Appeal against the remedy granted by the Court in a case of true ownership and innocent purchase.

[2020]GCA002

IN THE COURT OF APPEAL OF GUERNSEY
(Civil Division – Appeal No. 529/531)

Before:

John Vandeleur Martin QC, President
David Perry QC
Sir Michael Birt

Between:

GRAHAM EDWARD HINDLE **Appellant**

-and-

IAN KITCHING **Respondent**

Judgment handed down: 24th January 2020

Counsel for the Appellant: Advocate M G Ferbrache
Counsel for the Respondent: Advocate A M Ozanne

JUDGMENT

Perry, JA

This is the judgment of the Court

Introduction

1. At the heart of these proceedings is a motor car: a Jaguar XK 150 3.4 litre fixed head coupé, right hand drive, registration number 68 EAL ("the Jaguar"). It was manufactured sixty years ago, in 1959. Before the Royal Court, the Appellant, Graham Edward Hindle, brought actions in detinue and conversion against the Respondent, Ian Kitching. Both causes of action were founded on the basis that the Appellant was the owner of the Jaguar, and that the Respondent had failed to deliver up the vehicle when requested so to do. The background is as follows. The Appellant, who lives in Guernsey, had bought the vehicle in England in 2003. In 2008, he left it with a mechanic in Guernsey for repair. By 2011, the mechanic and the car had disappeared. Subsequently, the car was bought by two purchasers in England before it was bought in 2013 by the Respondent, also in England. The Appellant

brought his claim as an innocent loser, while the Respondent defended it as a blameless purchaser.

2. Following a number of interlocutory skirmishes (including an application to serve the Respondent out of the jurisdiction, an application for summary judgment, and applications in respect of the pleadings and expert evidence), the action was heard by the Royal Court (Ordinary Division) (Deputy Bailiff Richard McMahon, sitting with three Jurats: C.H. Le Pelley, T.J. Ferbrache and S.J. Morris) between 29 and 31 October 2018, and on 1 November 2018. In a judgment dated 3 April 2019, the Royal Court found that the Appellant was the owner of the Jaguar. Accordingly, the Royal Court ordered the Respondent to deliver up the vehicle, subject to a condition that the Appellant pay to the Respondent the sum of £46,989.42, an amount which reflected costs incurred by the Respondent, and the person from whom he bought the Jaguar, in carrying out repairs and improvements to the vehicle. Alternatively, the Respondent was given the option of electing to pay the Appellant £20,000, which, should he decide to exercise it, would enable him to treat the Jaguar as his own. The Respondent was also ordered to pay the Appellant nominal damages of £100. The Respondent has sought to exercise his election as envisaged by the Royal Court's Order.

3. With that by way of introduction, the Appellant now appeals against the order made at the conclusion of the trial. Put simply, he seeks to uphold the judgment of the Royal Court on the issue of ownership and order for delivery up of the vehicle, but challenges the order in respect of the election given to the Respondent and the allowance for improvements. The practical result of a successful appeal would be the delivery of the vehicle to the Appellant with a payment of a sum of money to the Respondent (£3,660.82, being an allowance for those works carried out on the vehicle and paid for personally by the Respondent).

4. The Respondent submits that the Royal Court's order ought to be upheld and not varied. He also cross-appeals against the Royal Court's finding that the Appellant's claim was not prescribed. Put in simple terms, the Respondent contends that the Appellant failed to bring his claim in a timely manner, with the result that his right to claim title to the vehicle was extinguished before the commencement of the proceedings, which were brought in May 2016.

5. In a subsequent judgment, dated 21 June 2019, following full argument, the Deputy Bailiff ordered the costs of the proceedings to be paid by the Respondent on the recoverable basis. The Deputy Bailiff rejected a submission, advanced on behalf of the Respondent, that the Appellant ought to pay his costs on an indemnity basis. He did so for the understandable reason that such an order would fail to reflect the fact that the Appellant had succeeded in his principal cause of action, detinue, and that he, as lawful owner of the vehicle, had been the victim of a wrongful act. In addition to the substantive appeal, there is a challenge to the Deputy Bailiff's order as to costs, pursued by Mr Kitching, the Respondent in the substantive appeal. Among other things, he claims that he was the *"substantial winner"* at trial and that Mr Hindle should be required to pay his costs from 5 July 2016 (the date on which Mr Kitching made an offer of a payment to settle the claim) on an indemnity basis.

6. This case shows how difficult it is to strike the right balance between the claims of true owners and the claims of innocent purchasers, particularly where, as in this case, the proceedings are hard-fought and protracted. We wish to pay tribute to the manner in which the issues were addressed by the Deputy Bailiff and dealt with by the Jurats. For the reasons set out below, we dismiss the appeal as to remedy, as well as the cross-appeal on prescription. We also dismiss the appeal as to costs.

The Factual Background

7. Before turning to the Royal Court's judgment and the Appellant's grounds of appeal, it may be helpful to summarise the factual background. This is relevant to our consideration of the substantive appeal and sets the scene for our consideration of the costs appeal.

8. The Appellant, who lives in Guernsey, purchased the Jaguar in June 2003 from Barons Auctioneers, Southampton, for the amount of £17,889.10, which included the seller's premium and other expenses. The actual purchase price was £16,700. He insured it for an agreed value of £20,000. The Appellant did not inform the DVLA of his acquisition of the vehicle until 2 February 2005 when he gave an address in Burntisland, Scotland (in fact his cousin's address), as his address as keeper. This was to ensure that the registration mark attached to the vehicle would not be lost, as would have been the case had the vehicle been imported permanently into Guernsey. In his letter to the DVLA, the Appellant claimed that the vehicle had been off the road since 2003, undergoing prolonged restoration, a process that was continuing. He asked for the new registration document to be sent to an address in Guernsey where he was *"staying temporarily for the winter months."* Around five years after the purchase, in the summer of 2008, the Appellant noticed a flaw in the Jaguar's paintwork. He left it with a Guernsey mechanic, Mr Sidonia Freitas, trading under the style of Autoclean at premises in Les Caches Business Park, St Martin. The Jaguar remained at Mr Freitas' garage for a year, at which point Mr Freitas informed the Appellant that he was moving premises to a garage in St Martin. In the summer of 2010, Mr Freitas moved to premises at L'Ancresse. At the beginning of 2011, Mr Freitas informed the Appellant that he was again moving premises, this time to premises in Havelet Bay, and confirmed that he was continuing to work on the vehicle. The Appellant informed Mr Freitas that he would like the Jaguar returned to him. Mr Freitas proved elusive, however, and the Appellant was unable to contact him by telephone. In late March 2011, the Appellant was finally able to track down Mr Freitas to a Guernsey café – the Black Cat (also known as Café Noir) and spoke to him in person. Mr Freitas confirmed that he would return the Jaguar to the Appellant.

9. It is at this stage that Mr Steven Day, an English car dealer, enters the picture. On 14 April 2011, Mr Day acquired the Jaguar from an unknown third party in Guernsey. He was later registered as the keeper of the Jaguar, at an address in Essex, from which he ran his car sales business. At the time of the purchase a vehicle history investigation, known as an HPI check, was carried out with a clear result. This check would have shown, among other things, whether the vehicle had been reported as stolen and the names and number of previous owners.

10. On 2 May 2011, the Appellant received a letter from the DVLA (via the address in Scotland) informing him that "*someone else has applied to be recorded as the keeper*" of the Jaguar. The letter informed him that if no contact was made within 14 days, the DVLA was required to issue a registration certificate (known as a V5C) to the person declaring himself to be the vehicle's new keeper.

