody that day), the Court of Appeal stated, *inter alia*, that:

(1) An immediate sentence of imprisonment is, save in the most exceptional circumstances, always appropriate in cases of perjury.

(2) It was deeply concerned about the serious delay in bringing A before the Royal Court for sentencing.

(3) It was concerned that the period of imprisonment may have been extended by relation to other offences on which A was not then being sentenced. Those offences should not have been taken into account.

(4) No reference had been made by the Royal Court to A's co-operation and plea of guilty, which entitled him to at least some reduction of sentence.

(5) The period of detention on remand of 31 days had not been taken into account

[Law Officers of the Crown v. Watt – Court of Appeal 29.11.99 (PW/ADL)]. For full report of judgment of Court of Appeal, see paragraph 139.

Serious fraud – Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 – orders of Certiorari and Prohibition

23. In related appeals against H M Procureur's decision to exercise his powers under section 1 of the 1991 Law (see 26.GLJ.4 and 14) it was ORDERED BY CONSENT in the Court of Appeal that: the Appeal be allowed and the Orders and Acts of Court of the Ordinary Court be set aside; that the Procureur's decision to issue the Notice be quashed; that the Notice be quashed and declared invalid and of no effect; and that the Procureur be ordered to take no further steps or disclose information received under the Notice, to deliver up those documents received, to destroy any copies of the documents received and not to use any information gained under the

Notice.

[Bassington Limited et al v. H M Procureur; Lazarenko et al v. H M Procureur – Court of Appeal 6.1.99 (RICEH/NJB/HMP)].

Sexual offences – age of consent

24. Projet de Loi: The Sexual Offences (Amendment) (Guernsey) Law, 1999. – Provides that a homosexual act in private is not an offence if only two persons take part or are present, both consent thereto, and both have attained the age of 18 years instead of, as previously, 21 years.

Approved by the States 29.9.99. Awaiting Royal Sanction.

Theft – legislation

25. Order in Council: The Theft (Bailiwick of Guernsey) (Amendment) Law, 1999. - This Law inserts two extra offences into The Theft (Bailiwick of Guernsey) Law, 1983, namely - obtaining a money transfer by deception (section 15A) and dishonestly retaining a wrongful credit (section 27A).

Approved by the States 29.6.98. Royal Sanction 21.7.99. Registered and in force 4.10.99. (No. XII of 1999).

DIVORCE AND MATRIMONIAL CAUSES

Magistrate's Court applications – procedure – Practice Direction

26. 1. All Causes to be tabled under the provisions of the Domestic Proceedings and Magistrate's Court (Guernsey) Law, 1988, as amended, and under the provisions of the Illegitimacy Law 1927, must be lodged at the Greffe no later than 12 noon on the day the Cause is to be tabled. A folder will be available at the Greffe.

2. Consent Orders for the signature of the Magistrate should be lodged with the Deputy Greffier sitting on the day, no later than 2.25 pm. The form of Order in such instances should

be as provided in Practice Direction No 2 of 1999 (see paragraph 73) which provides for a standard form of Consent Order in relation to matters being tabled before the Royal Court.

Members of the Bar are requested not to make provision for the Magistrate to sign at the foot of the Cause. A separate form headed "Consent Order" should always be used.

[Practice Direction No. 5 of 1999].

ECCLESIASTICAL LAW

Church of England – Priests-in-Charge

27. Order in Council: The Priests-in-Charge (Assimilation to Rectors) (Guernsey) Law, 1999. – Places a Priest-in-Charge in the same position as a Rector during the currency of his or her licence for all civil law purposes.

Approved by the States 28.7.99. Royal Sanction 14.12.99. Awaiting registration.

EMPLOYMENT

28. Order of the Royal Court: The Employment Protection (Appeals and References) Order, 1999. – Makes provision, pursuant to the Employment Protection (Guernsey) Law, 1998 (see 25.GLJ.26), for the procedure to be followed where there is an appeal from the decision of an adjudicator to the Royal Court or where an adjudicator refers a question of law to the Royal Court.

[Order of the Royal Court No. I of 1999].

EVIDENCE

Accomplice evidence – requirement for corroboration – evidence of prior consistent statements – difference – directions to Jurats

29. A was convicted by the Royal Court of importation of cannabis resin. His alleged accomplices, B and T, had pleaded guilty to the same offence, and elected to give evidence against A. It was HELD by the Court of Appeal, dismissing his appeal -

1. To convict A, credible independent evidence was necessary to corroborate the evidence of B and T. The prosecution submitted that two matters were capable of amounting to corroborative evidence. The Deputy Bailiff had so directed the Jurats but had made it clear to the Jurats that it was for them to determine whether those matters did so amount to corroborative evidence.

2. A's counsel had argued that the Deputy Bailiff had failed to have included sufficiently frequent reminders on the basis on which certain evidence of accomplices was to be

treated and on the burden of proof. Trial by jurats involves an examination of a case by experienced judges of fact and if only for this reason repetitive directions and warnings must be regarded as unnecessary and as unhelpful.

3. The Court was aware that the basis on which criminal appeals were dealt with in Guernsey was different from that in England in that there was no power to set a conviction aside on the ground that it was unsafe. This was not a case where such a ground would have been accepted even if it had been open to the Court to do so.

4. Whilst there had been an apparent confusion as to the real position and role of T as an accomplice the way in which the summing up was rendered did not in the Court's opinion give grounds for concluding that the jurats had been misled.

5. The trial had been characterised by its extreme fairness as evidenced by the Deputy Bailiff's refusal to allow evidence from a fellow remand prisoner to the effect that A had tried to bribe B into not giving evidence against him.

[Law Officers of the Crown v. Rodney – Court of Appeal 22.9.99 (RMM/CMF)]. For full report of judgment of Court of Appeal see paragraph 135.

Commentary

This case is a rare example of where the Court of Appeal appears to be acknowledging the somewhat different qualities of a jurat from the English jury member. In this particular case the complaint was that the Deputy Bailiff had not repeated on a regular basis throughout his summing up warnings concerning the burden of proof and the dangers of convicting on accomplice evidence. As there appears to be no English learning to the effect that judges when directing juries must be repetitious in such matters it would be perhaps dangerous to lay too much weight on what the Court of Appeal is saying in this case. In several cases going back to the case of Heywood in 1971 the Court of Appeal has on more than one occasion commended the practice of the Bailiff when summing up to the jurats treating them in the same way as a jury.

Affidavits etc – execution before Advocates

30. Order of the Royal Court: The Affidavits, etc. (Execution before Advocates) Rules, 1999. – Provides that Advocates of the Royal Court of at least 5 years' standing are persons before whom a power of attorney, affidavit or other document specified under section 1 of the Powers of Attorney and Affidavits (Bailiwick of Guernsey) Law, 1995 (see 18.GLJ.1) may be executed or sworn in the Bailiwick.

[Order of the Royal Court No. III of 1999].

31. Practice Direction: Members of the Bar are requested to note that the Royal Court will not accept an Affidavit sworn by an Advocate where a member of that Advocate's firm has been responsible for the drafting of the document. The existing practice whereby notaries public swear documents that have been prepared within their Advocate's practice is being reviewed.

No objection is taken at this stage to its continuing until further consultation with the Association of Notaries Public has taken place.

[Practice Direction No. 6 of 1999].

FINANCE BUSINESS

Insurance business

32. Order in Council: The Insurance Business (Bailiwick of Guernsey) Law, 1999. – Extends the Insurance Business (Guernsey) Law, 1986 as amended, which previously applied in the Islands of Guernsey and Alderney, so as to apply throughout the Bailiwick.

Approved by the States of Guernsey 24.2.99; by the Chief Pleas of Sark 7.4.99; and by the States of Alderney 5.5.99. Royal Sanction 21.7.99. Registered 28.9.99. In force 1.10.99 (No. XI of 1999).

FIREARMS

33. Projet de Loi: The Firearms (Guernsey) (Amendment) Law, 1999. – Amends the Firearms (Guernsey) Law, 1998 (see 26.GLJ.21) by making provision for licences for the lawful possession of loaded shot guns in public places.

Approved by the States 29.9.99. Awaiting Royal Sanction.

34. Ordinance: The Firearms (Guernsey) Law, 1998 (Commencement) Ordinance, 1999. - Brings the Firearms (Guernsey) Law, 1998 (see 26.GLJ.21) into force on the 30th April, 1999.

In force 30.4.99. (No. V of 1999).

GAMBLING

Betting

35. Ordinance: The Gambling (Betting) (Amendment) Ordinance, 1999. – Amends the Gambling (Betting) Ordinance, 1973 so as to enable licensed credit betting offices and licensed betting offices operating only as licensed credit betting offices to open and effect betting transactions on Sundays (other than Christmas Day) between 9 a.m. and 10 p.m. and restricting bookmakers' authorised agents from receiving or negotiating bets on Sundays, Good Friday and Christmas Day.

In force 24.2.99. (No. II of 1999).

Betting - bookmaker's licence – more than one application for one available licence – appeal against refusal –

36. A applied for a bookmaker's licence and was notified that the States Gambling Control Committee had decided to issue the available licence to another applicant, B, thus precluding it, under the provisions of the Gambling (Betting) Ordinance 1973 which limited the number of licences to seven, from granting a licence to A. No other reasons for refusing A's application were given. On A's appeal against the decision of the Committee, HELD by the Lieutenant Bailiff, on an application for directions, having considered the decisions *inter alia* in R v. Commission for Racial Equality ex parte Hillingdon London Borough Council [1982] 1 QB 276 and Associated Picture Houses v. Wednesbury Corporation [1948] 1 KB 223, clearly the intention of the legislature was that the Committee should consider all the applications on their merits before making a decision as to which should be successful. The indication from the letter received by A was that his application had been rejected out of hand, B's licence having already been granted. In order that the appeal be properly considered it would be necessary also to consider the merits of B's application which would include disclosure of all the relevant documentation relating thereto (unfortunate though the situation might be for B who had incurred expense in reliance on the licence and would incur further costs on the appeal due to no fault of his own). It would have been sensible for the Committee to have suspended the validity of any licence granted pending the expiration of the time limited for appeal. Finally, the effect of the wording of section 20(2) was that the burden of showing that the Committee's decision was a reasonable use of its powers should rest on the Committee who should have the final right of reply. (ARWH).

[Goulding v. States Gambling Control Committee – Full Court 25.5.99 (AJA/RJMcM)].

Crown and Anchor

37. Ordinance: The Gambling (Crown and Anchor) (Liberation Day) Ordinance, 1999. – Allowed Crown and Anchor table permits to be granted by the Gambling Control Committee in respect of any period between 12 noon and 11 p.m. on Sunday, 9th May, 1999.

In force 28.4.99. (No. VI of 1999).

Gaming and lotteries

38. Ordinance: The Gambling (Gaming and Lotteries) (Amendment) Ordinance, 1999. – Amends the Gambling (Gaming and Lotteries) Ordinance, 1991 (see 12.GLJ.35) in order to increase the maximum ticket prices and prize values permitted in respect of private lotteries which are unlicensed or licensed under Classes I, II and III. It also introduces a new Class IV private lottery for which the permit fee is £100, under which tickets at up to £5 each can be sold and the maximum value of any single prize can be up to £20,000.

In force 29.9.99. (No. XVIII of 1999).

HEALTH AND MEDICINE

Public health – amending legislation

39. Order in Council: The Public Health (Amendment) (Guernsey) Law, 1999. – See 26.GLJ.24.

Royal Sanction 11.5.99. Registered 15.6.99. In force 1.10.99: Ordinance No. XVII of 1999. (No. V of 1999).

Public health – tattooing etc

40. Projet de Loi: The Tattooing, Piercing, Acupuncture and Electrolysis (Guernsey and Alderney) Law, 1999. – Regulates the carrying out of tattooing, body piercing, ear piercing, acupuncture and electrolysis, and limits the circumstances in which it is lawful to carry out such operations on young persons, except, in either case, in the normal course of medical or dental practice.

Approved by the States of Guernsey 28.4.99 and 9.12.99; and by the States of Alderney 1.9.99. Awaiting Royal Sanction.

HOUSING

Control of occupation - individual coming to Guernsey on the open market and then living on the local market - "en famille" relationship producing two children – human right to family life – issues for the judge and issues for the Jurats

41. X came to Guernsey and lived in open market accommodation and then lived with Y, a qualified resident, on the Local Market under licence. They were not married but had two children and lived together for over four years. The relationship ended with X having limited access to the children. X requested a licence so as to be able to maintain access, which was refused. X maintained that this was an interference with his right to family life, (European Convention on Human Rights, Article 8). Both Counsel agreed that as the Human Rights Convention was not part of domestic law the convention rights were matters for the Jurats to consider in reaching the question of whether the Authority's decision was reasonable. HELD, by the Bailiff:

1. The Authority could consider factors set out in section 6(2)(a) of the Housing (Control of Occupation) (Guernsey) Law 1994 (periods and circumstances of residence) and 6(2)(b) (family and like connections) either separately or together and its method of so doing was a consideration for the Jurats not the Judge.

2. The reasonableness given to X's status in the community, his financial standing and contact with the children were not questions of Wednesbury unreasonableness for the Judge but rather questions for the Jurats.

per the Bailiff:

Having regard to the Authority's duty to give reasons for its decisions (Walters v States Housing Authority 24.GLJ.32) it could either address this by a full statement of what it perceived the current housing problem to be and how that affected the application it is considering; thus if people like Mr X were to be restricted with regard to his rights to live in Guernsey and develop links with his children there must be a coherent explanation to justify the proportionality involved, or the Authority could publish a statement to be regularly updated as appropriate as to the present housing needs and the pressures placed on it with regard to housing licences and relate that to the application (although it would appear that much of the relevant information had not been collected, e.g. whether licence holders were still living under licence, whether licence holders had become qualified residents, whether "en famille" relationships were continuing, details of residence in uncontrolled accommodation).

The case would be remitted to the Housing Authority to give full amplification of its reasons and for a re-consideration in view of any further submissions made on X's behalf. (deVGC).

[X v. States Housing Authority – Royal Court - 6.8.99 (CMF/HMC)].

Control of occupation – native of Guernsey – strength of connections with Guernsey – issues for the judge and issues for the Jurats

42. A, who challenged the refusal of the Housing Authority to give her a licence to occupy a controlled dwelling, raised a number of preliminary issues for the Bailiff who HELD:

1. Applying his judgment in X v Housing Authority (see paragraph 41 above), the factors set out in section 6(2)(b)(ii) of the Housing (Control of Occupation) (Guernsey) Law 1994 could be taken into account when considering the position under section 6(2)(b)(i).
2. The strength and degree of A's connection with Guernsey was a matter of degree for the Jurats.
3. The weight to be given to birth in Guernsey was for the Jurats. The Housing Law created two parallel paths of qualifying: by birth in Guernsey or to Guernsey-born parents (which do not of themselves give the qualification) and substantial periods of residence in Guernsey. The balance between the two was not of law but a judgment that could be reviewed by the Jurats.
4. The weight to be given to A's catering qualifications (this was not an application for an essential employment licence) was for the Jurats.

The appeal would be heard by the Jurats. (deVGC).

[Edwards v. States Housing Authority – Royal Court 11.11.99 (NJB/HMC)].

INCOME TAX

Computation of income

43. Projet de Loi: The Income Tax (Year of Computation) (Guernsey) Law, 1999. – Changes the period by reference to which income is assessed and deductible expenditure is allowed from the former preceding year basis to an actual basis, except in respect of business income and expenditure which will continue to be assessed and allowed on the same basis as at present. The new system will come into force on 1st January 2002 (unless the States by Ordinance defer its commencement to the beginning of any subsequent year) and transitional provisions operate during its first year.

Approved by the States 27.10.99. Awaiting Royal Sanction.

44. Ordinance: The Income Tax (Exemption of Benefits) (Amendment) Ordinance, 1999. - Increases from £400 to £450 the aggregate amount of benefits in any year (excluding benefits specifically exempted from tax) to be left out of account in calculating the assessable income of any employment for the purpose of the Income Tax Law.

In force 1.1.00. (No. XXXII of 1999).

Guernsey Tax Tribunal

45. Order in Council: The Guernsey Tax Tribunal (Validation) (Guernsey) Law, 1999. – See 26.GLJ.30.

Royal Sanction 10.3.99. Registered and in force 12.4.99. (No. IV of 1999).

Guernsey Tax Tribunal – statutory duties - Case Stated – proper approach

46. In allowing an appeal by way of Case Stated from a decision originating in the Guernsey Tax Tribunal, the Court of Appeal discussed the duties of the Tribunal in stating a Case for the Royal Court under section 80(3) of the Income Tax (Guernsey) Law, 1975, as amended. The duty of the Tribunal was to set forth the facts and the determination. This required findings of fact where the evidence was susceptible of more than one interpretation and determination as to the tax consequences of those findings of fact, the purpose being that both taxpayer and Revenue should know what conclusion the Tribunal had arrived at and why. The determination of the Tribunal must be clear and unambiguous and the evidence which supported the Tribunal's conclusion must be identified. Where a Statement of Agreed Facts, or any other documentation, was presented as part of the Case Stated, an explanation should be given as to how the documents were analysed and what conclusions were drawn from them.

[Gold v. Administrator of Income Tax – Court of Appeal 22.7.99 (StJAR/HMC)]. For full report of judgment of Court of Appeal, see paragraph 144.

Returns

47. Order in Council: The Income Tax (Returns Amendment) (Guernsey) Law, 1999. – See 26.GLJ.31.

Royal Sanction 10.3.99. Registered 12.4.99. Deemed to be in force from 1.1.99.

INDIRECT TAXATION

Impôts

48. Ordinance: The Impôts (Temporary Increase of Rates) Ordinance, 1999. – Temporarily increased the rate of impôt on tobacco pending conclusion of the budget debate.

In force 8.12.99. (No. XXX of 1999).

49. Ordinance: The Impôts (Budget) Ordinance, 1999 – Increases the impôt on tobacco.

In force 9.12.99. (No. XXXI of 1999).

INJUNCTIONS

Breach of injunction – irregular share transfer - contempt proceedings – standard of proof

50. PP moved to Guernsey to care for D1 who tendered a cheque in the sum of £600,000 to PP. The cheque was then stopped. PP sued on the cheque. D1 owned substantial property through D2, a company. PP sought and were given injunctive relief to prevent any sale of the property that might defeat any judgement obtained by PP.

The injunction had been granted as a result of representations from Counsel rather than on the basis of a supporting affidavit. Both this application for injunctive relief and an action by DD to evict PP were ancillary to the main action on the cheque.

PP claimed that their position had been prejudiced as a result of DD purporting to transfer a share in D2 in the name of P1 into the name of a third party and causing P1 to be removed as secretary to D2. The purported transfer was made at a meeting of D2 at which D1 was the only director present. No transfer document bearing the signature of P1 was produced at the meeting but only a photostat. There were other possible irregularities in the conduct of the proceedings. PP claimed that DD were in contempt of court. HELD by the Deputy Bailiff, to succeed in an action for contempt of court there must be a clear breach of an injunction. Establishing attempted contempt is insufficient. The criminal standard of proof is required. On the facts there was insufficient evidence that could have lead to the Jurats being directed that there had been a breach of an injunction. (An agreed order was subsequently made to correct

the Companies Register and nullify the share transfer). (deVGC sitting with Jurats).

[Savage and Savage v. Robinson and E.T.S. Limited – Ordinary Court 26.3.99 (MGF/JPG)].

Interim injunctions – application for injunction to restrain proceedings in foreign courts – jurisdiction of Royal Court – factors to be taken into consideration

51. D, a company, was the trustee of two trusts, A Trust and B Trust. D was involved in litigation in Jersey in respect of the A and B Trusts as a co-defendant with other parties. D resigned as trustee of the A and B Trusts and was replaced as trustee by P. On its retirement from the Trusts D retained all of the liquid assets of the Trusts (approximately £7 million) pursuant to Article 30 paragraph 1A of the Trusts (Jersey) Law, 1984. According to D, the funds were required to support the indemnities given by P (as new trustee) against its costs and expenses in defending the Jersey proceedings. P brought proceedings seeking an interim injunction that D be restrained from taking any action in the litigation in Jersey in as much as it affected the assets of the trusts without consulting with P prior to the taking of any steps and only taking such steps with P's approval. In other proceedings D had sought to be removed from the Jersey litigation as it was no longer trustee of the trusts. HELD by the Lieutenant-Bailiff, dismissing the application, that the relevant Article of the Jersey Law did not give a resigning trustee an absolute right to retain assets but only to require provision of "reasonable security" before parting with the assets. The Court has jurisdiction to restrain proceedings in foreign courts. That restraint would not impinge upon the authority of the other court but would be enforced by coercive action against the party against whom it is given. Such jurisdiction must be exercised with great caution. Having considered the cases of Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak [1987] 1 AC 871 and Las Mercedes (Owners) v. Abidia Daver (Owners) [1984] The Times, February 7, the factors to be taken into account in considering such an application were: the inconvenience and expense to the parties; any deprivation of legitimate personal or juridical advantages if the injunction was granted; the risk of prejudice to the parties; whether the existence of two or more sets of proceedings was vexatious or oppressive; and the prevention of injustice. The actions in Jersey and in Guernsey differed in several respects and it could not be said that both sets of proceedings involved the same issues of fact. There was no presumption that the existence of both sets of litigation was vexatious or oppressive. Further, regard must be had to the three principles of *American Cyanamid* when granting interlocutory injunctions, being:

> Is there a serious question to be tried?
> If so, would damages be an adequate remedy?
> Where does the balance of convenience lie?

P had failed to establish these three pre-requisites and the application would dismissed. (ARWH).

[De Montfort Securities Limited v. Abacus (Guernsey) Limited – Ordinary Court 23.3.99 (StJAR/JJLM)].

Mareva injunction – application for – failure to make full and frank disclosure – damages – power of the Court

52. See Matheson Securities (Channel Islands) Ltd v Hulme, paragraph 68.

INTERNATIONAL LAW

Waste disposal

53. Ordinance: The Transfrontier Shipment of Waste Ordinance, 1999. – See paragraph 96.

Yugoslavia – freezing of funds etc.

54. Ordinance: The Federal Republic of Yugoslavia (Freezing of Funds and Prohibition on Investment) Ordinance, 1999. - Incorporates into Guernsey domestic law the provisions of Council Regulations (EC) 1294/99 concerning a freeze of funds and a ban on investment in relation to the Federal Republic of Yugoslavia. Repeals the Yugoslavia and Serbia (Freezing of Funds and Prohibition on Investment) Ordinance, 1998 (see 26.GLJ.34).

In force 29.7.99. (No. XIX of 1999).

Yugoslavia – petroleum products

55. Ordinance: The Federal Republic of Yugoslavia (Supply, Sale and Export of Petroleum and Petroleum Products) (Penalties and Licences) (Guernsey) Ordinance, 1999. - Incorporates into Guernsey domestic law the provisions of Council Regulations (EC) 900/1999 prohibiting the sale and supply of petroleum and certain petroleum products to the Federal Republic of Yugoslavia. (See also paragraph 56 below).

In force 10.5.99. (No. XIV of 1998).

56. Ordinance: The Federal Republic of Yugoslavia (Supply, Sale and Export of Petroleum and Petroleum Products) (Penalties and Licences) (Guernsey) (No. 2) Ordinance, 1999. - Incorporates into Guernsey domestic law the provisions of Council Regulations (EC) 2111/1999 prohibiting the sale and supply of petroleum and certain petroleum products to certain parts of the Federal Republic of Yugoslavia. Repeals the Federal Republic of Yugoslavia (Supply, Sale and Export of Petroleum and Petroleum Products) (Penalties and Licences) (Guernsey) Ordinance, 1999 (see paragraph 55 above).

In force 18.10.99. (No. XXIX of 1999).

Yugoslavia – prohibition of flights

57. Ordinance: The Federal Republic of Yugoslavia (Prohibition of Flights) (Guernsey) Ordinance, 1999. - Incorporates into Guernsey domestic law the provisions of Council Regulations (EC) 1901/98 concerning a ban on flights of Yugoslav carriers between the Federal Republic of Yugoslavia and the European Community (of which the Bailiwick is

deemed to form part).

In force 30.6.99. (No. XI of 1999).

ISLAND DEVELOPMENT

Application for development – whether evidence of previous similar rejected applications should be placed before Jurats – admissibility of anonymous letter

58. The owners of two adjoining properties sought permission from the IDC under section 14 of the Island Development (Guernsey) Law, 1966, as amended, to create a parking area in front of each of their properties, with shared access to the road. An anonymous letter was sent to the IDC opposing the application. Their application, and subsequent re-applications, were rejected by the IDC. When the matter was to be appealed to the Royal Court the Crown Advocate acting for the IDC applied for permission to produce as part of the agreed bundle documentation showing that there had been ten previous applications to the IDC, from 1974 onwards, to create parking, all of which had been rejected on similar grounds to the current one. AA resisted the application on the basis that it would mean that the record was cluttered up with a great deal of irrelevant material – particularly as the conditions prevailing at the time of early applications, especially in relation to traffic, were vastly different. It was HELD by the Lieutenant Bailiff that evidence of a consistency in the decisions by the IDC should go before the Jurats. The evidence of the rejection should be produced by way of a summary of the Committee's decisions giving name of the applicant, date of decision, the result and the grounds expressed for the decision. However, all the documentation relating to those decisions was not necessary. It was further held, in relation to the anonymous letter, that this should be placed in the bundle before the Court as:-

(1) It might give rise to an indication that the IDC had had regard to it in making their decision;

(2) whether the IDC did, in fact, have regard to it was a matter for the Jurats; and

(3) if the Jurats held that the IDC had taken it into account it would then be for the Jurats to access the proper weight that should have been attached to it. (ARWH).

[Graham & Graham & Laughton v. Island Development Committee – Full Court 17.4.99 (PTRF/RJMcM)].

LANDLORD AND TENANT

Eviction – stay of execution – discretion of Jurats

59. D purchased a property from A and simultaneously negotiated with A for the use of a parking space to the rear of the property on land retained by A. An annual rental was agreed which, at D's request, was paid by monthly instalments. The agreed position of the car parking space was subsequently adjusted and further negotiations resulted in D acquiring the use of a further parking space, at an additional rent, adjacent to the existing one. Some years later A's agent notified D of a substantial increase in rent which increase was resisted by D. A gave D one month's notice to vacate the spaces. It was accepted before the Royal Court, in the subsequent

eviction proceedings, that the arrangement constituted a tenancy and the question remained whether it was a monthly tenancy or an annual tenancy. The Royal Court concluded, having been directed by the Bailiff that there was an annual tenancy, that the parking spaces in question could not be let to anyone else because such parking would block access to the rear of D's property and ordered that the eviction should be subject to a stay of execution for as long as D owned and occupied his property. They also set a rent. A appealed to the Court of Appeal which HELD that on the evidence before the Court, and applying the test set out in Guille v Mackay (1967), the Court should not interfere with the findings of fact made by the Jurats unless it was satisfied that there was no evidence before them upon which they could reasonably have arrived at those findings or that for any other reasons the findings of fact were perverse. The Jurats had been exercising a very wide discretion and the appeal would be dismissed.

[Westlands Holdings Limited v. Daish – Court of Appeal 16.3.99 (MGF/DGLeM)]. For full report of judgment of Court of Appeal see paragraph 140.

LIQUOR LICENSING

"Al fresco" licences

60. Ordinance: The Public Highways (Temporary Closure) Ordinance, 1999. – Establishes the system for the grant and regulation of "al fresco" licences.

Section 1 provides that the right of free passage over a public highway is removed in accordance with the terms of any "al fresco" licence. Sections 2-4 prescribe the details to be included and the formalities to be satisfied in respect of an application to the Royal Court for an "al fresco" licence. Non-compliance prevents the Royal Court from determining the application. At the hearing of the application, various reports must be submitted and the Royal Court may impose any conditions it thinks fit if it decides to grant the application (sections 5 and 6). By section 7, unless the "al fresco" licence is granted for specified days only, it expires on 31st December in the year it is granted or for which it is renewed. Renewal is available upon payment of the appropriate fee without the need to return to Court. An "al fresco" licensee can apply under section 8 for the variation of his licence and the same requirements must be met as if it were an original application. By section 9, H.M. Greffier is required to maintain a register of "al fresco" licences. H.M. Procureur is empowered by section 10 to apply to the Royal Court for an order suspending, varying, forfeiting or directing non-renewal of an "al fresco" licence. If a suspension will end before an "al fresco" licence expires, it can still be renewed (section 12). The fees payable are prescribed by section 13. Sections 14 and 15 create offences in relation to al fresco" licences and sections 16-21 deal with service of notices, a minor consequential amendment to the offence of obstructing the highway, interpretation, extent, citation and commencement.

In force 1.3.99. (No. I of 1999)

Permitted hours

61. Ordinance: The Liquor Licensing (Liberation Day) Ordinance, 1999. - Amends the Liquor

Licensing Ordinance, 1993 by extending the permitted hours for Liberation Day, Sunday, 9th May, 1999.

In force 28.4.99. (No. VII of 1999).

PRACTICE AND PROCEDURE (CIVIL)

Cause of action – application to strike out – prejudice to fair trial or abuse of process – Rule 36(2) of Royal Court Civil Rules 1989 – English law contract – proof of foreign law – requirement to demonstrate differences between Guernsey and foreign law – procedures followed by Court in proof of English law – Notice to admit facts

62. P and her husband held three life assurance policies with D. It was common ground that the benefits included payment in the event of the total disability of P. P retired from her employment in 1995 due to ill health and certified as unfit for that or any alternative employment. P brought an action claiming that D had failed to pay the claims notwithstanding that they fell within the Policies of Insurance. The contract was made in Guernsey and stated as being governed and construed by English law. It was conceded by D that Guernsey was a *forum conveniens*. D applied (1) for P's claim to be struck out on the grounds that it might prejudice fair trial of the action and (2) for an order that P file an amended cause raising the points of English law on which P relied. P applied for an order requiring D to (a) specify the relevant points of difference between English and Guernsey law and (b) admit certain facts which would show that in this matter the law and rules of interpretation were the same in both jurisdictions.

In relation to D's applications, the Lieutenant-Bailiff HELD (1) following Nagle v Fielding [1966] 2 QB at p. 648, that this was not a plain and obvious case in which it would be proper to apply the summary remedy of striking out; and (2) following M.C.C. Proceeds Inc. v. Bishopsgate Investment Trust PLC & Others [1998] The Times 7th December, findings of English law are findings of fact of a peculiar kind and belong to the judge, not the jury. Unless a party relied on principles of English law that differ from those of Guernsey law there was no requirement to plead English law. P had made it clear that she did not rely especially on any aspect of English law to establish her case. D's applications were rejected. With respect to P's applications, the Lieutenant-Bailiff HELD that (a) was premature unless D alleged differences in the relevant laws of the two jurisdictions (the time for such particularisation would be when the Defence was filed); and, in relation to (b), if the Court had the power to make an order for the admission of facts then such power was discretionary and no order would be made in advance of the filing of defences. (ARWH).

[Webber v. Allied Dunbar Assurance PLC – Ordinary Court 12.4.99 (PTRF/MGF)].

Cause of action – application to strike out – want of prosecution – abuse of process - action brought just within prescription period but after previous abandoned actions

63. P was the tenant of premises owned by G which were allegedly damaged in August 1992 by water from neighbouring premises owned by W. In March 1994 P began proceedings against G (now owned by W). On 23 February 1996 this action was struck out for want of prosecution

by consent. In late 1996 fresh proceedings were launched against inter alia W and G which on 21 December 1997 became perimé. In 1998 W started a claim against its insurer ("the insurance claim") and also that year P again began fresh proceedings against W and G. In essence the claim, which was issued at the end of the six-year prescription period, repeated and claimed what had been alleged in the previous summonses. P summoned for defences 13 weeks later. On 14 January 1999 W and G made requests for further and better particulars which P took 26 weeks to answer; meanwhile, the claim went rayée, W and G had applied for the claim to be struck out and P had applied for the action to be restored to the Rôle. HELD by the Deputy Bailiff, having reviewed the authorities:

(1) Whilst a Plaintiff has the right to commence an action at the latest moment within the prescription period he must, if having done so, then prosecute it with reasonable diligence which had clearly not been done in this case where there was a period totalling 28 weeks which could be regarded as inordinate delay which was also, on the facts, inexcusable. In determining whether there could be a fair trial the question was whether the Jurats would be able satisfactorily to resolve the disputes between the parties. It had been established by W and G that P had been guilty of inordinate and inexcusable delay such as to give rise to a substantial risk that it would not be possible to have a fair trial. The actions against both W and G would therefore be struck out on this ground.

(2) The claim against G would also be struck out as an abuse of process. The claims brought by the first and second summons had not been pursued in any way to show P's bona fides in using Court procedures although there was not sufficient evidence to show that P was not pursuing the current claim without an intention to go to trial. G had had to face the claim on three occasions, the second being no more than an unworthy and irrelevant "fishing expedition". For 5 years G had been kept under a threat of litigation by P but, without any attempt by P to bring it to trial, that was an abuse of process that was wholly unjustifiable and oppressive. However W had only had to face two separate claims for less than 3 years and it had failed to establish that the action should be struck out on this ground. (ACKD).

[Smith v Walter Property Limited and Grange Offices Limited – Ordinary Court 15.10.99 (ADNH/JPG)].

Cause of action – leave to amend – exercise of Court's discretion – wholly different cause of action

64. P, who ran a hotel business, leased nineteen rooms to D to accommodate D's staff for one year. There were allegations of considerable damage to the hotel. There was then a further sub-lease for one year and further allegations of damage. As a result of this, it was alleged, P could not get a Boarding Permit. P made claims for damage to property, loss of income and loss of good will of her business. The first Cause, which alleged breach of contract, was dated 15 April 1997. P subsequently applied to the Court to for permission to lodge a second Cause, dated 7 September 1998, which was outside the prescription period. The second Cause contained some of the allegations in the first Cause but also included allegations which, if proved, might amount to the tort of conspiracy and the tort of inducing or procuring a breach of contract. HELD, by the Lieutenant-Bailiff, that it was not possible to use Rule 35 of the Royal Court Civil Rules 1989 so as to bring in an entirely fresh cause of action which was fundamentally different from the original one. Conspiracy to cause injury and damage was quite different

from one of breach of contract. Whilst the court would always try to give a party all reasonable indulgence with regard to amendment in order to determine the real question in controversy between the parties provided that the opponent could be compensated in costs, it would not be possible to do that where the issues raised in the second Cause had little in common with those in the first. The application would be refused. (ARWH).

[Ogier v Grand Havre Holdings Limited – Ordinary Court 4.5.99 (unrep/DGLeM)].

Conflict of laws – forum conveniens – application for Guernsey proceedings to be stayed and declaration that Ireland be forum conveniens – matters to be taken into consideration

65. In proceedings to recover an alleged debt arising from the occupation of a hotel in Ireland, DD, who were at the date of the proceedings resident in Guernsey, applied for a stay and an order that the forum conveniens for the action be in Ireland. It was HELD by the Bailiff, applying the principles set out in Spiliada Maritime Corp v. Cansulex Ltd., The Spiliada [1986] AC 460, that the burden of proof in showing that there should be a stay rested with DD. However, as this was a transaction involving occupation of real property in Ireland, it was probable that the transaction would be governed by Irish law and the evidence would be provided by witnesses most of whom were resident in Ireland. The matters which would require investigation would be more conveniently investigated in Ireland. Accordingly, Ireland was the place where this action could more suitably be tried in the interests of the parties and of justice. The action would be stayed. (deVGC).

[Fir Trading Limited v. McKenzie & McKenzie – Ordinary Court 19.8.99 (JPG/EAGP)].

Judgments – stay of execution – application for stay pending outcome of proceedings against third party professional advisers – factors to be taken into consideration

66. AA had applied to the Court of Appeal for stay of execution of a judgment granted against them in favour of M Ltd, a trust company, shares in which were held by nominees including R Ltd, a firm of accountants who had been acting for AA in relation to their financial affairs (see 26.GLJ.45). The application had been adjourned pending a statement from AA of their claim against R Ltd. At the resumed hearing, prior to which AA had instituted proceedings against R Ltd which had filed its defences, the Court of Appeal, in considering how to exercise its discretion as to whether or not to grant a stay or execution, HELD that it could not simply take the case against R Ltd as disclosed in AA's pleadings but would also consider how far their claim had been undermined by R Ltd's defences and other evidence before the Court. It was apparent that the facts alleged were very much in controversy. However, AA had provided a sufficiently clear statement of their claim against R Ltd which had not been shown to be untenable therefore a stay of execution, pending the outcome of the action against R Ltd, would be granted provided that the action be pursued with reasonable despatch.

Pursuant to a subsequent application by M Ltd, the Court of Appeal further HELD, inter alia, that it would not be appropriate for the Court to seek to impose a specific timetable for the fixing of a trial date for the action between AA and R Ltd. However the Court would order that unless by a given date (15th March 2000) a date for the trial had been fixed M Ltd would be entitled to apply for the stay to be lifted. The Court also rejected M Ltd's application for leave to appeal to the Privy Council which application had been made on the basis that the Court's

decision that it had discretion to stay the judgment was a final decision and not an interlocutory one. The application was clearly an interlocutory matter and no leave to appeal to the Privy Council could be granted.

[Monument Trust Company Limited v. Gaudion & Gaudion – Court of Appeal 15.7.99 (StJAR/unrep) and 29.11.99 (StJAR/ADL)]. For full reports of judgments of the Court of Appeal, see paragraphs 141 and 142.

Limitation of actions – causes of action in tort and in contract

67. In proceedings concerning an action in negligence against a firm of advocates, DD filed defences containing an Exception de Fonds claiming that P's alleged causes of action in both contract and tort did not arise within six years before the commencement of the action. The Deputy Bailiff, in upholding the Exception and dismissing the Plaintiff's action HELD:

1. If he, sitting alone, was to determine the validity of the Exception, he must do so on the basis that all the facts and allegations in P's Cause were true; and must therefore consider the Cause in detail (thus reaffirming the decisions of the Guernsey Court of Appeal in Cherub Investments Limited v. Channel Islands Aero Club (Guernsey) Limited (Civil Appeal Reports No. II of 1982), and of the Privy Council in Vaudin v. Hamon [1974] AC 569). He must be satisfied that on the face of the pleadings it was beyond argument that the cause of action was statute barred. It would not be beyond argument if either arguable questions of fact could arise, or the full extent of the issues had not been definitively pleaded.

2. In Guernsey, the law relating to the accrual of a cause of action for breach of contract was the same as stated in the English authorities; and therefore the accrual of the cause of action for breach of contract was at the date the advocate had allegedly failed to give adequate and proper advice.

3. With regard to the accrual of causes of action in tort, the Guernsey Court would follow decisions of the English Courts on the common law, except insofar as the Guernsey law of torts was covered by Guernsey customary law or statutes. In this matter, on the basis of the English authorities on solicitor's negligence, and on the basis of the truth of the allegations and facts in the Cause, the "actual" or "relevant measurable" loss suffered by the Plaintiff occurred immediately after he entered the agreement on which his advocate had advised and his cause of action accrued at that date and was therefore prescribed. At that time the amount of damages might not be easily ascertainable, and the quantification of them might depend upon an imponderable; but neither of these considerations affect the determination of the time of the accrual of the cause of action.

4. The policy of the law, as stated in the House of Lords in Nykredit Mortgage Bank plc v. Edward Erdmann Group Ltd [1997] 1 WLR 1627, that within the bounds of sense and reasonableness the accrual of a cause of action should be advanced rather than retarded, and that, if parallel causes arise in contract and in tort, the disparity between the time when they respectively arise should be smaller rather than greater, has as much application in Guernsey as in England and Wales.

5. While there was no similar legislation in Guernsey to the Latent Damage Act 1986, which alleviates the hardship potentially caused to a plaintiff who is not fully aware of the facts on which their claim can be founded before the action is prescribed, no hardship to the Plaintiff arose in this case. (ACKD).

[Stefani v. Le Pelley et al – Ordinary Court 13.7.99 (AMM/NJB)].

Mareva injunction – application for – failure to make full and frank disclosure – damages – power of the Court

68. R was a company engaged in the business of stockbrokers. A1 was what was described as an associate of the company who had been "rolling over" some share purchase contracts upon which settlement had become due. As a result of his allegedly irregular dealings A1 was dismissed, but he made arrangements, agreed with an officer of R, for a family friend to lend money to A2, the wife of A1, to enable her to complete the outstanding share purchase contracts. R then went back on what had been agreed and put the shares into the name of its nominee company. It then sought an order restraining the disposal of the shares pending resolution of other outstanding claims against A1. (For a complete history of the matter and the way in which proceedings developed both in the Royal Court and the Court of Appeal see judgments of the Court Appeal reported in 24.GLJ.47). Having lifted the injunction on grounds of material non-disclosure the Court of Appeal directed that there should be an inquiry into the damages that should be paid by R to A2 as a result of her being restrained from dealing in the shares following the grant of the original injunction. This being the first occasion where the Royal Court had to conduct an inquiry into damages pursuant to an undertaking given by a Plaintiff seeking a freezing order the Court was required to give directions as to the procedure for such inquiries generally and as applied to this particular case. Held by the Bailiff:-

6. That, unlike English Courts, Guernsey Courts cannot investigate claims for unliquidated damages. It was for A2 to establish the amount of her loss and that might be presented on a number of alternative bases.

7. Both sides would file affidavits prior to an oral hearing where the deponents could be cross-examined before the jurats.

8. The inquiry into damages was between R and A2. R were not permitted to make A1 a party in attempt to reopen their argument that the value of the shares could be offset against their claim against A1. That would not preclude A1 being called as a witness on behalf of A2 to give evidence concerning her claim that she would have sold her shares at a particular time but for the injunction. (deVGC)

[Matheson Securities (Channel Islands) Ltd v Hulme et Femme – Ordinary Court 30.4.99 (MGF/PTRF)].

Péremption d'instance – application for restoration to the Pleading List – Rule 50 of the Royal Court (Civil Rules) 1989 – principles on which the Court acts and matters to be taken into account

69. P was resident in the UK for tax purposes until 1991, when he left the UK permanently to reside on his yacht in the Mediterranean. Prior to ceasing to be a UK tax resident P engaged D to give him advice about his tax affairs. P alleged that D had failed to carry out a number of transactions which resulted in a UK tax loss accruing to P and claimed against D in breach of contract and negligence. P's action became perimée. P acknowledged that his causes of action in contract and tort were prescribed. In dismissing his application to restore, the Deputy Bailiff HELD, on a review of such applications which had come before the Court previously, that the following principles could be identified;

(i) the burden was on the plaintiff to show an appropriate case for restoration of the action;

(ii) Rule 50 gives the Royal Court a discretionary jurisdiction as to whether or not to order the restoration of an action;

(iii) The Court should take account of certain matters when considering Rule 50 applications. These factors include

(1) the position of the plaintiff and the effect on him and his case if the action is not restored;

(2) the history of the action and the activity/inactivity of the plaintiff which has led to the action becoming perimée;

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

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

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

In the absence of "Guernsey factors" the Plaintiff's task in discharging the burden of persuading the Royal Court to show indulgence when Causes have been allowed to become perimée will be that much greater. In the present case the Court found that the Plaintiff had failed to pursue his case with due expedition and there were no "Guernsey" factors present. The Plaintiff had failed to persuade the Court that it would be just for it to exercise its discretion in his favour by restoring the Cause to the Rôle. (ACKD).

[Stoneman v. Pannell Kerr Forster – Ordinary Court 19.11.99 (ADNH/PTRF)].

Period of limitation – loss or damage by and to vessels – Maritime Conventions Act 1911 – Law Reform (Tort) Guernsey Law 1979 – statutory interpretation

70. In proceedings concerning an action for damage caused to a yacht by a motor vessel, D raised an Exception de Fonds that the action was prescribed by section 8 of the Maritime Conventions Act 1911, registered on 18th January, 1960, whereby the relevant period was two years from the date of the damage. In the Ordinary Court the Bailiff held that the provisions of section 19(1) of the Law Reform (Tort) (Guernsey) Law, 1979 had repealed the 1911 Act so that the prescription period was 6 years as provided in section 4(1) of the 1979 Law. In allowing D's appeal and remitting the action to the Royal Court, it was HELD by the Court of Appeal that the 1979 Law had neither expressly nor impliedly repealed the 1911 Act. The Court of Appeal considered Kutner v. Phillips (1891) 2 QB 267 in which it was held that in order to find an implied repeal the provisions of the later statute must be so inconsistent or repugnant when read with those of the earlier that the two cannot stand together. The Court of Appeal found that there was neither an express nor an implied repeal of S.8 of the Act of 1911, which therefore remained in force in this Island.

[Baron Shipping Company Limited v. Le Pelley – Court of Appeal 5.1.99 (RJC/JMW)]. For full report of judgment of Court of Appeal, see paragraph 143.

Settlement out of Court – application to require party to consent to judgment in compliance with settlement – powers of Court

71. P and DD compromised a claim relating to building works and one of the provisions of the compromise was that if DD did not pay they would consent to judgment in a liquidated amount. P summoned DD seeking an order that DD consent to judgment. DD did not appear despite good service on them. HELD by the Bailiff, the Court had no power to require DD to consent to judgment as this would be an order for specific performance of a contract. However, leave would be given to amend the cause to provide for a default judgment against DD in the amount agreed to be paid under the compromise.(deVGC).

[R G Phillips Limited v. Hill and Hill – Ordinary Court 16.4.99 (NLP/unrep)].

Royal Court– procedure – Practice Directions

72. Since the Jurats' business was separated from that of the business of the Bailiff sitting alone, the public business of the Friday Court has become increasingly formal and in the main non-contentious. Sittings regularly last for less than a quarter of an hour, and in view of the fact that Counsel often have business immediately afterwards in Chambers in what has become known as the Interlocutory Court, the Court has decided that Counsel need no longer robe for the Friday sittings of Ordinary Court before the Bailiff sitting alone.

It is further directed that in order to reduce the number of unnecessary attendances by Advocates for purely formal business, that with effect from 23rd April 1999 the following changes in procedure will apply.

1. Applications of a non-contentious nature where notice has to be given and opposition called

The most frequent of these are applications to change the name of companies, but there are a number of other applications under the Companies Law, and also Patents and Intellectual Property.

Experience has shown that opposition is only lodged in a very small proportion of cases. The Court would not be in a position to deal with any opposition without giving further directions. The Advocate presenting the application would no doubt need more detailed instructions from his/her clients. For all practical purposes therefore the matter could not proceed on the day that opposition is called for.

The procedure in future will be that Advocates will not have to attend in Court for such applications unless they wish to. If they complete a form in the style attached *[for attachment, application should be made to the Greffe]*, and attach it to the Cause, Her Majesty's Greffier will read the Cause and call for opposition. If there is none, the application will normally be granted unless there is some other difficulty where the Court will adjourn it. If opposition does appear, the matter will normally be stood over to the following Friday's Interlocutory Court for directions. In such instances, the Greffe will so notify the Advocate presenting the application. It will be for that Advocate to list the matter on the Interlocutory Court Schedule.

However, there could be an occasion (where, for example, an opponent has travelled specially to the Island) where the Court should endeavour to give directions on the day on which opposition is called. Accordingly the Court reserves the right to call over the presenting Advocate or a member of his/her practice so that preliminary directions can be given in that day's Interlocutory Court.

2. Civil actions – agreed Orders

In matrimonial cases it has become the practice for agreed Orders to be made without Counsel appearing, provided they have been signed by Counsel for the parties involved. It is proposed to extend this to matters before the Ordinary Court whenever it is appropriate for an agreed Order to be made.

Agreed Orders, therefore, will be accepted if they are signed by Counsel in cases where matters are being adjourned, placed on the Pleading List (provided that address for service is clearly recorded), the lodging of pleadings and orders for adjournment on the Pleading List (as in cases where Exceptions are filed), or placing the matter on the Witness List.

It is important in all cases that the Order the Court is being requested to make is clearly indicated.

The form of any consent order so presented shall be in the form provided by paragraph 4 of Practice Direction No. 5 of 1995. [See 20.GLJ.48].

The scope for tabling consent orders is in theory unlimited, but the Court must reserve the right to look at the Order and, if need be, call Counsel to appear before it where there are any

questions the Court wishes to raise. The important point to note, however, is that this procedure can only extend to cases where both parties are represented by Counsel.

Where parties are unrepresented the Judge must still see those parties, in order to make sure that they are the persons they claim to be, and that they understand what they are doing.

[Practice Direction No. 1 of 1999].

73. A subsequent Practice Direction contained a standard form of consent order which it was suggested be tabled before the Royal Court in accordance with Practice Directions No. 1 of 1999 and No. 5 of 1995. Members of the Bar should *not* make provision for the Bailiff or Deputy Bailiff to sign at the foot of the cause presented to the Court. A separate form headed "Consent Order" should always be tabled. *For standard form consent order, application should be made to the Greffe.*

[Practice Direction No. 2 of 1999].

74. All Causes (other than those referred to in paragraph 2), Defences, Exceptions and other Pleadings tabled in actions before the Court must bear at the foot thereof in block capitals the name of the Counsel (not the firm) who settled the same.

This direction shall not apply to straightforward debt and other actions where the length of the Cause does not exceed one page.

Where skeleton arguments or other written submissions are lodged in any matter they should be signed at the foot thereof by the Advocate who prepared them, together with the date on which they were prepared.

[Practice Direction No. 3 of 1999].

75. The Bailiff has directed that each Jurat be provided with a copy of the Causes tabled before the Tuesday Ordinary Court.

Advocates are therefore requested to provide five copies of Causes and any supporting documents (each copy to be marked Greffier, Bailiff, Jurat as appropriate).

If there is likely to be more than a nominal amount of paperwork on any matter then Counsel should request the Greffier sitting as Clerk of the Court for directions from the Bailiff or Deputy Bailiff as to what documents should be provided for the Jurats.

In respect of Causes tabled before the Full Court which consist mainly of Liquor Licence applications, the present practice will continue, for the moment, so it will not be necessary to provide copies for each Jurat. Counsel are requested to provide 3 copies of each Cause and supporting documents (each copy to be marked Greffier, Bailiff, Jurats as appropriate).

[Practice Direction No. 4 of 1999].

Security for costs – Alderney resident – impecunious plaintiff

76. An Alderney resident was injured in St Peter Port harbour on a ship owned by an Alderney company. He sued his employers for substantial damages in the Guernsey Court. The employers sought security for costs because the man was resident in Alderney and there was no procedure for reciprocal enforcement of judgments between Alderney and Guernsey. P's advocate had told D's advocate that the man was now impecunious and was being represented on a pro bono basis but the employers persisted in their application. To order security would bar the man from proceeding with his action. HELD by the Deputy Bailiff that this was as strong a case as any for not ordering security for costs and D's application would be dismissed with costs, indemnity costs for P being refused with reluctance on the basis that the point had apparently not been considered before. (deVGC).

[Cosheril v. Felix Shipping - Ordinary Court 5.3.99 (EAGP/RICEH)].

Service out of the jurisdiction – exception déclinatoire –jurisdiction of Royal Court to hear matter originating in Malta

77. P issued proceedings for damages against D1, a Guernsey company. D1 in turn joined D2, a Maltese company, having gained leave under Rule 7 of the Royal Court Civil Rules to serve outside the jurisdiction. D2 declined the jurisdiction of the Court by way of an Exception Déclinatoire and suggested that leave had been wrongly granted. It was HELD by the Bailiff that the allegation that the Court lacked jurisdiction was prima facie incorrect. The Royal Court was a superior Court and, as such, no matter was deemed to be outside its jurisdiction unless it was expressly shown to be, for example, where another Court had jurisdiction. Accordingly, the Exception would be dismissed. The Bailiff subsequently considered an Exception de Fonds as to whether, notwithstanding the Royal Court having jurisdiction, justice might be better served by proceeding outside Guernsey. He concluded that, due to the matter originating in, and concerning almost entirely persons from, Malta, and due to the absence of any special circumstances that suggested Guernsey, Malta was the more appropriate forum for the proceedings. (GMD).

[Johnson v. Manitoba Marine Limited et al – Ordinary Court 23.3.99 (JMW/StJAR)].

PRISON

78. Order in Council: The Prison Administration (Amendment) (Guernsey) Law, 1999. – See 26.GLJ.46.

Royal Sanction 10.2.99. Registered and in force 16.3.99. (No. I of 1999).

79. Ordinance: The Prison Administration (Alcohol and Drug Testing) Ordinance, 1999. – This sets out in detail the drug-testing regime allowed under section 3A of the Prison Administration (Guernsey) Law, 1949, as amended.

In force 1.7.99. (No. X of 1999).

PUBLIC ASSISTANCE

80. Ordinance: The Central Outdoor Assistance Board Regulations (Amendment) Ordinance, 1999. - Amends the Central Outdoor Assistance Board Regulations, 1963 by fixing, for the year 2000, the limit on weekly income for receipt of outdoor assistance and the ordinary maximum rates of outdoor assistance.

In force 7.1.00 (No. XXVI of 1999).

ROAD TRAFFIC AND PUBLIC TRANSPORT

Clearways

81. Ordinance: The Road Traffic (Clearways) Ordinance, 1999. – Made permanent the experimental clearway in Rue des Monts, St. Sampson, consolidated the measures relating to other existing clearways (and repealed the various Ordinances creating them) and introduced the power for the States Traffic Committee in the future by Order to insert, delete or amend entries in the Schedule prescribing details about clearways in operation.

In force 1.9.99. (No. XVI of 1999).

Fixed penalties

82. Ordinance: The Traffic Offences (Fixed Penalties) (Amendment) Ordinance, 1999. – Increases the amount payable in respect of a fixed penalty notice under the Traffic Offences (Fixed Penalties) Ordinance, 1989 from £10 to £15.

In force 30.6.99. (No. XII of 1999).

International driving permits – fees

83. Ordinance: The Motor Vehicles (International Circulation) (Amendment) Ordinance, 1999. – Amends the Motor Vehicles (International Circulation) Ordinance, 1974 to enable the States Traffic Committee in future to prescribe by Order the fee charged for issuing an international driving permit.

In force 27.5.99. (No. VIII of 1999).

Speed limits

84. Ordinance: The Road Traffic (Speed Limits and Trials) (Amendment) Ordinance, 1999. – Amends the Road Traffic (Speed Limits and Trials) Ordinance, 1987 in order to make permanent year-round and summer 25 mph speed limits on certain roads in the Castel Parish.

In force 31.3.99. (No. III of 1999).

SOCIAL SECURITY

Attendance and invalid care allowance

85. Ordinance: The Attendance and Invalid Care Allowances Ordinance, 1999. - Fixes, for the year 2000, the annual income limit for receipt of attendance allowance and invalid care allowance at £53,000. Also fixes the weekly rate of attendance allowance and invalid care allowance.

In force 3.1.00. (No. XXIII of 1999).

Family allowance

86. Ordinance: The Family Allowances Ordinance, 1999. - Fixes family allowance, for the year 2000, at the rate of £10 a week in respect of each child of the family.

In force 4.1.00. (No. XXIV of 1999).

Health service benefit

87. Ordinance: The Health Service (Benefit) (Amendment) Ordinance, 1999. - Sets prescription charges at £1.90 from the 1st January 2000.

In force 1.1.00. (No. XXV of 1999).

Social insurance – amending legislation

88. Order in Council: The Social Insurance (Guernsey) (Amendment) Law, 1999. - Amends the Social Insurance (Guernsey) Law, 1978 in the following respects - it substitutes the concepts of a survivor's grant and a widowed parent's allowance for, respectively, a widow's grant and a widowed mother's allowance; it makes technical changes in relation to entitlement to unemployment benefit, sickness benefit, industrial injury benefit, maternity grant and maternity allowance; it enables regulations to be made as to the duties and obligations of persons who receive benefit on behalf of other people; it allows the Authority to appoint the actuary to the insurance fund; and it defines the expression "accident" for the purposes of industrial injury benefit.

The Law applies only to Guernsey, Alderney, Herm and Jethou.

Approved by the States 27.1.99. Royal Sanction 22.6.99. Registered 17.8.99. In force 17.8.99 (as to part); 1.1.00 (as to remainder: see paragraph 89). (No. VI of 1999).

89. Ordinance: The Social Insurance (Guernsey) (Amendment) Law, 1999 (Commencement) Ordinance, 1999. - Brings certain sections of the Social Insurance (Guernsey) (Amendment) Law, 1999 (see paragraph 88) into force on the 1st January, 2000.

In force 24.11.99. (No. XX of 1999).

Social insurance – rates of contributions and benefits

90. Ordinance: The Social Insurance (Rates of Contributions and Benefits, etc.) Ordinance, 1999. - Fixes, for the year 2000, the percentage rates of social insurance contributions; the upper weekly and monthly earnings limits; the rates of all social security benefits, allowances and pensions; and the amount of the maternity grant and death grant. Also fixes the amount of the Guernsey Health Service Fund Allocation.

In force 1.1.00 as to sections 2, 3, 4, 5, 6 and 8; and 3.1.00 as to remainder. (No. XXI of 1999).

Supplementary benefit

91. Ordinance: The Supplementary Benefit (Implementation) (Amendment) Ordinance, 1999. - Fixes the limit of weekly income for supplementary beneficiaries residing in the Guernsey Cheshire Home.

In force 30.6.99. (No. XIII of 1998).

92. Ordinance: The Supplementary Benefit (Implementation) (Amendment) (No. 2) Ordinance, 1999. - Fixes, for the year 2000, the limit of weekly income, and the normal requirements, for the various classes of supplementary beneficiary.

In force 7.1.00. (No. XXII of 1999).

TRADE AND INDUSTRY

Trading stamps

93. Order in Council: The Trading Stamps (Repeal) (Guernsey) Law, 1999. – See 26.GLJ.60.

Royal Sanction 10.3.99. Registered and in force 12.4.99. (No. III of 1999).

TRUSTS

Charitable trust – power of the Royal Court to declare a trust to be charitable

94. X Ltd was the trustee of a charitable trust ("the Trust") established in Guernsey, the purpose of which was the advancement of education and research in any or all of the fields of medicine, ecology and pharmaceutics. An overseas revenue authority sought to impose penal taxes unless X could demonstrate that the Trust was a validly constituted Guernsey charity. A legal opinion would not suffice. The Guernsey Tax Authority's acknowledgement that the Trust was treated by the Administrator as a charitable trust was similarly unacceptable. A declaration was sought from the Guernsey Courts that the Trust was a charity pursuant to Section 63 of the Trusts (Guernsey) Law 1989 (as amended) ("1989 Law"). The Royal Court, although

recognising that the Trust was a charity, held that it had no authority to make a declaration that the Trust was a charity. X appealed to the Court of Appeal. HELD by the Court of Appeal that the Royal Court does have the power to make the declaration under both the Guernsey customary law and the 1989 Law. If the question had arisen before the 1989 Law was passed the answer would have been decided on the basis of Guernsey customary law. In such a case the Courts of Guernsey would have had the power to decide whether a trust was a valid charitable trust or not and could have made a declaration that it was a charitable trust. This power was not taken away by the 1989 Law. Section 74(2)(b) preserved the powers of the Guernsey Court which exist independently of the 1989 Law. The Court of Appeal held that, pursuant to section 63 and section 11 of the 1989 Law, the Royal Court may "make an Order in respect of the execution, administration and enforcement of a trust...". If an application were made in respect of the Trust the Royal Court would have to decide the preliminary question of whether the Trust was charitable or not before deciding as to the administration of the Trust, and could include in its Order a declaration as to whether or not the Trust was charitable. Similarly, under section 63(1)(b) the Court may "make a declaration as to the validity or enforceability of a trust". If the validity of the Trust was in dispute, the preliminary question as to whether or not the Trust was charitable would have to be decided before deciding on its validity. A declaration of the Trust's charitable status would be an essential part of the declaration as to the validity or otherwise of the Trust. Section 11(2)(c) provided that "a trust is invalid and unenforceable to the extent that it has no beneficiary identifiable or ascertainable under Section 8(1), unless it is created for a charitable purpose.". Section 8(1) sets out that beneficiaries must be able to be identified or ascertained. There were no identifiable or ascertainable beneficiaries of the Trust. Therefore, in order for the Trust to be valid the Trust had to be created for a charitable purpose. If the Court held that it was so created, the Court could declare that the Trust was charitable. The appeal would be allowed and the declaration sought by X that the Trust was a validly constituted charitable trust under the laws of Guernsey would be granted.

[Insinger Trust (Guernsey) Limited, as Trustee of the FDS Charitable Trust – Court of Appeal 10.6.99 (MJSE)]. For full report of judgment of the Court of Appeal see paragraph 147.

Resignation of trustee – trust property – retention of reasonable security – Article 30(1A) of the Trusts (Jersey) Law 1984

95. See De Montfort Securities Limited v. Abacus (Guernsey) Limited, paragraph 51.

WASTE DISPOSAL

96. Ordinance: The Transfrontier Shipment of Waste Ordinance, 1999. - Incorporates into Guernsey domestic law the provisions of Council Regulations (EEC) No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community (of which the Bailiwick is deemed to form part). This enables the Bailiwick to accede to the Basel Convention relating to the supervision and control of shipments of hazardous wastes.

In force 1.5.99. (No. IV of 1999).

ALDERNEY

BUILDING AND DEVELOPMENT CONTROL

Building and Development Control Committee – transfer of functions

97. Ordinance: The States Committees (Transfer of Functions) (Alderney) (Amendment) Ordinance, 1999. – See paragraph 101.

Fees

98. Ordinance: The Fees (Amendment) (Alderney) Ordinance, 1999. – See paragraph 102.

CONSTITUTIONAL LAW

States of Deliberation – replacement of Conseillers

99. Order in Council: The Replacement of Conseillers (Consequential Provisions) (Guernsey and Alderney) Law, 1999. – See paragraph 7.

Transfer of functions

100. Ordinance: The States Committees and States Engineer (Transfer of Functions) (Alderney) Ordinance, 1999. - Transfers functions under the Government of Alderney Law, 1987 from the Committee for Agriculture and Fisheries to the General Services Committee and from the Surveyor and Clerk of the Works to the States Engineer.

Ordinance of the States of Alderney of 5.5.99.

101. Ordinance: The States Committees (Transfer of Functions) (Alderney) (Amendment) Ordinance, 1999. - Transfers functions under the Building and Development Control (Alderney) Law, 1975, the Building (Alderney) Law, 1978, the Historic Buildings and Ancient Monuments (Alderney) Law, 1989 and the Housing (Control of Occupation and Development) (Alderney) Law, 1994 to the Building and Development Control Committee.

Ordinance of the States of Alderney of 10.11.99.

FEES

Boats

102. Ordinance: The Fees (Amendment) (Alderney) Ordinance, 1999. - Sets the fees for the licensing of boats and for boatmen's licences in Alderney.

Ordinance of the States of Alderney of 20.1.99.

Building and development control

103. Ordinance: The Fees (Amendment) (Alderney) Ordinance, 1999. - Sets the fees for applications and the deposit of plans under the Building and Development Control (Alderney) Law, 1975.

Ordinance of the States of Alderney of 20.1.99.

FISHING

104. Ordinance: The Fishing (Regulation of Trawling) (Alderney) Ordinance, 1999. - Prohibits trawling by vessels with engine power exceeding 300 horsepower within Alderney territorial waters; and trawling by vessels with engine power exceeding 150 horsepower within one nautical mile of the Alderney shore.

Ordinance of the States of Alderney of 10.11.99.

GAMBLING

105. Projet de Loi: The Gambling (Alderney) Law, 1999. – Establishes the Alderney Gambling Control Commission and repeals and replaces the Gambling (Alderney) Law, 1975, as amended, thereby consolidating Alderney's Law in respect of gambling.

The Commission, appointed by the Policy and Finance Committee, will consist of a chairman and three members. The duties of the Commission are set out, including granting licences for gambling, supervising and controlling the operation of such licences, investigating licensees and ensuring the monies due to the States are accounted for. The Commission also has the responsibility to keep under review the extent and character of gambling in Alderney. Information provided to the Commission about licensees or associates by auditors is excepted from any duties of non-disclosure. Any personal liability in civil proceedings of the Commission members, officers and servants is excluded, save in cases of bad faith. Further provision about the Commission is contained in the Schedule.

Approved by the States 1.9.99. Royal Sanction 14.12.99. Awaiting registration.

106. Ordinance: The Gambling (Betting) (Amendment) (Alderney) Ordinance, 1999. – Section 1 amends the Gambling (Betting) (Alderney) Ordinance, 1997 with effect from 1st May, 1999. Requirements that holders of electronic betting centre licences may only exercise their licences if they have obtained approvals for their control system submissions and their auditors (new sections 3A and 3B) and that licensees must permit their operations to be monitored (new section 3C) are inserted. A non-refundable application fee of £5,000 in respect of an electronic betting centre licence application is introduced. New sections 11A and 11B provide factors that may be taken into account when determining an application for an electronic betting centre licence in relation to the suitability of the applicant and, where applicable, the applicant's proposed nominee. New sections 11C and 11D enable the Committee to investigate applicants for electronic betting centre licences and their business and executive associates and to require

from the applicant relevant information or documents to assist such investigations. Transitional provisions in respect of existing licensees are contained in section 2.

Ordinance of the States of Alderney of 3.3.99.

GOVERNMENT OF ALDERNEY

Amending legislation

107. Projet de Loi: The Government of Alderney (Amendment) Law, 1999. - Amends the Government of Alderney Law, 1987 by providing that members of the States and the President thereof shall also cease to hold office in the event of their legal disability or insolvency; by providing that statements made by members in the course of States meetings enjoy qualified privilege; by making minor procedural changes for people's meetings; and by enabling Ordinances to be made in relation to a number of matters (including the establishment of an Alderney Special Constabulary and for voting at elections by proxy).

Approved by the States 15.12.99. (Awaiting Royal Sanction).

Transfer of functions

108. Ordinance: The States Committees and States Engineer (Transfer of Functions) (Alderney) Ordinance, 1999. – See paragraph 101.

HOUSING

109. Order in Council: The Housing (Control of Occupation and Development) (Alderney) (Amendment) Law, 1999. - Amends the Housing (Control of Occupation and Development) (Alderney) Law, 1994 by re-enacting section 1 of that Law which specifies the persons to whom the Building and Development Control Committee is able to grant permission for the construction of a dwelling. In future, applicants must not previously have owned a dwelling in Alderney; must not previously have been granted permission for the construction of a dwelling in Alderney; must own the plot on which the dwelling is to be constructed; and must not previously have owned, with the consent of the States, a long lease in a dwelling on land owned by the States.

Approved by the States 5.5.99. Royal Sanction 21.6.99. Registered and in force 17.8.99. (No. X of 1999).

110. Ordinance: The Housing (Exemptions) (Repeal) Ordinance, 1999. - Repeals the Housing (Exemptions) (Alderney) Ordinance, 1997 which exempted Bonne Terre Limited from the provisions of the Housing (Control of Occupation and Development) (Alderney) Law, 1994. The Building and Development Control Committee may not therefore grant development permission for the construction by that company of the housing development specified in the 1997 Ordinance.

Ordinance of the States of Alderney of 1.9.99.

111. Ordinance: The Housing (Exemptions) (Alderney) Ordinance, 1999. - Exempts Mount Hale Limited 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 that company of the housing development specified in the Ordinance.

Ordinance of the States of Alderney of 1.9.99.

112. Ordinance: The Housing (Exemptions) (Alderney) (No. 2) Ordinance, 1999. - Exempts the members of the Rue les Joy (Southside) Residents' Association 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 housing development specified in the Ordinance.

Ordinance of the States of Alderney of 6.10.99.

113. Ordinance: The Housing (Exemptions) (Alderney) (No. 3) Ordinance, 1999. - Exempts Ollivier Street Holdings Limited 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 that company of the housing development specified in the Ordinance.

Ordinance of the States of Alderney of 15.12.99.

INTERNATIONAL LAW

Waste disposal

114. Ordinance: The Transfrontier Shipment of Waste (Alderney) Ordinance, 1999. – See paragraph 125.

Yugoslavia – freezing of funds etc.

115. Ordinance: The Federal Republic of Yugoslavia (Freezing of Funds and Prohibition on Investment) (Alderney) Ordinance, 1999. - Incorporates into Alderney domestic law the provisions of Council Regulations (EC) 1294/99 concerning a freeze of funds and a ban on investment in relation to the Federal Republic of Yugoslavia. Repeals the Yugoslavia and Serbia (Freezing of Funds and Prohibition on Investment) (Alderney) Ordinance, 1998 (see 26.GLJ.71).

Ordinance of the States of Alderney of 1.9.99.

Yugoslavia - petroleum products

116. Ordinance: The Federal Republic of Yugoslavia (Supply, Sale and Export of Petroleum and Petroleum Products) (Penalties and Licences) (Alderney) Ordinance, 1999. - Incorporates into Alderney domestic law the provisions of Council Regulations (EC) 900/1999 prohibiting the sale and supply of petroleum and certain petroleum products to the Federal Republic of Yugoslavia.

Ordinance of the States of Alderney of 2.6.99.

117. Ordinance: The Federal Republic of Yugoslavia (Supply, Sale and Export of Petroleum and Petroleum Products) (Penalties and Licences) (Alderney) (No. 2) Ordinance, 1999. - Incorporates into Alderney domestic law the provisions of Council Regulations (EC) 2111/1999 prohibiting the sale and supply of petroleum and certain petroleum products to certain parts of the Federal Republic of Yugoslavia. Repeals the Federal Republic of Yugoslavia (Supply, Sale and Export of Petroleum and Petroleum Products) (Penalties and Licences) (Alderney) Ordinance, 1999 (see paragraph 116 above).

Ordinance of the States of Alderney of 10.11.99.

Yugoslavia – prohibition of flights

118. Ordinance: The Federal Republic of Yugoslavia (Prohibition of Flights) (Alderney) Ordinance, 1999. - Incorporates into Alderney domestic law the provisions of Council Regulations (EC) 1901/98 concerning a ban on flights of Yugoslav carriers between the Federal Republic of Yugoslavia and the European Community (of which the Bailiwick is deemed to form part).

Ordinance of the States of Alderney of 2.6.99.

LIQUOR LICENSING

119. Ordinance: The Alderney Liquor Licensing (Amendment) Ordinance, 1999. - Amends the Alderney Liquor Licensing Ordinance, 1994 (see 17.GLJ.52) by providing that the Court of Alderney shall not consider objections to the renewal of liquor licences unless 21 days' prior notice has been given; by amending the permitted hours; and by requiring warning notices to be displayed in restaurants.

Ordinance of the States of Alderney of 3.3.99.

120. Ordinance: The Alderney Liquor Licensing (Amendment No. 2) Ordinance, 1999. - Amends the Alderney Liquor Licensing Ordinance, 1994 by providing that the permitted hours for Saturday the 1st January, 2000 shall be from midnight to midnight.

Ordinance of the States of Alderney of 6.10.99.

PRACTICE AND PROCEDURE (CIVIL)

Security for costs – action by Alderney resident commenced in Guernsey Royal Court

121. See Cosheril v. Felix Shipping, paragraph 76.

PUBLIC HOLIDAYS

122. Ordinance: The Public Holidays (Alderney) Ordinance, 1999. - Makes Friday, the 31st December, 1999, a public holiday.

Ordinance of the States of Alderney of 15.12.99.

RATING

123. Ordinance: The Occupiers' Rate (Level for 2000) Ordinance, 1999. - Sets the occupiers' rate for the calendar year 2000 on property at 168 pence in the pound of rateable value.

Ordinance of the States of Alderney of 10.11.99.

ROAD TRAFFIC

Speed trials

124. Ordinance: The Speed Trials (Alderney) Ordinance, 1999. - 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 5.5.99.

WASTE DISPOSAL

125. Ordinance: The Transfrontier Shipment of Waste (Alderney) Ordinance, 1999. - Incorporates into Alderney domestic law the provisions of Council Regulations (EEC) No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community (of which the Bailiwick is deemed to form part). This enables the Bailiwick to accede to the Basel Convention relating to the supervision and control of shipments of hazardous wastes.

Ordinance of the States of Alderney of 1.9.99.

WATER

126. Order in Council: The Alderney Water Supply (Amendment) Law, 1999. - See 26.GLJ.73

Royal Sanction 22.6.99. Registered and in force 17.8.99. (No. VII of 1999).

SARK

INTERNATIONAL LAW

Yugoslavia – freezing of funds etc.

127. Ordinance: The Yugoslavia and Serbia (Freezing of Funds and Prohibition of Investment) (Sark) Ordinance, 1999. - Incorporates into Sark domestic law the provisions of Council Regulations (EC) 1295/98 and 1607/98 concerning the freezing of funds held abroad by the governments of the Federal Republic of Yugoslavia and the Republic of Serbia, and the prohibition on new investment in the Republic of Serbia.

Ordinance of the Chief Pleas of 4.4.99.

LAND LAW

Freehold land subject to lease – Letters Patent of 1611 – validity of leasehold – conduct of counsel in lay courts – use by Sénéschal of local knowledge

128. In 1950, A, a French national, married H, the second cousin of R. H owned a piece of freehold land that had been in his family since its original purchase from the Seigneur in 1719. H built a bungalow on the land that he occupied together with A and effected other development. On his death in 1994 the land became vested in R by operation of the Sark law of succession. Meanwhile, in 1994, H had executed a lease, drawn up by an Advocate, which demised the majority of the land to A on a 90-year lease. R considered that the terms of the lease were unfavourable to him and applied to the Court of the Sénéschal to have the lease set aside on a number of grounds. The Sénéschal set aside the lease on the ground of undue influence of A over H and A appealed to the Royal Court. The principal issue on appeal was whether the Sénéschal had been correct in concluding on the evidence before him that there had been undue influence. The Court also commented upon other issues before the Sénéschal although these had not been addressed in his judgement. The Bailiff, allowing the appeal, HELD:

1. The Sénéschal had misdirected himself in holding from the evidence before him that there had been undue influence by A upon R;

2. Although the Sénéschal was entitled to take his local knowledge into account in deciding issues of fact, he should not have formed any views on matters of character other than on the strength of the evidence called before him. He had fallen into error in so doing;

3. Advocates had a duty to assist lay courts in the Bailiwick. In serious litigation counsel must work together to identify the issues that the Court is being asked to decide and to do all

they can to prepare and present the case in a way that enables the Court to come to a reasoned conclusion;

4. There was no residuary power of the Court of the Sénéschal to declare leases as being void as being an incumbrance and as such contrary to the Letters Patent of 1611.