11. By letter dated 3 May 2011, the Appellant informed the DVLA that he was still the registered owner of the Jaguar. He explained that he had brought the vehicle to Guernsey about a year earlier to have some repairs carried out by Mr Freitas. He expressed his concern that someone was trying to steal the Jaguar and that he had been in touch with the Guernsey police. He asked that no further steps be taken to issue a new registration certificate. At around the same time, the Appellant visited the Black Cat Café and spoke

again with Mr Freitas, who stated that the Jaguar was still in storage in Guernsey and that he was taking steps to return it to the Appellant.

12. On 8 May 2011, the Appellant again wrote to the DVLA and noted that he had been in touch with Mr Freitas, who claimed to be in financial difficulties. He expressed his suspicion that Mr Freitas was seeking to obtain title to the Jaguar with the aim of selling it. He indicated that he was attempting to recover the vehicle and requested to be supplied with the name and address of the person who had applied to be the registered keeper. Three days later, on 11 May 2011, the Appellant attended a police station in Guernsey. A letter from the police, dated 20 March 2018, records that the Appellant told the police that the Jaguar had not been returned by Mr Freitas after it had been delivered to him in 2010 for a service. (As noted above, the vehicle had in fact been left with Mr Freitas for repair, and not a service, in 2008.) No formal criminal complaint was made at this time, however, as the Appellant had been told by Mr Freitas that the Jaguar was in storage and would be returned to him shortly.

13. On 19 May 2011, the Appellant again wrote to the DVLA to inform them that Mr Freitas had told him the Jaguar would be returned to him later that week. He asked the DVLA to do nothing further. A few days later, on 24 May 2011, the DVLA wrote to the Appellant explaining that he had not notified them of his disposal of the vehicle and he was threatened with a financial penalty for the failure. He was offered an out of court settlement of £55 in respect of the relevant offence. The Appellant responded to the DVLA on 30 May 2011 stating that he had explained that the Jaguar had been "*left with a firm of Auto restorers several months ago to have some repair work carried out*" and that he was attempting to have the vehicle returned to him. He repeated that he remained the lawful owner and keeper of the Jaguar, and that what was taking place was tantamount to theft.

14. By letter of 8 June 2011, the DVLA informed the Appellant that he was required to notify the police of the theft and that he should provide the DVLA with a crime reference number so that the matter could be investigated further. On 22 June 2011, another letter was sent to the Appellant by the DVLA repeating the offer of an out of court settlement in respect of his failure to provide notification of the change of keeper. In his response, dated 29 June 2011, the Appellant made reference to his earlier correspondence. On 7 July 2011, the DVLA acknowledged receipt of this letter and stated that they would respond when their enquiries were concluded. By letter dated 15 July 2011, the DVLA notified the Appellant that it was not part of their function to record details of legal ownership and, in light of the current dispute over ownership, the enforcement case against the Appellant had been closed.

15. Around six months later, on 30 January 2012, Mr Day sold the Jaguar to Mr Craig Goldie for £22,000 after it had been advertised for sale on the "*Car and Classic*" website. On this occasion no HPI check was conducted. At this time, the Jaguar was in need of restoration and was without an MOT certificate. Mr Goldie was told by Mr Day that he had acquired the vehicle incomplete from Guernsey, and that he had taken it to his Essex premises in or around September 2011, since when remedial work, including welding and painting, had been undertaken. The vehicle was delivered to Mr Goldie's premises, the Carrosserie Company (UK) Ltd, in County Durham, and approximately £43,000 was spent on restoring and improving it. An explanation of the works was provided by Mr Richard Francis, an associate of Mr Goldie who has an expertise in classic cars, and who had been present when the vehicle was delivered to the Carrosserie Company:

"Most of the exterior chrome was missing, what was there was in a bad condition that either needed replacing or re-plating. … Although a new coat of paint had been applied to sell the car, it was done on a budget that had not put right any faults to the bodywork. There were Silicones in the paint finish and the doors didn't fit properly at all. Earlier poor repairs were the cause. The catches had been welded into place and stopped any of the adjustment. … The underside of the car was covered in heavy coats of underseal, applied to conceal the corrosion to the inner & outer sill sections and to the main floor. Filler had been applied to rust holes in the top of the sill panels to hide even more problems. … Apart from the front seats none of what interior trim that came with the car was usable. Lots of the interior fittings were missing and what trim was there was in such a state that we had to replace it. The Webasto style roof was with the car and it was evident on closer inspection that it had been in poor condition for a considerable amount of time, the material cracked & edges torn. The support frame was missing as was the fitting kit. A complete new Webasto style roof was hence fabricated and fitted, along with a complete new headlining. On delivery there was very little oil in the engine, this was changed before running the car here. It actually ran quite well, but what came out had very little viscosity. The engine was then recommissioned rather than rebuilt. The oil & filter fitted by us was used for flushing to remove as much as possible internally. It was fairly obvious that this car had sat for many years without any maintenance, the amount of sludge removed was clear evidence of that. Carbs were removed and rebuilt, dynamo and started [sic] motor replaced, radiator rebuilt. All the rubber hoses were perished and replaced. The engine was then fully serviced and brought back to very good serviceable condition. Clutch master & slave cylinders were replaced along with the relevant pipework, seals changed where necessary, oil's [sic] changed to both gearbox & diff. All steering & suspension bushes were worn and in need of replacing. It was clearly evident that zero maintenance had been carried out to this car for a considerable amount of time. All shock absorbers were replaced as they were leaking and the steering rack excessively worn. This was replaced with an electro-hydraulic unit to make driving on today's roads more pleasurable. At the same time the track end rods were replaced. Regarding the brakes, the entire system needed to be addressed. The only original parts re-used were the rear callipers, they were sent to a specialist to re-sleeve in stainless steel as the inside of the original cylinders were so badly worn and replacements weren't available. Everything else, front callipers, master cylinder, servo, pipework etc. was replaced."

16. Approximately eight months later, on 25 September 2012, the Appellant, who had last seen the vehicle in 2009, attended the Black Cat Café. It had closed down and there was no sign of Mr Freitas. The Appellant then made a formal complaint to the Guernsey police and a police report was created. This report made reference to the fact that the Appellant had not seen the Jaguar for almost 3 years. The Appellant claimed that the Jaguar was worth £40,000. Inquiries revealed that the Jaguar had been registered to Mr Goldie on 30 January 2012. Also on 25 September 2012, the Appellant emailed the DVLA to explain the position and to seek further information about the Jaguar. The Appellant forwarded this email to Aviva, his insurers. By letter of 4 October 2012, the DVLA wrote to the Appellant, making reference to the letter it had sent on 8 June 2011. The letter noted that the police had not marked the vehicle as having been stolen and the letter concluded: "*As you have confirmed that the vehicle is no longer in your possession, a V5C* [that is, a Registration Certificate] *has been issued to the new keeper*."

17. In November 2012, the Appellant's insurers Aviva, indicated that they would "*see what the outcome of the police investigation is before making a decision on [his] claim*." The

Appellant responded: "*I am more concerned to have my Jaguar returned to me in good condition than receiving compensation for its theft*."