In the course of his judgment the Bailiff considered the cases of Watson v. Troutead (1987) 5.GLJ.16, Baker v. Dewe (1991) Court of the Sénéschal and Leopard v. Kay-Mouat (1993) 16.GLJ.2.

[De Carteret v. Surcouf – Ordinary Court 24.9.99 (NJB/SJAR)].

Succession - reform

129. Order in Council: The Real Property (Succession) (Sark) Law, 1999. - Modifies and codifies the law of Sark in relation to succession to real property. Abolishes the customary rules as to male preference and as to the exclusion from succession of illegitimate and adopted children. Permits the owner of a tenement or freehold to devise it by will. Persons survived by descendants may devise to any one descendant. Persons not survived by descendants may devise to any one natural person. In addition, persons not survived by descendants may give property on trust for sale, the proceeds of sale being paid or applied to beneficiaries or charitable purposes.

Wills of realty may now contain gifts of personalty. The rights of douaire and franc veuvage are abolished: a surviving spouse will now have lifetime enjoyment of one third of the property of the deceased spouse. The surviving spouse may choose the portion of the property over which this right is to be exercised.

Formalities are prescribed for the execution of wills of realty. The devisee of a property under a will may apply to the Court for the registration of the will. The Court is given power to make a declaration of paternity within a period of one year from the death of the alleged father.

The Schedule codifies the rules as to intestate succession to real property, incorporating certain modifications into the previous customary regime.

Approved by the Chief Pleas 24.11.99. Royal Sanction 14.12.99. Awaiting registration.

GUERNSEY STATUTORY INSTRUMENTS

130. 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 Social Insurance (Unemployment, Sickness and Invalidity Benefit) (Amendment) Regulations, 1999	11.1.99	4.1.99	1.
The Social Insurance (Married Women and Widows) (Amendment) Regulations, 1999	11.1.99	4.1.99	2.
The Social Insurance (Contributions) (Amendment) Regulations, 1999	11.1.99	1.1.99	3.
The Boarding Permit Fees Order, 1998	14.12.98	1.4.99	4.
The Immigration (Guernsey) Rules, 1999	19.1.99	1.2.99	5.
The Road Humps Order, 1999	19.1.99	20.1.99	6.
The Migration of Companies (Fees) (Amendment) Regulations, 1999	9.2.99	1.4.99	7.
The Employment Protection (Recoverable Costs) Order, 1999	11.2.99	11.2.99	8.
The Employment Protection(Summonsing of Witnesses and Documents) Order, 1999	11.2.99	11.2.99	9.
The Parking Places (Amendment) Order, 1999	10.2.99	15.2.99	10.
The Social Insurance (Benefits) (Miscellaneous Provisions) (Amendment) Regulations, 1999	12.2.99	4.1.99	11.
The Social Insurance (Classification) (Amendment) Regulations, 1999	11.3.99	2.4.99	12.
The Health Service (Medical Appliances) (Amendment) Regulations, 1999	17.399	1.4.99	13.

The Gambling (Sunday Credit Betting) Order, 1999	23.3.99	28.3.99	14.
The Post Office (Inland Post) (Amendment) Order, 1999	25.3.99	4.5.99	15.
The Post Office (Overseas Parcel Post) (Amendment) Order, 1999	25.3.99	4.5.99	16.
The Post Office (Overseas Letter Post) (Amendment) Order, 1999	25.3.99	4.5.99	17.
The Parking Places (Amendment) Order, 1999	19.4.99	1.5.99	18.
The Import and Export of Goods (Control) (Guernsey) (Amendment) Order, 1999	11.5.99	12.5.99	19.
The Weights and Measures (Measuring Equipment) (Liquid Fuel and Lubricants) Regulations, 1999	17.5.99	18.5.99	20.
The Rent Control (Variation) Order, 1999	26.5.99	1.7.99	21.
The Social Insurance (Contributions) (Amendment) (No. 2) Regulations, 1999	11.6.99	1.7.99	22.
The Weights and Measures (Intoxicating Liquor) Regulations, 1999	22.6.99	23.6.99	23.
The Adoption Allowance Regulations, 1999	8.7.99	1.8.99	24.
The Prohibited and One-Way Streets (Amendment) Order, 1999	19.7.99	26.7.99	25.
The Court of Appeal (Civil Division) (Costs and Fees) (Amendment) (Guernsey) Rules, 1999	22.7.99	22.7.99	26.
The Parking Places (No. 3) (Amendment) Order, 1999	10.8.99	16.8.99	27.
The Social Insurance (Unemployment, Sickness and Invalidity Benefit) (Amendment) (No. 2) Regulations, 1999	17.8.99	17.8.99	28.

The Prohibited and One-Way Streets (Amendment) (No. 2) Order, 1999	16.8.99	23.8.99	29.
The Motor Vehicles (International Circulation) (Amendment) Order, 1999	1.9.99	1.10.99	30.
The Elections (Presence of Candidates at Count) Rules, 1999	28.9.99	1.1.00	31.
The Electoral Roll (Specified Sum for Candidates' Copies) Regulations, 1999	28.9.99	1.3.00	32.
The Fishing (Prohibition of Importation of Ormers) Order, 1999	28.9.99	28.9.99	33.
The Protected Cell Companies (Prescribed Company) Regulations, 1999	5.10.99	6.10.99	34.
The Protected Documents (Inspection and Copying Fees) Regulations, 1999	13.10.99	1.1.00	35.
The Protected Cell Companies (Fees for Insurers) (Amendment) Regulations, 1999	26.10.99	1.1.00	36.
The Financial Services Commission (Fees) (Amendment) Regulations, 1999	26.10.99	1.1.00	37.
The Health Service (Medical Appliances) (Amendment) (No. 2) Regulations, 1999	17.11.99	1.1.00	38.
The Health Service (Pharmaceutical Benefit) (Amendment) Regulations, 1999	17.11.99	1.1.00	39.
The Health Service (Pharmaceutical Benefit) (Restricted Substances) (Amendment) Regulations, 1999	17.11.99	1.12.99	40.
The Health Service (Payment of Authorised Suppliers) (Amendment) Regulations, 1999	17.11.99	1.1.00	41.
The Health Service (Payment of Authorised Appliance Suppliers) (Amendment) Regulations, 1999	17.11.99	1.1.00	42.

The Income Tax (Guernsey) (Valuation of Benefits in Kind) Regulations, 1999	18.11.99	1.1.00	43.
The Impôts (Temporary Variation of Rates Order, 1999	17.11.99	22.11.99	44.
The Water Charges Order 1999	18.11.99	1.1.00	45.
The Fishing (Minimum Size and Prescribed Species) (Amendment) Order, 1999	23.11.99	1.1.00	46.
The Social Insurance (Benefits) (Miscellaneous Provisions) Regulations, 1999	2.12.99	1.1.00	47.
The Social Insurance (Claims and Payments) (Amendment) Regulations, 1999	2.12.99	1.1.00	48.
The Social Insurance (Contributions) Regulations, 2000	2.12.99	1.1.00	49.
The Social Insurance (Increase of Benefits) Regulations, 1999	2.12.99	3.1.00	50.
The Social Insurance (Married Women and Widows) (Amendment) Regulations, 1999	2.12.99	1.1.00	51.
The Social Insurance (Residence and Persons Abroad) (Amendment) Regulations, 1999	2.12.99	1.1.00	52.
The Social Insurance (Unemployment, Sickness and Invalidity Benefit) (Amendment) (No. 3) Regulations, 1999	2.12.99	1.1.00	53.
The Social Insurance (Widow's Benefit and Old Age Pensions) (Amendment) Regulations, 1999	2.12.99	3.1.00	54.
The Prohibited and One-Way Streets (Amendment) (No. 2) Order, 1999	3.12.99	10.12.99	55.
The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Regulations, 1999	7.12.99	1.1.00	56.

The Income Tax (Pensions) (Contribution Limits and Tax-free Lump Sums) Regulations, 1999	16.12.99	1.100	57.
The Boarding Permit Fees Order 1999	15.12.99	1.4.00	58.
The Alderney Duty Free (Amendment) Order, 1999	21.12.99	22.12.99	59.

UNITED KINGDOM STATUTORY INSTRUMENTS

131. 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.

	S I Number
The Wireless Telegraphy (Visiting Ships and Aircraft) Regulations, 1998	2970
The Federal Republic of Yugoslavia (United Nations Sanctions) (Channel Islands) (Amendment) Order, 1999	284
The Wireless Telegraphy (Television Licence Fees) (Amendment) Regulations, 1999	765
The Broadcasting (Guernsey) Order, 1999	1314
The Geneva Conventions Act (Guernsey) Order, 1999	1316
The Women Priests (Channel Islands) Order, 1999	1317
The Afghanistan (United Nations Sanctions) (Channel Islands) Order, 1999	3134

JUDGMENTS OF THE GUERNSEY COURT OF APPEAL

A 132. [CRIMINAL DIVISION – APPEALS NO.229 and 230]

15th MARCH, 1999

THE LAW OFFICERS OF THE CROWN
v.
B **HAROLD EDWARD MALIA & PAUL RIBEYRE**

Before: HARMAN (PRESIDENT), GLOSTER and CLARKE, JJ.A

Sentence – misuse of drugs – importation of Class B drug

See paragraph 20.

C

A.M. Merrien for the Appellant Malia
M.J. Riddiford for the Appellant Ribeyre
H.M. Comptroller for the Crown

THE PRESIDENT: On 27th February 1998, Edward Harold Malia and Paul Ribeyre appeared before the Deputy Bailiff in the Royal Court when they pleaded guilty to an Indictment containing two counts. On the first count, Paul Ribeyre, who was alone charged, pleaded guilty to being D knowingly concerned in the fraudulent evasion of the prohibition on importation of cannabis resin, during July and August 1997. In the second count both Appellants pleaded guilty to a similar offence allegedly committed during the month of August 1997.

On 19th August 1998, before the Deputy Bailiff and Jurats, they were sentenced as follows: Malia to a sentence of 5 years imprisonment on count 2, and Ribeyre to concurrent sentences of 10 years imprisonment on counts 1 and 2. The Court also made a confiscation order on the basis that E Ribeyre had benefited from drug trafficking with proceeds amounting to £53,765. This included £4,260 seized from him at the time of his arrest and the estimated value of motor cars, which he was known to possess in and around London, amounting to £8,120. In default of the payment of the latter sum, he was ordered to serve a sentence of 6 months imprisonment consecutive to the otherwise concurrent sentences of 10 years imprisonment.

The reason for the delays in sentencing, which are apparent from the dates which I have recited, F were at least in part attributable to the investigation being made about Ribeyre's benefits from drug trafficking. However, in the case of each Appellant, the sentences were ordered to run from 31st August 1997, being the day of their arrests. Both men now appeal to this Court against their sentences with leave of the Bailiff. The general grounds in each case are that they were manifestly excessive, and these have been helpfully developed before this Court by Mr. Merrien and Mr. Riddiford.

G These matters came before the Royal Court following an unusually long and painstaking investigation and surveillance. The Court at trial was told that no fewer than 27 officers of Guernsey Customs and Excise, 15 Guernsey police officers, and a number of law enforcement officers in England and Jersey were involved in addition to forensic experts. It appears that 114 witness statements were taken over a 10 month period based on the information collected.

The prosecution identified Ribeyre as the principal person targeted during the investigation. He was involved as the immediate supplier and organiser of the importations on 8th August and 21st August. On each occasion he used others to act as couriers for the physical importation of the drugs, but in each instance he travelled with them.

On 8th August Hovell was the courier, and on 31st of August Malia and Hovell were the two couriers involved.

On 8th August Ribeyre and Hovell flew together from Gatwick to Guernsey, Hovell with 5 or 6 x 9 ounce bars of cannabis resin taped around his body. Having arrived in Guernsey without challenge, they went to a hotel where Hovell handed over the drugs to Ribeyre. They subsequently returned to the United Kingdom separately and on different days, with Hovell taking with him a substantial sum of money, being presumably proceeds of the sale by Ribeyre of the cannabis to a local supplier. They were both under close observation throughout this period. By the time Ribeyre had left the Island on 11th August, the two men between them had taken back to the mainland between £9,200 and £9,700 in cash, although it is not known whether all of the cannabis resin had been sold or paid for.

On 31st August 1997, Ribeyre, Malia and Hovell arrived in Guernsey having sailed by ferry from Poole. Malia and Hovell were acting as the couriers, travelling under false names, and each with 11 bars of cannabis resin, weighing over 2,600 grammes, taped about their bodies. All three men were arrested.

Evidence was subsequently given that based upon a street value of £7 to £9 per gramme, or £200 to £255 per ounce, the total value of the cannabis resin seized on 31st August amounted to between £37,534 and £48,323. It appears that the street value of the cannabis brought in on 8th August, if it amounted to 5 or 6 x 9 ounce bars, would have been approximately between £9,000 and £13,000.

Malia and Hovell both stated in interview that they had expected to receive approximately £1,000 each for acting as a courier. Malia and Hovell were, of course, arrested with the drugs literally attaching to their bodies. Meanwhile Ribeyre was denying that he knew or had anything to do with Malia, Hovell or a local known drugs dealer whose name was given to him.

He pleaded guilty without giving prior notice when arraigned before the Court on 27th February 1998, by which time he had had, of course, the opportunity of considering the full and detailed witness statement of Hovell, who was about to give evidence for the prosecution, together with the very substantial other evidence available at that stage to be called.

We have considered the severity of the sentences passed on both of these Appellants in the light of all the circumstances. Malia is a single man, aged 38 at the time, who was born and brought up in Jersey. He had lived in London for the past 10 years. He had a bad early record for offences of dishonesty and for offences in connection with driving. In 1982 he was fined for possession of cannabis resin, and on 2nd July 1996, at Croydon Crown Court, he was sentenced to 2 years imprisonment for unlawfully importing cannabis resin. He was released on licence in April 1997. He was a courier on that occasion, and the prosecution emphasised that he reverted to that role very shortly after being released from that sentence of imprisonment.

It was urged before us that his sentence of 5 years imprisonment was excessive, bearing in mind that he was being sentenced for a single importation of a quantity which, although very substantial, was not in the top bracket. Furthermore, it was argued that there was an unjust disparity between the sentences imposed on Malia and Hovell. Although Hovell admitted his part in the two importations almost at once and made a full witness statement at a later date, with a view to giving evidence for the Crown against Ribeyre, he was clearly more involved than Malia and his sentence of 2 years imprisonment went to confirm that Malia's sentence was too high. Although he may not have had any sensible alternative to pleading guilty, nevertheless there had never been any suggestion that he would do otherwise.

He was to be paid £1,000 for transporting approximately half of the consignment of drugs, but apart from that he knew very little about what was happening. It was wrong, it was urged before this Court, to describe him as a man who went straight back into the business of being a drug courier on release from his last sentence for a similar offence, and he should not have been sentenced on this occasion above the starting point in Oren 18 GLJ 13.

Ribeyre was sentenced on the basis of an appropriate starting point being a sentence of imprisonment of 15 years, reduced in this instance to 10 years by virtue of his plea of guilty. It was submitted to us that this sentence was too high when considered overall. Although he could not contradict the Deputy Bailiff's description of him as a major player in a United Kingdom drug importing organisation, he was nevertheless certainly not in the top league. He was essentially the immediate supplier and organiser for others further up in the organisation, however it was comprised.

We were referred to a number of cases, in particular to the case of Paul 20 GLJ 14, where a sentence of 10 years imprisonment was upheld on appeal in 1995. Paul had pleaded not guilty, had previous convictions, and had used a courier for the importation of 2,700 grammes of cannabis resin from St. Malo, concealed in a bicycle.

This Court has given most anxious consideration to these submissions, and in doing so has taken into account the sentence imposed in all three cases. We have finally concluded that the sentences passed on these two Appellants were indeed too high in the light of all the known facts. We emphasise that this view is based upon the overall situation in this case and in no way affects other general principles of sentencing. In our judgment the correct starting point in considering the position of Ribeyre should have been 12 years with a reduction in the event to 8 years imprisonment, to take into account his plea of guilty. We have also concluded that Malia's sentence should be reduced from 5 years to 4 years imprisonment.

We therefore allow these appeals to that extent, reducing the sentences to 8 and 4 years respectively. 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.

Sentences reduced to 8 years' imprisonment and 4 years' imprisonment respectively.

133. [CRIMINAL DIVISION – APPEAL NO. 232]

15th MARCH, 1999

LAW OFFICERS OF THE CROWN
v.
KRISTIAN KIRK

Before: HARMAN (PRESIDENT), GLOSTER and CLARKE, JJ.A

Sentence – misuse of drugs – possession of Class B drug

See paragraph 21.

J.J.L. Morgan for the Appellant
H.M. Comptroller for the Crown

THE PRESIDENT: On 6th October 1998, this Applicant, aged 17, together with his girlfriend, Sarah Kate Le Page, also aged 17, appeared before the Bailiff and Jurats in the Royal Court, having pleaded guilty to an Indictment containing 3 Counts.

The first Count charged Miss Le Page with unlawful possession of a quantity of cannabis resin found in her bedroom on the day of her arrest. Count 2 charged Kirk with unlawfully supplying cannabis resin between dates shortly before 25th June 1998, the day also of his arrest; and Count 3 again charged Kirk alone with possessing a quantity of cannabis resin with intent to supply it to another, that being the same as the cannabis resin charge against Le Page in Count 1.

Both accused were of previous good character, Kirk having been unemployed since January 1998. Both lived at home with their parents. In the event Le Page was sentenced to 6 months Youth Detention suspended for 18 months, to be served under the supervision of a Probation Officer.

Kirk received an immediate custodial sentence, the Court having concluded that the offence was so serious that a custodial sentence was necessary for the protection of the public or prevention of crime. Those words of course followed S. 2(1)(b) of the Criminal Justice (Youth Detention)(Bailiwick of Guernsey) Law, 1990, but also may be thought to have embraced S. 2(1)(c) which refers to a situation where the offence was so serious that a non-custodial sentence cannot be justified.

He was sentenced to 9 months Youth Detention on Count 2, and to 18 months Youth Detention on Count 3, those sentences to be served concurrently.

He now applies directly to this Court for leave to appeal against the sentences on the grounds that they were excessive, and also that they reflected excessive disparity. That latter ground is not now pursued.

The facts of the case may be shortly stated: On 25th June 1998, Customs and Police Officers executed a search warrant at Le Page's home address. She was not there at the time, but arrived soon afterwards driving a car owned by Kirk. She was alone. She at once produced a cardboard shoe box from her locked bedroom. Inside the box was £150 in cash, and in a make-up bag a

quantity of cannabis resin, 116.58 grammes, which as has already been pointed out, is the same cannabis referred to in Count 3 against Kirk.

A further sum of £200 in cash was recovered from the car, and also the sum of £441 from a handbag in Le Page's bedroom. Cling film, knives and a chopping board, together with small traces of resinous substance were also found in the bedroom, being the necessary tools of the trade of a drugs dealer. They belonged to Kirk. He was arrested later the same day and £60 in cash was found under his mattress at home. The four separate sums of money recovered that day therefore totalled £851.

At Kirk's trial the Court made an unchallenged confiscation order in this sum as representing the proceeds of his drug trafficking. In the course of interview he assessed the quantity of cannabis resin, for which he was later charged in Count 2 for having unlawfully supplied it to another, as having been in the region of 2 to 2½ ounces, sold at approximately £200 per ounce. This quantity, 70.875 grammes, therefore had a street value of perhaps £500. Evidence was available that the 116.518 grammes, the subject of Count 3, could be sold in Guernsey for between £815 and £1,048. The total street value was therefore probably in the region of £1,500.

Both this Applicant and his girlfriend separately admitted that they were regular users of cannabis resin, and Kirk himself stated that in his opinion the drug should be de-criminalised. His mitigation, if that is what it amounted to, was to the effect that he bought and passed on the drug within a circle of friends, and for the purpose of providing for himself and his friends alone. Le Page was one of those friends and it was accepted by the prosecution that she allowed cannabis resin to be stored in her locked bedroom, which was more secure than the room which this applicant had at his parents' home.

The prosecution described Kirk as a small time dealer, albeit at the bottom end of the scale. He was not prepared to name his supplier or any persons to whom he had himself sold the drug.

In mitigation before the Royal Court it was stated on his behalf that his main motive in buying the drug was to please his friends in order that their small group could smoke cannabis resin together as their accepted social life. It was suggested that while it was in fact the Applicant who stood in the dock, it could quite easily have been any one of the number of five people with whom he smoked regularly. This Court is not concerned with such a hypothetical situation.

However, the sentencing Court had to consider the implications of a carefully prepared Probation Report by Mr. Stuart Crisp. Paragraph 9 is in these terms:-

"He recognises that his cannabis use has occupied a very large part of his life for about a year and a half. He believes that he lost both his jobs due to its heavy use, because he could not get up to go to work. However, he believes that the drug is relatively harmless and feels that it should be legalised."

The report states that Kirk has used various "mind-altering" substances since the age of 13 years.

Mr. Morgan, this morning, has referred us again to paragraph 13 of the report, a passage of which was read at the previous hearing. It is in these terms:-

"If he were to serve an immediate custodial sentence there would be a strong possibility of him becoming further entrenched in the drug culture."

This, in our judgment, is not an acceptable argument. If there is any doubt about the road which this teenage trafficker is now treading, it should be resolved by the passage in Miss Le Page's Probation Report, which was read out by her Counsel, in his presence, at the trial. Thus:-

"She maintains that she primarily used cannabis in social settings as opposed to needing it to help her cope with her problems. She does however acknowledge that in addition to the criminal trouble she is now in, she is becoming aware that her drug usage is starting to take a hold on her. She notes, for example, that she becomes irritable when she does not have access to drugs, e.g. cannabis."

It has been submitted before us that the test set out in S. 2(1)(b) of the 1990 Law should be construed as relating, at least primarily, to cases involving violence or containing a sexual element. Mr. Morgan could produce no authority for that proposition and we cannot accept it. Nor do we regard the Applicant's age as a ground for concluding that the sentence was manifestly excessive. The reality, in our judgment, is that he admitted having benefited from drug trafficking, and he has shown absolutely no contrition.

We are satisfied that there is no merit in this application, which is therefore dismissed.

134. [CRIMINAL DIVISON – APPEALS NOS. 234 and 235]

16th MARCH, 1999

THE LAW OFFICERS OF THE CROWN
v.
BRIAN STEVEN SCRAGG & JOHN TERRENCE OSBORNE

Before: HARMAN (PRESIDENT), GLOSTER and CLARKE, JJ.A

Sentence – misuse of drugs – importation of Class A drug

See paragraph 18.

A.D. Laws for the Appellant Scragg
A.D.N. Havard for the Appellant Osborne
H.M. Comptroller for the Crown

THE PRESIDENT: On 27th November 1998, Brian Steven Scragg and John Terrence Osborne appeared before the Royal Court, jointly charged in an Indictment containing two Counts.

In the First Count they were charged that during July 1998, they were knowingly concerned in the importation of a controlled drug of Class A, namely, Ecstasy, in Guernsey, contrary to the prohibition on importation imposed by S.2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974, as amended.

The quantity was three hundred tablets, with a street value of between £25 - £30 per tablet, and thus an overall street value of £7,500 - £9,000.

In Count 2 they were charged with a similar offence in relation to the Class A drug, Diamorphine, or heroin. The quantity in this instance was 7.204 grams, or about a quarter of an ounce. At an estimated street value of £300 per gram, the total value of this heroin amounted to approximately £2,000.

Both men pleaded guilty to the counts and were each sentenced to 6 years imprisonment on Count 1 and 18 months imprisonment on Count 2, to be served concurrently. On the basis of his involvement in drug trafficking the sum of £530 was ordered to be confiscated from Scragg, this money having been found on his person at the time of his arrest.

He now appeals to this Court against his sentence, leave having been granted by the Bailiff on 4th March, 1999.

Osborne, having on 3rd December, 1998, completed an application form for leave to appeal against his sentence, later on 18th January, 1999, signed a form in order to abandon his application. This might have been the end of the matter, but we are informed that he was inadvertently provided with the wrong form and that therefore his purported abandonment was a nullity. The form in question related to abandonment of an appeal after conviction by the Magistrate's Court. In those circumstances he now applies direct to this Court for leave to appeal against his sentence, and we have considered that application together with the appeal of Scragg.

Scragg was at the time aged 24, was unemployed, and has a substantial record for offences of dishonesty. Osborne's background was not dissimilar. Neither of them had convictions for previous drugs offences, but both are heroin addicts.

On Friday 24th July 1998, the two men together flew to Guernsey from Southampton. However, at Southampton Airport, Osborne had triggered off the alarm whilst going through a metal detector and when he was searched a package was found concealed in his groin. At this point he ran away and before he was caught, disposed of a number of hypodermic syringes and other items which were recovered from a dustbin at the Airport.

Scragg at this time had £716 in cash, and part of this money was used to obtain new tickets which were required before they were allowed to fly because the original tickets had been bought in false names. They were allowed to proceed from Southampton, but in these perhaps somewhat surprising circumstances, were stopped as soon as they arrived in Guernsey. By this time Scragg's cash balance had been reduced to £530, after the purchase of the new air tickets.

Putting the matter shortly, they were both arrested and interviewed, and eventually agreed to an x-ray examination which indicated the presence of foreign bodies internally concealed. In the case of Osborne, this proved to be six packages, each containing 50 Ecstasy tablets, and in the case of Scragg, the heroin already referred to, and the subject of Count 2. They each maintained that the heroin was for personal use and to be shared between them.

They were both interviewed on a number of occasions, and their answers reflected varying degrees of candour or lack of it, but throughout both men refused to identify anybody else with whom they might be involved in this importation.

In opening the case to the Court, Her Majesty's Comptroller stated that the quantity of 300 Ecstasy tablets was the largest amount with which the Guernsey Courts had previously been concerned, and that the previous record seizure and prosecution was in respect of 200 capsules in 1993, involving

the trial of a man named Fallaize. It should be noted that in that case the Accused pleaded guilty to possession with intent to supply 200 capsules. He was sentenced to 5 years imprisonment and £400 was confiscated as the proceeds of drug trafficking, with a 1 month consecutive sentence in default. The street value on that occasion was given as £5,000 - £6,000. A

The Deputy Bailiff, in passing sentence, emphasised two aggravating features of this case. The first was the quantity of the drugs, the damaging side effects of which are still being discovered. The additional aggravating feature was the method of importation, inside the bodies of the two men, which imposed additional unpleasant duties for the customs officers concerned.

As has already been noted, both men received the same prison sentences, although the Court took the view that Scragg's position was "further up the line of command than Osborne." He was said to be acting as banker to the enterprise and it was he who was able to buy the replacement air tickets. B

Despite the fact that they were both caught in circumstances which virtually precluded any other pleas than guilty, they were still nevertheless entitled to credit for not contesting the case.

Mr. Laws for Scragg, has rested his submissions before us on the proposition that Scragg would have been sentenced on the assumption that the tablets being carried were of "average or near average content", following the English law as stated in R. v. Warren & Beeley (1966) 1 Cr. App. R. (S) at page 233. C

The practice now is to determine the total weight of active constituent at 100% purity, which figure would be used as the basis for sentence. In the instant case no reference was made at the trial to the purity or weight of the drugs imported. In fact, they were below average potency. Each tablet weighed an average of .352 at a purity of 20%, which gave a weight of active constituent of 70.4 milligrams, as against the recognised average of 100 milligrams. The two men therefore fell to be sentenced for the equivalent of 211 average tablets rather than 300, which was the total being carried by Osborne. D

In Warren & Beeley, the judgment which was given by Lord Taylor, CJ, contained the following passages beginning at the bottom of page 235:- E

"The drug usually comes in the form of a well made tablet. There are capsules, but those are less common. Sometimes, though rarely, the drug comes in the form of loose powder. Dosage units vary between a content of 75 milligrammes or 125 milligrammes of the active constituent, but most tablets, we are informed, contain amounts close to the average of 100 milligrammes. Accordingly, 5,000 tablets would be expected to contain a total of 500 grammes of the active constituent. From the manufacturer's point of view, the achievement of 100 milligrammes or thereabouts is desirable: if less than that were included the tablet would be less marketable, and if more than that were included, then it would be more than is necessary or appropriate for an individual dose and the manufacturers will be unlikely to wish to exceed what was necessary for that purpose." F

And then from further down page 236:-

"The range of Ecstasy prices at street level is variable. The price varies considerably depending upon a number of factors such as the number of doses being purchased, the relationship between the buyer and the seller and the place of purchase. Because Ecstasy has become so widely available during the past few years the price has dropped considerably. In 1990 the national average price per tablet was £21. That dropped to £16.50 in February 1994, and has since further dropped to £13. G

Thus, if street value were to be a criterion in determining the level of sentencing, the more Ecstasy imported the lower would be its value and the lower would be the level of sentencing. This would clearly be contrary to public policy. It was this factor which prompted the Court to alter the criteria in its guidance as to offences involving heroin and cocaine in Aranguren. Since that case regard should be had to the weight of the drug, rather than to its street value."

The judgment continues:-

"We consider the same applies to Ecstasy. The evidence, as we have said, is that most tablets contain amounts of the active constituent close to the average of 100 milligrammes and, accordingly, 5,000 tablets would contain 500 grammes. In Aranguren the Court held that importations of heroin or cocaine of 500 grammes or more at 100% purity should merit sentences of 10 years upwards; importations of 5 kilogrammes or more, 14 years and upwards. We consider that similar criteria should, by way of guidance, be applicable to importations of Ecstasy. In applying the criteria in that way we consider that the tariff in regard to offences concerning Ecstasy will be maintained substantially at the same levels as those in relation to the other Class A drugs. It is to be assumed, since Parliament has so classified the drugs, that drugs within one class are to be regarded similarly.

It follows from what we have said that in general, for 5,000 tablets or more of Ecstasy, the appropriate sentence would be of the order of 10 years and upwards; for 50,000 tablets or more, 14 years and upwards. That is on the basis that the tablets are of average (or near average) content mentioned above. If analysis shows a substantially different content in an individual case then the weight of the constituent will be the determinative factor so far as this particular criterion is concerned.

However, we wish to stress two matters: first, these criteria are by way of guidance only; and secondly, that the quantity of tablets or the weight of the constituent is only one factor to be considered in deciding the appropriate sentence. The role of the offender, his plea, any assistance he may have given to the authorities are some, but not all, of the other considerations which the Court will have to weigh."

Mr. Laws has referred us to another recent English case R. v. McPhail (1997) 1 Cr. App. R. S. at page 321, in which reference was made to Warren & Beeley. For these purposes it is only necessary to read from the head note:-

"A sentence of seven years' imprisonment for possessing Ecstasy tablets with intent to supply reduced to five years on the ground that the tablets concerned were of 25% purity.

The Appellant pleaded guilty to possession of Ecstasy tablets with intent to supply, possession of amphetamine sulphate with intent to supply, and possession of cocaine. The Appellant was found in possession of 238 Ecstasy tablets, and 125 grammes of amphetamine sulphate. Sentenced to seven years for possession of Ecstasy with intent to supply, with concurrent sentences for the other offences, and a confiscation order...

Held: (considering Warren & Beeley) a defence witness had established that the tablets of Ecstasy were on average of one quarter purity. In Warren & Beeley it had been said that in normal circumstances Ecstasy tablets contained 100 milligrammes of the active constituent, but that if analysis showed that in a particular case there was a substantially different content, that was a determinative factor. It was essential for Counsel to lay before the sentencing judge information on

the percentage of the active constituent of the drug. The sentence of seven years for possessing Ecstasy was too long; a sentence of five years would be substituted..."

However, Mr. Laws has rightly drawn the attention of this Court to the Jersey Court of Appeal case of Alan Thomas Campbell which was heard by five judges, judgment being given by the Bailiff on 4th April 1995, (1995 JLR 136). The judgment contained the following, beginning at line 22 on p.146:-

"Thirdly, the Attorney General asked us to consider whether the test laid down by the English Court of Appeal in R. v. Aranguren (1994) 16 Cr. App. R. (S), at page 211, for gauging the gravity of an offence was apt for adoption in Jersey. In Aranguren the Court held that reference to the street value of the drug should be abandoned in favour of a formula related to weight and purity. This case was considered by the Royal Court in the case of Campbell (1994 JLR N-13) where Crill, Bailiff, stated..."

And I pause there to point out that the reference to Attorney General v. Campbell refers to Attorney General v. Campbell, 15th September 1994, Jersey unreported, where Crill, Bailiff stated:-

"... it has never been the practice of this Court to have regard solely to one or the other. This Court has had regard to both the weight and the street value. It has never been disjunctive, it has been conjunctive, and the Court takes both into account. The Court cannot sentence purely on the market principle alone, and it must be stressed, as I said at the opening, that the effect on Jersey of importing even a small amount is far greater in proportion than it would be in England."

And then the judgment in the Court of Appeal case of Campbell continues:-

"This approach appears to us to be entirely satisfactory having regard to the nature of drugs cases coming before the Courts in this jurisdiction. Both the street value and the weight of the drugs are relevant factors for the Court to know in assessing the level of involvement of the Defendant in drug trafficking."

In our judgment a similar approach should be adopted in this jurisdiction. As was conceded on behalf of both these men there is no evidence that in Guernsey the street price per tablet of Ecstasy is in any way affected by the amount of active constituent. In any event it would only be one factor to be considered in deciding the appropriate sentence.

Moreover, the Court has received assistance from Her Majesty's Comptroller, who has informed us that the street price of £25 - £30 per tablet in Guernsey has remained virtually constant since about 1994. This is because here it is essentially a sellers market and a notably unsophisticated one. On the mainland and elsewhere one may expect to find tablets bearing impregnated marks to identify the source of origin, and which would indicate the recognised level of the constituent. This is not the case in the experience of the Guernsey authorities, so he assured us. Here the purchaser will set out to buy what is going, regardless of purity, and expecting to pay the recognised price. For this reason, it is submitted there is a different market in Guernsey, and it is in the quantity that the essential gravity of an offence lies.

We are satisfied that this is the correct approach for this Court to adopt. Mr. Havard, on behalf of Osborne, while adopting the submissions of Mr. Laws on content, has further argued that in his client's case his personal circumstances were not sufficiently taken into account. Both men have been heroin addicts since the age of 18. He was not in a position to make rational decisions when

owing money to suppliers of heroin, and he was threatened with injury if he did not make this drugs run. The sentence, said Mr. Havard, was anyway at the top end of the scale and should be reduced.

A

However, having considered all the matters which have been advanced in support of Scragg's appeal and Osborne's application, we have come to the conclusion that it is impossible to disregard the large quantity of Ecstasy involved in Count 1. Further, it should not be ignored that the heroin was a larger amount than would have been required by the two men during an originally projected stay of 48 hours on the Island.

B In our judgment there is no merit in either the appeal or the application and both therefore must be dismissed.

135. [CRIMINAL DIVISION – APPEAL NO. 236

22nd SEPTEMBER, 1999

C

LAW OFFICERS OF THE CROWN
v.
MATTHEW RAE RODNEY

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

D **Criminal appeal against conviction – directions to jurats generally – directions on corroborative evidence and evidence to show prior consistent statements**

See paragraph 29.

C.M.Fooks, for the Appellant
R. McMahon, for the Crown

E THE PRESIDENT: On 11th January 1999, this Appellant appeared before the, then, Deputy Bailiff in the Royal Court when he pleaded not guilty to an indictment which alleged that he and others between 20th July 1998 and 30th August 1998, in the Bailiwick of Guernsey or elsewhere, were knowingly concerned in the fraudulent evasion of the prohibition on importation of cannabis resin, a controlled drug of Class B, contrary to the prohibition on importation imposed by Section 2(1) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended. On 14th January 1999, after a trial before the Deputy Bailiff and ten Jurats, he was convicted of this offence by a majority of
F nine to one, and on 17th February 1999, was sentenced to two and a half years imprisonment. He now appeals against the conviction and the circumstances are as follows:-

On the morning of 29th August 1998, two men, named Andrew Bamber and Jason Tucker, were stopped by Customs Officers at the passenger terminal building, White Rock, St. Peter Port, having just arrived from Poole on board the Condor ferry. Bamber had a return ticket for two persons in the name of Haslet. They were afterwards searched and a quantity of cannabis resin was recovered
G from each of the men. 6.65 grams of cannabis resin were found in a Kinder egg hidden in Bamber's underpants and 51.98 grams were discovered in a condom concealed internally in his body. 55.967 grams of cannabis resin were found in a condom concealed internally by Tucker. Thus a total weight of 114.597 grams of cannabis resin was recovered from the two men. In addition a number of Ecstasy tablets were found in the possession of Tucker, but it was accepted at all times by all

parties that they were in no way connected with the case in relation to this Appellant. It was accepted that they were for the personal use of Bamber and Tucker and that Rodney knew nothing about them. They later pleaded guilty to the same offence as that charged against Rodney, and were allegedly two of the "others" referred to in that Count.

Bamber and Tucker were both interviewed at length on 29th and 30th August, having been kept separated from the time of their arrest. Their version of events would not, of course, be evidence in the case against Rodney but for the fact that they both afterwards elected to give evidence for the Prosecution as alleged accomplices at Rodney's trial. It was however common ground that neither man had been to Guernsey or Sark before, and Tucker and Rodney were unknown to each other. Rodney and Bamber knew each other because during 1997 they had worked together for a company called South West Home Care in Poole. In due course Bamber left that employment and the two men lost touch. Subsequently, during 1998 they were in contact again as a result of the exchange of telephone numbers through mutual friends. By this time Rodney was working in Sark. It appears that there was some suggestion that Bamber should visit Sark at the time of the Sark Water Carnival in the middle of August but, perhaps because he was unable to afford the cost of the visit, nothing came of it. It then seems that there was further conversation on the telephone about the possibility of Bamber visiting Rodney over his birthday, which was to be celebrated by a party, which was to take place on 30th August. The common ground ends there.

It was the case for the Prosecution that Bamber and Tucker brought the cannabis resin to Guernsey en route to Sark in order to supply it to Rodney who was to pay £700 for it. According to Bamber this was the agreement between him and Rodney, and he had called upon the assistance of Tucker to obtain the cannabis resin because he, himself, did not have immediate access to a source of supply in that quantity and could not in any event afford to pay for it from his own available funds. He therefore recruited Tucker, who with the assistance of two third parties, obtained the cannabis resin in the days immediately before they set off for Guernsey. As has already been pointed out, Tucker had never previously been to the Channel Islands, did not know Rodney, but was aware of the general purpose of the expedition.

As a result of what Bamber and Tucker were saying in interview, Rodney was arrested during the afternoon of 29th August. The sum of £765 was found in an envelope in a bedroom cabinet at his lodgings in Sark. In addition he had £135 in cash in his wallet. According to Bamber £700 was the sum to have been paid to him and Tucker for the four ounces of cannabis resin brought in by them. It is right to point out that during the trial this figure was varied to the extent that it appeared approximately £900 in all was found at his address and also, in cross-examination, it transpired that the eventual sum to have been paid by Rodney to the other two men may have been as low as £550, according to the various calculations made and accepted in answer to questions. £900 was a figure that cropped up during the appeal from time to time and also, of course, at the trial were the £765 and the £135 discovered separately. The fact, however, remained that Rodney had a substantial sum of money in cash in his room which would have enabled him to have paid for the cannabis. There was also uncontradicted evidence to which Rodney himself contributed, that on 21st August he had visited Guernsey and there paid the sum of £2,000 in cash into his account at Lloyds TSB Bank. The paying in slip was found in his wallet and Rodney himself stated in evidence that on that day he had gone to Guernsey with a total sum of £2,400 in cash. After making various purchases in different shops he returned to Sark with approximately £300 which he at that stage retained. He was afterwards paid for his week's work, but was all the time expecting to spend approximately £200 on a wedding present for his sister and a further sum of perhaps £30 for her birthday present. He was anyway expecting to leave Sark around 10th September in order to begin a course in computer maintenance and technology at Weymouth College. There was therefore no special

significance in his retention at his lodgings of a substantial sum of money after paying £2,000 into his bank account in Guernsey.

A

The case for the Prosecution being that the cannabis resin was destined for Rodney, and always had been, it was put in cross-examination on the Appellant's behalf by Mr. Torode that the entire amount which was being taken over was in reality for the benefit of Bamber and Tucker, either for them to sell on or to use themselves, or probably both. At all times it was acknowledged that it would be dangerous for the Jurats to convict Rodney on the evidence of Bamber and Tucker unless it was corroborated by credible independent evidence. The Prosecution relied upon two matters which it was submitted were capable of amounting to corroborative evidence. The Deputy Bailiff
B so directed the Jurats in the summing-up.

The Condor travel ticket with which Bamber and Tucker had travelled had been booked by Rodney in the false name of Haslet. The Prosecution suggested that this was conduct for which no sensible explanation was afterwards given. According to Rodney, it was necessary for the tickets to be pre-booked and time was running short with the approaching Bank Holiday weekend. He therefore agreed to book the ticket on his own credit card and Bamber asked if it was alright if he brought a
C friend along. Rodney agreed to this and asked what name should be put on the ticket. According to Rodney Bamber then said "Stick it under Pencil Head's name", which Rodney took to be a Mr. Nigel Haslet with whom they had both worked at Poole. Mr. Haslet was known as "Pencil Head" or alternatively as "Fat Belly". Bamber did not suggest that Haslet would in fact be his companion and Rodney did not ask. Further, while he thought it was strange he did not question this proposal and in his own words "went ahead with it." The consequence was that a ticket was issued in Poole in the name of Haslet for two persons with a contact address in Sark, which was that of Rodney's place of
D work, and a telephone number which was that of Bamber at his home near Wareham. The fact that the telephone number was attributable to Bamber was not appreciated at the time of the trial, but the Deputy Bailiff reminded the Jurats in the summing-up that the booking was at all times traceable to Rodney.

The second detail of evidence on which the Prosecution relied as capable of amounting to corroboration was the £765 in his possession which the Applicant had retained or collected eight
E days after paying in £2,000 in cash into his bank account in Guernsey.

The Deputy Bailiff having directed the Jurats that these two matters were capable of amounting to corroboration, at all times made it clear to them that it was for them to determine whether these two alleged corroborative details did so amount to independent confirming evidence.

This was not a case of drugs smuggling on a conspicuously large scale. The quantity of cannabis
F resin involved amounted to a shade over four ounces and it was the evidence of both Bamber and Tucker that they expected to retain approximately half an ounce for their own personal uses. Their own anticipated financial gain was perhaps in the region of £150. The street value of the total amount of cannabis resin was in the region of £800 to £1,100. With a population in Sark of about 500 persons the demand for this drug was said to be unknown but it would not otherwise be judged to be substantial. The cannabis seized could produce something in the region of 830 cigarettes. All this was no doubt reflected in the sentences of 18 months imprisonment in the case of Bamber and Tucker and 2½ years imprisonment in the case of Rodney, who at all times was alleged by the
G Prosecution to have been responsible as the instigator of the importation. He was a man of previous good character and positive evidence about this was led in the course of the trial. Nevertheless the cannabis resin involved was properly to be regarded as a commercial quantity, if only because the ticket of the two visitors was dated for their return the following day.

In our approach to this appeal it is right that we should draw attention to the fact that the law relating to appeals in criminal matters in Guernsey is not the same as that subsisting in England. In this jurisdiction the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the Appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal. This Court does not consider the direct issue of whether the conviction was safe, but we are far from saying that in the present case we would have accepted such a proposition if indeed it had been open to us to do so. It must be emphasised that the trial of this Appellant was characterised by its extreme fairness at all stages. When the Prosecution sought to lead evidence from a fellow remand prisoner named Line to the effect that Rodney had approached Line to act as a go between between him and Bamber with a view to offering Bamber a sum of money if he did not give evidence against Rodney, the Deputy Bailiff disallowed the evidence on the ground that its prejudicial effect would outweigh its probative value.

It is also necessary for us to say a word about the system of trial by Jurats, having regard to the submissions which have been made during the presentation of this appeal. As is well known, and as has been frequently emphasised in the past, trial by Jurats is not at all the same as trial by a jury. Members of a jury may well be hearing a case for the first time and have no previous experience of determining issues of fact as required of them in such a trial. Trial by Jurats involves an examination of the case by experienced judges of fact, and if only for this reason repetitive directions and warnings must be regarded as unnecessary, and indeed as unhelpful. In the course of Miss Fooks' skeleton submissions she argued that the Jurats "should have been frequently reminded as to the basis on which Tucker's evidence was being admitted"; that in considering the evidence of Bamber "there should have been included periodic reminders that this was only what Bamber said"; and that "it would have been of more assistance to the Jurats had he (the Deputy Bailiff in his summing up) reminded them more frequently of the burden on the Prosecution to prove that the Appellant was knowingly concerned..." Miss Fooks further submitted that there were "insufficiently frequent warnings to the Jurats of the dangers of accomplice evidence." For the reasons indicated above we have rejected these arguments and Miss Fooks did not seek to pursue them after we had pointed out to her the potential confusion caused by needless repetition.

In the course of her revised grounds of appeal Miss Fooks criticised Counsel for the defence at the trial under six separate headings. In her subsequent skeleton submissions and in her arguments before us, she to some extent modified the tone of these criticisms. She emphasised that they were made with some hesitation and that the matter was complex and that Mr. Torode had spent much time on the matter. She acknowledged that it was also very easy with hindsight to criticise whereas in the heat of the Courtroom it is sometimes difficult to make such clear decisions. In argument before us she recognised that it is never easy to criticise tactical decisions made by Counsel in the course of a trial.

Nevertheless, we have to consider them as possible grounds of appeal, and have done so in the light of the frequently cited English authorities. In R. v. Gautam (1988) Criminal Law Review 109, CA, the judgment of the Court which included Lord Lane CJ was given by Taylor J, (as he then was). The judgment stated that it had to be clearly understood that if defending Counsel in the course of his conduct of the case made a decision or took a course which later appeared to have been mistaken or unwise, that, generally speaking, had never been regarded as a proper ground for appeal. This judgment was subsequently approved by the Court of Appeal in R. v. Ensaw (1989)

89 Cr. App. R 139, when the Court stated that if it had any lurking doubt that an Appellant might have suffered from injustice as a result of flagrantly incompetent advocacy, then it would quash the conviction. In R. v. Clinton (1993) 97 Cr. App. R 320, it was acknowledged that where the conduct of Counsel for the defence was advanced as a ground of appeal, it was a matter which would have to be brought within Section 2(1)(a) of the 1968 Act, as rendering the verdict unsafe or unsatisfactory , if it was to succeed. In the course of his judgment Rougier J, stated:-

> "It is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of Counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict according to the terms of the subsection."

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.

Miss Fooks has made further submissions in the course of her helpful and attractively presented address to this Court. She has argued that the Deputy Bailiff and defence Counsel should have placed before the Jurats all of Tucker's interviews, while complaining that the trial was generally confusing for the Jurats because there was a great quantity of unnecessary documentation, and Counsel and the Deputy Bailiff did not explain the issues clearly and concisely. She has also submitted that there should have been editing of the interviews because there was much unnecessary and irrelevant material in all the records of interview and there was a considerable amount of prejudicial material in the form of mis-questioning and mis-statements by the Customs Officers. We are bound to say that we do not see any substance in these arguments.

Miss Fooks has also complained about the confusion which she says arose during the trial in regard to the cash found in the possession of the Appellant. The reality was, as has already been noted, that the sum of £765 was found in a bedroom cabinet at the Appellant's lodgings and £135 was found in his wallet. This could not, in our judgment, have confused or misled the Jurats.

Among further grounds Miss Fooks has submitted that the Deputy Bailiff did not adequately direct the Jurats on the elements of the offence and in particular on the issue of "being concerned in" the importation. We do not see how this can be properly argued having regard to the careful and accurate direction given by the Deputy Bailiff at the start of his summing-up at pages 225 B to 226 B. Miss Fooks has however since accepted that this was not in the forefront of her case. For our part we regard this direction as faultless.

No doubt the strongest argument in support of this appeal must relate to the evidence of Tucker. It is of course right that some of his evidence was hearsay, and also that it was wrong to suggest that his evidence required to be corroborated in the same way as the evidence of Bamber. However, Miss Fooks at first argued that Tucker's evidence should have been disallowed altogether and that the Deputy Bailiff should have refused leave for the Prosecution to call him. She so argued notwithstanding the fact that Mr. Torode apparently accepted, at the beginning of the trial, that his evidence was admissible to show prior consistent statements of the other Prosecution witness, Bamber, who he was shortly to accuse of recent fabrication. As Miss Fooks herself pointed out in her submissions it was agreed that the matter would be dealt with by direction in the summing-up. We do not consider that the exercise of his discretion by the Deputy Bailiff in allowing this

evidence is open to criticism. When the time came the Deputy Bailiff directed the Jurats as follows (Page 231 G to H):-

> "You'll remember that Tucker reported on what Rodney had allegedly said to Bamber. I'm not going to remind you of those parts of his evidence, but it's very important that you do not regard what Tucker says Bamber says Rodney says, as any evidence whatever against Rodney. That evidence only assists in showing, if it does, that there is some degree of consistency in what Bamber is saying. But I again remind you that Tucker cannot corroborate Bamber and that to the extent that it was only Bamber who was ..."

I pause to say that at this stage there was apparently something said that was inaudible and was not picked up by the tape which goes on to record:-

> "... the accused you must be sure you can accept what Bamber says."

Although the tape was apparently inaudible at this point it was not suggested to us that it qualified the accuracy of this direction.

However, as we have already pointed out, Miss Fooks has submitted that the Deputy Bailiff should have excluded the whole or substantially the whole of Tucker's hearsay evidence on the ground that it was unreliable and prejudicial to the Appellant. She has said that, even if there was a clear and accurate direction by the Deputy Bailiff, the Jurats could not reasonably be expected to perform the necessary mental gymnastics. While we do not accept this proposition it must be acknowledged that she is on firmer ground when she refers to the confusion which it may be argued arose during the course of the trial as to the real position and role occupied by Tucker as an accomplice with Bamber in the importation. She has pointed out that prosecuting Counsel on more than one occasion referred to Bamber and Tucker in the same breath and as if their evidence was of the same nature. Whether or not Tucker's evidence was sufficiently consistent and reliable so as to be probative rather than merely prejudicial to the Appellant, it was plainly inappropriate to equate him as a witness with Bamber. The Deputy Bailiff would appear to have appreciated this during the summing-up (Page 40 D):-

> "The Crown rely on these two pieces of evidence as corroborative of the evidence of Bamber and Tucker; they are really corroborative evidence of Bamber."

However, he went on to say:-

> "They can in my view be corroborative. As I said earlier, it's for me to point out the evidence which, if you accept it, is capable of independently confirming Messrs. Bamber and Tucker's evidence but it is for you to decide whether it does in fact provide independent confirmation of that evidence."

Earlier he had said (Page 227 B):-

> "Corroboration is independent evidence, that is to say, evidence which does not come from either of the accomplices, Bamber or Tucker, which confirms in some important respect, not only the evidence that- not only evidence that the crime has been committed, but also that the accused is concerned in the way that I have described. I say 'confirms in some important respect', because it is not necessary that there should be independent evidence of everything that Messrs. Bamber and Tucker have told you."

To that extent, therefore, Miss Fooks argues that there was a misdirection in the summing-up. The question for this Court to determine is whether that may have resulted in a miscarriage of justice.

A

Miss Fooks, notwithstanding her earlier submissions that the evidence of Tucker should have been disallowed altogether, eventually appeared to accept that his evidence was necessarily relevant and probative to establish the narrative of how he bought and paid for the drugs, and had assisted Bamber in their attempted importation. He was also a relevant witness to answer the charge that he was acting alone with Bamber and that to his knowledge nobody else was concerned, which was an essential element of Rodney's defence. Further, it must be recognised that he was at all times an accomplice of Bamber, with whom he had pleaded guilty to a joint charge. To that extent his admissible evidence would require corroboration in so far as it might affect the position of Rodney although, as was recognised throughout the trial, it did not in fact incriminate him. In our judgment the Jurats could not have been misled and nobody could possibly have drawn the inference from what was said by the Deputy Bailiff, or by Prosecuting Counsel, that the effect of the two mens' evidence was the same.

B

C

It is of course right that the evidence in the case was bedevilled with inconsistencies and discrepancies, but the Deputy Bailiff laid special emphasis on these matters in the summing-up (See pages 230 B to F and 234 A to B) and with complete fairness in relation to the Appellant's case.

For all these reasons we reject the arguments which have been advanced to us in the course of this appeal which must therefore be dismissed.

There is, I think, no application for leave to appeal against sentence?

D

ADVOCATE FOOKS: No, that's correct sir.

THE PRESIDENT: Yes. Yes, we would wish to - have you an application?

ADVOCATE FOOKS: No, thank you sir.

E

THE PRESIDENT: Well we grant legal aid in this case because apparently as a result of an oversight it had not been granted earlier, and we are grateful to both Counsel for their assistance in this matter.

ADVOCATE FOOKS: Thank you, gentlemen.

Appeal dismissed

F

G

136. [CRIMINAL DIVISION – APPEAL NO. 239]

19th JULY, 1999

THE LAW OFFICERS OF THE CROWN
v.
IAN PETER O'REILLY

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

Sentence – assault and assault with intent to rob

See paragraph 16.

D.G. Le Marquand, for the Appellant
P. Robey, for the Crown

SIR JOHN NUTTING, QC: This Appellant pleaded guilty on 15th February 1999, before the Lieutenant Bailiff, to two charges; one of assault and one of assault with intent to rob.

Leave to appeal to this Court was granted earlier this month. The bases of the appeal are that the sentences on each of the two offences were too long, and that the totality of the length of the period which the Defendant faces in custody was excessive. Bearing in mind that the period spent in custody pre-trial was two and a half months, and bearing in mind that the Appellant was effectively ordered to commence his sentence on 15th February, the total period that he faces is some three years and eight and a half months.

The Appellant is a 24 year old single man who, at the material time, was employed as a barman at the Hotel de Beauvoir. He is not a stranger to the Courts, although it is fair to say that the previous offences which are relevant to the matters before this Court today relate to fairly trivial offences and may be summarised thus: In August of 1990 for common assault he was fined; four months later for the theft of a pedal cycle he was put on probation for 18 months; in 1997 for conduct likely to cause a breach of the peace he was ordered to pay a fine of £350 or 35 days imprisonment in default, plus 14 days imprisonment suspended for 12 months; and in 1998 for theft from a meter he was ordered to undergo imprisonment for 7 days, and in view of the breach of the suspended sentence he was ordered to undergo a further 7 days imprisonment, that period being made consecutive to the period in respect of the conduct likely to cause a breach of the peace, making a total of 21 days in custody.

The offences with which this Court is concerned today represent therefore the first occasion when the Appellant has appeared in Court for offences of any real seriousness and the first time that a sentence has been passed upon him involving imprisonment for any length of time.

The facts of the offences may be conveniently summarised. Count 1, on Monday 2nd November last year, the Appellant spent the evening with a friend visiting various public houses in St. Peter Port. On his own admission, the Appellant thought that he had spent about £50 on drink that evening, and as a result, to use the words he deployed in describing his state when he was subsequently interviewed by police, he was in "a dreadful condition."

The evening, or the events giving rise to the offence of common assault, began when he went to the Weighbridge to pick up a taxi in order to return to the hotel where he was billeted as a result of his employment. Mr. Naftel was a taxi driver waiting at the Weighbridge Taxi Rank, at 2.30 on the morning of Tuesday 3rd November. The Appellant asked to be taken to the Hotel de Beauvoir, and together with his companion of the evening, they set off for that destination. Unfortunately, the taxi driver made a significant error in the route, which resulted in the journey taking longer than necessary in both time and distance. The effect of this was that the meter on Mr. Naftel's taxi would have claimed an excessive charge for the distance that should have been travelled. At the hotel Mr. Naftel pulled up at the main entrance and asked payment for the amount on the meter which was recorded as £6.20. What Mr. Naftel had done was to stop the meter sometime during the journey in order to avoid an overcharge.

The Appellant, who had undertaken the journey on frequent occasions, refused to pay more than £6 which he said was the amount that he'd always paid. He pulled out a £5 note and five 20 pence pieces, and said that he was not going to pay any more. Some words were exchanged. Both the Appellant and his companion alighted from the taxi but Mr. Naftel, for some reason or other, thought that it would be best also to get out of the taxi, as he put it, "to try to calm the lads the down." This, unfortunately, resulted in the injuries which Mr. Naftel sustained.

His account was that the Appellant punched him with a clenched fist directly in his face and then followed it with another punch, and it is clear from the injuries examined in hospital later that evening that Mr. Naftel was indeed punched several times in his face. Mr. Naftel's account was that he was also kicked about the legs. It is hardly surprising that the taxi driver's description to police was a little vague, but it is from his account and from the Appellant's account that one must attempt to derive some assistance in relation to what actually happened.

The two men, the Appellant and his companion, ran off having assaulted Mr. Naftel, who was at least fit enough to drive himself to the Princess Elizabeth Hospital where he was examined and treated. The injuries that he had suffered, which included two black eyes and cuts to his face, required treatment. The cuts to his face required one or two sutures and he was off work for a day.

Police enquiries resulted in the arrest of the Appellant on Tuesday 17th November. When arrested and cautioned he replied "that's rubbish", but when interviewed later he admitted his responsibility for the assault and, indeed, asked to be interviewed about it. His account to the police was in the main similar to Mr. Naftel's, up to the moment when the assault began. The Appellant said that at that stage he felt that the taxi driver was moving to punch him, and so he got his own punches in first. Whatever the truth of the matter, the fact is that nothing can excuse the assault to which Mr. Naftel was subjected.

The second count was one which involved an assault with intent to rob. It occurred in this way: Mr. Keith de la Haye is a 50 year old resident of St. Peter Port, who, on the night of 28th November was walking up Mill Street, shortly before midnight. He was going home having finished work at a local restaurant. As he walked up Mill Street, he could see the Appellant, whom he did not know, and could not of course subsequently identify, standing on the pavement past a restaurant. As he got level the Appellant suddenly jumped out at Mr. de la Haye, came up to his right side, and demanded money.

Mr. de la Haye said that at the stage when the demand was made he felt something sharp in the centre of his chest. He told the Appellant that he had not got any money and the Appellant then said "Give me the money or I'll stab you." In fact, Mr. de la Haye had a £10 note in his shirt pocket

and raised his hand to obtain it. The Appellant, feeling the raising of Mr. de la Haye's arm, told him not to bring it up. At that moment a group of people appeared around the corner of the street just ahead. That was sufficient to make the Appellant run away. Mr. de la Haye called the police and later a video of that street on a local shop corner was examined and the Appellant was arrested. He at first denied, but subsequently admitted, the offence, and when interviewed said that he had no clear recollection of the incident and he could not say what the reasons for his actions had been. He insisted that he did not carry knives, and the only item that he could have used in perpetrating this assault was a lighter.

Mr. Le Marquand, who has appeared on behalf of the Appellant, makes the following points in pursuing this appeal. First, so far as the common assault is concerned, he submits that the facts of the case are peculiar because the assault arose out of a genuine argument about the fairness of the fare demanded, granted (which was common ground) that the taxi driver had taken a route which resulted in some measure of overcharging; second, Mr. Le Marquand points out that although the Appellant was in no circumstances entitled to react as he did, this was a very different offence from the conventional offence of the robbery of a taxi driver where, as is usual in the circumstances of those particular cases, an attempt is made to evade payment of any kind; third, says Mr. Le Marquand, this is a very different case from that which had occurred within the last 12 months in this Island where a taxi driver had been stabbed and his assailant ran off without paying any fare of any kind; lastly, Mr. Le Marquand points out, this Appellant effectively provided the evidence which resulted in the charge by admitting the offence to police.

Mr. Le Marquand has placed before us a schedule of other offences committed within this jurisdiction. We have to say we have not found the schedule of any great help, but more to the point, Mr. Le Marquand has furnished the Court with two authorities which we have found of assistance in resolving this appeal. The first is the case of Foster 1982 (4) Cr. App. R. (S) at page 101. In that case the Appellant was one of a group of youths travelling on the under deck of a bus. The group declined to pay their fares when asked by the conductor and attempted to leave the bus without paying. The Appellant in this case seized the conductor by the neck and knocked his head against a window. It is perfectly clear that the bus conductor was not injured as severely as the taxi driver in the instant case, but it is also clear that the Court decided that the sentence passed on that particular Appellant, namely, 6 months detention, was a lenient sentence in all the circumstances. We have found that case of some assistance in deciding and balancing the various mitigating and aggravating factors in the instant case; and we have found it of some help to us in deciding what the appropriate sentence on this Appellant should be.

Secondly, we have been referred to an Attorney General's Reference, in relation to the second charge of assault with intent to rob. That Attorney General's Reference, is Lee number 6 of 1994, is reported in 1995 (16) Cr. App. R. (S) at page 343. It is a case in which Lord Taylor, Lord Chief Justice presided, and it is a case whose facts are not wholly dissimilar from the circumstances of this case. A youth was threatened with a knife in relation to handing over the contents of his pockets; he did so, and the offender was given a Community Service Order of 120 hours as punishment.

Three features distinguish these cases. In Lee the offender pleaded not guilty and used no weapon but did succeed in his demands, and obtained some money. However there are features of similarity too. Both cases shared aggravating aspects of the offenders' conduct, firstly, both offences were committed at night in a public street, secondly, both victims were threatened with physical injury if they did not hand over money. There was also one mitigating feature common to both cases, no actual violence was used to enforce the demand.

We have found the case of Lee of some help in deciding what the appropriate sentence should have been for the offence of assault with intent to rob. The Lord Chief Justice substituted a sentence of 18 months imprisonment and bore in mind firstly that the offender in the Attorney General's reference had undergone successfully the period of Community Service and secondly, that being a reference some reduction had to be made for the element of double jeopardy.

So far as the common assault is concerned, we have determined to reduce the sentence passed by the lower Court, and we do so for three reasons: Firstly, we consider that on the facts before the lower Court 18 months was too long for a crime, however inexcusable, which had the background which we have outlined, and which Mr. Le Marquand has urged on us to take into good account. Secondly, we consider there is force in the point that had the case been dealt with in the Magistrate's Court as it could have been, and as it would have been, were it not for the subsequent offence, the Appellant would have faced a maximum sentence of 12 months imprisonment.

Thirdly, we are mindful of the fact that at present the Appellant faces a total period of imprisonment for these two offences of 3 years and 6 months, and that that offence starts from 15th February 1999. We think that the overall length of sentence that he faces for these offences is too long, and therefore we have determined to reduce the sentence on the common assault to 9 months imprisonment which, in our view, meets the justice of that particular offence and which added to the sentence of 2 years for the subsequent offence, which we uphold, because we think it is the right sentence, results in a total sentence of 2 years and 9 months for these two offences. We consider that that sentence meets the justice of this case, to that extent this appeal is therefore allowed.

MICHAEL JACOB BELOFF, QC: Stand up, Mr. O'Reilly. The appeal will be allowed to the extent that for the sentence of 18 months imprisonment for the common assault there will be substituted a sentence of 9 months for the reasons given by My Lord.

Sentence for common assault reduced to 9 months.

137. [CRIMINAL DIVISION – APPEAL NO. 240]

22nd JULY 1999

THE LAW OFFICERS OF THE CROWN
v.
MICHAEL DOUGLAS SIMS

Before BELOFF (PRESIDENT), NUTTING and CLARKE, JJ.A

Sentence – burglary – robbery – assault

See paragraph 17.

M.G.A. Dunster, for the Appellant
P. Robey, for the Crown

SIR JOHN NUTTING, QC: On 9th March 1999, Michael Douglas Sims pleaded guilty to four offences: burglary in November 1998, robbery on 2nd December 1998, and burglary and assault on 6th December 1998. For these offences he was sentenced to a total of 7 years imprisonment.

He applied for leave to appeal, such leave being refused on 7th July, 1999. He pursued his application before the Full Court. On 19th July we granted him leave to appeal and varied his sentence to one of a total of 6 years imprisonment. We now give our reasons:-

The Appellant is 28 years of age. He was adopted as a baby by parents who separated subsequently. He was brought up in London and obtained employment in the catering trade. He came to this Island in April 1998 and worked as a barman at Batten's Restaurant in St. Peter Port, for two months and then as an assistant in a bank. After October 1998, he was unemployed and began to get into debt. The instant offences occurred in the following two months.

He has convictions for offences of dishonesty, but since these occurred in 1991 and the Appellant has been out of trouble since that time, his previous record has little or no bearing on the offences before this Court.

We turn to the detail of the facts of the charges. The first, burglary, Count 1: The property in question is an open market house owned by Naftiaux Holdings Limited. The Appellant had been shown around the outside of the property by a local firm of estate agents sometime in November 1998. He claimed at that time to be looking for a house to buy. He apparently noticed that a key was left in the lock of the rear door of the property and he identified that he could reach the key by stretching an arm through the cat flap and opening the door. He returned after his visit and took the key, from which moment he had access to the property. During the course of that same month he entered the property, loaded kitchen appliances into his girlfriend's car and took them away. These items included a washing machine which he subsequently sold at auction. A microwave oven and a tumble drier, both of which he sold to a second-hand electrical dealer.

We turn now to the second count, robbery: Susan Lihou works part-time at the Friquet Stores. At about 5.30 p.m. on 2nd December last she was working alone in the shop. The Appellant entered and asked for a packet of cigarettes. She then heard him say "I want the money" in a calm voice. He then said "This is real, I'm not joking" in a more aggressive manner. Mrs. Lihou noticed that the Appellant was holding a knife with a serrated blade, six inches in length. He held the knife just above the counter. Mrs. Lihou replied that she couldn't open the till, to which the Appellant responded "You must be able to press some buttons." She looked again at the knife and pressed the "No Sale" button, whereupon the cash drawer opened. The Appellant leant across the counter and hurriedly grabbed at the ten and twenty pound notes in the till. Mrs. Lihou moved to press the alarm button under the counter and said she was calling the police. The Appellant then ran out of the shop, dropping several of the bank notes that he'd taken. He made off with £110, leaving £120 in notes scattered on the shop floor.

We turn to Counts 3 and 4, theft and assault: Batten's Restaurant uses the former Albany Hotel in St. Peter Port as staff headquarters for their employees. The Appellant occupied one of the rooms whilst he was employed by Batten's between April and July 1998. The manager of Batten's is a Mr. Vurchio, who occupied a room at the Albany Hotel at the material time. In the early hours of the morning of 8th December, Mr. Vurchio finished work and drove back to his room at the Albany Hotel. He went to his room and unlocked the door. As he entered his umbrella fell over; it had obviously been resting against the door. As Mr. Vurchio went further into his room he noticed that the door of one of the wardrobes was open and he saw the shape of a head above the wardrobe door, covered by what appeared to be a black woolly balaclava. The person in hiding was the Appellant. He came forward and immediately hit Mr. Vurchio about the head and body with a blunt object. Mr. Vurchio screamed loudly causing the Appellant to panic. He ran towards a large window on

the opposite side of the room. The window was open, the Appellant got out of it, and ran away down the garden at the back of the hotel. Vurchio started to run after the Appellant but soon lost him in the darkness.

When the victim returned to his room he noticed that one of his business cards had been taken from a pile on the bedside table. Written in pencil on the left-hand side were the words "Pin number" "Alarm No. 1" "Alarm No. 2" and "Safe". Mr Vurchio also noticed a length of rope coiled around the post of his dressing table. A knife was later recovered from the garden which the Appellant subsequently admitted to police was the same knife which he had used to rob Mrs. Lihou at the Friquet Stores, and which he had taken, but not used, to scare Mr. Vurchio. In a victim impact statement Mr. Vurchio later said:-

> "Since the attack by Michael Sims, I have been unable to sleep at nights. He has caused a lot of stress not only to myself but to my employers as well as my staff who have been living at the Albany Hotel. I still cannot go into a room without checking there is no one behind the wardrobe and I still have pain in my head where he hit me."

That same afternoon, police officers attended the Appellant's address in St. Peter Port and arrested him. He was subsequently interviewed. After initial prevarication, he admitted the burglary in Count 1 and to disposing of the various items in the way we have described. In relation to Count 2, the Appellant told police that he had had two arguments with his girlfriend on 1st December about money. He explained that he took a knife from her flat, obtained the loan of an Alfa Romeo on test drive from a local garage, and drove to a car park near the Friquet Stores. He then admitted to police the circumstances of that robbery, and said that he had wanted to get some money in order to pacify his girlfriend.

In relation to Counts 3 and 4, he explained to the interviewing officers that because of his financial problems he had tried to get in touch with his father who refused to help. However, he had told his girlfriend that money was due from his father and when that sum failed to materialise, he felt he had to do something to find money. He formulated the idea of entering Mr. Vurchio's room and waiting for him, and obtained a rope which he said he had intended to use to tie up Mr. Vurchio. Having entered the room via the window, he placed an umbrella against the door supposing that if Mr. Vurchio came in and the umbrella fell over Mr. Vurchio would bend down and pick it up, enabling the Appellant to attack him from behind. He said that he had moved a light from the bedside table so as to dazzle Mr. Vurchio when he entered the room. He used a pair of tights, he told the police, that he had taken form his girlfriend's flat to put over his hands in order to avoid leaving fingerprints. Additionally, he said that he wrapped an ornament which he found in the room in a piece of material and used it to strike his victim. He agreed that he intended to extract from Mr. Vurchio details of the pin number in order to obtain money from Mr. Vurchio's account.

The Appellant explained that the words on the piece of paper referring to the alarms and the safe, concerned the premises of Batten's Restaurant where, having tied up Mr. Vurchio, he intended to go to steal cash. He said that the words on the document consisted of a check list so that he wouldn't forget to obtain all the relevant information from Mr. Vurchio before he went to Batten's, including the combination number of the safe and the key numbers for the alarm. He told police that he was expecting to profit in the sum of approximately £1,000 from these activities.

Before dealing with his appeal against sentence, we must refer first to the application made by his advocate to adjourn these proceedings so that a psychiatric report could be prepared on the Appellant. The basis of the application was that the Royal Court should have appreciated that in all

the circumstances of the case it would have been assisted by such a report, and ought to have commissioned one of its own motion. The essence of the application was that had the Royal Court enjoyed the benefit of such a report it would have had a greater insight into the circumstances in which this Appellant, whose previous record did not in any way forecast the series of offences he committed in the winter of last year, should have suddenly and unexpectedly resorted to serious crime. Having reviewed the events leading up to the hearing in the Royal Court, and what took place at that hearing, we concluded that the application to adjourn this hearing for a psychiatric report must be refused. The reasons for our refusal may be stated shortly:-

A

1. The Appellant and those representing him were given advance notice of the Crown's opening in the Royal Court. That document made clear that the Crown's case was that the Appellant had committed all these offences because he was unemployed and very short of money at the material time. Indeed, the basis for the assertion of these motives by the Crown was that which was contained in the interviews which the Appellant had with the police.

B

2. In the Royal Court the Appellant's Advocate referred to the fact that the Appellant had read the outline of the opening in advance of the hearing and his Advocate confirmed to the Royal Court that the Appellant accepted the outline of events, including the motive for the offences.

C

3. Nothing was said at that time to contradict the assertions made by the Crown, and nothing was suggested to the Royal Court by way of advising them that some hidden psychological explanation might exist for the commission of these offences.

D

4. A Probation Report was available to the Court dated 1st March 1999. We have reason to believe that if the Probation Officer had considered that the Appellant's psychological history, to which she specifically referred in her report, was such as to warrant further investigation, she would have had no hesitation in speaking to the Appellant's Advocate in drawing the matter to the attention of the Greffier.

5. Upon enquiry of Mr. Dunster, who appeared for the Appellant in this Court as he did below, Mr. Dunster volunteered that the Appellant was indeed aware of the fact that no psychological report was available to the Royal Court. Despite that fact no application was made to the Royal Court for such a report to be prepared.

E

We do not wish anything that we have said to act as a deterrent to those now responsible for the Appellant's psychological, physical and mental wellbeing to take steps necessary to provide any medical or psychological assistance to the Appellant. It is apparent that the Appellant now wishes to gain a greater insight into the behaviour that led to the commission of these offences. We are also told that he has been referred to Dr. Browne, a consultant psychiatrist, in order to help him gain that insight and to reflect his wish to avoid repeating such offences when he is released from prison. We applaud his determination which we are satisfied has arisen since his appearance before the Royal Court. We hope that the consultations will benefit the Appellant and we are confident that he will receive any necessary treatment which may ensue within the prison system.

F

We now turn to consider the appeal against sentence.

G

The Appellant put forward two grounds:-

1. That the Royal Court erred in law in passing consecutive sentences for Counts 3 and 4; and

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2. that the Royal Court failed to give sufficient discount in the sentences, bearing in mind the totality of 7 years imprisonment.

The essence of the Appellant's argument on the first ground is that he has been sentenced twice for the same offence. We do not agree with that proposition. It is to be noted that for reasons which no doubt seem sound to those responsible for drafting the charges, the Appellant was indicted in Count
B 3 for an offence of burglary contrary to Section 9(1)(a) of the Theft (Bailiwick of Guernsey) Law 1983, that is entering Mr. Vurchio's room with intent to steal. In Count 4 he was charged with assaulting Mr. Vurchio contrary to common law. There is no doubt that had the Appellant been charged with assault with intent to rob, a single count would have encompassed the mischief described in the two counts with which the Appellant was in fact charged. Such a single count might well have been more apt to cover the Appellant's activities, but the Crown elected to charge the attempted theft and the actual violence in two separate counts. Such counts describe two
C separate criminal activities, and we do not accede to the submission that as a matter of law in passing separate and consecutive sentences for these offences, the Royal Court made the error of sentencing the Appellant twice for the same offence. The first ground therefore fails.

However, we consider the second ground has substance. Whether the sentence of 7 years was the appropriate sentence may be tested by questioning what the proper sentence would have been if the Appellant had been convicted after a trial rather than on his own confession. Bearing in mind the discount to which the Appellant was fully entitled on account of his plea of guilty, it is clear to us
D that the proper sentence after a trial would have to have been at least 9 years imprisonment. We take the view that such a sentence would have been excessive. We consider that the correct sentence in this case, giving effect to the Appellant's pleas, was one of 6 years in total. We have borne in mind what Lord Lane, The Lord Chief Justice, said in R. v. French (1982) 4 Cr.App.R.(S) at page 57:-

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> "We would emphasise that in the end whether the sentences are made consecutive or concurrent the sentencing judge should try to ensure that the totality of the sentences is correct in the light of all the circumstances of the case."