18. Some four months later, on 19 March 2013, the Appellant sought further information from Aviva, who indicated that they would deal with the claim under the terms of his policy and on the basis that the car was lost to him. The insurers stated that they could proceed with a financial settlement and, in the event of the Jaguar being marked by the police as stolen, would proceed with legal proceedings against the current keeper. They also stated that, were it to be retrieved, they would consider selling the car back to the Appellant. The Appellant responded expressing his concern that the Jaguar was an appreciating asset, worth in excess of £35,000 if in excellent condition, but its insurance value was only £23,000 (the documentation shows this was actually £22,000). Having received an email from his insurers on 7 October 2013, which raised the possibility of a settlement of the insurance claim, with the Appellant buying the vehicle in the event of its subsequent recovery, the Appellant annotated the email with the words: "*Yes, but at what price?"*

19. On 1 November 2013, Mr Goldie sold the Jaguar to his good friend, the Respondent, for the sum of £65,000. At the time of the purchase, Mr Goldie represented that he was the owner of the vehicle and no HPI check was carried out. The Respondent later spent £3,660.82 on repairs to the Jaguar. He insured it for an amount equal to the purchase price and became its registered keeper. In 2015 the Respondent had the vehicle valued by the Jaguar Enthusiasts Club and, as a result, reinsured the vehicle for £85,000; this remained the insurance value until the time of the trial.

20. On 22 March 2016, the Appellant, having been informed by the police that the Respondent was the new registered keeper of the vehicle, sent the Respondent a letter setting out the background and explaining that, owing to the Appellant's ownership of the Jaguar, he, the Respondent, was wrongfully retaining it. He was asked to return the vehicle. On 29 March 2016, the Respondent replied indicating that he would be instructing solicitors and seeking a more detailed explanation. Then, on 21 April 2016, solicitors instructed by the Respondent wrote more fully to the Appellant denying his claims. Legal proceedings were commenced by the Appellant on 4 May 2016.

21. At the trial, the Royal Court heard evidence from the Appellant and his wife, and from the Respondent and Mr Goldie. The witness statements of Mr Anthony Cavell (on behalf of the Appellant and which dealt with the Appellant's purchase of the vehicle from Barons Auctioneers in 2003) and Mr Richard Francis (on behalf of the Respondent and which dealt with the condition and maintenance of the vehicle from 2012 and its value in 2018) were read to the Court. As noted, the action was heard by the Royal Court over four days, from 29 to 31 October 2018, and 1 November 2018. On 3 April 2019 the Royal Court delivered its judgment. On 2 May 2019, the Appellant gave notice of his intention to appeal.

The Royal Court's Judgment

22. Before considering the Appellant's grounds of appeal, the Respondent's cross appeal, and the appeal as to costs, it is necessary to explain the Royal Court's reasoning. This provides the relevant context for the arguments advanced in the appeals. The issues that fell for determination are considered in the order in which they were considered by the Royal Court.

Detinue

23. The Appellant's first cause of action was based on the ancient tort of detinue. Detinue was abolished in England and Wales by section 2(1) of the Torts (Interference with Goods) Act 1977 ("1977 Act"). As a result, the first issue for the Royal Court to determine was whether detinue existed or continued to exist in Guernsey law, notwithstanding its abolition in England and Wales.

24. The Respondent submitted that Guernsey's customary law had never recognised detinue as a cause of action or, alternatively, if it did, that the law would by now have developed in accordance with the principles established in *Morton v Paint* (1996) 21 G.L.J. 61, with the result that it was no longer an extant cause of action. Accordingly, so the Respondent submitted, the only cause of action open to the Appellant was one based on the tort of conversion.

25. In *Morton v Paint (supra)*, Southwell JA (with whom Blom-Cooper and Sumption JJA agreed) made the following observation in respect of the common law of occupiers' liability (at page 26):

> *"It would not be appropriate to leave Guernsey law in the state reached by English law nearly 40 years ago, which was justly criticised as something of a blot on English jurisprudence and requiring urgent reform. For the Guernsey Courts to cling to obsolete English common law cases which ceased to be authoritative in England and Wales 40 years ago would not be in the interests of those who live in Guernsey or their visitors".*

26. Whilst the Court in *Morton v Paint* confirmed that it could continue to develop the customary law, it also made clear that certain fundamental parts of Guernsey law are incapable of alteration by judicial decision. In this respect, the Court of Appeal was referring to Guernsey's law of property. It observed that the principle of non-alteration did not prevent judicial development of the Guernsey law of tort, since it has long been founded on English judicial decision. The Court stated that, "*in tort cases the Guernsey Courts follow the decisions of the English courts on the common law*".

27. In response to the Respondent's argument, the Appellant submitted that detinue continued to exist in Guernsey and that this was apparent from the reference made by the Deputy Bailiff in *Inalux SA v Old Crown Trust Ltd* (unreported, 16 June 2000) to the tort: *"an action for delivery up of papers, in effect an action in detinue"*. It was further submitted that once the cause of action existed, it could only be abolished through legislation, as had occurred in England and Wales. Contrary to the submission made on behalf of the Respondent, it could not be abolished through the development of the customary law.

28. The Royal Court observed that had the case been argued on identical facts in the early 1970s, there was no doubt that the Appellant could have brought an action in detinue based upon the common law principles then operating in England and Wales.

29. Following upon the Royal Court's acceptance that a claim in detinue could have been brought before the enactment of the 1977 Act, it was necessary to determine whether the abolition of detinue by that English Act should now form part of the customary law of Guernsey. The Royal Court made reference to the well-established principle that the customary law cannot be abrogated without legislative intervention.

30. In this regard, of particular significance, as the Royal Court noted, is the Trading Standards (Enabling Provisions) (Guernsey) Law 2009. This legislative instrument enables an

Ordinance of the States to make provision in relation to trading standards, where that provision is defined in section 2 as including "*provision corresponding to that which is made by or which may be made under any Act of Parliament as set out in the Schedule.*" One of the Acts listed in the Schedule is the Torts (Interference with Goods) Act 1977.

31. The Deputy Bailiff expressed the view that the 2009 Law is the measure which would have enabled the States to enact legislation similar to section 2(1) of the 1977 Act (which abolished detinue in England and Wales) and abolish detinue as a cause of action in Guernsey. The enactment of the 2009 Law in its very broad terms added weight to the conclusion that, in the absence of legislative intervention, detinue continues to remain available in Guernsey as a cause of action. This area was described by the Deputy Bailiff as being one where *"the legislature has started to take steps to follow the statutory changes made in England but has not yet completed that task"*.

32. As a result of this analysis, with which we agree, the Deputy Bailiff directed the Jurats that they were to approach the Appellant's claim on the basis that he was entitled to pursue his primary claim in detinue and, only if he did not succeed in that claim, in conversion as an alternative. In defining detinue, the Deputy Bailiff made reference to paragraph 1072 of *Clerk and Lindsell on Torts* (14th edition, 1975):

> *"The gist of liability in detinue is the wrongful detention of the plaintiff's chattel. The action is available against a defendant who … withholds the plaintiff's chattel after the plaintiff has demanded its return. The principal object of the action is to recover the chattel or its value. Such an action is as much concerned with matters of … property as with matters of tort."*

33. The Deputy Bailiff further directed the Jurats that they needed to consider whether the Appellant owned the Jaguar and, if so, whether the Respondent had better title to it.