We have therefore given thought as to how such a total sentence should be distributed among the offences. We have concluded that the appropriate way to achieve this as a matter of discretion is to make the sentence on count 4 concurrent with, rather than consecutive to, the sentence on count 3.
F The sentence of the Royal Court is varied in that way and to that extent this appeal is allowed.

Sentence reduced to 6 years' imprisonment.

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138. [CRIMINAL DIVISION – APPEAL NOS. 241 & 242]

22nd JULY, 1999

THE LAW OFFICERS OF THE CROWN
v.
JOHN MATHER & PETER STUART COOPER

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

Sentence – misuse of drugs – importation of Class A and Class B drugs – pressure on vulnerable couriers – destination of drugs – effect on sentence

See paragraph 19.

N. Le Poidevin, for the Appellants (on behalf of C.M. Fooks, re Cooper)
R. McMahon and P. Robey, for the Crown

SIR JOHN NUTTING, QC: We ordered that the appeals of John Mather (Appeal No. 241) and Peter Stuart Cooper (Appeal No. 242) be consolidated because they raise similar questions of sentencing policy which are more conveniently addressed in one judgment. For reasons of convenience we also propose to deal with the facts of the appeal of Cooper first.

On 18th May 1999, this Appellant, Peter Stuart Cooper, appeared before the Bailiff and was sentenced to 4 years imprisonment to run from the date of his arrest for an offence of importing 2 kilos of cannabis resin (a Class B drug) contrary to Sections 23(1) and 23(1)(a) of the Customs and Excise (General Provisions)(Bailiwick of Guernsey) Law 1972, as amended.

The Appellant is 35 years of age and comes from Cheshire. He and his sister were both adopted at an early age. He has a long history of previous convictions having appeared before the Courts on six previous occasions for possessing cannabis or cannabis resin, and on two previous occasions for possessing controlled drugs with intent to supply. He also has convictions for dishonesty including burglary, theft and obtaining property by deception.

The facts of his case were as follows. On Wednesday 17th March 1999, the Appellant arrived at Guernsey Airport from Southampton. When questioning the Appellant in the Arrivals Hall, a Customs Officer heard a rustling sound as the Appellant moved. He was searched and two kilos of cannabis resin were found strapped to his body in six separate packages. The street value in Guernsey of such an amount is estimated to be between £14,000 and £18,000.

When asked how he came to be involved with the importation of the drug he gave the following explanation. He had been on holiday in early 1999 for two months. When he arrived home in March he discovered that his sister, whom he described as a heroin and crack cocaine addict, had approached a number of people in Manchester for drugs and had run up a debt of nearly £4,000. These suppliers were, he said, threatening violence against his sister and his family, it would be unwise for him to have ignored them.

The Appellant said that he explained to them that he had no available cash, but that over a period of time he could pay the money back on behalf of his sister. However, this was not acceptable to

them. The Appellant said that they offered him the chance to earn the money by taking two kilograms of cannabis resin to Guernsey. The plan was that he would be given £5,000 on handing over the drugs in Guernsey and another £3,000 within two days, and that once he had taken the total of £8,000 back to Manchester he would hand it over to the suppliers and his sister's debt would then be treated as cleared. The Appellant said that he took two days to think about this suggestion, because he didn't really want to undertake this journey. However, eventually, because of the threats made against his sister and his family, he agreed to the plan.

The Bailiff had before him a statement from a Manchester solicitor which supported the Appellant's contention that the drug world in Manchester contained some hardened criminals to whom violence was second nature. The Bailiff was also asked to consider mitigation that the Appellant had committed the offence because of pressure from the suppliers and out of loyalty to his sister, though we have before us a supplementary Probation Report which casts doubt on this second matter. We will return to pressure as an aspect of the Appellant's mitigation.

On behalf of the Appellant Miss Fooks urged us to consider the effect on the Appellant's release date if he was transferred to an English jail. The main effect of such transfer would depend on-

1. Whether he applied for a transfer himself;

2. whether he was returned on a "restricted" basis, in which case his sentence would subsequently be administered in England under Guernsey provisions, or on an "unrestricted" basis, in which case his sentence would be administered under English provisions.

We are not attracted by this submission. This Court cannot determine this appeal on suppositions which depend on the Appellant's preference for the jurisdiction where he is to spend his period of imprisonment.

He committed a crime within this jurisdiction and this Court must determine his appeal on principles of Guernsey law and Guernsey sentencing policy. The extent to which his release date would be altered if he chose to apply for a transfer on one or other of the bases mentioned, is not in our view a material consideration for this Court.

Miss Fooks also submitted that the Royal Court may well have acted under a false impression as to whether the Appellant had made any profit on the transaction. The facts of the financial aspect were clearly set out by the Crown, that the Appellant would be the custodian of the sum of £8,000 which, having received in Guernsey, he was to hand over on his return to Manchester. The supplier intended, apparently to apply such money to defray the debt for the purchase of the couriered drugs, and to use the balance to expunge the debt of the Appellant's sister. There is a passage to which we were referred in the transcript which may bear the interpretation that the Bailiff had not completely understood the details outlined above. We have considered carefully all the relevant references in the transcript, including those references in the Bailiff's sentencing remarks. We do not consider that the Bailiff sentenced the Appellant on a false basis. We consider that the transcript demonstrates that the Bailiff was aware that such money as would be available to reward the Appellant for his journey to Guernsey was intended to be used to cancel his sister's debt.

We were also asked to compare the sentence passed on the Appellant with those passed on other offenders in circumstances of sufficient similarity, as alleged, to warrant comparison in order to test the proposition that this sentence was excessive. We have done that exercise though we have not

found it especially helpful because of certain important dissimilarities between the cases to which we have been referred and the instant case.

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We have also borne in mind this Appellant's plea and his co-operation with the Customs Officers, including other matters of particular relevance to him which were advanced persuasively by Miss Fooks. In reaching our decision we desire to emphasise that we have borne all these matters very much in mind.

We turn to the case of John Mather. On 12th April 1999, he pleaded guilty in the Royal Court to two counts of importing drugs. The first cocaine (a Class A drug) and the second, amphetamine (a Class B drug). The Bailiff sentenced him to 4 years imprisonment for the first offence and 3 years imprisonment for the second offence, such offences to run concurrently from 5th January 1999, the date of the Appellant's arrest. He applied for leave to appeal, which was granted on 7th July 1999. The single ground of appeal pursued before us was that the Royal Court failed to take any, or any sufficient, account of the pressure placed upon the Appellant which compelled him to carry out these importations.

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The Appellant is a 36 year old single man. At the time of his arrest he was living alone in a rented house in Liverpool, where he was born and educated. After leaving school, having achieved "O" and two "A" levels, he obtained employment as a National Hunt jockey. Unfortunately, he had to abandon that activity about six years ago as a result of an injury. He had been unemployed for a year or so prior to February 1999.

The facts of his case were that on 5th February 1999, the Appellant arrived in Guernsey by boat from Weymouth. He was stopped by Customs Officers. He lied to them about his address in England and invented the name of a person whom he claimed to be visiting in Guernsey. He could supply neither an address nor indeed a telephone number for this person. He provided a urine sample which tested positive for both cocaine and amphetamine. He was arrested, cautioned, and then interviewed.

D

For the rest of that day he gave an account concerning the circumstances in which he arrived in Guernsey, which he later admitted to have been only partially true. The next day, 6th February, having denied that he was carrying drugs internally, he passed from his body one packet of a substance which proved on analysis to be cocaine, weighing 4.35 grams, and having a street value in this Island of between £670 and £1,000. He later passed ten packages of what later proved to be amphetamine. Some of these packages were damaged, but as the Appellant subsequently acknowledged, the amount he had inserted into those packages in advance of his journey was 300 tablets. Such an amount would have had a street value in Guernsey of between £7,500 and £9,000.

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He told the Customs Officers that the background to the importation was that on 3rd February he had been told to take some drugs to Guernsey by someone whom he refused to name. He said that he had been collected from his home address by another person whose name he also refused to reveal, and was driven to Weymouth. He told how he was provided with money for his boat ticket. He said that the drugs were given to him when he reached Weymouth and the cocaine had been forced upon him at the last minute. He insisted that he was making no financial gain for himself, and that his role in the affair was that of a mere courier.

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The mitigation placed before the Royal Court underlined the matters mentioned by the Appellant in interview. It was claimed that he had become involved in drugs when he started to take cannabis. He found that this drug relieved the pain of his injury. It is clear that he became sufficiently

involved with his suppliers, who he claimed were ruthless professional drug dealers from Liverpool, to such an extent that he had agreed that his house should be used as a "safe house" for the storage of drugs, including LSD, amphetamine and cannabis.

Shortly before his trip to Guernsey his house had been visited by Police as a result of a suspected burglary. This visit resulted in the confiscation of the stored drugs. The Appellant was arrested and charged, and committed for trial in England two days before his arrest in Guernsey. His plea in mitigation emphasised that the drug dealers had told him that they would make him pay for these drugs, but that if he undertook the journey to Guernsey as a courier, he could expunge his debt.

He claimed that this offer was accompanied by threats to harm his brother who was in prison at the time.

In sentencing the Appellant the Bailiff said:-

> "The Court accepts that you may have felt under some pressure to make this importation and that you may not have been getting any extra reward for bringing these drugs to Guernsey, but the Court does not see this as a situation where there could have been any plea of duress that you were forced into this. The pressure may have been on you, but it was not a situation where duress would have been a defence and, of course, your Counsel is not saying that, he is putting it forward in mitigation."

In his case too, we will return to pressure as an aspect of the mitigation.

The matters advanced to this Court peculiar to this Appellant included the submission that he had been recently informed that the individual for whom the cocaine was destined intended to use it for his own purposes and that of two close friends. What an Appellant may subsequently learn about the nature of the importation has no relevance to his intention at the time of the importation, which is the appropriate moment in assessing his state of mind insofar as that state of mind impacts on the punishment.

It must also be borne 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 and Excise (General Provisions)(Bailiwick of Guernsey) Law 1972, as amended, is directed, is 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, on 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 imported the less likely it is that the drugs will be used for the use of the importer alone, and the more likely it is that the drugs will be supplied to one or more persons within the jurisdiction.

Quantity is an aggravating feature, and the Courts should be slow to entertain arguments designed to cause a reduction in sentence because the drugs are to be shared out among friends as distinct from being distributed on a commercial basis. Sir Louis Blom-Cooper, QC in delivering the judgment of the Court in Louise McDonald 20.GLJ.16, said:-

> "We are content to echo, with one important qualification, what the five judge Court of Appeal for Jersey said in Campbell v. The Attorney General, 4th April 1995, at page 7 of the transcript:-

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

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

The one qualification that we would make is that where the import falls short of a commercial enterprise, but is designed to supply third parties with illicit drugs, the Courts will still take a serious view of the deliberate act of spreading the use of controlled drugs among the populace of the territory, in this case, the Island of Guernsey."

The same considerations apply to an importer who is a mere courier of imported drugs. The claim by a courier that he believed the drugs to be for the consumption of the person to whom he is enjoined to hand the drugs after his arrival, will have a decreasing claim to validity the larger the quantity involved. If the quantity is small, the courier may also plausibly claim that he had reason to believe it was for 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, although in substantial quantity, were for personal consumption rather than commercial supply. The resolution of the truth 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, on the amount and class of drug involved. Certainly the courier's belief which may or may not be a plausible one, 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.

Advocate Le Poidevin also submitted that the sentence in relation to Count 1 was excessive. He has supplied us with a number of authorities with which to make comparisons to the instant offence. Such comparisons, particularly concerning cases which did not involve the same offence as the one the Appellant faced in this case, or which were dealt with in the Magistrate's Court and involved charges of a small amount of a Class A drug for personal consumption, are not in our view helpful in deciding whether this total sentence of 4 years imprisonment was one with which we ought to interfere.

We have considered carefully the other arguments which Mr. Le Poidevin has advanced on the Appellant Mather's behalf. If we have not included a lengthy discussion of all of them in this judgment it is not because we have given them less consideration than those to which we have referred.

In both these appeals there is an important common feature: each Appellant has asserted that he was under pressure to commit the offences. The Appellant Cooper claimed that he allowed himself to become a courier out of a sense of loyalty to his sister who might well suffer injury if her debt to her drug suppliers remained unpaid. The Appellant Mather submitted that he became a courier because he feared for an imprisoned brother's welfare unless he acceded to the threats of those with whom he had become criminally associated.

Both Miss Fooks for the Appellant Cooper, and Mr. Le Poidevin for the Appellant Mather, suggested that the Royal Court had failed to give sufficient weight to this aspect of the mitigation

and that each Appellant was subjected to pressure in the commission of the offence not amounting to duress in law.

A

The melancholy fact is that cases of drug importation and supply account for perhaps half the cases dealt with on indictment in the Royal Court. In recent years the Courts have remarked on an increase in the number of offenders who claim that their own dependency, or the dependency of someone close to them, has caused them to yield to a request to import or supply drugs. This claim is frequently allied to suggestions that the approach by the dealer was accompanied by threats or promises. Such mitigation suggests that pressure falling short of duress ought to cause the Court to reduce the sentence otherwise appropriate.

B

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 so 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. To uphold and maintain this approach the Courts have invariably granted leniency to those willing to provide real information and evidence about those in the drug trade with whom they had come into contact, and to reflect in the sentence the nature of that assistance. If the Courts were willing to accept that those who felt compelled by threats to assist drug dealers falling short of the quality of duress necessary to afford a defence, they would be adding a new category to the single group whose membership automatically results in a reduction of sentence. In our view it would be wrong to add any such category.

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D The significance of the impact of pressure on drug importers was touched on by this Court in the of Brian Stephen Scragg & John Terrence Osborne on 16th March 1999. In dismissing Osborne's application for leave to appeal the President, Robert Harman, QC said:-

> "Mr. Havard, on behalf of Osborne, has further argued that in his client's case his personal circumstances were not sufficiently taken into account. Both men have been heroin addicts since the age of 18. He was not in a position to make rational decisions when owing money to suppliers of heroin, and he was threatened with injury if he did not make this drugs run."

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The Court refused the application to reduce the sentences on the ground that these were not matters which should weigh with the Court in view of the amount of drugs imported. We agree with this approach and take this opportunity to emphasise that on grounds of public policy judges should be slow to regard a suggestion of pressure falling short of that sufficient to be a defence to the charge, as a justification for reducing the sentence,

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Another potential category may include couriers who are themselves addicted to drugs. Experience shows that those who supply drugs exhibit a particular ruthlessness in recruiting couriers. They often prey on those already involved in the drugs trade who are vulnerable either because they are themselves addicted and require the drugs, as in the case just cited, or because in return for acting as couriers they are allowed to reduce or extinguish debts they otherwise may owe to the dealer for the drugs they have purchased for their own use. It is important that as an additional matter of public policy Courts should decline to permit couriers falling into this group to be permitted to mitigate their conduct and to reduce the time they spend in prison by preying in aid their vulnerability to persuasion by those who have recruited them.

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There exists the need to ensure that all reasonable steps are taken to prevent drugs being imported into this Island. This makes it necessary to prevent drug dealers targeting potential couriers falling into the categories that we have mentioned. Leniency by Courts to reflect mitigation of pressure or dependency would, in our view, inevitably result in dealers using the services of those susceptible to threats or blandishments more frequently than at present and would tend to increase rather than to diminish the availability of drugs within the Bailiwick. It is the duty of the Court to prevent any such increase.

In Geraldine Sarah Williams 14th October 1997, the Court of Appeal, Martin Collins, QC, presiding, had to consider the position of a young mother with children of 4 years and 11 years of age, who had been sentenced to 3 years imprisonment for importing cannabis into Guernsey. In rejecting her application for leave to appeal the President said:-

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

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

The approach of the Court in that case was an echo in this jurisdiction of that by the English Court of Appeal in the leading case of R. v. Aramah (1982) Vol. 76 Cr. App. Cases, page 190. In acknowledging that couriers were often people of good character, Lord Lane has this to say:-

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

We underline Lord Lane's use of the phrase "misplaced sympathy."

The conclusion which we have reached is that there should be no other categories of people, apart from informants who, by virtue of the special type of their mitigation, should be entitled to an automatic reduction in sentence. If this conclusion results in sentences being imposed for drug offences which may seem harsh, such a conclusion has a pedigree supported by distinguished judges in both this and the mainland jurisdiction. It is essential that Courts play their part in reducing the availability of drugs and grounds of public policy make this conclusion the more compelling in its application to a small community ringed by the sea.

We consider that in both these cases the Royal Court gave to these Appellants such credit for the mitigation advanced which the Court could legitimately take into account. We consider that in neither case should the sentence be reduced. These appeals are accordingly dismissed.

139. [CRIMINAL DIVISION – APPEAL NO. 243]

A 29th NOVEMBER, 1999

THE LAW OFFICERS OF THE CROWN
v.
MATTHEW WATT

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

B **Sentence – perjury – delays in sentencing – offences wrongly taken into account – co-operation, guilty plea and time spent on remand to be taken into account**

See paragraph 22.

A.D. Laws, for the Appellant
C P Wilkins for the Crown

THE PRESIDENT: Matthew Watt was a witness in the Magistrate's Court in the trial of Timothy Brian Dorey on charges which involved serious alleged motoring offences, and arose out of an incident on the night of 7th/8th April 1998. Watt was in a car driven by Dorey. Philip Roy Fallaize was also in the car.

In the course of his sworn evidence Watt testified that Fallaize, not Dorey, had been the driver of
D the car. Watt knew perfectly well that this evidence which he was giving was a lie, and he gave this false evidence deliberately in order to secure an acquittal of Dorey on the serious charges with which Dorey was charged. Watt's conduct therefore amounted to the more serious crime of perjury.

Perjury is rightly treated as a very serious offence. Perjury in the course of criminal proceedings may lead to the conviction of an innocent person or the acquittal of a guilty person. Perjury is therefore an interference with the proper administration of justice which in all but exceptional
E circumstances must result in a sentence of immediate imprisonment being imposed on the perjurer.

Watt pleaded guilty to the offence of perjury. The matters which have been put forward on his behalf, in written submissions, by Advocate Laws are these:-

(1) His plea of guilty;

F (2) That the sentence on a perjurer should bear some reasonable relation to the nature of the crime with which Dorey was charged, and the sentence which would have been imposed on Dorey if Dorey had been convicted. On this footing it is said the crime committed by Watt was at the lower end of the scale.

(3) Though Watt has a regrettably long record of criminal offences committed during his teens, those offences were committed to gain attention, and more important, under the
G influence of excessive drinking of alcohol. Watt has since taken steps to control his use of alcohol.

(4) He has quite good employment prospects as a chef, and had hoped, if not sentenced by the Royal Court to an immediate term of imprisonment, to take up a good job as a winter head chef.

(5) The offence was committed when Watt was about 20 years old, and Watt was just 21 years old when sentenced. The Court should take into account his age and the prospect of so good a job at so young an age.

(6) Watt, when arrested on leaving the Court building, was entirely co-operative with the Police and admitted his guilt straightaway.

(7) The case was long delayed in coming before the Court for sentencing. The relevant dates are these: The alleged motoring offence by Dorey was committed on 7th/8th April 1998. Dorey's trial in the Magistrate's Court was on 21st August 1998, over four months after the offence was allegedly committed. Watt admitted his perjury on the same day, 21st August 1998. Watt did not come before the Royal Court for sentencing until 5th October 1999, over thirteen months having gone by. Throughout that period Watt had had the charge of perjury and the prospect of imprisonment hanging over his head.

(8) Though a sentence of imprisonment was and is the only appropriate sentence in almost all cases of perjury, in Watt's circumstances, it was submitted before the Lower Court, a suspended sentence was appropriate so that he could take up the offer of the job; and

(9) Watt was very contrite about what he had done.

In the excellent Probation Report by Probation Officer Greg Harvey, it was recognised both that Watt has a tendency to dishonesty, which was previously made worse by drink, and that Watt now understands how important it is that he is constantly vigilant to check that tendency. The Probation Officer did not expressly propose a suspended sentence of imprisonment but reading between the lines that was the tenor of his report.

Watt was sentenced to 6 months imprisonment by the Royal Court. Because he had only just become 21 three weeks before the hearing, the Royal Court presided over by the Bailiff, decided to apply the Youth Detention criteria. The Royal Court, applying those criteria, was satisfied that the offence of perjury as committed by Watt was so serious that a non-custodial sentence was not appropriate. The Royal Court took account of the decision of the Court of Appeal in The Law Officers of the Crown v. Harvey, in which this Court had held that an immediate custodial sentence, not a suspended sentence, was normally to be imposed in cases of perjury.

In the course of the judgment of the Royal Court the Bailiff stated that account had been taken of the fact that after the offence of perjury was committed, Watt returned to Alderney and committed a number of serious offences and also was in breach of his bail.

Mr. Laws has correctly submitted that those were matters which should not have been taken into account by the Royal Court when sentencing on the perjury offence, for the simple reason that Watt would have been sentenced separately for those other offences, and if they were taken into account on the perjury offence, there was the obvious risk of Watt being effectively sentenced twice in relation to those other offences. This Court is concerned that that may have happened, and that

imposition of the six month prison sentence for perjury might have reflected punishment for the other offences.

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The other main point taken by Mr. Laws today, is that Watt was detained on remand for 31 days and that this period of detention was not taken into account as it should have been. That point also is well founded.

This Court has taken full account of all the points put forward so well by Advocate Laws. The approach of this Court can be summarised in this way:-

B

(1) An immediate sentence of imprisonment is, save in the most exceptional circumstances, always appropriate in cases of perjury.

(2) Such an immediate sentence was and is clearly appropriate in Watt's case.

(3) This Court is deeply concerned about the serious delay in bringing this young man before the Royal Court for sentencing. Where it is clear that the Defendant is pleading,
C and has to plead, guilty, and even more so where the Defendant is young, speedy sentencing is essential. The proverb "justice delayed is justice denied" applies very well to this case. It is not appropriate for a delay as long as thirteen months to occur, as occurred in this case. Such cases should in future be brought on within one month and not thirteen months.

(4) This Court repeats its concern that the period of imprisonment may have been
D extended by relation to the other offences on which Watt was not then being sentenced.

(5) No reference was made by the Royal Court to Watt's co-operation and plea of guilty, which entitled him to at least some reduction of sentence.

(6) The period of detention on remand of 31 days was not taken into account.

E Having regard to all these matters, this Court has decided to reduce Watt's sentence to one which will enable him to be released today from prison in relation to this offence. We are informed that the appropriate period is 83 days. Accordingly that is the length of imprisonment which we impose.

Watt now has to understand that he is mercifully being released from prison today, and it is time for him to turn over a new leaf, to take up the employment which one hopes will be available to him as a chef, and from now on to abandon the committing of silly, dishonest offences of this kind, and to
F seek to live a sensible and honest life.

This Court has dealt with considerable mercy in relation to this serious crime in order to give him the opportunity to turn over that new leaf.

Sentence reduced to 83 days' imprisonment.

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140. [CIVIL DIVISION – APPEAL NO. 248]

16th MARCH, 1999

WESTLANDS HOLDINGS LIMITED
v.
IAN DAISH

Before HARMAN (PRESIDENT), GLOSTER and CLARKE, JJ.A

Landlord and tenant - eviction – stay of execution – discretion of Jurats

See paragraph 59.

M.G. Ferbrache, for the Appellant
D.G. Le Marquand, for the Respondent

THE PRESIDENT: In 1980 the Respondent to this appeal negotiated with a Mr. Tompkins of Westlands Holdings Limited, to purchase a property at 15 Glategny Esplanade, St. Peter Port.

Behind No. 15 there is an area of ground since described on a plan as patio/garden area. This leads through double gates into a further area of ground owned by Westlands, but which is subject to a right of way through an arch at the side of No. 16, and an alleyway which gives vehicle access to the area behind the properties, notably numbers 14, 15, and 16, and to a further car parking area which contains a number of spaces let out by Westlands. Directly opposite, and outside the double gates is a piece of ground which is required as a turning circle for vehicles coming and going if using the garden area behind No. 15 for parking. There is no room at this point for a third party to park without obstructing the access of the owners of No. 15.

However, Mr. Daish, who had at the time a young child, did not wish to use the back garden for parking and negotiated with Mr. Tompkins to rent a car space outside his double gates. On 24th June 1980, Mr. Tompkins wrote to Lovell & Partners, acting for Mr. Daish, on the writing paper of Westland Holdings, in which he stated:-

> "I confirm that subject to the amendments suggested, the above company will make available at least one car space with the property in addition to the enclosed yard space."

The rent for such car space would be £120 per annum subject to adjustment annually, on a cost of living basis. The letter also stated that the space to be allotted could be agreed and would be numbered so as to prevent confusion. This letter was written before the purchase of No. 15 had been completed.

On 3rd July 1980, Mr. Daish wrote himself to Mr. Tompkins at Westlands and his letter included this paragraph:-

> "The sum of £120 per annum subject to adjustment annually on a cost of living basis, would be agreeable, and I would wish to make use of this space from, say, 7th July onwards. I would however enquire as to whether the rental amount could be paid on a monthly basis for

the sum of £10 under a bank standing order, arrangement payable directly to the company's bank account."

A

Mr. Daish also suggested where his parking space should be.

On 9th July, Mr. Tompkins replied in a letter addressed to Mr. Daish in these terms:-

"It is agreed that you can pay the rental amount on a monthly basis with a standing order direct to the company's bank account, which is at Barclays Bank Limited, High Street, St. Peter Port."

B

Events then proceeded smoothly and continued until 1994, when Mr. Daish negotiated again with Mr. Tompkins to rent a further space to the west of his then parking space to take another car for the use of his son, who was by now aged 17. A suitable increase in rent was agreed to a total at that time of £416.52 per annum.

C

Thereafter the two parking spaces were rented by Mr. Daish at the agreed rent which was subject to annual review. However, on 9th April 1997, Lovell & Partners, on behalf of Westland Holdings, wrote to Mr. Daish with a proposal that the rents of the two spaces should be increased to £800 and £400 respectively, making a total of £1,200, which, it was stated in the letter, could be paid monthly in advance by standing order. The letter stated:-

"This lease will be for one year, but renewable, with the rent increased to reflect the current market rental value of the demised premises."

D

Following upon a meeting, and the resistance of Mr. Daish to the proposed increase in rent, Lovell & Partners wrote again on 24th April 1997, giving Mr. Daish notice to vacate the two spaces. The letter stated that as he currently paid rent on a monthly basis the necessary notice should be one month. The letter finally indicated that Westlands would not allow parking on the two spaces by anybody else, thus enabling Mr. Daish to continue to be able to gain access into the rear of his dwelling. It is to be noted that since the correspondence in 1994, Mr. Tompkins had died.

E

To complete the picture it should also be noted that in 1987, Mr. Daish, with the agreement of Westlands, had shifted his main parking space to a position actually inside his turning area and his secondary car space in due course was immediately beside that new position.

Both sides then put the matter in the hands of solicitors, and there was initially some controversy about whether the arrangement had been for a tenancy or was simply operating as a licence.

F

However, by the time the case came before the Royal Court it was acknowledged by both sides that it was in fact a tenancy. The question however remaining, and of importance in all the circumstances, was whether it was an annual tenancy or a monthly one. Apart from any other consideration it affected the notice to which the lessee was entitled. It was contended on behalf of Westlands and disputed on behalf of Mr. Daish that there was a monthly periodic tenancy. Mr. Daish insisted that he had a yearly tenancy.

G

The subsequent Court proceedings were considerably delayed for reasons which it is unnecessary to particularise here, but it is sufficient to say that at that hearing the first issue for the Court to determine was the nature of the tenancy, and then to make an order subject to the 1946 Law, which gave the Court increased power to stay execution in actions for eviction.

By S.2:-

> "When the tenant or sub-tenant of a dwelling house or other premises is proceeded against for eviction from any dwelling house or premises, the Court may, having taken into consideration the position of the parties and all the circumstances of the case, make an order that execution of any order for eviction from the said premises be suspended during such time, and upon such conditions, as the Court may consider reasonable." A

The case came before the Deputy Bailiff and Jurats, sitting in the Ordinary Division of the Royal Court, in March 1998. The unanimous conclusion of the Jurats was to the effect that the car parking spaces referred to in the action were situated in an area necessary to be kept clear, subject to a right of way, in order to gain access to No. 15, and therefore could not be let to others. Further, the Jurats gave a stay of eviction for as long as the present owners own and remain in occupation of No. 15. B

They considered that a fair rent would be £500 per annum for the main car space, and £250 per annum for the smaller car space, subject to the Guernsey Retail Price Index. The commencing date of the stay should be 1st November 1998, and should be for as long as the present owners, or survivor of them, remained in occupation and owned No. 15, and continued to occupy the parking spaces. Westlands have appealed this order on the basis that it was anyway unreasonable. C

It was accepted on behalf of Westlands before the Royal Court, and is also accepted now before us, that the arrangement entered into in 1980 between Mr. Tompkins and Mr. Daish in the event amounted to a tenancy rather than an occupancy or a licence. However, the submission that a tenancy with a rent of £120 per annum suggested an annual tenancy was challenged. Nevertheless, it would appear to have been the position that had not Mr. Daish asked for the rent to be paid monthly rather than annually, it would in fact have been paid once a year. D

This, on the face of it, would appear to be an unlikely state of affairs if the rental was envisaged by both parties from the beginning as being for a monthly tenancy.

Mr. Ferbrache, for the Plaintiffs, argued before the Royal Court that the tenancy evolved into a monthly tenancy rather than simply an occupancy. If Mr. Daish was simply an occupier the maximum stay he could obtain would be six months. Mr. Le Marquand, for Mr. Daish, disputed the word "evolved". E

Mr. Ferbrache submitted that while the Plaintiffs accepted that Mr. Daish wished to continue to park on a particular area, equally the landlord was entitled to have back his premises and enhance the existing car parking space. This would be so because it would not only provide a turning area for Mr. Daish but would also provide a turning area and greater amenity for the remaining car parking spaces. These were now let to a single tenant. Henceforth Mr. Daish should park on his own land as on occasion he had done in the past. F

There was no dispute that the tenancy could be brought to an end by the landlords; the question to be determined was the length, if any, of the stay. After Mr. Le Marquand had submitted that the disputed ground over which Mr. Daish had a right of way in any event, was of no commercial value, and the Deputy Bailiff and Jurats had visited the scene to view, Mr. Daish himself gave evidence. G

The so called "back garden" or "patio area", which was also described at one stage as a "yard" was, he said, originally a paved area with no plants or trees or shrubs. With a young child it was not

practical to park a car in that area, notwithstanding the double gates. It was in these circumstances that he negotiated with Westlands, through their agents, Lovells, to rent a space in addition to the
A enclosed yard. Mr. Daish asked to pay the rent monthly rather than annually, because of his heavy mortgage commitments at that time. He described how, after seven years, he moved his parking space from the original agreed position in order to accommodate the then tenant at No. 16, Glategny Esplanade.

The effect was to release a commercial space because he moved in to a position within his own turning area and where therefore nobody else could park. However, he did not ask for a reduction
B in rent. Mr. Daish further stated that when he received the 1997 letter from Lovells seeking to raise the rental to a level stated to be commensurate with rates achieved on other parking spaces, namely, £800 per annum and £400 per annum respectively, for the main and secondary spaces, he was very surprised because, so he said, he already had an agreement with Westlands Holdings.

He said further that when an eviction order was granted and any suspension of the execution of that order if granted expired, he would have to dismantle all the amenities of the garden area which over
C a period of seventeen years had been created. He said that at different times there had been problems with people parking in the car park space, which had hitherto been allotted to him, and that that would necessarily affect access to his back garden.

He insisted that he had had an open ended agreement with Mr. Tompkins to use the space or spaces until such time as he sold the property at No. 15. It was on that basis that he bought No. 15 in the first place. Nevertheless, he was prepared to compromise over the rental to be paid.

D The Deputy Bailiff concluded on the basis of the evidence before the Court that this was indeed an annual tenancy. The original agreement was for a rental of £120 per annum, although by a subsidiary agreement to be paid monthly, and that rental was to be reviewed annually. The Deputy Bailiff directed the Jurats accordingly. The Deputy Bailiff further recited for the benefit of the Jurats the words of S.2 of the 1946 Law, that is to say, that the Court may, having taken into consideration the position of the parties and all the circumstances of the case, make an order that execution of any order for eviction from the said premises be suspended during such time, and upon
E such conditions, as the Court may consider reasonable.

He further directed the Jurats that any stay of execution should clearly be understood to be subject to amendment in the event of change of circumstances of either the tenant or the landlord. In this connection it is acknowledged by both parties that notwithstanding there is no reference to it in the order, the position is at all times subject to S.4 of the 1946 Law, which covers any person in respect of which the order was made.

F

In my opinion, the Deputy Bailiff was right to direct the Jurats that this was an annual tenancy. Further, the position under the 1946 Law was fully before the Court and the summing-up to the Jurats was adequate in this respect. We have had regard to the judgment in the case of Guille v. Mackay (1967) where it was held by this Court, on appeal from the Ordinary Division of the Royal Court, that it is proper for the Court of Appeal to approach the Jurats' findings on a question of fact in the same way as the Court of Appeal in England would approach the findings of a jury in an
G appeal in a civil case which had been tried by a judge and a jury, i.e. that the Court would not interfere with the findings of fact made by the Jurats unless it was satisfied that there was no evidence before them upon which they could reasonably have arrived at those findings, or that for any other reasons, the findings of fact by the Jurats were perverse.

The test which we have to apply is the same today; and the question which we have to decide is whether there was evidence before the Jurats on which they could reasonably come to the conclusion at which they did arrive. It should be emphasised that they were exercising a very wide discretion. In my opinion these were findings with which it is impossible for this Court to interfere, and accordingly I would dismiss the Appeal.

MISS GLOSTER, QC: I would agree and have nothing to add.

M.G. CLARKE, QC: I too agree and have nothing to add.

ADVOCATE LE MARQUAND: Sir, I would ask for costs of the appeal in favour of the Respondent.

THE PRESIDENT: Yes.

ADVOCATE LE MARQUAND: I'm obliged, sir.

Appeal dismissed.

141. [CIVIL DIVISION – APPEAL NO. 249]

15th JULY 1999

MONUMENT TRUST COMPANY LIMITED
v.
HERBERT FREDERICK GAUDION
and
RUBY ADA GAUDION

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

Judgments – stay of execution – application for stay pending outcome of proceedings against third party professional advisers – factors to be taken into consideration

See paragraph 66.

St J.A. Robilliard, for the Appellant
The Respondent Mr H.F. Gaudion in person.

THE PRESIDENT: The history relevant to this judgment was summarised in the judgment of this Court on 15 October 1998, which in turn referred to the earlier judgment of this Court on 4 February 1998. Accordingly this judgment, to be fully understood, needs to be read with and in the light of those earlier judgments. The same defined terms are used.

The history, in brief, is that in 1992 the Gaudions had indebtedness to the Royal Bank of Scotland (RBS) of nearly £270,000. In that year they were defrauded in the USA of a substantial sum and needed to borrow £230,000. They borrowed this sum from a Mr. Neuman on 15 December 1992, at an extortionate rate of interest, for only 3 months. They did not repay timeously. Enforcement

proceedings were brought by Mr. Neuman. On 18 November 1993 they borrowed from Sigmet £345,000, at another extortionate rate of interest, for approximately 1 year, to enable them to repay Mr. Neuman. On 22 December 1994 they borrowed £800,000 from Monument, Ernest & Young's company, again at a high rate of interest, so as to repay to Sigmet about £520,000 and to RBS £272,700. Thus the amount borrowed from Mr. Neuman of £230,000 in December 1992 had within 2 years more than doubled to the sum of £520,000 which they repaid to Sigmet. By December 1995 they had repaid to Monument about £274,000. In February 1996 Monument sued the Gaudions to recover the balance claimed to be due of £707,504.82, so that the total indebtedness of the Gaudions had risen to about £981,000 (subject to the £274,000 repaid). If the RBS repayment is put on one side, this means that the original borrowing from Mr. Neuman in December 1992 of £230,000 had risen by February 1996 to approximately £708,000. On 18 October 1996 Monument secured summary judgment against the Gaudions for the principal owing of £526,103.

Those are the bare bones of the history of the events by which this elderly couple, having been fleeced of about £230,000 by fraudulent Americans, find themselves today (having repaid about £274,000) with a potential total indebtedness of over £700,000 and a judgment against them in favour of Monument for £526,103.

The Gaudions sought from this court on appeal a stay of execution of that judgment. That appeal was heard by this Court in October 1998. The bases on which such stay was sought were that the Gaudions have a cross-claim (1) against Monument itself, and (2) against Ernst & Young who own and control Monument.

With regard to (1), this Court in its judgment on 15 October 1998 concluded that there was insufficient material before the Court to justify this Court in exercising its discretion to grant a stay on the basis of a cross-claim against Monument.

With regard to (2), this Court concluded that, on the analogy of two English cases (*Canada Enterprises Corporation Ltd. v McNab Distilleries Ltd.* (1976) and *Burnet v Francis Industries Ltd.* (1987), both reported in [1987] 1 WLR at pp.802 and 813n), and on the basis of the action already brought in Guernsey by the Gaudions against (*inter alios*) Ernst & Young, a stay of execution on suitable terms would be appropriate, except that this Court was not satisfied that it had received any sufficiently clear statement or explanation of the damages claimed to be recoverable from Ernst & Young to justify the exercise of its discretion to grant a stay of execution at that stage. Accordingly this Court adjourned the hearing of the appeal to give the Gaudions and their then advocates time to obtain expert assistance and to return to this Court with the necessary statement and explanation of their damages claim, so that the hearing of the appeal could proceed.

In the event, the adjournment has been rather longer than anticipated. In the meantime the Gaudions unfortunately have lost the assistance of their advocates who decided that they did not have the resources to continue to act on a *pro bono publico* basis. So at the resumed hearing Mr. H.F. Gaudion appeared on behalf of his wife and himself, though with the benefit of the documents prepared by the advocates. Advocate St. J.A. Robilliard again appeared on behalf of Monument.

At the beginning of the resumed hearing Mr. Robilliard applied for an order requiring the Gaudions to disclose to Monument a copy of an affidavit sworn by Mr. Stephen Harlow, a partner in Ernst & Young, and furnished to the Gaudions' advocates on 20 April 1999. We ruled against Monument's application on the ground that, because this Court cannot adjudicate on any factual issues between the Gaudions and Ernst & Young, the averments in the affidavit could not be called in aid by Monument.

For the purposes of the continued hearing of the appeal Monument wished to have an opportunity to present to this Court the answers of Mr. Harlow and Ernst & Young to the *prima facie* criticisms of their conduct contained in this Court's judgments of 4 February and 15 October 1998. That approach is misconceived, first, because (as already indicated) the Court cannot adjudicate on factual issues between the Gaudions and Mr Harlow or Ernst & Young; and secondly, because there seems to have been some misunderstanding of the nature of those criticisms. As this Court has emphasised more than once, its criticisms of Mr. Harlow and Ernst & Young are based on the limited material before it, and relate to conduct which in its judgment should be properly investigated by the appropriate professional and disciplinary bodies. Because the Gaudions have now sued Mr. Harlow and Ernst & Young, the basis for those criticisms will first be considered by the Courts of Guernsey before being examined by such bodies. This Court cannot and does not at this stage reach any conclusion as to whether such criticisms are, and if so to what extent, well founded, and those criticisms have not formed any part of this Court's reasoning on any of the matters in issue on this appeal.

Before ceasing to act for the Gaudions Advocate N. le Poidevin and Babbé le Poidevin Allez had prepared submissions on the damages issue together with (among other things) a lengthy affidavit sworn by Mr. Gaudion on 17 February 1999, a brief supporting affidavit sworn by Mrs. Gaudion, and information in relation to the Gaudions' finances produced by BDO Read Ltd, chartered accountants, which was subsequently incorporated into the Gaudions' amended *Cause* in their action against Ernst & Young.

Besides Mr. Robilliard's written submissions extensive material was placed before us on Monument's behalf, including a further affidavit sworn by Mr. Timothy Simon Howarth on 2 March 1999, and an accountant's report from Deloitte & Touche commenting on the information supplied by BDO Read Ltd.

As we have already said in relation to the Appellant's application for disclosure of Mr. Harlow's affidavit, we cannot adjudicate on any of the factual issues between the Gaudions and Ernst & Young. Therefore, many of the factual allegations and comments emanating from both sides, often conflicting, are not germane to our present task. However, in order to exercise our discretion as to whether or not to grant a stay of execution, we are not prepared simply to take the Gaudions' case against Ernst & Young as disclosed in their pleadings in that action at its height. We decided that we should go further than this, and should consider how far any aspect of the Gaudions' damages claim had been substantially undermined or disposed of by the observations advanced by Deloitte & Touche, by the submissions made on Monument's behalf by Mr. Robilliard, and by the evidence of Mr. Howarth in his affidavits.

We have examined at length the Gaudions' amended *Cause* in their action against Ernst & Young. We emphasize that it would be inappropriate for us to purport to rule on any aspect of any claims made in the amended *Cause*. But in order to assess whether the Gaudions may have a reasonably substantial claim in damages against Ernst & Young we have looked in particular at the case in negligence as pleaded against that firm in relation to the Sigmet loan transaction.

In the amended *Cause* it is alleged by the Gaudions:

(a) that in November 1993 Ernst & Young were, and had for many years been, the Gaudions' advisers on financial matters (para. 4);

(b) that Mr. Harlow or Ernst & Young advised the Gaudions to enter into the Sigmet loan agreement at that time (para. 22);

(c) that the Gaudions relied on that advice (para. 23);

A (d) that Ernst & Young did not advise the Gaudions against the Sigmet loan (para. 26);

(e) that Ernst & Young were in breach of their duty of care to the Gaudions (para. 26);

(f) that had Ernst & Young not been in breach of their duty of care the Gaudions would not have entered into the Sigmet loan transaction (para. 54);

B (g) that as at November 1993 the Gaudions had a surplus of assets over liabilities and that as a result of the negligence of Ernst & Young that surplus has since been converted into a large deficit (para. 61 - that paragraph sets out the loss and damage claimed by the Gaudions and incorporates the information prepared by BDO Read Ltd.).

It is obvious from Ernst & Young's pleaded defence that the facts from which the allegations we have set out are derived are very much in controversy between the Gaudions and Ernst & Young. But there are three points which in our judgment tilt the balance in favour of granting the Gaudions the stay of
C execution they seek:

(a) Although the report from Deloitte & Touche to which we have referred puts forward arguments disputing the Gaudions' claim (that they were in surplus in November 1993 and that had it not been for Ernst & Young that surplus would have been to a greater or lesser extent retained), and although those arguments, or some of them, may be valid (at this stage we cannot reach any conclusion on this), none of the arguments is so clearly
D right as to enable us to conclude that the Gaudions' claim for damages on this particular basis is either unsustainable or even likely to prove untenable.

(b) If the Gaudions established that they had **any** surplus in November 1993, and if they can show that, had Ernst & Young not been negligent, **any** surplus would have been subsequently retained (as distinct from being inevitably dissipated in the discharge of indebtedness) the Gaudions would arguably be entitled to recover from Ernst & Young
E at least the principal sum for which Monument has obtained summary judgment.

(c) Although causation is in issue between the Gaudions and Ernst & Young, the authorities we have been referred to do not preclude recovery by the Gaudions.

Mr. Robilliard cited in particular the case of *Galoo Limited v Bright Grahame Murray* [1994] 1 WLR 1360; [1995] 1 All ER 16, but we consider that that case is of little relevance to the task before us. The
F English Court of Appeal did not rule (and correctly did not rule) that a financial adviser may not be held liable in damages where a client takes a loan in very disadvantageous circumstances. That court did not purport to say that in all such cases a financial adviser merely provides the opportunity to take such a loan and that therefore the adviser's bad advice, or non-existent advice, may not be the cause of the client's loss.

The Gaudions have in our judgment provided a sufficiently clear statement and explanation of the
G damages they seek to recover from Ernst & Young. Accordingly, balancing all the factors put forward on behalf of Monument by Mr. Robilliard and those which were or could have been put forward by Mr. Gaudion, we reach the conclusion that a stay of enforcement of Monument's judgment pending

determination of the Gaudions' action against Ernst & Young should, in the exercise of this Court's discretion, be granted.

A

In his submissions Mr. Robilliard sought to re-argue before this Court questions already dealt with in the previous judgment. On the basis of new evidence contained in fresh affidavits of Advocate Peter Ferbrache and Mr. Timothy Howarth, Mr. Robilliard contended that Monument had made the loan as trustee of a Guernsey trust settlement called "the ITB Settlement", and that there could not be any "economic unity" between the ITB Settlement beneficiaries and Ernst & Young. At the hearing in October 1998 Mr. Robilliard had argued that Monument was acting as trustee or nominee on behalf of Mr. Erb, and that argument was dealt with at page 7D-H of the Judgment of 15 October 1998. The fact that the source of the money lent by Monument in its own name, and without reference to any trusteeship or agency, may have been a trust settlement rather than Mr. Erb himself makes no difference to the conclusion this Court has reached, to exercise its discretion in favour of a stay of execution.

B

Accordingly this Court orders that execution of Monument's judgment be stayed pending determination of the action between the Gaudions and Ernst & Young, conditional on appropriate undertakings being given by the Gaudions. The Gaudions have already given written undertakings dated 26 January 1999 (1) not to dispose of or otherwise deal with the realty now owned by Weardale, (2) to note on the Guernsey public records that the shares of Weardale are under arrest, and (3) to apply to the Royal Court to register such undertakings on the public records. The Gaudions must also undertake to proceed with their action against Ernst & Young with reasonable despatch. There will be liberty to restore in the event that (*inter alia*) there is undue delay in bringing the action against Ernst & Young to trial.

C

D

In connection with this, we wish to make these further observations. This Court understands that fresh attempts are to be made by the Bar of Guernsey to provide the Gaudions with suitable legal assistance. This is essential, because clearly Mr. and Mrs. Gaudion are unable on their own to conduct either these proceedings or the action against Ernst & Young. It is also essential because, as the Bailiff recognised in his judgment of 7 June 1999 at page 7B-D, when refusing to seek further legal assistance for the Gaudions, in the absence of such assistance the Gaudions are likely to have to abandon their claim against Ernst & Young (and their other claim against Ferbrache & Co.), even if (and we stress "if") such claims would in the end be shown to be good claims. Furthermore, legal assistance is anyway essential to ensure that the evidence of Mr. and Mrs. Gaudion is obtained and recorded in the form of full written statements, having regard to their age and infirmities.

E

Costs of and relating to this appeal and the hearing before the Royal Court are to be paid by Monument to the Gaudions. In the event that either of the parties wishes to make further submissions to this Court on any aspect of the Court's order. including costs, liberty is given to make such further submissions provided that notice in writing is given to HM Greffier within 7 days from receipt of this judgment.

F

Stay of execution granted.

G

142. [CIVIL DIVISION – APPEAL NO. 249]

29th NOVEMBER 1999

MONUMENT TRUST COMPANY LIMITED
v.
HERBERT FREDERICK GAUDION
and
RUBY ADA GAUDION

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

See paragraph 66.

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

THE PRESIDENT: In the judgment of this Court handed down on 15th July 1999, we imposed a stay of enforcement of Monument's judgment against Mr. and Mrs. Gaudion, and indicated that either party could come back to the Court to deal with any consequential matters, including costs. In relation to costs this Court made a provisional order and Mr. Robilliard for Monument has confirmed today that he does not seek to disturb that order.

Three points have been raised on behalf of Monument today. The first is that some specific date should be laid down, by which the fixing of a trial date in the action between the Gaudions and Ernst & Young should take place. Mr. Robilliard proposed 28th February 2000; Mr. Laws for the Gaudions did not express any serious dissent from a date at about that period.

This Court could not impose a timetable in relation to the conduct of an action against Ernst & Young without Ernst & Young, and the third party who has been joined, being heard. Therefore, this Court proposes instead to order that unless by 15th March 2000 a date for the trial of the action of Gaudion v. Ernst & Young has been fixed, Monument will be entitled to return to this Court to apply for the stay to be lifted. Unless good grounds for the delay were then put forward on behalf of the Gaudions, there would be a reasonably strong case for the stay to be lifted.

In specifying 15th March 2000 as the date, this Court anticipates that a trial date will be fixed by the Royal Court, even though there then remain minor questions of discovery or particulars or otherwise still to be resolved. We say this because, in view of the likely length of the trial, the earliest trial date likely to be fixed will be sufficiently far away as to enable all such minor interlocutory matters to be resolved well before the trial date.

The second point is this: Mr. Robilliard relies on the fact that Monument is an unsecured creditor of the Gaudions. Monument is concerned that over the next months, or a year, or more, other creditors may come forward with debts later in date, but in relation to which Monument has no priority. So he submits that the shares in Weardale should be transferred to Monument subject to certain conditions.

In the action by Weardale against the Gaudions, this Court held that Monument had no security and was not entitled to hold the Weardale shares which this Court ordered to be returned to the

Gaudions. For this Court now to order the transfer back to Monument of these shares, whatever might be the conditions imposed, would be inconsistent with its decision on the Weardale appeal, a decision which was not appealed against by Monument acting through Weardale. We cannot see any basis on which it would be appropriate for this Court to order the re-transfer of the Weardale shares, even if this Court had jurisdiction to do so, which we much doubt.

The third point is that Mr. Robilliard seeks leave to appeal to the Privy Council. There is clear authority that in an interlocutory matter, which this clearly is, this Court has no jurisdiction to give leave. Mr. Robilliard sought to distinguish between the exercise of a discretionary power to stay execution, which is an interlocutory matter, from a decision that such a discretion of power exists, which he argues is a final decision. In the judgment of this Court such a distinction is of no relevance. The matter is plainly interlocutory and therefore we cannot and do not grant leave.

Mr. Robilliard referred also to a possible route to the Privy Council by doléance. It is probable that no such route exists today, the Court of Appeal (Guernsey) Law 1961 having interposed the Court of Appeal between the Royal Court and the Privy Council. But even if such a route does exist, that would be a matter to be raised before the Privy Council, and not before this Court.

Finally, we would like to thank Mr. Robilliard and Mr. Laws for their succinct and helpful written and oral submissions.

ADVOCATE LAWS: Sir, would the Court be minded to make an order for costs in this matter in relation to Mr-

THE PRESIDENT: What are you asking for?

ADVOCATE LAWS: I would ask for costs, sir.

THE PRESIDENT: Yes. Mr. Robilliard?

ADVOCATE ROBILLIARD: There was an interesting discussion in the previous case to which two of you gentleman were party, I do not propose to add to that.

THE PRESIDENT: Yes, thank you. Yes, you have your costs.

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

Stay of execution granted; application for leave to appeal to Privy Council dismissed.

143. [CIVIL DIVISION – APPEAL NO. 259]

A 5th JANUARY, 1999

BARON SHIPPING CO. LIMITED
v.
LE PELLEY

Before: COLLINS (PRESIDENT), HARMAN AND LORD CARLISLE, JJ.A

B **Period of limitation – loss or damage by and to vessels – Maritime Conventions Act 1911 – Law Reform (Tort) Guernsey Law 1979 – statutory interpretation**

See paragraph 70.

R.J. Collas for the Appellant
C J.M. Wessels for the Respondent

THE PRESIDENT: This is an appeal by Baron Shipping Co. Limited (to whom I will refer as "Baron") from a decision of the Royal Court, sitting as an Ordinary Court, given on 13th July 1998, at the hearing of the Exception de Fond, raised by Baron in their Defence to an action brought by James Matthew Le Pelley ("the Plaintiff") and placed on the Pleading List by Act of the Court dated 12th July 1996.

D The cause of action was in negligence, the allegation raised in the Cause being that one Captain Fakin, the servant or agent of Baron, so negligently manoeuvred the motor vessel Juniper in St. Peter Port Harbour on 11th May 1994, as to collide with the Plaintiff's yacht, Riscale, then moored in that harbour, thereby causing damage claimed in respect of the cost of repair accompanied by a claim for surveying fees.

The Exception de Fond read as follows:-
E

"1. The Action by the Plaintiff is prescribed in that it is not maintainable for the following reasons-

(a) In the action he alleges that damage was caused to his yacht by the Defendant's vessel on 11th May 1994;

F (b) the Action was commenced by an ex parte application for substituted service tabled on 14th June 1996, and a summons issued pursuant thereto dated 21st June 1996, returnable in Court on 12th July 1996."

2. The Defendant will rely upon S.8 of the Maritime Conventions Act 1911, registered on the records of Guernsey on 18th January 1960."

G These dates were not in issue, nor was it in issue that if the Maritime Conventions Act 1911 S.8 was in force in relation to this claim the action would have been prescribed, subject to the obtaining of relief under the proviso to the same section.

By that Act ("the Act of 1911") which was by S.9 to "extend throughout His Majesty's Dominions and to any territories under his protection" and thus was an Act of the Imperial Parliament applicable to Guernsey, specific provision was made for limitation of actions in these terms:- A

> "8. No action shall be maintainable to enforce any claim or lien against a vessel for her owners in respect of damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered..." B

There followed a proviso under the terms of which there was a general power to extend time in the discretion of the Court, and a specific duty to extend time in one particular instance. These provisions, including the proviso, were consistent with and gave effect to Article 7 of the (Collision 1910) International Convention for the Unification of certain Rules of Law with respect to Collisions between Vessels, 1910. In this action an alternative claim was made under the terms of the Proviso; this claim remains alive and its relevance is dependent upon the outcome of this appeal. C

The Act was entitled "An Act to amend the Law relating to Merchant Shipping with a view to enabling certain Conventions to be carried into effect", and by the preamble reference was made to the Brussels Conventions of 1910. It was registered on the Records of Guernsey on 18th January 1960.

Section 8 of the Act of 1911 has been repealed in the United Kingdom by the Merchant Shipping Act 1995 ("the Act of 1995") but it is to be observed that by S.315 the latter Act extends only to England and Wales, Scotland and Northern Ireland. Section 8 therefore remains in force in Guernsey and no doubt in other dependencies of the Crown, subject to the arguments raised on this appeal in the case of Guernsey. D

I note also that by S.190 of the Act of 1995 a two year limitation period is retained, no doubt reflecting continuing treaty obligations undertaken by the Crown. There are substantial differences of detail, in that, for example, the wide discretion given by the proviso in the case of the Act of 1911 is narrowed to the taking into account of only certain specific circumstances upon the granting of an extension, but the two year period is retained. E

It is the intention of the States of Guernsey to prepare separate legislation for the Island, as distinct from requesting an extension of the Act of 1995, and in this connection the Court was referred to Billet D'Etat X of 1998. F

The contention advanced on behalf of the Plaintiff, which found favour with the Bailiff, was that this provision was repealed by the Law Reform (Tort)(Guernsey) Law, 1979 ("the law of 1979"), which by S.4(1) provided as follows:-

> "4(1) Notwithstanding the provisions of any enactment or any rule of law, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued." G

By S. 19(1) it was provided as follows:-

"In this Law, unless the context otherwise requires the following expressions have the meanings hereby respectfully assigned to them, that is to say:-

A

'enactment' includes any enactment of the Parliament of the United Kingdom."

Finally, by S. 20 it is further provided that:-

"The Law set out in the left-hand column of the Schedule to this Law is hereby repealed to the extent set out in the right-hand column of the said Schedule."

B

That Schedule referred to only one enactment which is not relevant to this appeal.

The Bailiff held that, despite a "different formula of words" to use his phrase, the later law did "impact on the earlier."

The Bailiff continued:-

C

"The terms of both provisions correctly achieve a definition of the prescriptive periods, using different words that convey the same meaning; the two acts of legislation cannot therefore stand together."

"The effect of the Tort Law is that the Court can now entertain actions in tortious maritime collision for periods extended from two years to six. That creates no difficulty and no conflicts in practice. Undoubtedly the difference in the current Guernsey Law from that of

D

the current UK Law has arisen from a draftsman's slip. However, a revision of the law to comply with the Maritime Conventions of 1910 would be a matter for the States."

The difference to which the Bailiff referred was, of course, between the phrase "an action shall not be brought" in the Law of 1979, and the phrase "unless proceedings are brought within" in the Act of 1911.

E The judgment, which contains no reference to authority, does not make it clear whether the Bailiff was treating the Law of 1979 as expressly or impliedly repealing the provisions of the Act of 1911; the phrase "the two acts of legislation cannot therefore stand together" may be more consistent with his having taken the operation of the Law of 1979 to be by way of an implied repeal of the Act of 1911, but I am left in a state of some uncertainty.

In these circumstances I approach the issue both by reference to express and implied repeal.

F

The Law of 1979 provides for express repeal by the provisions of S.20 of the Law read together with the Schedule; this related only to the Married Women's Property Law of 1928. However, this is not necessarily restrictive in its effect, so that in my judgment it is open to a Court to hold that there may be an express repeal by one or more of the substantive provisions of a statute or law other than the repeal section, where this is sufficiently clear from the terms of that provision of the statute or law in question.

G

We were referred to the works of a number of text book writers by way of an analysis of the modes of repeal, express and implied.

Thus with regard to express repeal, Halsbury's Laws of England (4th ed. re-issue) Vol. 44 (1) paras 1297 and 1298, read as follows:-

A

> "No special wording is required to effect a repeal; the question is simply one of the intention of the legislator, but it is usual to distinguish between express and implied repeal though there is no difference in their effect."
>
> "Although no special wording is needed to effect a repeal, certain formulas are in common use. Where a portion of an enactment which is to be repealed is cited by reference to the words, section numbers, etc, with which it begins and ends, this reference is prima facie inclusive. In modern Acts it is usual, where the number of repeals is considerable, to set them out in a columnar Repeal Schedule."

B

Again, Bennion on Statutory Interpretation - A Code (3rd ed. 1997) S.85 at p. 221, reads as follows:-

> "To 'repeal' an Act is to cause it to cease to be a part of the corpus juris or body of law. To 'repeal' an enactment is to cause it to cease to be in law a part of the Act containing it."

C

> "A repeal may be express or implied."
>
> "The repeal of an enactment constitutes an amendment of the Act containing it."

And then later:-

D

> "A repeal may be made textually, naming the repealed enactment.
>
> Or the repeal may be made by indirect express provision..."
>
> For example by such a phrase as-
>
> > "Any other enactments inconsistent with this Act shall be repealed."

E

No contemporary support is to be found outside the words of S.4(1) itself in this matter for a finding that the States intended a partial or total repeal of S.8 of the Act of 1911. In this jurisdiction it is permissible to refer to travaux préparatoires in the interpretation of a Law. We were provided with a copy of the Report of the States Accident Law Reform Committee which was contained in Billet D'Etat II of 1972 which preceded the Law of 1979, and found therein no reference to the Act of 1911 or its subject matter. Indeed, the stated objective appears to have been to bring the law in this Island into line with that in England.

F

In these circumstances the Court can only find that there has been an express repeal if it is satisfied that the words used can have no other meaning. On that approach the Court would have to be driven to find that such a repeal was provided for despite the consequent departure from treaty obligations undertaken by the Crown and owed by this Island as a dependent territory. Reverting to the words in S.4(1) and in particular the words comprised in the phrase "Notwithstanding the provisions of any enactment or any rule of law...", these do not in my judgment constitute words of repeal, but rather are capable themselves of being no more than a recognition of the continued existence of the enactments and laws in question, and I so interpret the provision. Accordingly, I find that there was no such express repeal as was contended for.

G

I turn therefore to consider whether there was an implied repeal of S.8 of the Act of 1911 by S.4(1) of the Law of 1979.

A

The leading authority on repeal by implication is the old case of Kutner v. Phillips (1891) 2 QB 267, a decision of the Divisional Court whereby the jurisdiction conferred on the City of London Court over civil suits over persons who had employment in the City but did not reside or carry on business there themselves, had not been taken away by an implied repeal unsuccessfully alleged to have been effected by the County Courts Act of 1888.

B While the result turned on the terms of the two enactments in question, A.L. Smith, LJ, in the Divisional Court expressed, at 271, the principles to be applied, in terms which have not since been doubted:_

> "It is admitted on the part of the Applicant that there has been no express repeal of this section; but it is argued that, by reason of the legislation which has since taken place, and especially by reason of the provisions of the County Courts Act 1888, it has been repealed by implication. Now, a repeal by implication is only effected when the provisions of a later
> C enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim 'Leges posteriores contrarias abrogant' applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together: Thorpe v. Adams (LR 6 CP 125). Lord Coke in Gregory's case (6 Rep. 19(b)) lays it down 'that a later statute in
> D the affirmative shall not take away a former Act, and eo potior if the former be particular and the latter be general.'"

Thus too Halsbury's Laws of England (4th ed. re-issue) Vol.44(1) para.1299 reads as follows:-

> "An intention to repeal an Act or enactment may be inferred from the nature of the provision made by the later enactment. Repeal by implication cannot be prohibited, but
> E such an implication is found by the Courts with reluctance because the precision of modern drafting means the necessary repeals are usually effected expressly.
>
> The rule is, therefore, that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together."

Para. 1300 follows, and reads:-

F

> "It is difficult to imply a repeal where the earlier enactment is particular and the later general ... If Parliament had considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to interfere with that provision ... The special provision stands as an exceptional proviso upon the general."

G Similarly, Bennion (op. cit.) at p.226 cites the following passage from the speech of the Earl of Selbourne, LC, in Seward v. The Vera Cruz (1884) 10 AC 59, at 68 :-

> "... where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects expressly dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so." A

Our attention has been drawn, in addition, to two authorities in which the Courts in England have on the one hand considered the effect of the Act of 1911 itself on earlier legislation and on the other hand the effect on the Act of 1911 on later legislation.

First, in The Caliph (1912) P 213 the Court held that the provisions of S.8 of the Act of 1911 had overridden the terms of the Fatal Accidents Act 1846, which provided for a twelve month limitation period in the case of claims for damages for loss of life. B

The judgment was largely directed to the issue of whether S.8 was applicable to a Fatal Accidents Act claim at all. No reference was made in that judgment to the principles applicable to repeals by implication. However in my view the judgment can be interpreted as a preference for the particular over the general. C

This decision was approved by the Court of Appeal in The Alnwick (1965) P 357. Since the decision in The Caliph the period of limitation under the Fatal Accidents Act 1846 had been varied to one of three years from the date when the Cause of Action arose by virtue of the Law Reform (Limitation of Actions) Act 1954 S.3; while this appears on the face of it to have been to the benefit of a Plaintiff there was a substantial difference in that in the case of the Law Reform Act period there was no discretion or power as matters then stood further to extend the period whereas in the case of the Act of 1911 there was the proviso as mentioned above. The Court held that the Act of 1954 did not affect S.8 and went on to extend time under the proviso; that extension being by majority. No reference was made to Kutner v. Phillips (above) in the judgment of Sellers, LJ, but at 375 he said:- D

> "It has been submitted that the three year period of the Act of 1954 should now apply. But in my view, the alteration in the general law by the Act of 1954 cannot alter the construction of S.8 of the Act of 1911, however much more favourable it may be to a claimant." E

Thus, we can find a comparatively recent authority bearing on the Act of 1911 which preferred its terms to those of a more general Act.

Neither the phraseology used in the two provisions in question nor the surrounding circumstances lead me to the conclusion that the later of the two provisions is to be treated as so inconsistent with or repugnant to the earlier one as to constitute an implied repeal. The language is different and the basis upon which I have held that the express terms are to be interpreted is itself inconsistent with any such conclusion as is sought by the Appellants in relation to implication. F

Reference has already been made to the terms of the treaty obligations undertaken by the Crown and owed (inter alia) by the Bailiwick of Guernsey and to the recognition of those obligations in the title of and recitals to the Act of 1911. To the preference of the particular act of legislation over the general, is further to be added the presumption that the legislature (in this case the States) does not intend to act in breach of public international law. G

The Court was referred to the following passage from Bennion (op. cit.), at p.631, which I adopt as part of this judgment:-

A

> "...There is a prima facie presumption that Parliament does not intend to act in breach of [public] international law, including therein specific treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred." (Saloman v. Customs and Excise Comrs (1967) 2 QB 116, per Diplock LJ at 143).

B

An intention to bring about the breach of treaty obligations owed by the Bailiwick is something which there is no reason to impute to the States in this matter.

For all these reasons I would hold that there was neither an express nor an implied repeal of S.8 of the Act of 1911, which I find remains in force in this Island.

C

Accordingly, this appeal, in my view, is to be allowed and the action will be remitted to the Royal Court for the determination of all outstanding issues.

R.D. HARMAN, QC: I agree with the judgment which has been given by Mr. Collins and I have nothing to add.

LORD CARLISLE: I also agree with the judgment that has been given and I have nothing to add.

D

ADVOCATE COLLAS: I would ask for costs in respect of this appeal and in respect of the argument on the Exception and in the Court below.

ADVOCATE WESSELS: I can't resist that, provided the costs below are limited to the costs of this issue, the costs of the proviso arguments of course haven't been determined yet.

ADVOCATE COLLAS: I would agree with that, sir.

E

THE PRESIDENT: Yes, so be it. Well then the Appellant shall have the costs of the appeal and the costs relative to this issue under the Exception de Fond in the Court below.

ADVOCATE COLLAS: I'm obliged, sir.

Appeal allowed and action remitted to Royal Court

F

G

144. [CIVIL DIVISION – APPEAL NO. 263]

22nd JULY, 1999

HARRY GOLD
v.
ADMINISTRATOR OF INCOME TAX

Before BELOFF (PRESIDENT), NUTTING and CLARKE, JJ.A

Guernsey Tax Tribunal – statutory duties - Case Stated – proper approach

See paragraph 46.

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

THE PRESIDENT:-

1. INTRODUCTION:

The key issue in this dispute between Mr. Gold and the Administrator of Income Tax is whether the sum of £400,000 so far received by Mr. Gold pursuant to an agreement dated 4th April 1991, whereby Gamp Investments Incorporated (a Panamanian company) ("Gamp") purchased his and his wife's share-holding in Bellfield Venture Incorporated (another Panamanian company) ("Bellfield") for the sum of £850,000 should be treated as a Capital Gain thus attracting no tax under Guernsey fiscal law or as income thus attracting such tax. Mr. Gold contends for the former, the Administrator, in an assessment dated 10th November 1994, for the latter. On 12th May 1998, the Guernsey Tax Tribunal dismissed Mr. Gold's appeal against that assessment. On 3rd November 1998, the Bailiff in a laconic judgment upheld the Tax Tribunal's decision. We are invited to set the Royal Court judgment aside and to make further appropriate order to relieve Mr. Gold of this tax burden.

2. BACKGROUND:

I take the uncontentious background from the statement of agreed facts submitted to the tribunal, and I set out the following paragraphs of that statement:-

> "1. The appellant, Harry Gold and his wife, Maryse Esther, visited Guernsey in December 1987.
>
> 2. In February 1988 the Golds purchased "8 Rue de la Douzaine", Fort George, for £424,538 (of which the figure for realty, including congé and expenses was £405,000). This purchase was funded in part by a loan from National Westminster Bank.
>
> 3. Mr. Gold arrived in Guernsey on 30th March 1988, but as his house was not ready for occupation, stayed at the St. Pierre Park Hotel for 1 or 2 days. He then returned to the United Kingdom on 20th April to organise the removal of furniture and the

collection of his wife. He returned to Guernsey on 21st April and his furniture arrived on 22nd and/or 23rd April, 1988.

A

4. The Golds were resident, for Guernsey income tax purposes, for 1987 and have been solely resident for Guernsey income tax purposes for 1988 et seq.

5. Mr. Gold is a solicitor of the Supreme Court of England and Wales.

6. Since arriving in Guernsey Mr. Gold has practised as an English solicitor which involves at times acting as a financial, commercial, and property consultant, under the practice name H. Gold & Co.

B

7. In September 1988, Mr. Gold replaced his National Westminster loan with an unsecured, interest bearing, loan for £220,000 from a Panamanian company, Gamp Investments Inc.

8. Mr. Gold advised the Administrator that the loan from Gamp was repaid out of the proceeds of a sale of shares which took place on 4th April 1991, whereby shares in Bellfield Ventures Inc. were sold to Gamp for £850,000 - this sum to be paid by way of the following stage payment agreement:-

C

£200,000	being payable to Mr. Gold on the date of sale;
£200,000	being used to satisfy the amount of the loan then outstanding to Gamp;
£450,000	being payable to Mr. Gold on 4th April 1994.

D

Subsequently the Administrator has been advised that the £450,000 due to be paid on 4th April 1994, remains unpaid.

[Paragraph 9 omitted]

E

10. On 10th November 1994, the Administrator raised an assessment in the name of Mr. Gold in respect of the Year of Charge 1991, which included estimated profits arising to Mr. Gold from the sale of these shares of £1,501.291, calculated as follows:-

Bellfield Ventures Inc. Proceeds	£850,000
Less Costs	£ 309
Profit	£849,691

F

The profit was categorised by the Administrator as Additional Miscellaneous Investment Income.

Bellfield, according to a statement of Mr. Gold, submitted to the Tax Tribunal, was a vehicle for off-shore activities, the nature of, and the clientele for which, are unspecified. It is accepted by Mr. Gold that he provided certain services by way of introductions and such like: beyond that there is no agreement as to what, if anything, he did for Bellfield or, apart from his ownership of, at any rate 40% of the share-holding, the nature of his connection therewith.

G

3. LEGISLATIVE REGIME: THE INCOME TAX (GUERNSEY) LAW, 1975 ("the Law")

(i) The Substantive Law:-

2. Income in respect of which tax is chargeable shall be income of one or other of the following classes, namely-

(1) income from business;

(2) income from offices and employments;

(3) income from the ownership of lands and buildings; and

(4) income from other sources;

and the income for any year of charge in respect of which tax is chargeable (in this Law referred to as "assessable income") shall in the case of each particular class be computed in such manner and by reference to such year of computation or other period as is mentioned in this Law.

[Ss. 3 to 6 omitted]

7. (1) Subject to the succeeding provisions of this section, the amount of the profits of any business for any year of computation shall be computed in accordance with the ordinary commercial principles applicable to the computation of profits of that business.

[Ss. 8 to 16 omitted]

17. (1) The assessable income from sources not covered by any of the sections seven, eight or nine of this Law shall be the income arising or accruing from such sources after deduction of any expenditure not being:-

(a) a sum paid to an person not resident in Guernsey by a body to which an exemption from tax has been granted under any Ordinance made under section 40A of this Law and which, by virtue of section 5(1A) of this Law, is not regarded in the hands of the recipient as arising or accruing from a source in Guernsey; or

(b) in the nature of capital expenditure or personal expenses.

wholly and exclusively incurred for the purpose of earning such income.

[Sub-S (2) omitted]

18. The onus of proof that any expenditure is an allowable deduction from profits or income for the purposes of this Law shall be upon the person claiming so to deduct.

19. In computing the amount of assessable income under this Law no account shall be taken of:-

A

(a) profits and losses arising from the realisation of investments except where the varying of investments and the turning of such investments to account is a business or part of a business;

(b) receipts of a casual or non-recurring nature other than receipts arising from a business or from the exercise of an office or employment.

B

20. (1) Save as otherwise in the Law provided, as respects assessable income from sources outside Guernsey, other than income from the carrying on of a business or dividends, interest, royalties and any other income of a similar nature arising or accruing from a body to which an exemption from tax has been granted under any Ordinance made under section 40A of this Law (hereinafter referred to as "income to which this chapter applies") the year of computation shall, notwithstanding the provisions of section six of this Law, be the year of charge and the provisions of sections thirty and thirty-one of this Law (which relate to commencements and cessations) shall not apply in respect of any such income."

C

I draw attention only to the fact that the statute differentiates between sources of income, and that different incidents attach to different forms of income. However, income from whatever source is income chargeable to tax.

D

(ii) Collection Machinery:

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

E

F

73. Assessments shall be made by the Administrator and a notice giving particulars of the assessment and stating the amount of tax chargeable in consequence of the assessment shall be sent by post, addressed to the person concerned at his usual or last known place of residence or, in the case of a company, at its principal place of business. Every such notice shall contain a statement that a right of appeal is conferred by this Law and shall further state the time within which notice of appeal must be given.

G

81. (1) Subject to the provisions of section eighty-one A of this Law, tax for any year of charge shall be payable in two equal instalments as follows:-

A

(a) the first instalment on or before the thirtieth day of June in that year:

Provided that where the assessment in consequence of which the tax is chargeable has not been made before the tenth day of June in that year the first instalment shall be payable within twenty-one days from the date of the issue of the notice of assessment;

B

(b) the second instalment on or before the thirty-first day of December in that year:

Provided that where the assessment in consequence of which the tax is chargeable is made after the tenth day of December in that year the second instalment shall be payable within twenty-one days from the date of the issue of the notice of assessment.

C

(2) A penalty shall be payable within thirty days from the date of the order communicating the penalty:

Provided that the Administrator may, at his discretion, allow a further time for payment.

D

83. In default of payment of tax, including any tax deducted or deductible under the provisions of section eighty-one A of this Law, or penalty by the due date, the Administrator may proceed to enforce payment as if the amount due were a civil debt.

82. (1) Where notice of an appeal to the Authority or Guernsey Tax Tribunal against an assessment or a penalty has been given, the Administrator may, at his discretion, allow such part of the tax charged in consequence of the assessment as appears to him to be in dispute, and the whole or part of the penalty imposed, to remain unpaid pending the result of such appeal.

E

(2) On the determination of the appeal any balance of tax or penalty shall become payable, and any tax or penalty overpaid shall be repaid.

F

I draw attention only to the fact that there is a duty upon the tax payer to make a return as to income, a matter peculiarly within his knowledge and to co-operate with the Administrator's requests for information. The Administrator for his part has to make an assessment, no doubt in good faith, on the basis of the material so supplied. The taxpayer's remedy, if in his view the Administrator has erred, is to engage the Appellate machinery.

G

(iii) Appeals to the Tribunal:

"76. Any person aggrieved by an assessment made upon him by the Administrator, or by any penalty, direction or order imposed or made by the Administrator under this Law, shall be entitled to appeal to the appropriate body on giving to the Administrator notice in writing (stating the grounds of appeal) within twenty-one days of the date of the issue of the notice of assessment or of the order imposing the penalty, or other order or direction:

Provided that the appropriate body may admit an appeal if it is satisfied that owing to absence, sickness or other reasonable cause a person has been prevented from giving the aforesaid notice within the time limited.