34. In terms of the distinction between detinue and conversion, the Deputy Bailiff made reference to the exposition given by Diplock L.J. in *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 W.L.R. 644 (at pages 648-649), which we quote in full as it provides the framework for the arguments in the appeals:

> *"There are important distinctions between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of the conversion; the latter is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue. It is important to keep this distinction clear, for confusion sometimes arises from the historical derivation of the action of conversion from detinue sur bailment and detinue sur trover; of which one result is that the same facts may constitute both detinue and conversion. Demand for delivery up of the chattel was an essential requirement of an action in detinue, and detinue lay only when at the time of the demand for delivery up of the chattel made by the person entitled to possession the defendant was either in actual possession of it or was estopped from denying that he was still in possession. Thus if there had been an actual bailment of the chattel by the plaintiff to the defendant, the latter was estopped from asserting that he had wrongfully delivered the chattel to a third person or had negligently lost it before demand for delivery up, and the plaintiff could sue in detinue notwithstanding that the defendant was not in actual possession of the chattel at the time of the demand. (See Jones v. Dowle; Reeve v. Palmer.) Alternatively the plaintiff could sue in conversion for the actual wrongful delivery of*

the chattel to the third person, though not for its loss. In the absence of bailment, an unqualified refusal to comply with a demand for delivery up of a chattel made by the person entitled to possession may amount to conversion as an alternative to detinue if the defendant at the time of the refusal was in actual possession of the chattel. If he has wrongfully delivered it to a third person before the date of the demand the prior wrongful delivery constitutes the conversion, not the subsequent refusal to comply with the demand. (See Sachs v. Miklos.) But even where, as in the present case, the chattel is in the actual possession of the defendant at the time of the demand to deliver up possession, so that the plaintiff has alternative causes of action in detinue or conversion based upon the refusal to comply with that demand, he has a right to elect which cause of action he will pursue (see Rosenthal v. Alderton & Sons Ltd.) and the remedies available to him will differ according to his election.

The action in conversion is a purely personal action and results in a judgment for pecuniary damages only. The judgment is for a single sum of which the measure is generally the value of the chattel at the date of the conversion together with any consequential damage flowing from the conversion and not too remote to be recoverable in law.

On the other hand the action in detinue partakes of the nature of an action in rem in which the plaintiff seeks specific restitution of his chattel. At common law it resulted in a judgment for delivery up of the chattel or payment of its value as assessed, and for payment of damages for its detention. This, in effect, gave the defendant an option whether to return the chattel or to pay its value, and if the plaintiff wished to insist on specific restitution of the chattel he had to have recourse to Chancery."

Applicable Law

35. The next issue that fell to be resolved by the Royal Court concerned the applicable law; was the case governed by English or Guernsey law? It was submitted on behalf of the Appellant that the action was governed by Guernsey and not English law. The converse submission was made on behalf of the Respondent.

36. The Royal Court accepted that it generally looks to English law principles of private international law when considering Guernsey's own private international law. The Court observed that, unlike in England and Wales, where the position is regulated by statute (for example, the Private International Law (Miscellaneous Provisions) Act 1995), the applicable principles are still governed by the common law. As a result, the decision of the House of Lords in *Chaplin v Boys* [1971] A.C. 356 remained the leading authority.

37. Applying what is known as the "*double actionability*" test, an act done abroad is a tort and actionable as such in Guernsey if it is an act which, if done in Guernsey, would be a tort; and not justifiable, according to the law of the country where it is actually done. In *Chaplin v Boys (supra)*, Lord Wilberforce stated (at page 389, with Guernsey substituted for the territory there under consideration):

> *"The broad principle should surely be that a person should not be permitted to claim in [Guernsey] in respect of a matter for which civil liability does not exist, or is excluded under the law of the place where the wrong was committed … I would, therefore, restate the basic rule of [Guernsey] law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done."*

38. The Royal Court observed that Lord Wilberforce had declined to move towards an approach developed in other jurisdictions, for example in the United States, of applying the *lex delicti*; that is, the law of the place where the tort was committed.

39. Basing itself on the observations in *Chaplin v Boys*, the Royal Court observed that the general rule requires consideration first of whether, if all the conduct took place in Guernsey, the facts would give rise to an action under Guernsey law. If so, the mere fact that some or all of those facts took place in another jurisdiction is irrelevant. If, by reference to the law where the conduct in question took place, there would be no cause of action, then the conduct could not be pursued as a tort in Guernsey. The Royal Court observed (correctly) that the "*double actionability*" involved did not mean that the same cause of action must exist under both systems of law. It is sufficient that the conduct involved gives rise to *some* cause of action in each place. If so, the cause of action available under Guernsey law can be pursued and, in general, Guernsey law would be the applicable law.

40. In support of the submission that the action should be regarded as an exceptional case in which the whole of the action should be resolved by reference to English law principles, counsel for the Respondent relied upon *Cox v Ergo Versicherung AG* [2014] A.C. 1379, in which Lord Sumption JSC drew a distinction between elements which are questions of substance and those that are procedural. The conclusion reached in that case was that the relevant German damages rules were substantive "*because they determine the scope of the liability*".

41. The Royal Court accepted that flexibility exists as a matter of Guernsey's private international law. As a result, there would be flexibility if it could be shown that there were clear and satisfactory grounds to do so where all, or virtually all, of the significant factors indicated that a particular issue should be governed by English law, on the basis that it had the most significant relationship with the events in question and the parties. The Deputy Bailiff ultimately held, however, that this was not an exceptional type of case. The Appellant lives in Guernsey and the Respondent in England. The demand for the return of the Jaguar had been made in Guernsey, seeking its return to Guernsey, and there was no compelling argument to displace Guernsey law as the law of the forum.

42. The Deputy Bailiff was of the view that the submission advanced on behalf of the Respondent that the "*double actionability*" principle had not been satisfied was based upon a misunderstanding of that principle. It was sufficient that the Appellant would have had a cause of action in England and Wales, even though it is not the one upon which he now relied. As a result, the Royal Court concluded that the Appellant's action in detinue remained available to him, even though such a cause of action was abolished as a matter of English law by the 1977 Act.

43. The Royal Court observed that, even were the issue to be reduced to one relating solely to remedies, the primary heads of relief were not materially different, whether at common law or under statute. The possible remedies for detinue, as explained by Diplock L.J. in *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd (supra)* are:

    (i) for the value of the chattel as assessed and damages for its detention; or

    (ii) for return of the chattel or recovery of its value as assessed and damages for its detention; or

(iii) for return of the chattel and damages for its detention.

44. The relief provided under section 3(2) of the 1977 Act for wrongful interference with goods against a person in possession or control of the goods is one of the following:

(a) an order for delivery of the goods, and for payment of any consequential damages, or

(b) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages, or

(c) damages.

45. The Deputy Bailiff identified a number of additional reasons for rejecting the Respondent's submissions on the applicable law.

(i) First, acceding to the Respondent's primary submission, namely that the whole of the case should be dealt with in accordance with English law, would be to overlook the fact that detinue continues to exist in Guernsey as a cause of action under the customary law.

(ii) Second, if English law principles were applied to remedies, it would create a hybrid solution under which liability would be determined by Guernsey law and then the relief to flow from that liability would be determined in accordance with the current regime in English law. This is a regime that has not been enacted into Guernsey law, despite the existence of enabling powers to do so. This would lack clarity and would therefore be unsatisfactory.

(iii) The differences, to the extent that there were any, related not to the orders available but to the quantification of the monetary elements of the remedy. The difficulties were therefore procedural rather than substantive.

46. For these reasons the Deputy Bailiff directed the Jurats that the Appellant's action should be considered primarily as an action in detinue and that relief would be a matter of Guernsey and not English law. As a result, reports provided by the Respondent to the Royal Court from two experts (Mr Dominic Dowley QC and Mr James Mather) on matters of English law were of no direct assistance.