80A. In this Part of the Law "the appropriate body"-

(a) where the appeal relates to an assessment, penalty, direction or order made or imposed in relation to a year of charge for which the appellant has not delivered a return as to his income in accordance with section 68 of this Law, means the Authority; and

(b) in any other case, means the Guernsey Tax Tribunal established by the Third Schedule to this Law.

THIRD SCHEDULE Section 80A(*b*)

THE GUERNSEY TAX TRIBUNAL

1. (1) There is established by, and in accordance with the provisions of, this Schedule a body to be known as the Guernsey Tax Tribunal.

(2) The Tribunal's functions consist of-

(a) hearing and determining appeals, and,

(b) stating and signing cases for submission to the Ordinary Court,

in relation to any matter which may be referred to it under, and in accordance with the provisions of, any enactment.

Membership of the Tribunal

2. (1) The Tribunal is to comprise-

(a) a President, and

(b) a Vice-President, and

(c) not more than seven other members,

appointed from time to time by the Full Court.

3. (1) The States Advisory and Finance Committee shall appoint a person who appears to the Committee, after consultation with the Tribunal's President, to have appropriate qualifications and experience to be the clerk to the Tribunal.

(2) The clerk shall-

(a) be responsible for the Tribunal's administration, and

(b) advise the Tribunal when so requested on questions of law.

[The remainder of S.3 and S.4 omitted]

5. (1) On receiving notice of appeal in relation to any matter which may be referred to the Tribunal under any enactment, the Administrator shall forward the notice to the Tribunal, whose President or Vice-President shall convene sufficient members to constitute a quorum.

(2) At the hearing of the appeal -

(a) any three members constitute a quorum;

(b) the President or Vice-President shall preside;

(c) a member shall not sit if he has any direct or indirect pecuniary interest in the appeal;

(d) every member, party, representative and witness has the same protections, immunities and duties as he would have if sitting or appearing in proceedings before the Ordinary Court;

(e) the proceedings shall be conducted:

(i) in accordance with natural justice;

(ii) with as little formality, and with as much expedition, as a proper consideration of the matters before the Tribunal will permit;

(f) every question shall be determined by the opinion of the majority of the members sitting but if they are equally divided the opinion of the person presiding shall prevail;

(g) Subject to this Schedule and the provisions of any other enactment, the Tribunal's procedure is within its discretion.

(3) Proceedings before the Tribunal are not to be held bad for want of form or void by reason of any informality.

(4) The President or Vice-President may, by means of a certificate signed by him, correct any error arising from an accidental slip or omission in a decision of the Tribunal.

78. (1) The Administrator shall be entitled to be present during all the time of the hearing of an appeal, to give reasons in support of the assessment or other order made by him and to be present when the determination of the appropriate body is announced.

(2) The appellant and the Administrator shall be entitled at the hearing of any appeal to appear by an advocate or by an accountant who is a member of the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants in Scotland, the Institute of Chartered Accounts in Ireland or the Association of Certified Accountants, or who holds an equivalent qualification approved by the appropriate body:

Provided that the condition as to membership of one of these institutes or the Association, or the holding of an equivalent qualification, as the case may be, shall not apply to an accountant who has appeared before the Authority in a professional capacity in respect of an appeal in relation to income tax before the first day of January, nineteen hundred and seventy-four.

(Sub-S(3) omitted)

(4) Where on the hearing of an appeal, the appellant desires to put forward any ground of appeal which was not specified in the notice of appeal, the appropriate body, if in its opinion the omission of that ground from the notice was not wilful or unreasonable, may allow the appellant to put forward that ground any may take it into consideration.

(5) The appropriate body may, by notice sent by post, summon any person, (other than the appellant) whom it thinks able to give relevant evidence, to appear before it to be examined.

(6) Any witness before the appropriate body may be examined on oath, but where the witness is the appellant or any agent or servant of the appellant or any other person confidentially employed in his affairs, the witness shall not be compelled to give evidence on oath or to answer any question to which he objects.

(7) Any member of the appropriate body shall have power to administer the oath referred to in the last preceding subsection.

(8) The appropriate body may adjourn any appeal from time to time.

79. (1) In disposing of an appeal the appropriate body may-

(*a*) in the case of an assessment-

(i) confirm, reduce, increase or annul the assessment; or

(ii) set aside the assessment and direct the Administrator to make a fresh assessment after making such further enquiry as the Administrator thinks fit or the appropriate body may direct; or

(*b*) in the case of an order imposing a penalty- confirm or cancel such order or vary it so as either to increase or reduce the penalty; or

(*c*) in the case of any other direction or order- make such order thereon as it thinks fit.

(2) Save as provided in section eighty of this Law orders made by the appropriate body shall be final and conclusive."

I draw attention only to the fact that the onus is on an Appellant taxpayer to disturb the assessment. The Administrator's function, if not duty, is to defend his assessment with the material available to him and by cross-examination, if he chooses, of the Appellant. What is required to disturb an assessment must depend upon the facts and circumstances of the particular case, but the more cogent the evidence supplied by the Appellant in support of his appeal, the more cogent must be the rebuttal by the Administrator. While the Appellant is not obliged to answer the questions, he runs the risk that if he does not do so he will in fact fail to discharge the burden which, I repeat, lies upon him.

(iv) Appeals to the Courts:

"80. (1) Upon the determination of an appeal the appellant or the Administrator, if dissatisfied with the determination as being erroneous in point of law, may require the appropriate body to state and sign a case for submission to the Royal Court.

(2) Such requirements shall be made by delivering, at any time within twenty-one days after the determination of the appeal, a notice in writing to the President of the appropriate body.

(3) The case shall set forth the facts and the determination of the appropriate body.

(4) The case when stated and signed shall be delivered by the President to the party who required it.

(5) The party to whom the case has been delivered shall, within twenty-one days after he has received it, transmit the case to Her Majesty's Greffier and send to the other party a copy of the case, together with notice in writing that he has so transmitted it.

(6) The Royal Court sitting as an Ordinary Court shall hear and determine any question of law, arising on the case, and may reverse, affirm,

or amend the determination of the appropriate body, remit the matter to the appropriate body with the opinion of the Court thereon, or make such other order as the Court may think fit.

(7) The Court may cause the case to be sent back for amplification or clarification and thereupon the case shall be amplified or clarified accordingly and returned to the Court and the last preceding sub-section shall thereupon apply.

(8) Where the amount of the assessment is to be altered in consequence of the judgment of the Court, the Administrator shall alter the assessment and charge accordingly.

(9) An appeal shall lie from the Ordinary Court to the Court of Appeal."

I draw attention to the fact that appeals to the Royal Court and hence to the Court of Appeal are on points of law only. The structure of the appeal means that where the taxpayer takes the matter to the Court of Appeal, in essence the Court of Appeal is determining whether the Tribunal erred in law, although in form whether the Royal Court erred in failing to hold that the Tribunal erred in law.

Errors of law could embrace:-

(1) Misconstruction of the fiscal legislation or other material in general law;

(2) Material departure from the prescribed procedure or the doctrines of fairness;

(3) Perversity in the sense used in Edwards (Inspector of Taxes) v. Bairstow & Another (1956) AC 14, a decision of the House of Lords.

That classic statement of principle by Lord Radcliffe, at p. 35, which I now cite, asserts the limits of the appellate jurisdiction and also provides a warning against seeking to convert what is in truth a point of fact into a point of law:-

"I think the true position of the Court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a Case, and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the Case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in

which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when, in cases such as these, many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur." A

I also bear in mind, and draw attention to, what is usefully stated in Simon's Direct Tax Service, Binder 2 - General Principles 1995, A3.703 at page 3708:- B

"A higher standard of proof of the primary facts is required where the Commissioners draw inferences from those facts of fraudulent conduct."

4. THE CASE STATED:

The case stated by the Tribunal, dated 21st September 1997, provided in material part at paragraph 10, under the rubric "Administrator's Arguments": C

"Scenario 1

Was what Mr. Gold received for his shares by way of disguised remuneration? Mr. Gold has provided services for Bellfield but said he had not been remunerated for them. The Company appeared to have been successful enough for someone to pay £850,000 for 40% of the shares only two years after it was formed. D

Scenario 2

If Mr. and Mrs. Gold owned 40 of the 100 issued shares in Bellfield they were if not the major shareholders, at least the second largest shareholders. It was asked if this was a scheme to transmit some of the profits of Bellfield to Mr. and Mrs. Gold, but not in income form, i.e. as profit on sales of shares instead of dividends. E

Scenario 3

A man may have an interest in a company but not wish anyone to know of his connection with it. If he withdrew an income from the company he would take the risk that this may lead to his involvement coming to light. As an alternative, therefore, he may sell shares that he owns in another company to that company at an inflated price, so extracting income, but again in the guise of profits on a sale of shares. F

The Assistant Administrator admitted that he could not say which if any of these theories was correct, nor whether a subtle alternative applied. He believed on the information available any of these alternatives seemed more likely than the explanation given by Mr. Gold."

I turn to paragraph 13, the dispositive part of the case stated, and that provides as follows:- G

"13. (1) The Guernsey Tax Tribunal determined inter alia that-

(a) as a question of fact the proceeds of the sale of the share-holding in Bellfield Ventures Inc. constituted miscellaneous business income;

A

(c) the assessment be reduced to £849,691, and described as miscellaneous business income.

(2) In reaching this determination the Tribunal found that the Administrator's contention that what Mr. Gold received from the sale of the shares constituted disguised income was supported by the evidence presented.

B

Mr. Gold's submission that he knew very little about the shares and at the time of the sale he was unaware of their value was not accepted. Proof has been submitted that he had known Gamp Investments Inc. from February 1988 and provided services to the company. Mr. Gold had been reluctant to provide evidence. The Tribunal reached the decision that the sale of the shares was miscellaneous business income. The profit on the sale of the shares was in exchange for services which Mr. Gold rendered to the company. This view is borne out by paragraph numbered "1" of Appendix 14.

C

(3) With regard to the cases referred to, the following cases relate to whether a profit on a transaction arises from an adventure in the nature of trade or from a capital gain. Only one was mentioned. The Tribunal reached the conclusion that the profit on sale was disguised remuneration and not a capital gain."

D

They then set out a list of four cases, and continue:-

"The Appellant's advocate quoted "When nothing is received, there is nothing to be brought into account" from Mason (Inspector of Taxes) v. Innes (1967) 2 All ER 926. The Tribunal decided that far from nothing being received Mr. Gold had in fact received disguised remuneration in the form of a substantial profit on the sale of the shares."

E

"Abbott v. Philbin (1961) AC 352, concerns the grant of an option to an employee of a public company. The Tribunal determined that this case had no relevance to the appeal of Mr. Gold. Mr. Gold did not receive an option to buy shares in Bellfield Ventures Inc. and in addition his close involvement with the company was not in any way similar to the position of an employee of a public company.

F

14. The Guernsey Tax Tribunal also strongly recommended that the Administrator of Income Tax should not pursue the collection of tax on £450,000 until the outstanding amount was received by the Appellant.

15. The Appellant has declared his dissatisfaction with the decision in 13(a) and (c) above as being erroneous in point of law, and has requested the Tribunal to state and sign a case for the opinion of the Court, which case, WE, the Guernsey Tax Tribunal who heard the appeal, have hereby stated and signed accordingly.

G

THE QUESTION:

For the opinion of the Court is whether the Tribunal was wrong in Law in concluding, on the basis of the evidence put before it, that the profits of £849,691 arising from the sale of the share-holding in Bellfield Ventures Inc. constituted income in the hands of the Appellant."

5. APPELLANT'S SUBMISSIONS:

The following arguments were advanced by the Appellant, by Mr. Robilliard, for whose submissions as well as for those of his opponent, we were grateful.

1. On a proper construction of sections 73, 76, 78(1) and 79(1)(a)(ii) the Tax Tribunal's only option where the Administrator's assessment, as was the case, described the income as miscellaneous income and the case advanced before the Tribunal was that it was miscellaneous business income, was to set aside the assessment and to direct the Administrator to make a fresh assessment.

   This was on the basis that the two forms of income were distinguished in the statute and that each had different incidents. We reject this submission.

It seems to me that the core of an assessment as recognised by section 73, is the quantification of the amount on which tax is chargeable and consequently the amount of tax chargeable thereon. This follows both from the vocabulary of section 73 itself and the clear implication of section 79(1)(a)(i) that the focus of the Tribunal's powers is on, in my judgment, naturally, how much if any tax is due. I reach that conclusion with relief, since quite apart from questions as to limitation which might arise on which we have heard no argument, the alternative conclusion would serve the ends neither of justice or of convenience, in circumstances where the debate at three Appellate levels had related to the Tribunal's findings that this was miscellaneous business income and to the propriety of that finding.

2. A breach of the rules of natural justice, to which the Tribunal is expressly made subordinate, in that the Appellant was unaware until the hearing before the Tribunal that the Administrator intended to rest his case on the three alternative scenarios which I have quoted, all of which led to the conclusion that the sums received were "miscellaneous business income."

It is however clear, from the affidavit of Advocate van Leuven, dated 24th March of this year, who appeared with Mr. Robilliard for the Appellant before the Tribunal-

(1) That the three possible scenarios were introduced by Mr. Gray for the Administrator in opening.

(2) That the Appellant was asked by his own advocate as to whether he wished to comment on matters which related, inter alia, to those three scenarios.

(3) That in any event he had opportunity to do so.

(4) That no application for an adjournment was sought on his behalf.

Further, as Mr. Robilliard said with candour, had an adjournment been requested, the Appellant's subsequent response at any notionally adjourned hearing to questions raised in relation to those three scenarios would have been likely to have been exactly the same as it was, that is to say, that he disputed all three of them.

In those circumstances I take the view that any breach of natural justice, as to which no finding is necessary, was, and was quite sensibly, waived.

3. The Administrator's submissions were inaccurate and objectively misleading.

Though Mr. Robilliard described this as a procedural point it seems to me that this was a substantive point. If the Tribunal adopted the Administrator's submission then there may be grounds for interference, but if not, not. Therefore I reject that ground of appeal as well.

4. The Tribunal's conclusion was unsustainable on the test in Edwards v. Bairstow.

Of the four submissions ventilated it was this that seemed to me to be the only one which had true substance and I now address it separately.

6. POSSIBLE APPROACHES OF THE TRIBUNAL:

One can discern two lines of approach that were in theory open to the Tribunal. On the premise that the taxpayer bore an obligation to supply information to the Administrator on matters to which he would be uniquely privy, and on the basis that the onus lay upon the taxpayer to dislodge an assessment already reached, the Tribunal might have found the following facts and found them to be significant.

(1) There was no evidence as to how Bellfield's shares increased in value in less than two and a half years from £309, the expense of the formalities of formation, to £850,000.

(2) Such increase was prima facie astonishing, if not incredible. In any event it called for explanation which was absent.

(3) If, as the Appellant claimed, he knew nothing or little about the value of the shares, how could he estimate what was a fair price for the Bellfield shares?

(4) Both Bellfield and Gamp were Panamanian companies which shared addresses. The Appellant had, on any view, a connection with each, had on any view, provided services for each, but was for whatever reason, unforthcoming about the detail of his connection, or the volume or the nature of the services, which was, itself, suggestive of a far larger degree of connection and involvement then he was prepared to acknowledge.

On that footing the Tribunal might have concluded that the Appellant had failed to disturb the Administrator's assessment, and to the extent that this resulted from the Appellant's decision to keep his cards close to his chest, he was the author of his own misfortune.

Alternatively, the Tribunal might have approached the matter in this way: On the premise that the Appellant was by necessary implication, if not expressly accused of making a deceptive return (a matter which I shall elaborate here shortly hereafter) the Tribunal might have found the following facts, and found them to be significant:- A

(1) On the face of it the agreement was, as it purported to be, an agreement for the purchase and sale of shares for good consideration.

(2) There is no reason why the Appellant should not have been given a 40% interest in Bellfield, both as an incentive to assist in its business and as a quid pro quo for any services rendered in connection with that business. This would be a not unusual arrangement. B

(3) There would be no reason in those circumstances why the Appellant should be privy to all Bellfield's activities or have any insight or detailed knowledge of the value of its, and in consequence of his, share-holding.

(4) Given that the Appellant was on any view a debtor of Gamp, the price offered by Gamp for the shares, which discharged that debt, and left him with a healthy profit, would have been more than satisfactory to him. C

(5) There was no evidence that the Appellant provided other than legal services to Gamp, or services by way of introduction of clients to Bellfield, for which remuneration of the order of £400,000 would by itself be normal.

D

(6) There was no reason to believe that a solicitor against whom, in the hallowed phrase "nothing was known" would be guilty of deception.

(7) There was no evidence that the Appellant had, in fact, declined to co-operate with the Administrator or answer such questions as were put to him both before and at the hearing itself.

E

On that footing the Tribunal might have concluded that there was no basis for determining that the Appellant had been dishonest or that his description of the material transactions should be other than accepted at its face value.

7. ACTUAL APPROACH OF THE TRIBUNAL:

How did the Tribunal in fact approach this matter? I have already quoted from key paragraphs of the case stated. In my view, regrettably, the Tribunal did not adequately discharge its statutory task which, under section 80(3) of the Law, is to set forth the facts and the determination. Such requires, in my judgment, findings of fact where the evidence is susceptible of more than one interpretation and determination as to the tax consequences of those findings of fact. This is conformable both with the language used in the sub-section and with the perceptible statutory purpose, that both taxpayer and Revenue should know what conclusion the Tribunal has arrived at and why. This would satisfy the imperative for fairness, enable either party to decide whether to appeal, and if so, on what grounds, and assist the Appellate body in its deliberations. As Mr. Justice Vinelott said in the case of Carvill v. Inland Revenue Commissioners "The Times" LR 24th January 1996, on analogous English legislation:- F G

"(ii) Parties were entitled to expect that Commissioners would in the case stated make findings covering the matters relevant to the arguments to be adduced on the appeal."

A

In my judgment the Tribunal did not do so.

As to its determination, it is unclear, in my view, whether the Tribunal found that the disguised remuneration was for services provided to Bellfield or to Gamp or to both. The language of the determination which I have quoted provides material for all constructions but is compelling of none, and is generally redolent of ambiguity.

B

As to findings of fact, paragraphs 4 and 5 of the Case Stated set out the Statement of Agreed Facts together with the Appendices. The Statements of Agreed Facts were, of course, as the title suggests, facts, but they were by themselves unilluminating. The Appendices were no more, in my view, than undigested evidence. I note in particular that the correspondence between the Appellant and his advisors and the Administrator was incomplete, no doubt as a result of a genuine desire not to over burden the Tribunal. In this instance however, such economy impaired its utility. The Tribunal nowhere indicated how they analysed the documentation nor what conclusions they drew

C

from them.

To return to the structure of the Case Stated, paragraphs 8 and 11 recited the arguments advanced on behalf of Mr. Gold, the Appellant. Paragraphs 10, 12 and 15 recited the arguments advanced on behalf of the Administrator. Paragraph 9 summarised the Appellant's evidence but made no particular finding thereon. Paragraph 13 which is the key to the Case Stated contains, in my respectful view, no less than five conclusory statements.

D

(1) That the proceeds of the sale of the share-holding in Bellfield Ventures constituted miscellaneous business income;

(2) that what Mr. Gold received from the sale of the shares constituted disguised income;

E

(3) that the profit on the sale of the shares was in exchange for services which Mr. Gold rendered to the company free.

(4) that the profit on sale was disguised remuneration and not capital gain;

(5) that Mr. Gold in fact received disguised remuneration in the form of a substantial profit on the sale of the shares.

F

The second conclusory statement is elaborated by the observation that it was "supported by the evidence presented" but there is no identification of what evidence nor any explanation of how such unidentified evidence supported that conclusion.

The third conclusory statement referred to a paragraph in the letter of 30th November 1992, from the Appellant to his fiscal advisors, St. Clair Jacobs, which states only:-

G

"This company..." that is Bellfield "... was formed for the purpose of supplying services and entering into transactions outside of Guernsey and my share-holding was to give me an interest in the company on the basis that I would be making certain introductions to off-shore companies and other contacts and advising generally."

Otherwise, apart from reciting, as I have quoted, that they did not accept Mr. Gold's submission that "He knew very little about the shares and at the time of the sale he was unaware of their value", therefore implying that he had more knowledge, but not what, and that they found that he had provided services to "the company", but not which, no other facts were set out in the dispositive part of the determination. It is a matter of regret that the Case Stated was, in my judgment, in an inadequate form. We were told from the Bar that some efforts were made to ensure that it was in better form, we did not explore this in any detail, suffice it to say that such efforts as were made, and we have no doubt that they were made, they were in the event unavailing.

I contemplated exercising powers to remit the case to be sent back for, in the language of sub-section (7) of Section 80: "Clarification or amplification", but I concluded that it was likely to be a vain exercise given that more than two years has elapsed, and that not all Members of the Tribunal are still in post. I do not for my part underestimate at all the task that is faced by a lay Tribunal constituted in accordance with the provisions of Schedule 3, and compounded in this particular instance by the absence of any tape-recording of the proceedings and the illness of the Clerk at the time when the Case Stated came to be drafted. I nonetheless respectfully encourage the Tribunal for the future to perform their statutory duty to the letter, and any parties who appear before them to give appropriate assistance to the Tribunal by, for example, inviting them to make findings as to particular facts perceived to be relevant.

8. CONCLUSION:

I shall assume that the Tribunal's determination that Gamp was paying the Appellant was for services rendered to Bellfield, in which case Gamp would have been its agent, or to Gamp in which case Gamp would have paid as principal or to both. On that general assumption the question arises whether any facts were found which could support that conclusion within the perimeters of the test laid down in Edwards v. Bairstow. At this juncture it is necessary to be reminded that the allegations against the Appellant, however delicately described, are ones of deception.

If a taxpayer puts forward a transaction as a straightforward purchase and sale of shares knowing that, whatever its form, its substance is remuneration for services rendered, he cannot be doing other than seeking to deceive the Revenue. He is not telling the full story and by telling a half truth, he is suggesting an untruth. Albeit with misgivings I have come to the conclusion that the Tribunal has simply not been able to sustain its conclusion. Its statement that they disbelieved the Appellant's evidence about his ignorance of share value is in itself unexplained and is in any event ambiguous. Did he know that the shares were of a high or low value, or that the value had increased, diminished or remained static since he was given them?

The "particulars" said to support the conclusion that the share sale purchase agreement was not what it was purported to be and hence dishonestly presented would be quite inadequate to support a pleaded case of fraud. I cannot, for my part, sensibly allow a significantly lower standard to prevail in this context. While, if the option had been realistically open to me in law and in fact, I might have preferred to make an order which required the Appellate process to recommence form the start on a proper basis, in all the circumstances I am compelled to the conclusion in my judgment that this assessment ought to be annulled.

J.G. NUTTING, QC: I agree.

C.S.C.S. CLARKE, QC: With equal misgiving to those expressed by the President I also agree. The details given by Mr. Gold of the activities of Bellfield and Gamp and the services provided by him were exiguous, as were the findings of fact of the Tribunal. A taxpayer who is short on explanation to either the Revenue or the Tax Tribunal inevitably runs the risk that adverse findings of facts will be made and that adverse conclusions will be drawn against him. Had the Tribunal approached the matter in the first of the two ways referred to by the President, the lack of information from Mr. Gold could have been of considerable significance, but as it is the paucity of some of the information provided by him cannot make good the deficiencies in findings of fact by the Tribunal which in so far as they can be discerned at all, do not in my judgment support the conclusions, themselves obscure, which they were said to underpin.

AADVOCATE ROBILLIARD: Sir, there are no costs in the Tribunal. I would ask for my costs in the Royal Court and in this Court sir, and I would underline the fact that the main argument was, of course, the same in both Courts, sir.

H.M. COMPTROLLER: All I would say in response to that is it seems to me from your judgment, for which we are most grateful, that in a sense the Administrator has won three-one and been pipped at the post by a technical error by the Tribunal. I make that representation in conjunction with recording that the main argument below was, of course, my friend's submission that it was up to the Administrator to produce evidence before the Tribunal which you have quite rightly said is not so. So I don't anticipate that I will succeed in my opposition, but I do register opposition to an award of costs.

M.J. BELOFF, QC: Can I just ask as a technical matter, if the order for costs were made against you that would come out of public funds?

H.M. COMPTROLLER: It will, sir.

M.J. BELOFF, QC: Yes.

(Pause whilst Judges confer)

M.J. BELOFF, QC: Do you wish to say anything more?

ADVOCATE ROBILLIARD: No, sir.

M.J. BELOFF, QC: We propose to give to the Appellant his costs in this Court and half his costs before the Royal Court, to reflect the submission that you have made.

H.M. COMPTROLLER: I'm obliged, sir.

M.J. BELOFF, QC: We're very grateful to you both for your assistance.

Assessment annulled.

145. [CIVIL DIVISION – APPEAL NO. 268]

21st JULY, 1999

KEITH BADEN CORBIN
v.
THE THROGMORTON TRUST PLC

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

Contracts - construction – accountancy term – definition – whether to be interpreted as at date of contract or by reference to subsequent changes in accounting practice

See paragraph 8.

J.M. Wessels, for the Applicants
J.P. Greenfield, for the Respondent

MR CLARKE QC: This is an appeal from the decision of the Bailiff on 26th January of this year, in which he determined a question as to the construction of a Put/Call Agreement dated 16th January 1987 adversely to the applicants Keith Baden Corbin ("Mr. Corbin") and Neal Mauger Duquemin ["Mr Duquemin"], one of whom, Mr. Corbin, now appeals.

The facts are these:-

Havelet Holdings Inc. ("Havelet"), now called Rayon Limited, is a Guernsey Company carrying on the business of company and trust administration. Until July of 1997 Mr. Corbin was its managing director.

In January of 1987 the Respondents, The Throgmorton Trust PLC, ("Throgmorton"), acquired a majority interest in Havelet, which in 1996 they sold. On 16th January 1987 Mr. Corbin, Mr. Duquemin and Throgmorton entered into a Put/Call option agreement relating to the ordinary shares of Havelet. By that agreement Throgmorton agreed with Mr. Corbin and Mr. Duquemin, amongst other things, that within 28 days of their ceasing to be employed by Havelet on a full time basis, either of them could require Throgmorton to purchase at the "Option Price" what were defined as the "Existing" and "New" shares.

The definition of the "Option Price" in the agreement had the effect that if what were referred to as "Option Profits" were less than the 1986 pre tax profits of Havelet and its subsidiaries, the Option Price should be the fair value of the shares. If, on the other hand, the Option Profits were greater than the 1986 pre tax profits of Havelet and its subsidiaries, the Option Price should be that produced y multiplying the Option Profits by a multiple of not less than 10.5 together with an additional 0.5 for each one hundred thousand pounds by which those profits were greater than the 1996 pre tax profits, up to a maximum multiple of 14, and then dividing the result by the number of shares to reach a price per share.

The Option Profits were defined by the agreement as meaning "the consolidated profits of [Havelet] and its subsidiaries, before taxation, before extraordinary items, and after deducting all interest charges, expenses and provisions (including deductions or accruals in respect of profit sharing, bonus or incentive schemes, employee's share schemes and similar schemes) certified by the

auditors on the basis of the Group's Accounts for the latest financial year ending prior to the giving of a notice pursuant to Clauses 2, 4 and 5 of this Agreement, or as the case may be, the Group's Accounts for the financial year ending before the date on which the relevant Executive Shareholder ceases to be employed by the company, and in any such case" after adding back some specified consultancy fees.

The "Group's Accounts" were defined as "the audited consolidated accounts of [Havelet] and its subsidiaries for the relevant financial year, audited in accordance with Accounting Standards approved in the United Kingdom, and (to the extent consistent therewith) consistently with the audited consolidated accounts of [Havelet] and its subsidiaries for their previous financial years".

If you read the two definitions together, the Option Profits, so far as presently relevant, are:

> "the consolidated profits of [Havelet] and its subsidiaries before taxation, before extraordinary items, after deducting all interest charges, expenses and provisions... certified by the auditors on the basis of the audited consolidated accounts of [Havelet] and its subsidiaries for the relevant year audited in accordance with the Accounting Standards approved in the United Kingdom and (to the extent consistent therewith) consistently with the audited consolidated accounts of Havelet and its subsidiaries for their previous financial years."

On the 14th July 1997 Mr. Corbin required Throgmorton to purchase his shares in Havelet in accordance with the Put/Call Agreement. The relevant year was therefore the year ending 31st December 1996. Thereafter a dispute arose as to what were the Option Profits and, hence, the Option Price. In the Group's Accounts for the year ending 31st December 1986 the profit before tax is recorded as being £488,557. If, as Throgmorton contend, these are the Option Profits, then they are less than the 1986 pre tax profits as defined in the Agreement, which were £517,858.

Mr. Wessels, on behalf of Mr. Corbin, contends that in order to ascertain the Option Profits for the purposes of the Put/Call Agreement it is necessary to add to the figure of £488,557, a further figure of £60,000. This is the figure which appears in the 1996 accounts, on page 11, as part of Note 6, as an "Exceptional" item in respect of the permanent diminution of a freehold property owned by a subsidiary of the company Barbara Le Grande Limited.

If this argument be well founded, the Option Price will fall to be calculated not on the basis of the fair value of the shares, but by reference to the alternative formula contained in the Agreement.

The £60,000 figure is a sum which, on 20th May 1998, Deloitte and Touche reported to the parties would have been recorded as Extraordinary in the 1996 accounts having regard to generally accepted accounting practices as at the 16th June 1987, the date of the Put/Call Agreement. The figure appears, as I have said, in the 1996 accounts as an Exceptional Item, not as an Extraordinary Item.

The reason why the £60,000 figure does not appear in the 1996 accounts as an Extraordinary Item, although it would have done had those accounts been prepared in accordance with standards prevailing in 1987, is that those standards have changed.

In 1987 the Statement of Standard Accounting Practice No. 6 ("SSAP/6") August 1986 revision, provided the following definition of Extraordinary Items namely:-

"those items which derive from events or transactions outside the ordinary activities of the business and which are both material and expected not to recur frequently or regularly. They do not include items which though exceptional on account of size and incidence, and which may therefore require separate disclosure, derive from the ordinary activities of the business, and neither do they include prior year items merely because they relate to a prior year."

In a well known text book - "Generally Accepted Accounting Practice in the United Kingdom" - one example of an item which might be treated as Extraordinary under SSAP/6 is a provision for a permanent diminution in the value of fixed assets, including investments, because of an extraordinary event.

SSAP/6 defined "ordinary activities" as:

"any activities which are usually frequently or regularly undertaken by the Company, and any related activities in which the Company engages in furtherance of incidental to, or arising from those activities. They include but are not confined to the trading activities of the Company".

By the date when the Option was exercised the relevant accounting standard was Financial Reporting Standard No. 3, which superseded SSAP/6 and fell to be adopted in respect of all financial statements for accounting periods ending on or after 20th June 1993. It was issued in October of 1992. That standard defines both "Ordinary activities" and "Extraordinary Items".

"Ordinary activities" are defined as:

"any activities which are undertaken by a reporting entity as part of its business, and such related activities in which the reporting entity engages in furtherance of incidental to or arising from these activities. Ordinary activities include the effects on the reporting entity of any event in the various environments in which it operates, including the political, regulatory, economic and geographical environments irrespective of the frequency or unusual nature of the events."

"Extraordinary Items" are defined as:

"material items possessing a high degree of abnormality which arise from events or transactions that fall outside the ordinary activities of the reporting entity and which are not expected to recur. They do not include exceptional items nor do they include prior period items merely because they relate to a prior period."

This change of definition of Extraordinary Items, when coupled with the definition of Ordinary activities, severely curtailed the circumstances in which would be appropriate to classify an item in the accounts as extraordinary. As a result Extraordinary Items are now extremely rare.

This Standard, we were told, marked the final step in a change from adopting a "current operating performance" to an "all inclusive" concept of company income. It reflected the Accounting Standards Board's concern that increasingly significant sums were being classified as extraordinary which in reality were normal.

We have had the benefit of extremely helpful written submissions from Advocate Wessels on behalf of Mr. Corbin and Advocate Greenfield on behalf of Throgmorton, and also of oral submissions which lost nothing, indeed gained, by their brevity.

The task of the Court as in all questions of construction, is to discover and give effect to the intention of the parties as revealed by the words that they used read in the circumstances and context in which their agreement was made. As Lord Hoffman put it in Investors Compensation Scheme Limited v. West Bromwich Building Society (1998) 1 WLR 698 at 912:

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

Mr. Wessels accepted, and it was therefore common ground, that part of the background knowledge available to these parties was that the term "Extraordinary Item" was an accounting term of art (if accountancy be an art), and that accounting standards would be subject to change over the period of up to 15 years for which the Put/Call Agreement could remain operative. But, as he submitted, the mere fact that the parties realised that those standards might change does not necessarily mean that they agreed that that change should affect their bargain. In his contention what the parties sought to do by their definition of Option Profits was to fix, for the lifetime of their agreement, the meaning of Extraordinary Items as understood at 1987. If that was so, he said, the parties would enjoy a constant and known standard by which the Option Profits in whatever year could be measured; that standard would be fair, since it would eliminate items which might not truly reflect the underlying operating performance of the company; and most importantly, that standard would be the standard agreed by the parties. Per contra, if that was not done, the parties would be at the risk of changes in the definition of, Extraordinary Items, or even the disappearance of such items, effected by a third party and beyond their control.

Skilfully though these submissions were advanced, I am not persuaded that they represent the correct analysis.

In my judgment, the meaning of the Agreement that can be ascertained both from its terms and the background knowledge of the parties to it, is that Option Profits were to exclude "Extraordinary Items" in the sense that those two words bore at the time of the relevant accounts.

Although the knowledge of the parties as to the variability of Accounting Standards, and thus the meaning of Extraordinary Items, does not, of itself, compel the conclusion that Extraordinary Items in the definition of Option Profits means extraordinary by current standards, it is, when taken with the terms of the definition of Option Profits a strong pointer to that conclusion. Against a background of possible change in Accounting Standards, the parties did not provide for exceptional items to have the definition contained in SSAP/6; nor did they define it themselves in those or similar terms. Instead they provided that Option Profits were to be profits certified on the basis of Havelet's consolidated accounts audited in accordance with Accounting Standards approved in the United Kingdom. It is common ground that this must be a reference to current standards, that is to say those applying to the audit of the relevant year, since the statutory accounts could not properly be audited by reference to any other standards. Further, the latter half of the definition of Option Profits recognises that those standards may require auditors to act in a manner inconsistent with the basis upon which the accounts in earlier years had been drawn up.

The accounts, thus audited, are therefore, fundamental to the certificate. They are that upon which it is to be founded and without which it falls. This indicates, in my judgment, that the parties contemplated that Extraordinary Items should be those that were to be found in the consolidated accounts audited for the relevant year in accordance with the current accounting standards on which the certificate was to be based. A certificate of the consolidated profits of Havelet for 1996 before what would in 1987, but not in 1996, have been an Extraordinary Item,
would not, in my judgment, be a certificate of profits less Extraordinary Items on the basis of accounts audited in accordance with 1996 standards.

I do not ignore Mr. Wessels' submission that a certificate of Option Profits could be based on the audited accounts, if the auditor had used them as the base material for the certificate, whilst excluding from the certificated profits any item which those accounts revealed to be Extraordinary by 1987 standards.

There are, however, a number of difficulties with this submission. Firstly, it gives, to my mind, inadequate weight to the words "certified on the basis of accounts audited in accordance with Accounting Standards approved in the United Kingdom", which, in my judgment, contemplates that the entries in those accounts in respect of Extraordinary Items (if any) will be determinative.

Secondly, Mr. Wessels accepted that his submission had to be not only that Extraordinary Items, but, also, that all other items in the definition of Option Profits would fall to be certified, for the purpose of determining Option Profits, by reference to 1987 accounting standards. He was, I am sure, right to make this submission since it seems to me most unlikely that the parties, as reasonable men, would in 1987 have intended that in 1996 (say) Extraordinary Items should be judged by 1987 standards and everything else by 1996 standards.

If, however, the auditor, in certifying Option Profits, must apply 1987 standards to all the items positive or negative that might make up those profits it might well be necessary for him to go behind the audited accounts to the raw accounting material that underlay them - a process which I find it difficult to believe these parties may reasonably be supposed to have contemplated.

Thirdly, on this submission, the reference in the definition to current accounting standards is almost otiose. If the reference was omitted the statutory accounts would still be audited on the basis of current accounting standards. But, if the Appellant be right, those standards are in no way determinative of the make-up of option profits.

In my judgment it is apparent from the words used by the parties in their Agreement, read in the light of the knowledge that they can reasonably be regarded as having, that they were content for Option Profits to be determined by the standards prevailing in the relevant year, and for Extraordinary Items, whether by way of profit or charge, to be deducted or not according to the standards of the day.

For my part I see nothing unreasonable or uncommercial in such an agreement, which could work to the advantage or disadvantage of either party. Nor does the fact that, if those standards changed, they would do so at the behest of the Accounting Standards Body or some other similar entity strike me as something that the parties could not have been expected to bear with equanimity.

In my judgment the Bailiff was right for reasons that, with much greater economy, he gave and the Appeal should be dismissed.

M.J. BELOFF QC: I agree. In my judgment Mr. Wessels' able submissions were inappropriately informed by a measure of hindsight. It is precisely because, as he accepted and did indeed aver, reasonable persons in the parties' position would not have envisaged the dramatic change in and narrowing of the meaning of the phrase "Extraordinary items" in accountancy practice and parlance between 1987 and 1996 that they would have been content to adopt a flexible rather than a fossilised meaning of that phrase in their Agreement of the former year. Otherwise I respectfully associate myself in full with the reasoning of my brother Clarke.

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

ADVOCATE J.P. GREENFIELD: In those circumstances Sir, I'd ask for an order for costs.

ADVOCATE J.M. WESSELS: I accept costs for the event in this case Sir.

M.J. BELOFF QC: It will be so ordered.

ADVOCATE J.P. GREENFIELD: Thank you Sir.

Appeal dismissed.

146. [CIVIL DIVISION – APPEAL NO. 269]

29th NOVEMBER, 1999

KATHLEEN EDNA SMITH
v.
VINCENT ROGER HELMOT and SONIA HELMOT

Before: SOUTHWELL (PRESIDING), SMITH and GOLDRING, JJ.A

Appeals – appeal to Court of Appeal from Royal Court – application for extension of time – appeal against judgment for payment of costs relating to previous proceedings – issue of fresh proceedings

See paragraph 3.

The applicant in person
D G Le Marquand for the Respondents

P.D. SMITH, QC: In this case the defendant, Kathleen Edna Smith, seeks an extension of time to enable her to appeal a judgment of the then Deputy Bailiff of 19th February, 1999 ordering her to pay to the plaintiffs, Vincent Roger Helmot and Sonia Elizabeth Helmot, £4,729.25 and costs.

The sum of £4,729.25 comprises £2,986.75 in respect of the costs of the trial between the parties in the Royal Court and £1,742.40 being the costs of the defendant's unsuccessful appeal to this Court.

The defendant's application for extension of time was heard on 29th November, 1999. Miss Smith appeared in person and Advocate D. G. Le Marquand appeared for the plaintiffs. We refused the

defendant's application and indicated that we would state our reasons at a later date. This I now do in this, the judgment of the Court.

The defendant gave notice of appeal on 26th February, 1999 well within the period of one month prescribed by Rule 3 of The Court of Appeal (Civil Division) (Guernsey) Rules 1964. However, she did not lodge the documents required by Rule 8 (1) to be lodged with the Registrar within four months of setting down. Rule 9 reads:

> "If the appellant has not lodged with the Registrar all such documents and exhibits as he is required to lodge with the Registrar under paragraph (1) of the last preceding Rule –
>
> (a) within the time limited for so doing under that paragraph;or
>
> (b) where the time so limited has been extended or abridged by an order made under Rule 17 of these Rules, within the time limited for so doing under that order;
>
> he shall be deemed to have abandoned his appeal."

Miss Smith's application may be viewed as one to extend the time limit prescribed by Rule 8(1) or as one to extend the time for appealing prescribed by Rule 3 on the basis that by reason of the effect of Rule 9 Miss Smith's original appeal must be deemed to have been abandoned and she must start again. Nothing of substance appears to turn on the choice of these alternatives. The applicable principles would appear to be the same either way. For my part, I consider that the more logical view is that this is an application to extend the time limit in Rule 8 (1).

In this particular case there are essentially two matters to be considered. First, the reason for the delay. Secondly, the merits of the proposed appeal.

As far as the first is concerned, Miss Smith has issued fresh proceedings against the Helmots contending that a fence erected by them encroaches onto her premises. Miss Smith candidly admitted that she wanted to delay dealing with the Helmots' judgment and, therefore, prosecuting her appeal in the present matter until her fresh proceedings have been disposed of.

In my judgment this is not a reason upon which Miss Smith may properly rely. Whatever the outcome of the fresh proceedings she will remain liable to pay the Helmots' costs of the original proceedings in the Royal Court and in this Court. Miss Smith appears to believe that the fresh proceedings may somehow result in reversal of the decisions against her in those original proceedings but, of course, this cannot be the outcome. Thus, there is no justification for delaying what would be the completion of those original proceedings.

Turning to the merits of the proposed appeal it is apparent that what Miss Smith objects to is not the actual quantification of the costs awarded against her but the fact that she has been ordered to pay costs to the Helmots. Essentially she has little or nothing to say about the amounts claimed or awarded. She has not sought taxation and although she did appear before the Deputy Bailiff she does not appear to have specifically challenged any of the items in either bill. Rather, her objective seems to have been to protest against the outcome of the original proceedings. It follows that I am unable to conclude that Miss Smith's proposed appeal has any merit.

The matters to which I have referred are sufficient to dispose of Miss Smith's application. However, in argument Mr. Le Marquand raised two additional points. First, that as Section 15 (c) of The Court of Appeal (Guernsey) Law, 1961 provides that an appeal to this Court shall not lie *"without the leave of the presiding judge of the Court making the order, from any order made with the consent of the parties or as to costs"* we would not have jurisdiction to entertain the defendant's proposed appeal, the Deputy Bailiff not having given leave. Secondly, that the defendant's entitlement to redress was limited to requesting the Bailiff that the costs be taxed under Rule 7 (1) of The Royal Court (Costs and Fees) Rules 1990, an option Miss Smith did not exercise.

In my judgment it would be inappropriate to rule on these additional points without having the advantage of hearing the arguments from both sides advanced by counsel. In any event, ruling on them is not necessary to enable the defendant's application to be disposed of.

Application for leave dismissed.

147. [CIVIL DIVISION – APPEAL NO. 275]

10th JUNE, 1999

INSINGER TRUST (GUERNSEY) LIMITED

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

Trusts - charitable trust – power of the Royal Court to declare a trust to be charitable

See paragraph 94.

M J S Eades, for the Appellant

THE PRESIDENT: Insinger Trust (Guernsey) Limited ("Insinger") is the trustee of the FDS Charitable Trust ("the Trust") established in Guernsey by a pharmaceutical company under the terms of a Deed or Declaration of Charitable Trust made on 27th October 1998. The Trust is intended to be irrevocable. The objects of the Trust are set out in Clause 3 of the Deed which provides as follows:-

> "Objects:
>
> The Trustees shall hold the capital and income of the Trust Fund upon trust to apply the income and all or such part or parts of the capital for or towards the advancement of education and research in any or all of the fields of medicine, ecology and pharmaceutics at such time or times and at such places in such manner as the Trustees may in their absolute discretion think fit provided that the Trustees may at their absolute discretion for the period of 21 years from the date of this Deed instead of applying the income of the Charity in any year accumulate all or any part of such income at compound interest by investing the same and the resulting income in any of the authorised investments and hold the same as an accretion to and as part of the capital of the Charity without prejudice to their rights to apply the whole or any part of such accumulated income in any subsequent year as if the same were income of the Charity arising in the then current year."

I also quote from Clause 6 of the Deed, which is entitled "Further Powers". The opening words of Clause 6 are:-

> "In furtherance of the charitable objects but not further or otherwise the Trustees shall have the following additional powers..."

And sub-Clause (k) reads:-

> "(k) to do all such lawful acts or things as shall further the attainment of the objects of the Charity and so far as may be necessary to do such acts or things in collaboration with any person body institution authority or otherwise provided that no part of the Trust Fund shall be used or applied for a non-charitable purpose;"

There is no register of charities in Guernsey, and there is no special body to administer or regulate charities in Guernsey. The regulation of charities is therefore a matter for the Guernsey Courts. Before the passing of the Trusts (Guernsey) Law 1989 ("the 1989 Law") trusts including charitable trusts were governed by Guernsey customary law. Since the passing of the 1989 Law, there is a statutory framework, in which charitable trusts are dealt with specifically in a few respects, in particular as regards the introduction of the Cy-prés rules. The Trust is recognised by the Guernsey Tax Authorities as being a charitable trust and therefore not subject to taxation in Guernsey. But apart from that recognition a trustee of a charitable trust has no means of establishing its charitable status except by asking the Guernsey Courts to make a relevant determination.

The Trust has made donations to a scientific body in Russia, so as to enable that body to pay sums to scientists and others engaged in research, research which otherwise would cease to be carried on due to lack of funds. Such donations do not make the recipient or recipients "beneficiaries" of the Trust. There are no beneficiaries of the Trust, which is established for charitable purposes, and for no other purposes. If the Trust were to be administered otherwise than for its charitable purposes, it would naturally be for H.M. Procureur to bring that matter before the Guernsey Courts so that the trustee could be restrained from using the funds of the Trust otherwise than for the charitable purposes laid down in the Declaration of Charitable Trust.

The proper law of the Trust is Guernsey law: See S.3(b) of the 1989 Law, and the definition of "charitable" in Clause 2(b) bis of the Deed.

The Trust is a charity under Guernsey law. The trustee of the Trust needs a decision of the Guernsey Courts that the Trust is a charity. The Royal Court has refused to grant an appropriate declaration, even though the Royal Court has itself recognised that the Trust is a charity. The Royal Court has held that it does not have the power to grant that declaration.

In my judgment the Royal Court does have that power.

Suppose, first, that this question had arisen before the 1989 Law was passed, so that it had to be decided on the basis of Guernsey customary law, without there being any statutory provisions. The Courts of Guernsey then had the power to decide, for example, whether a trust was a valid charitable trust or not, and if it was charitable, how it was to be administered as a charity, and any other question arising in relation to the charity. Clearly under Guernsey Law the Courts could have made a declaration that a particular trust was a charitable trust. That power has not been taken away by the 1989 Law; see S.74 (2)(b) of the 1989 Law, which preserves powers of the Guernsey Court existing independently of the 1989 Law. "Court" is defined in S.23 (1) as "the Royal Court sitting

as an Ordinary Court". Pursuant to the Court of Appeal (Guernsey) Law 1961, Part II, this Court is able to exercise on an appeal all the powers of the Royal Court.

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Accordingly, in pursuance of the power which this Court has under Guernsey customary law, I would make the necessary declaration that the Trust is a charitable trust under Guernsey Law.

I turn, secondly, to the statutory position. The Royal Court held that S.63 of the 1989 Law did not give it power to make the declaration. Section 63(1) provides that on the application of any person mentioned in sub section (2) (who include H.M. Procureur and a trustee) the Royal Court may-

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"(a) make an order in respect of:-

(i) the execution, administration or enforcement of a trust..."

I stop there to consider the position if an application were made in respect of the administration of a trust. Suppose that the preliminary question arose as to whether or not the trust was charitable. The Court would have to decide this question before deciding as to the administration of the trust. The
C Court could include in its order a declaration as to whether or not the trust was charitable.

Continuing with S.63 the Royal Court may:-

"(b) make a declaration as to the validity or enforceability of a trust."

Suppose that the validity of a trust was in dispute, and that again the preliminary question arose
D whether it was charitable or not. The Court would have to decide this preliminary question, and if it held the trust to be charitable, would if appropriate, declare that it was charitable. That would in those circumstances be an essential part of the declaration as to the validity or otherwise of the trust.

I turn to S.11 which is also relevant. Under that section an application to the Court as to the validity or enforceability of a trust may be made by any person mentioned in S.63(2), i.e. including H.M. Procureur and the trustee: see S.11(6). Section 11(2) provides that a trust is invalid and
E unenforceable to the extent that (inter alia):-

"(c) it has no beneficiary identifiable or ascertainable under Section 8(1), unless it is created for a charitable purpose."

Section 8(1) deals with the way in which beneficiaries are to be identifiable or ascertainable, and I need not quote its terms.

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Suppose that, as with the Trust here, there were no identifiable or ascertainable beneficiary or beneficiaries. The question would then arise whether the trust was "created for a charitable purpose." If the Court held that it was so created, the Court could in its discretion declare that the trust was charitable.

So, with great respect to the Royal Court, I conclude that, contrary to its decision, the power to
G make a declaration that this Trust is a charitable trust arises both under Guernsey customary law and under the terms of the 1989 Law. I would therefore allow the appeal, and grant the declaration sought by Insinger that:-

"The FDS Charitable Trust is a validly constituted charitable trust under the Laws of the Island of Guernsey."

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And that:-

"The objects of the FDS Charitable Trust are those of a non-commercial, non-profit organisation having the charitable purpose of the advancement of education and research in the fields of medicine, ecology and pharmaceutics."

There is one further point. Insinger as the trustee of the charitable trust correctly gave notice to H.M. Procureur, who is a necessary party to any application of this kind concerning a charity. Naturally H.M. Procureur may not wish to appear before the Court, but notice must be given to him. H.M. Procureur was aware of the application by Insinger and of this appeal, and indicated by letter his support for both. I make this point as to the requirement to give notice to H.M. Procureur so that no misunderstanding may arise from observations made when leave to appeal to this Court was granted.

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SIR PHILIP BAILHACHE: I agree and have nothing to add.

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

Appeal allowed.

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The Historical Mutability of Congé: a Note

by Dr Darryl Ogier, States Archivist

The Bailiff's recent judgment on the appeal De Carteret v. Surcouf[1] says, at p. 22:

> "At some time in Guernsey the Crown and the private seigneur seemed to have recognised that it would not be expedient to continue to levy a thirteenth of the purchase price in perpetuity and the reduced two per cent congé was brought in."

When this payment of two per cent of the purchase price of realty replaced the payment by the purchaser of a full treizième, and why, is an interesting question.

It should be said at the outset that no firm answer as to date can be given, other than to say the reduced amount was current in the seventeenth century. Lord Hatton (Governor 1670-1706) referred to payments of less than a thirteenth:

> "...Whoever will take to rent for ever or purchase Houses or lands, or any perpetuall rent arising from such houses or lands as are part of any fief in the Island, must first obtaine a *conge* or leave soe to doe from the Lord of the fief, for which he is to pay the *thirteenth part* of the value of whatever his purchase comes to if it be upon any private man's fief, the owner of the fief gives *Congé* and receives the *trezieme*, but if it be upon the King's fief the King's receiver gives the *Congé* and receives the trezieme; in which usually the extreamity is not exacted, but some allowance made to incourage purchasers. ...*two Crowns* is usually taken for the trezieme of a *quarter* of wheat rent, and for a purchase bought with mony; *three forths of the full 13th* is commonly taken; as if the price payed be 52 livres there is usually taken for the tresieme 3 livres, whereas 4 would be the full 13th penny. .....[2]

This suggests the Receiver General and private seigneurs pursued a "jam today" policy, accepting less than their full due as a means of encouraging parts or the whole of purchases to be made for cash. Such would require congé (and hence payment), as opposed to transactions made solely for rentes, which would not; at least not until redemption, when and if ever that might take place.

Thomas Le Marchant (d. 1684), who was Hatton's tutor, does not mention the lesser sums in his discussion of the Approbation des Lois' treatment of Book V, Chapter 8 of Terrien's *Commentaires*, but I do not think this precludes the possibility that similar compromises were made in his time.[3]

An ordinance of 17 January 1814 sets out the penalty for the offence of applying for a congé to a Seigneur other than the one upon whose fief the property rests. This apparently was a reaction to a practice by fraudulent purchasers of "shopping around" to find who might issue the cheapest congé for presentation in Court, irrespective of fief.[4]

The two per cent rate is mentioned in a report of Jean Carey, H M Receiver General, to the Treasury, dated 25th April 1835:

> "...It was originally the 13th part of the purchase money disbursed on all sales of real property but for a great length of time past has been commuted by the mutual agreement of

> the parties only, without being established by any known law, to two per cent on the purchase-money for the redemption and purchase of corn rents, - to about three per cent on that of money rents at their present value – and to three per cent on the purchase-money paid for landed property when it is acquired without reference to rents of any sort....[5]

Prises à rente, as completed in the twentieth century, expressing as they did "the redemption and purchase of corn rents" attracted the two per cent payment. I imagine the three per cent equivalent was forgotten, due to the infrequency of transactions in money rents in recent times. Nor am I sure that I have ever seen a conveyance of "landed property when it is acquired *without reference to rents of any sort*" completed in the nineteenth or twentieth century, before 1969.

Thus the proportion of any redemption price demanded for congé on a prise à rente appears to have diminished over the years, from the original treizième, to two écus per quarter in Hatton's time. It possibly remained negotiable with private seigneurs c. 1814, and was set at two per cent, on Crown fiefs at least, by 1835.

This remained the situation, although "without being established by any known law", and some readers will remember how as lately as the nineteen-eighties Cecil de Sausmarez exercised a certain discretion in respect of congés issued on Fief Sausmarez. Recent Receivers General have not imitated this. On the other hand, neither have they sought to levy three per cent for congé in respect of the modern style conveyance, which the remarks of 1835 suggest they would have claimed in another era.

[1] Judgment of 24 September 1999, on appeal from the Court of the Seneschal of Sark (see paragraph 128).

[2] Greffe: Lord Hatton's Treatise (Greffe Collection no. 58), pp. 109-10 (Abbreviations expanded). For the attribution of this work to Hatton see D M Ogier "The Authorship of Warburton's Treatise", *Transactions of La Société Guernesiaise* xxii (1990).

[3] T Le Marchant, *Remarques et animadversions sur l'Approbation des Lois et Coustemier de Normandie usitées es jurisdictions de Guernezé et particulierement en la Cour Royale de la ditte isle* (J Guille and P Le Cocq [eds], 2 vols, Guernsey 1826), i, pp. 142-5.

[4] *Ordonnances* vol. ii, p. 141.

[5] Island Archives Service: Receiver General's Letter Book 1835-41 (RG 7-7), pp. 2-3.

The Status of Women in Norman Law Before the Revolution

by Sophie Poirey

When we refer to Norman Law, we mean the law which applied in Normandy as from the creation of the Duchy in the Xth century up to the French Revolution and even for a short time after that. We are talking in essence of customary law, inherited to a large degree from the Franks, who were ethnically predominant in that part of Neustria which was destined to become Normandy.

Originally communicated by word of mouth, Norman customary law was nonetheless the subject of two authoritative-sounding treatises, which were published anonymously by lawyers who had their own private motives for drafting them. These treatises were designated, in the trade, by the term *coutumier.*

The first Norman coutumier, *Le Très Ancien Coutumier* dates from the beginning of the XIIIth century. A very thorough and quite remarkable work, it was nonetheless followed some fifty years later by a second coutumier drafted in Latin by a jurist from Le Cotentin, the *Summa de legibus*, which was soon to be followed by a French version of the same work, *Le Grand Coutumier de Normandie*. This latter work was a unique document of the day in medieval France, and from it was born the law as practised in the province up to the end of the XVIth century and which survives to this day in the Channel Islands.

At the end of the XVth century the monarchy, which had always intended, if not to abolish, then at least to take control of and standardize provincial law, now commissioned an official draft law which was to encompass all of the customary laws. But the Normans, anxious to avoid any unwarranted interference in their affairs, were the last to obey the royal command, and the official Coutume, finally promulgated in 1583, for the most part picked up on, and in places followed, sometimes word for word, the spirit and provisions of the *Grand coutumier* of the XIIIth century.

Norman law is founded upon a combination of the medieval coutumiers and the *Coutume* of 1583, and also on legal doctrine as expressed by commentators who explained and threw light on what were sometimes obscure legal points, as well as on jurisprudence, notably that of the *Échiquier* and then of the *Parlement* of Rouen.

The Normans' attachment to their *Coutume*, and their wish to conserve its principles, gave rise to its being one of the most specific yet elaborate of all the provincial models of pre-revolutionary law. The principal characteristic of the Norman *Coutume* is its insistence on the family. It favours the institutions which encourage the conservation of the property of the ancestors.

Contrary to our modern law, derived from a *Code Civil* which regards property ownership from a strictly individualist point of view, medieval law regards property as being tied to the general interests of the family for which it provides support. A property owner's rights are purely transient, the property itself having to remain within the family or return to it. Thus customary law does not take account of property in terms of a unit. It is not possible to assess the value of everything one owns by way of one single set of rules. Therefore a distinction is made between *personalty*, which is considered valueless, as in the adage *res mobilis res vilis,* and *realty*, the latter being subdivided into *acquêts*, where property has been purchased personally by an individual, and *propres*, where property has been inherited from forebears. It is the latter which carries the most protection, since it is considered as a bastion of support for the family and as having to be transmitted to succeeding generations.

These features are to be found in the majority of *coutumes*, but Norman law has established a system of protection which exceeds in its strictness that of customary law in other parts of France. Norman customary law is thus characterized by this specific protection of family property with the aim of preventing the loss of a family line of succession, such as would occur if inheritances were allowed to run sideways, or be diverted away from the line as a result of marriage, or as the result of a commercial arrangement. This protection gives rise to several consequences in regard to women's rights:

- Given that a woman cannot transmit the family surname to a succeeding generation, and that she may marry, she could well pass family property into the hands of an outsider. It is for this reason that she loses all rights to inheritance if she has brothers. Since she cannot be of use in conserving the stock of the original family, she is not therefore allowed to impound family property from her brothers who are carrying on the family line.

- Because she is considered as weak and needing protection against third parties, but equally from herself, the married woman does not exercise powers of ownership over *propres* during her marriage. Such powers are entirely exercised by her husband. Moreover the Norman *coutume* does not allow the common ownership of property between spouses. The aim is always to avoid the prospect of family property passing, via the marriage, into a different family line.

- For the same reason the widow, who remains an outsider to her husband's family line, cannot inherit from him, except for part of his personal estate which is considered, as stated above, to be negligible in the eyes of Norman law.

Despite this rigorous treatment reserved for the woman, it must nonetheless be remembered that Norman law also has the quality of being extremely protective and doubtless more so than certain other *coutumes* which accord to women a status which is essentially more privileged, but which provide less material protection. Thus:

- The girl benefits from certain protection as to her marriage and dowry, notably if she is orphaned and placed under the control of her brothers.

- The married woman is protected against mismanagement of her affairs by her husband since she is bound to retrieve her inherited realty upon the dissolution of her marriage, according to the rule known as *l'inaliénabilité dotale*.

- Finally the widow benefits from numerous advantages, the most financially profitable of which is the *dower*, a lifeline designed to enable her to enjoy rights of usufruct over her husband's inherited real estate.

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Let us thus follow the different stages of the life of a Norman woman under *l'Ancien Régime* as a girl, a married woman and then a widow, assessing these rôles in the light of their respective legal implications.

The 'inconvenience' of having brothers in Normandy

So much store was set on family property in Normandy that it was sufficient for one boy alone in a household for his sisters to lose *ipso facto* all their claims to inheritance. In fact, according to the *Coutume*: *the male is deemed to be older than the female.*

This severity which characterizes Norman customs is rooted in the origins of the *coutume* and the reasons for which it was created. Normandy suffered more than any other place from the scandinavian invasions, and when the province was ceded to the Norse invaders at the beginning of the Xth century, the local population was already attuned to the customs of the Franks, which were primitive and rudimentary in form. Whereas everywhere else in France these characteristics were moderated as a result of contact with legal systems which could be dubbed *savants*, i.e. Roman law and canon law, those same characteristics evolved in a much severer form in Normandy.

According to Article CCXLVIII of the *Coutume* of 1583, "*as to line of succession in regard to inherited realty, so long as there are males or descendants of males, the females, or descendants of females cannot inherit, whether they are in direct or collateral line*".

Whether nobles or commoners, young Norman women could therefore count themselves lucky when they were married off. Nevertheless their parents were not bound to provide a dowry. They were wholly within their rights if they gave only a bouquet and a "*chapel de roses*", i.e. the floral crown of the bride. As the Norman saying goes: "*a husband and nothing more, or he who does not wish to give a dowry does not do so*". And as the drafted *Coutume* was to add: "*...and if nothing was promised him at the time of his marriage, nothing he will get*" (Article CCL). The Normans in fact considered that a father had done his duty by his daughters when, by virtue of the marriage which he had contracted for them, he had guaranteed for them the hope of collecting the various advantages which were attached to it, notably the dower.

Of course parents would often of their own volition provide a dowry for their daughters, either through affection or because they did not wish them to be disadvantaged. After all, the prospect of finding only a bouquet of roses in the basket of wedding presents might have proved a dissuasion to the most ardent of suitors! As a purely moral obligation, the dowry was nonetheless limited in law by the *Coutume*. Girls were not in fact allowed to receive, all told, more than one-third of their father's or their mother's possessions. A father who was unwilling to divest himself of his assets too soon, could equally give his daughter nothing at the time of her marriage, but put her in a position of being "*à partage*". *La réserve à partage* was an act passed before a Notary which had the effect of allowing the daughter to enter the line of paternal succession as an heiress even if she had brothers. But, there again, since the father was thereby diminishing the amount of the brothers' inheritance, he was prohibited from disposing of more than one third of his estate even if he had only one son and whatever the number of sisters.

When a girl lost her parents, she would be placed, until the age of twenty-five years, under the guardianship of the eldest of her adult brothers. The latter, assuming the rôle of a father figure, had the same authority as his father over his brothers and sisters, with the proviso that he fed, lodged, clothed and educated them.

Given, however, the fact that one cannot expect from a brother such care and regard for his sisters as they might have received from their parents, the Norman *Coutume* required him to take in hand their marriage prospects. He was required, on the one hand to procure for them husbands who were *idoine*, i.e. of similar social status to them (to avoid unsuitable matches) and a *mariage avenant*, i.e.

a suitable dowry. It is obvious that what was for the parents a mere moral duty became, in these circumstances, a civic obligation, requiring, if necessary, judicial sanction.

When she reached the age of twenty-five years, the as yet unmarried girl had the right to claim from her elder brother her *mariage avenant*, which she would take as an enjoyment, the full and entire ownership of which would come to her on the day of her marriage.

The amount of the dowry, *l'arbitrage du mariage*, which had been for a long time left to the discretion of the eldest brother was, as from the XVth century, and under the impulse of jurisprudence, confided to a family council composed, among others, of the grandparents, who were felt to be in a better position to evaluate objectively the needs of their grand-daughters. In order to determine the amount, the family council needed to take account of various criteria, in particular the social status of the girls, i.e. whether they were of the nobility or commoners, together with the quantity and the quality of property left by the deceased, with the overriding proviso that the sum to be fixed could never exceed one third of the value of such property.

This legal sacrifice of sisters in favour of their brothers aroused much criticism, particularly by jurists from Paris who dubbed the *Coutume* of Normandy "iniquitous". But the Norman jurists played the "for the greater good" card since, by giving preference to males, the *Coutume* favoured the family, not only in the transmission of the family heritage, but of the property which constituted the family's base.

But was the Norman woman's situation better when it stemmed from the authority of her father or from that of her brother, when it came to marriage?

The necessity for a careful choice of husband

Two essential characteristics enshrined the legal position of a married woman. On the one hand she found herself placed under the authority of her husband, and on the other hand her freedom to act was reduced. This situation is well described by a commentator such as Houard who stated that: "*from the moment the marriage has been celebrated, the wife is deprived of the right to act without her husband's authority*".

Once married, the woman passed from her father's or her brother's authority to that of her husband. This male domination meant that the wife's status was governed by that of the husband. She bore his title if he had one, and a married woman who was of age who married a man who was not of age would come under whatever guardianship to which he was subject.

Upon marriage the wife became the subject of her husband. The latter was in a position to enforce her obeissance by virtue of his *right of correction* which was at the very least excessive when one considers the limits placed upon it by the *Coutume.* A Norman woman had no right of complaint so long as her husband had not caused her blood to be spilt, caused her to be blinded in one eye, or broken one of her limbs!

Power over the person extended to power over her property. Apart from some personalty of which she retained ownership and which was at her disposal, such as her linen and personal jewellery, the married woman possessed nothing in her own right. Possessions inherited from her own family were controlled by her husband who had such possessions entirely at his disposal.

It would, nonetheless be wrong to view the Norman woman as an incapable being in the legal sense. It was rather a matter of reduced capability, in the sense that any action she took, in order to be valid, had to be authorized by her husband. Although the latter had control over her fortune, he had, in the eyes of third parties, to display a sense of responsibility in exercising such control.

A Norman woman could thus acquire a possession in her own right, but since her fortune was in the hands of her husband, she would, of necessity, have to acquire it with him, under penalty of the purchase being declared null and void. Similarly the married woman could receive an inheritance or a gift, but since the item could not be given to her without it falling into the hands of her husband, the latter, once more, would need to concur.

Thus the authority which the husband held over his wife, meant that, even when his own interests were not involved, nothing could be done without him or without his knowledge. On the other hand, Norman law rigorously protected the real estate of the wife under the rule known as *the inalienability of the dowry.*

The Normans refused to adopt the principle of ownership of property in common between husband and wife. This is because it seemed to them an equitable arrangement that the wife at least had the assurance that, if her husband were to predecease her, she would recover all the real property owned by her, i.e. property which she had brought into the marriage by way of her dowry, and in addition property which she might have acquired during the time of her marriage by way of inheritance or gift from her family.

It was thus that the *Coutume* was designed to protect the wife against any attempt at seizure or breaking-up of her property by the man who had control of it, namely her husband. Hence the Norman adage which sums it up: "*bien de femme ne doit jamais se perdre*" (a wife's property must never be lost).

Until the XVIth century the principle was rigorously applied, amd the wife would recover her property in the exact form in which she had owned it before her marriage. The effect of this was that any conveyance of her property to a third party during her marriage was expressly prohibited, even if she had been willing to consent to such conveyance. In the XVIth century the Parliament of Normandy passed the now-famous resolution known as the *arrêt de Cerisey.* Its effect was to modify a rule which had been largely breached in practice, so that the widow would henceforth recover her property, if not in its original form, then at least by retrieving the value of it from her late husband's estate. Additionally the widow was given recourse, if she was unable to recover the equivalent value of her property from her husband's estate, to an action known as "*bref de mariage encombré*" (i.e. by reason of diminished dowry) against the purchaser of her original property from whom she could claw it back.

The spirit of *le droit normand* is very well expressed by the commentator Basnage who acknowledges that "*although it is not within the spirit of our Coutume to give women an advantaged status, at least it safeguards what it gives them with all possible precision and forethought, and the Coutume does not allow them to suffer as a result of the bad behaviour of their husbands... In this province their complaisance and their love for their husbands is never prejudicial to their rights. Our Coutume is not a liberal one, but it does guarantee and preserve women's rights with much prudence and care*".

Some advantages of widowhood

It was, in short, widowhood which gave Norman women a certain autonomy. It was certainly the case that, as an outsider to her husband's line of succession, a surviving spouse was preceded as regards inheritance of family possessions by the children of the marriage or the children of an earlier marriage of the deceased, or, in the absence of direct descendants, by collateral members of the deceased's family or even his ascendants. But being a widow meant having certain material advantages which were particularly beneficial.

Firstly, as we have just observed, the rule of inalienability of property inherited by the woman from her own family, enabled her to retrieve her real property at least in value if not in kind. Additionally, she would inherit from her husband part of the personal and real estate which he had acquired during the marriage. Lastly, she would receive the wherewithal to live independently, by way of her *dower.*

Dower as an institution was widely accepted in all regions where the *coutume* applied, but especially in Normandy because of the strict way in which the status of women was defined. The whole of Section XV of the 1583 version of the *coutume* is devoted to this, and Norman women were particularly attached to it, as also were their husbands, who saw the *dower* as a guarantee that their wives would not be left penniless when they (the husbands) were no longer on the scene. The principle of the *Dower* arises from two institutions of the *Franks*: the *dos ex marito* which corresponded to the Germanic tradition of the dowry which the man brought to his future wife, and the *morgen gab* which was recompense for the loss of virginity of the new wife. On the morrow of the wedding night the husband would give to his wife a present of jewellery, followed by a present of real estate. The two institutions were to merge in the first half of the Xth century, to produce what became known as *le douaire* which consisted of a life enjoyment for the benefit of the widow over the property of her husband, possession of which would ultimately revert to the latter's heirs. Such life enjoyment was at the outset restricted to one third of the husband's property.

For one XVIIIth century commentator Roupnel de Chenilly, the *douaire* is "*recompense for the natural sacrifice of the pleasures of youth, of good health, rest and, almost always, one's freedom; it is therefore a token of gratitude rather than a generous present, a gratitude which needed to be faithfully observed, however, within the limits of customary law*".

In Normandy a woman acquired her rights of dowry as from the morrow of the wedding night in accordance with the rule *au coucher la femme gagne son douaire* culled from the *Grand Coutumier* and codified by Article CCCLXVII of the written *Coutume*. This wedding night test is not applied in the great majority of other French *coutumes* where the mere celebration of marriage is sufficient for the woman to acquire her rights of dowry. But in Normandy, according to the commentator Pesnelle, rights of dowry "*are only acquired by the woman once it can be presumed that the marriage has been consummated, i.e. by the couple going to bed*". In this way the Normans remained faithful not only to the *morgen gab* tradition of the Franks as adopted by the *Grand Coutumier* of the XIIIth century but also to medieval canon law according to which the marriage sacrament could only be validated by the *copulacarnalis*.

Customary law of the XIIIth century also taught, however, that the woman's rights to dowry acquired on her wedding night could be lost were she not present at her husband's side at the time of his death. This is described in another Norman adage "*au mal coucher, la femme perd son douaire*". Jurisprudence, however, would normally override this in certain cases. For example, if there were legitimate reasons for the wife's absence from her husband's death bed, she could not be

held at fault. It was in the spirit of the Norman laws that wives be punished only for marital estrangement, not for mere physical absence. This latter idea was codified by way of an addendum to Article CCCLXXVI of the 1583 *Coutume*. The effect of the Article as originally drafted was to deprive the wife of her dowry if she were absent at the time of her husband's decease. Article CCCLXXVII was therefore added, and the effect of this was to define what the *Coutume* meant by 'absence'. This addition read: "*when she has abandoned her husband without reasonable cause, or if there has been a divorce occasioned by the fault of the wife; but if the fault lies with the husband or with both of the couple, the wife will keep her dowry*".

It is thus that the husband's heirs would generally try to allege adultery on the part of the wife. Adultery was deemed to be a legitimate 'aggravating factor' in the abandonment of the husband.

In fact, a wife's adultery was considered as a particularly serious crime because, in the words of Roupnel de Chenilly, "*quite apart from the notoriety and guilt to which the wife exposes herself by her infidelity, particularly if she is a woman of rank, she is blatantly at risk of sullying the purity of an illustrious blood line by bringing into the family the fruits of strangers of ignoble stock.*"

The wife could equally lose her dowry *a posteriori*, that is to say having already received it - this could happen in circumstances where she was not properly discharging her responsibilities of management of the property which was the subject of that dowry. In such a case the heirs could apply to the Court for authorisation to take over the property in exchange for the regular payment of a 'rente' to the widow.

In Normandy a widow needed, in order to obtain her life enjoyment, to make application to the heirs. Everywhere else it was the heirs' responsibility to deliver it over to her. She could, of course, discover that the property that she had been destined to enjoy since the day of her wedding, had disappeared. In that event she had recourse in law to an action which had to be taken within a year and a day of the death of her husband, an action known as "*le bref de douaire encombré*" which permitted her to retrieve her property from the purchaser.

The last but not least of the advantages enjoyed by a widow, was that on remarriage she was allowed to keep a dowry which she had acquired from a first marriage. The church was indignant at the bestowal of such a favour, since it feared that, upon the winding-up of their late husbands' estate, widows would use their dowry as a bait to attract a new husband!

Conclusion

Such was the status of women in Normandy up to the time of the French Revolution, when all existing *Coutumes* were abolished. But in spite of the rigours of the customary law, the Normans, who were quite attached to their *Coutume*, had not asked for it to be done away with.

In the XVIIIth century Houard, in his celebrated *Dictionnaire de droit normand*, states that "*all of the provisions which are regarded as humiliating for women and girls, bear testimony to the respect and consideration they had inspired among the Normans. The mediocrity of the rights the Normans accorded to women was based on the principle of their presumed love of being in the background, of their work and of their modesty. Putting these three virtues together, one is not left wanting for much else*".

The Revolution did not set out to confer greater freedom upon women, in fact quite the reverse. On the eve of the Revolution, with some rare exceptions and in spite of the influence of the *salons*, the

philosophers of the *Lumières* movement set out unequivocally "to restrict women to their housework". As for the revolutionaries, they were to close down all women's societies and ban women from public speaking. And finally divorce - even if it existed in 1792 as a means of freeing women to leave "unfaithful husbands", it also served to liberate the latter from family ties which they could not stand any longer.

As for the *Code civil*, this was to prove even more anti-women than the old law. The authority of the husband, based on the rules of public order as much as a natural right, was reinforced. The lack of status of women became almost absolute. For example, she was not allowed to be a guardian (except of one of her own descendants) or to sit on a family council. And lastly the power of the husband was such that, if the wife decided to leave the marital home, she could be brought back by officers of the law and forced to "fulfil her duties".
Article 7 of the law of 30th *Ventôse* in the year XII of the revolutionary calendar was the death-knell for the provincial *Coutumes*. This was done in the name of making laws universal for the whole of France. Yet Norman law continued in the XIXth century to be applied without hesitation when it came to settling situations which had their origins prior to abolition. But perhaps we should turn to the Channel Islands in order to have glimpses of the way the laws of our ancestors are applied today.

Sophie Poirey is *Maître de Conférence* in History of Law at the Faculty of Law, Caen University.

Translated from the French by Geoffrey W. Mahy, *Officier dans l'Ordre des Palmes Académiques; President, Le Cercle Français de Guernesey*