Ownership of the Jaguar

47. Contrary to the arguments advanced on behalf of the Respondent, the Jurats were satisfied that the Appellant acquired good title to the Jaguar when he purchased it in 2003, or in any event subsequently and before the vehicle left Guernsey. This conclusion was reinforced by the fact that in the period from 2003 to 2009, no one had made a contrary assertion of title. Although the Jurats expressed understandable misgivings about some of the Appellant's evidence, they were satisfied that he did not pass on legal ownership of the Jaguar to any third party. The Jaguar had been left with Mr Freitas to be repaired in 2008, but no one, including Mr Freitas, had the right to dispose of the vehicle contrary to the Appellant's wishes.

48. The Jurats accepted that the Appellant first became aware of the material issues surrounding the Jaguar in March 2016 when he wrote to the Respondent demanding its return. For the purposes of limitation, the period leading to May 2016, when proceedings were commenced, was the relevant period. The Royal Court observed that the Respondent had raised the issue of limitation when seeking leave to amend his Defenses to plead a prescription exception. It had been submitted on behalf of the Respondent that section 3 of the English Limitation Act 1980 relating to successive conversions ought to be incorporated into Guernsey law. The Royal Court held that this submission had been rejected in an earlier ruling by the Deputy Bailiff (in a Judgment dated 12 September 2017) and it was rejected again for the same reasons. Even if the argument had been available as a matter of law, the Jurats rejected it on the facts, as they accepted that someone had chosen to deal with the Jaguar in the manner contrary to the Appellant's ownership only after May 2010 (or at least there was no evidence on which the Jurats could reach the conclusion that the step was taken prior to May 2010). The passage of time therefore did not have the effect of extinguishing the Appellant's title to the vehicle.

49. The Respondent also sought to rely upon section 23 of the Sale of Goods Act 1979, which provides:

> *"When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect in title."*

The Royal Court held that this provision only assisted the Respondent if the person from whom Mr Goldie acquired the vehicle had a voidable title. On this issue, the Jurats did not accept that Mr Day acquired good title to the Jaguar and gave little credence to his explanation, given to Mr Goldie, as to how he came to acquire possession of it. While the Jurats accepted that both the Respondent and Mr Goldie acted in good faith, the existence of a thief in the chain would provide a complete answer to this aspect of the Respondent's case. On the balance of probabilities, the Jurats found (at paragraph 73 of the Judgment) "*that, as someone dealt with the Jaguar without the consent or authority of the legal owner of it* [the Appellant], *everyone thereafter had not even acquired a voidable title*". This was something that had happened in Guernsey, that is, before Mr Day took possession of the vehicle in September 2011, and thus, title to the Jaguar had not been lost by the Appellant For these reasons, the Jurats found that the Appellant purchased the legal title to the Jaguar in 2003 and did not part with his title. Although the Respondent was recorded with the DVLA as the registered keeper of the Jaguar, the Appellant was and remained its legal owner.

Liability

50. Given the Jurats' conclusion that the Appellant retained legal title to the Jaguar, there could be no question that the Respondent was liable to the Appellant in detinue as soon as he failed to return the Jaguar having been requested to do so in March 2016.

Remedy

51. The Deputy Bailiff reminded the Jurats that the primary relief sought by the Appellant was an order for delivery up of the Jaguar. Damages for conversion were pleaded in the alternative. The Appellant claimed the value of the Jaguar to be approximately £90,000 and referred to out of pocket expenses of approximately £1,500.

52. In the absence of any Guernsey authority, the Deputy Bailiff drew heavily upon the principles identified by the English Court of Appeal in *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd (supra).* These principles were summarised in the following terms in the relevant edition of *Clerk & Lindsell* (14th ed., 1975, current at the time detinue was abolished in England and Wales by the 1977 Act):

> *"(I) For the value of the chattel as assessed and damages for its detention. This is appropriate where the chattel is an ordinary article of commerce and where compensation in money is adequate. The defendant has no formal option of return, but he may make a restitution any time before judgment, and then his liability is only for damages. If he does not restore the res, the plaintiff is entitled to judgment in this form.*
>
> *(II) For the return of the chattel or its value assessed, and damages. Here the plaintiff has the valuable right of applying to the court to enforce specific restitution of the chattel by writ of delivery. It is important in such cases to assess separately the value of the chattel and the damages for detention, because if the chattel cannot be found by the sheriff there is the alternative of destraint for the value as assessed.*
>
> *(III) For the return of the chattel and damages. This is comparatively unusual, for the only pecuniary redress which can be given under this judgment is damages for detention. Consequently the value of the chattel need not be assessed and the plaintiff can obtain only specific restitution."*

53. The Deputy Bailiff also made reference to *Whiteley Limited v Hilt* [1918] 2 K.B. 808, in which the English Court of Appeal reiterated that delivery up of a particular chattel (in that case a piano) is a discretionary remedy, which ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest. If the chattel falls into this category, such that it is of no special value to a claimant, damages will generally provide an adequate remedy.

54. The Deputy Bailiff also directed the Jurats that, when considering the appropriate remedy, they should also have regard to the general principle of putting the Appellant into the position in which he would have been had the wrong not been committed against him. In this connection, extensive reference was made to the opinion of Lord Nicholls in *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 A.C. 883, a case in conversion, where it is made clear that assessing the appropriate level of damages involves a value judgment concerning the extent of the loss for which the defendant ought fairly or justly to be held liable. The Deputy Bailiff made particular reference to paragraphs 79 to 83 of Lord Nicholls' opinion which deals with the position where there are successive conversions and the specific nature of the individual tortfeasor's liability.

55. The Deputy Bailiff also made reference to the summary of the position on successive conversions set out in *Clerk & Lindsell* (14th ed., at paragraph 1175):

> *"It may not infrequently happen that the owner of a chattel who has wrongfully been deprived of his possession may have a remedy against more than one person. A may wrongfully have taken it and B may afterwards have wrongfully detained it. A and B are not joint tortfeasers; there is a perfectly independent right of action against each. Judgment itself does not affect ownership of a chattel, but if judgment is obtained and satisfied for the full value of the chattel, the property is thereby changed as from the*

date of the wrongful act and vested in the defendant, and the plaintiff will consequently lose all right of action against any subsequent wrongdoer. He might still, however, it would seem, be entitled to nominal damages or any actual damages sustained over and above the value of the goods in respect of anything done previously."

56. The Deputy Bailiff suggested that the Jurats might be assisted by considering what outcome would be just, bearing in mind what the Appellant claimed to have lost. To assist in this exercise, the Deputy Bailiff suggested that the Jurats ought to consider the following matters:

(i) what they knew about the Jaguar, from 2003 until 2008, when the Appellant delivered it to Mr Freitas;

(ii) the remedial work Mr Freitas was expected to perform, and the condition the Jaguar would have been in had he performed it;

(iii) Mr Day's description of the Jaguar's condition and its value in 2011;

(iv) the value given to the vehicle by Mr Richard Francis (the witness who gave evidence on the Respondent's behalf) when it was delivered to the Carrosserie Company after being purchased by Mr Goldie;

(v) how the Jaguar would have been dealt with by the Appellant had he retained it in contrast with what had been done to put it into its current condition by Mr Goldie and the Respondent.

57. The Deputy Bailiff suggested that the Jurats might consider reaching a preliminary value of the vehicle in the condition in which the Appellant lost it, against which to test the Appellant's actual loss through a series of conversions, culminating in his demand to the Respondent for the return of the Jaguar and the Respondent's non-compliance with that demand.

58. The Deputy Bailiff also reminded the Jurats that some allowance had to be made for the Respondent's post-acquisition repairs and restoration, were they to decide to make an order for delivery up of the Jaguar. This was valued at £3,660.82, being the amount that the Respondent had pleaded as being expended by him in carrying out repairs and restoration.

59. The Respondent had also submitted, however, that allowance also had to be made for the repairs and improvements carried out to the Jaguar by Mr Goldie, valued at: £43,325.58.

60. In terms of how to assess the nature of any allowance, the Deputy Bailiff referred the Jurats to *McGregor on Damages* (20th ed. at paragraph 38-024):

"If damages are calculated by the value at the time of the conversion, then any increased value given to the goods through improvements made to them by the defendant or third parties will not be included in the measure of damages. To include such an increase in value would give the claimant more than compensation, for his loss was of the goods unimproved. The claimant is not forced to pay for improvements he does not want, since he is suing not for specific restitution but for damages only. The cases support this result, at least where the increased value has been the work of the defendant." (Emphasis added.)

61. Also in this connection, the Royal Court made reference to a number of old cases, cited by the parties, culminating in the judgment of Lord Denning MR in *Greenwood v Benett* [1973] 1 Q.B. 195, (where the facts were similar to the present case) which is the subject of analysis in *Goff and Jones*: *The Law of Restitution* (7th ed. at paragraph 6-011):

> *"In 1972 when Greenwood v Bennett was decided, the principle of unjust enrichment had not yet received authoritative judicial recognition. It is not surprising that Lord Denning's unreserved judgment does not contain a sophisticated analysis of its subordinate principles. But it is evident that the basis of the improver's claim was mistake and that the owner had gained an incontrovertible benefit which was readily realisable, which had not been realised, and which was gained at the improver's expense. Today a court may be less ready to conclude that the value of the benefit should be measured by what the improver had spent. This award would have been appropriate if the owner had freely accepted the services; but he did not know what the improver was doing, so that conclusion cannot be supported. But the owner had been incontrovertibly benefited. His incontrovertible benefit was the difference between the market value of the car when the owner regained possession and £75. But the improver should never recover more than he spent. This should be the ceiling to any award, otherwise the improver would profit from his act of conversion.*
>
> *It has been said that the recognition of a direct restitutionary claim, grounded on the plaintiff's mistake, may cause hardship to a blameless owner who may have to sell the chattel to reimburse the improver. But the owner will undoubtedly have received a benefit. In the majority of situations it will be no great hardship to compel the owner to sell the chattel in order to reimburse a person, blameless as the owner, if it is necessary to make restitution for the benefit which he has gained. A restitutionary claim may possibly be denied if the chattel is unique, but unique chattels are rarely improved. At the end of the day, the court must balance the claims of the innocent improver against those of the innocent owner. In our view, the equities of the improver's claim are more appealing."*

62. On the Respondent's behalf, it was submitted that Guernsey law recognises the existence of relief for unjust enrichment (just as it is recognised in Jersey, see *Flynn v Reid* (2012) (1) JLR 370), and that, as a result, the analysis in *Goff and Jones* should be followed in Guernsey.

63. On this aspect of the case, the Deputy Bailiff, having referred to a number of authorities setting out the position in England, reminded the Jurats that they were not bound to follow them. Their task was to reach a just outcome with the aim of putting the Appellant into the position in which he would have been had the wrong not been committed against him. The Deputy Bailiff directed the Jurats that their first task was to determine whether to grant the primary relief sought by the Appellant and, if so, on what terms. This was a discretionary remedy, with no absolute right to specific restitution. If the Jurats did make an order for delivery up, they could consider giving the Respondent the option to decline to deliver up the Jaguar and instead to pay compensation to the Appellant for its value, in which case the Jurats would need to determine the amount of any compensation.

64. In terms of value, that is should an order for delivery up be made, the Deputy Bailiff directed the Jurats that the submissions made on behalf of the Appellant, to the effect that the Respondent was entitled only to the value of improvements for which he was personally responsible, were too narrow and that the Respondent was entitled to more than his own

expenditure. Any older English authorities that pointed towards such a restricted approach would not be a safe guide on the basis that were detinue to exist today, the approach would have been aligned to that which applied to wrongful interference with goods, as set out in the 1977 Act. Adopting such an approach was said to be no more than a reflection of the flexibility of Guernsey's customary law and, more importantly, it would enable the Jurats to do justice between the parties. The Deputy Bailiff directed the Jurats that they were at liberty to treat the improvements made to the Jaguar by Mr Goldie as having been purchased by the Respondent if they thought this would fairly reflect what had happened.

65. The Deputy Bailiff reminded the Jurats that there was also a separate claim by the Appellant for damages. The relevant period was from the point at which the formal demand was made by the Appellant for the return of the Jaguar (by letter dated 21 April 2016).

The Jurats' Conclusions

66. In deciding the appropriate remedy, the Jurats concluded that the Jaguar had no *"special significance"* to the Appellant and reached this conclusion on the basis of the following matters:

(i) The Appellant was prepared to leave the vehicle with Mr Freitas from 2008 to 2011 without taking any steps to expedite the work for which he had contracted;

(ii) The Appellant's apparent lack of urgency to secure the return of the vehicle, and so enable him to use it again, implied that he was not concerned about it, so long as it was still in the possession of Mr Freitas;

(iii) The Appellant did not insist on seeing the vehicle, nor did he know where it was being stored;

(iv) The Appellant made less effort than others had done to add to the documentary record relating to the Jaguar's provenance (which the Jurats considered was a matter of great importance for maintaining the value of classic cars);

(v) In his correspondence with Aviva, the Appellant had been cautious about what it would cost him to have the vehicle returned if he accepted their offer to settle his claim for the vehicle as lost. This was clear from the handwritten note on the email he received from Aviva on 7 October 2013, on which he had written, *"Yes but at what price?"*;

(vi) Although the Appellant had stated that he wanted the vehicle returned, his solicitors had written to the Respondent demanding its return, or for the sum of £90,000 to be paid in lieu;

(vii) The Appellant regarded the vehicle more as an asset with an inflated value to be realised than as a possession giving him any particular pleasure. By way of contrast, the Respondent, who cherished the Jaguar, used it on a regular basis, including at his daughter's wedding.

67. The Jurats accepted that the Jaguar could, in one sense, be regarded as unique, especially given its non-transferable registration mark. A comparable Jaguar could, however, be

purchased on the market, as such vehicles do come up for sale from time to time. Of relevance, however, was the Appellant's assertion that the registration mark was not special to him. Whilst not going as far as to say the Jaguar could be described as an ordinary article of commerce, the Jurats concluded that it would be wrong to make an order for delivery up without giving the Respondent the option of retaining the Jaguar and instead paying damages. They concluded that an order for delivery up of the vehicle to the Appellant would result in the Respondent having to part with a vehicle he *"cherishes"*, and that such an outcome would be "*oppressive*".

68. Equally, however, the Jurats concluded that it would be wrong to award damages only. This would overlook the fact that the Appellant had established his ownership of the Jaguar and would involve treating the Jaguar as an ordinary item of commerce, where compensation for its value is ordinarily a sufficient remedy, which was not the Jurats' finding. The Jurats considered that the fairer approach was to make an order for delivery up of the Jaguar, or payment for its value as assessed, as well as damages for its detention. Such a remedy reflected one of the forms of relief available in proceedings for wrongful interference by virtue of section 3(2)(b), read with section 3(3)(b) of the 1977 Act. The Jurats considered this to be the fairest approach, on the basis that it would give the Respondent an option as to whether to return the Jaguar and receive payment for the amount spent on its restoration, or to pay the Appellant for its value, minus any amount spent on its restoration.

69. In the event of the Jaguar being returned to the Appellant, the Jurats held that the Appellant would be required to pay the aggregate costs of the improvements for which both Mr Goldie and the Respondent were responsible. This amounted to a total sum of £46,986.42. They noted that the Appellant had effectively conceded that the sum of £3,660.82 would have to be paid (being the amount expended by the Respondent personally on improvements since his acquisition of the Jaguar), even though the Jurats accepted the Respondent's evidence that he had in fact spent more than this on improvements. The Jurats also accepted that the Respondent acquired a form of title to the improvements when he purchased the Jaguar from Mr Goldie. Mr Goldie had undertaken these improvements in the honest belief that he was the owner of the Jaguar, in the same way the Respondent did. As such, the Jurats considered it was reasonable for the Appellant to pay for them.

70. The Jurats rejected the Appellant's submission that the Respondent should be required to rely on any potential remedy he might have in proceedings against Mr Goldie, who in turn might have a potential remedy against Mr Day, as this would be a backward step procedurally, especially as justice could be done between the parties in the manner determined by the Royal Court.

71. The Jurats identified a further reason for ordering the Appellant to pay the full amount of the improvements, namely that he would otherwise be unjustly enriched. In other words, the Appellant would be compensated beyond what it was that he lost and for which the Respondent could properly be found to be liable. Crucial to the Jurats' reasoning on the aspect of the case was that the Appellant would be receiving the Jaguar in a much improved condition, primarily as a result of the expenditure of Mr Goldie and this would amount to an unjustifiable windfall to his benefit.

72. For the purposes of valuing the Jaguar, the Jurats preferred the evidence of Mr Richard Francis (the Respondent's witness who was found to be the most knowledgeable witness on value), read together with evidence from the detailed price guides published by "*Classic Car*" magazine. The figure reached by the Jurats for the value of the vehicle at the time of Judgment was £65,000.

73. In terms of the amount the Respondent ought to pay in damages, the Jurats identified two possible ways of approaching this assessment. The first was to take the assessed value of £65,000 and deduct from it the allowances to be made for the improvements (£46,986). This led to a total of £18,014.

74. The second was to consider what the Appellant had in fact lost. On this approach, at the time he lost it, the Appellant had insured the Jaguar for an agreed price of £20,000, although at that time no pictures were provided to the insurance company to verify its condition. The Jurats inferred from this that the Jaguar was worth much less than the Appellant claimed. The Jurats concluded, however, that the amount lost by the Appellant could properly be put in the region of £20,000.

75. The Jurats rejected a submission made by the Respondent that the Appellant had failed to mitigate his loss by declining to settle the claim through his insurers.

76. In terms of the damages to be awarded to the Appellant, the Jurats concluded that there was no evidence of actual out of pocket expenses, and, while the Appellant had been deprived of the use of the Jaguar for some time, the Jurats balanced that against the fact that he was prepared to be without it for an extended period of time when it was in the possession of Mr Freitas. They therefore awarded nominal damages of £100.

77. The Royal Court's Order, so far as material, was in the following form:

    (i) That the Respondent deliver up the Jaguar motor vehicle identified by registration mark 68 EAL to the Appellant on the condition that the Appellant shall at or before such delivery pay to the Respondent £46,989.42.

    (ii) That if the Respondent so elects within 14 days, instead of complying with the order for delivery, the Respondent shall pay the Appellant £20,000 and the Appellant's receipt in respect of that amount shall enable the Respondent to treat the Jaguar as owned by him.

    (iii) The Respondent pay the Appellant £100 in damages.

78. The costs of the proceedings were reserved. Thereafter, on 21 June 2019, following detailed argument, the Deputy Bailiff dealt with the issue of costs in an ex tempore judgment. We address this judgment when we consider the appeal in relation to costs brought by the Respondent (see below at paragraphs 151 to 178).

79. The Respondent made the election required by the second paragraph of the Order, on 21 March 2019. Whilst this date appears curious, in that it pre-dates the judgment handed down on 3 April 2019, it was after the parties had received a draft text of the proposed judgment on 12 March 2019.

The Appellant's Grounds of Appeal

80. Subject to one point, raised in paragraph 4 of the Respondent's Notice concerning prescription and addressed below, neither of the parties to this appeal seeks to disturb the Royal Court's finding that the Jaguar was owned by the Appellant. The parties are also agreed that the power vested in the Royal Court to order the delivery up of the Jaguar was discretionary. The focus of the Appellant's complaint is directed solely to the remedy granted by the Royal Court. In this connection, the Appellant has raised no fewer than 19 written grounds of appeal; many of these are overlapping and several express the same point in different words. While a number of grounds are directed at decisions made by the Deputy Bailiff, the principal complaints are largely directed at either the Jurats' findings of fact, or the exercise of their discretion as to remedy: in some instances the grounds are unparticularised. It was hardly surprising that at the hearing of the appeal, Advocate Ferbrache, on behalf of the Appellant, made no real attempt to distinguish between the various grounds and concentrated his argument on the order made by the Royal Court.

81. That said, it is nevertheless right for us to identify the essential points in the Appellant's grounds of appeal, which are as follows:

(i) The Royal Court erred in ordering a right of election, as the only relief prayed for by the Respondent, that is in the event that the Appellant proved his case in detinue and the Royal Court ordered delivery up of the Jaguar, was that the Appellant pay the Respondent a sum of money.

(ii) The Royal Court erred in giving the Respondent a right of election to keep the Jaguar rather than complying with its order for delivery up, having held that:

(a) the Jaguar was not an ordinary article of commerce;

(b) it would be wrong for the Court to award only damages to the Appellant; and

(c) that compensation for the Jaguar's monetary value would not suffice to compensate the Appellant.

(iii) The Royal Court's finding that the Jaguar had no special value to the Appellant was perverse.

(iv) The Deputy Bailiff erred in exercising his discretion by permitting expert evidence from the Respondent's experts as to English law (Mr Dowley QC and Mr Mather) to be adduced before the Jurats, before he had first determined that Guernsey law was the applicable law.

(v) The Deputy Bailiff erred in the exercise of his discretion by permitting the Respondent to adduce expert evidence of English law from two experts (Mr Dowley QC and Mr Mather).

(vi) The Deputy Bailiff erred in in the exercise of his discretion by permitting the Respondent to adduce evidence from one of these English law experts (Mr Mather) so late in time, namely the second day of the trial, that the Appellant

was deprived of the necessary safeguards afforded to him by the relevant law and rules of evidence.

(vii) The Deputy Bailiff misdirected the Jurats by stating that they were entitled to determine the available remedies as if section 6 of the Torts (Interference with Goods) Act 1977 applied, having earlier directed them that the customary law could not be abrogated without the intervention of the legislature.

(viii) The Royal Court erred in concluding that the Respondent would not have had an action for breach of warranty against Mr Goldie.

(ix) The Royal Court erred in finding that the Respondent "*purchased*" the improvements made to the vehicle by Mr Goldie.

(x) The Royal Court lacked the necessary expert evidence to enable it to determine an appropriate level of compensation to be paid by the Respondent to the Appellant and thereby fell into error.

(xi) In determining the compensation to be paid to the Appellant, the Royal Court erred in that it took into account evidence which it should not have and/or failed to have regard to evidence which it should have done.

(xii) Having preferred the evidence of the value of the Jaguar given by Mr Francis, the Royal Court erred by failing to give any or sufficient reason for doing so as to enable the Appellant to understand its decision.

(xiii) The Royal Court erred in failing to give sufficient reasons as to why it then rejected Mr Francis's valuation and preferred a reduced valuation of £65,000 in circumstances where it held that the "*value of the [Jaguar] today is not just as a result of a rising market in classic Jaguars*" and discounted the value of the Jaguar rather than treating it as an appreciating asset. Such a finding was against all the weight of the evidence and perverse.

(xiv) The Royal Court erred in that having found that being an action in detinue the date for assessing the value of the Jaguar was the date of judgment, it proceeded to assess the damages payable to the Appellant by reference to the value of the Jaguar when it was taken by the Appellant to Mr Freitas.

(xv) Having assessed the condition of the Jaguar as *"average condition"*, which was replaced with "*good condition (albeit with the same definition)*" in Classic Car magazine, it then proceeded to value the Jaguar on the assumption that "*its condition [in the Appellant's possession] could well have deteriorated to rough condition or worse…*" This conclusion was against the weight of the evidence which was to the effect that the Appellant had maintained the Jaguar.

(xvi) The Royal Court erred in that it failed to give sufficient weight to the fact that Mr Goldie and the Respondent were working together in relation to the proceedings and that Mr Goldie had made a payment in the order of £20,000 to the Respondent.

(xvii) The Royal Court erred in concluding that it was material to the exercise of its discretion of whether to order delivery up of the Jaguar that the Respondent "*cherishes*" the Jaguar.

(xviii) The finding that the Respondent cherishes the Jaguar was against all the weight of the evidence which was to the effect that he had allowed the condition of the Jaguar to deteriorate after taking it into his possession.

(xix) Having held that the increase in the value of the Jaguar was as a result of the improvements effected by Mr Goldie, the Royal Court erred in awarding to the Respondent the increase when this belonged to the Appellant as owner of the Jaguar.

82. The Respondent's response to each of these grounds is addressed below, so far as necessary, in our consideration of the individual grounds of appeal.

The Grounds of Appeal

The Royal Court erred in ordering a right of election, as the only relief prayed for by the Respondent that is in the event that the Appellant proved his case in detinue and the Royal Court ordered the delivery up of the Jaguar, was that the Appellant pay the Respondent a sum of money (Ground 1)

83. In support of his argument on this issue, the Appellant makes reference to *Whiteley Limited v Hilt (supra)*, a decision of the English Court of Appeal in which Swinfen Eady MR (with whom Warrington and Duke LJJ agreed) stated (at page 819):

> *"... the power vested in the Court to order the delivery up of a particular chattel is discretionary, and ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest, and it is not alleged to be of any special value to the plaintiff, and where damages would fully compensate."*

84. Underlying this statement of principle is the obvious point that where a chattel is an ordinary item of commerce, damages in lieu of its return will ordinarily amount to an adequate remedy. The Appellant's submission is that an order for delivery up ought to be the remedy in any case where the property is not an ordinary item of commerce and as the Respondent did not seek a right of election, he is not entitled to the remedy ordered by the Royal Court.

85. By way of response, the Respondent submits that the Appellant is wrong in law and that the Appellant's argument fails properly to distinguish between the *'relief'* prayed for by a party to the proceedings and the *'remedy'* available to the Royal Court. The Royal Court decided a claim in detinue exists in Guernsey law and, as a result, the extent of the remedy or remedies available to the Royal Court fell to be determined by reference to the relevant authorities and precedents, and by the exercise of judicial discretion. It is also to be noted that the Respondent's pleading (relating to unjust enrichment), originally made as a counterclaim, was ordered by the Royal Court to be made instead as part of the Respondent's defences. This was made clear in the Deputy Bailiff's judgment dated 12 September 2017. The significance of this point is that the Respondent made clear at an early stage of the proceedings that he would be seeking a remedy that did not involve the Appellant's unjust enrichment.

86. The starting point in our analysis is that the authorities clearly establish, and the Appellant accepts, that the remedy of delivery up is a discretionary one. Within that discretion, there is scope for a court to give an election to a defendant, as it did in this case, in order to do justice between the parties.

87. We are of the clear view that the Jurats were entitled to make the order they did despite the fact that the relief in question was not expressly pleaded by the Respondent. We agree with the distinction drawn by the Respondent between the relief prayed for and the available remedy. It is the latter that is crucial. In this case the Jurats were doing no more than performing their judicial function, as they had been directed to do by the Deputy Bailiff. The issue of remedies lay at the heart of the case and the Jurats were directed to reach a just outcome with the aim of putting the Appellant in the position he would have been had the wrong not been committed against him. There is no absolute entitlement to an order for specific restitution with the obvious corollary that the question of remedy was within the discretion of the Royal Court irrespective of the Respondent's prayer for relief. We see no substance in this ground of appeal and reject it as being without merit.

The Royal Court erred in giving the Respondent a right of election to keep the Jaguar rather than complying with its order to deliver it up to the Appellant, and erred in finding that the Jaguar had no special value to the Appellant (Grounds 2 and 3)

88. In support of these grounds of appeal, the Appellant submits that in all the circumstances of the case, it was appropriate for the Royal Court to exercise its discretion to order the return of the Jaguar to him as its owner. In support of this argument he again relies on the decision in *Whiteley v Hilt, supra,* and contends that having found that the vehicle was not an ordinary article of commerce, where compensation for its monetary value would not suffice, the Jurats fell into error by making a compensatory order for its monetary value.

89. In response, the Respondent also makes reference to the decision in *Whiteley,* and draws particular attention to the judgment of Warrington L.J. (at page 821), who stated, "*The plaintiffs were suing in detinue and in conversion, and by so suing they gave to the defendant the option of taking them at their word and paying into Court the amount of the damages properly recoverable in an action of conversion".* The Respondent further submits that the position of the Royal Court in respect of whether the Jaguar was an ordinary article of commerce was more nuanced than the Appellant's submissions make apparent.

90. In considering these grounds of appeal, it is first necessary to consider the Jurats' reasoning. The Jurats found that the question of whether the Jaguar was an ordinary item of commerce was in part related to the assessment of how the Appellant regarded the vehicle. They noted that the Jaguar, with its particular registration mark, could be viewed as unique, but went on to state:

> *"However they [the Jurats] also find that vehicles like the Jaguar come on to the market from time to time and so a comparable vehicle, albeit with a different registration mark, can be purchased at whatever the going price is. They further note the Plaintiff's evidence that the mark itself was not special to him. Accordingly, whilst not going so far as to find that it is an ordinary article of commerce, the Jurats consider that it would be wrong simply to make an order for delivery up without more ado. This is because that would result in the Defendant being forced to part with a vehicle he cherishes. Consequently, adopting the language in Whiteley v Hilt that would be an oppressive outcome."*

91. Earlier, in their reasoning, the Jurats had found that the Appellant regarded the Jaguar more as an asset to be realised than as a possession giving him any particular pleasure. In other words, the Appellant considered the vehicle more as an asset with a profit to be made on its sale. This finding was amply supported by the evidence, such as the lack of urgency in his dealings with Mr Freitas and the fact that he had not added to the documentary record relating to the Jaguar's provenance. This was in sharp contrast to the Respondent who, so the Jurats found, cherished the vehicle and had used and maintained it for a period of more than six years. These were clearly relevant matters for the Jurats to take into account when deciding what was just. Moreover, the question of whether the Jaguar is an ordinary article of commerce was in part related to how it was viewed by the Appellant. Having acknowledged the fact that the Appellant has established that he was the owner of the Jaguar, the Jurats nevertheless decided that the just and equitable outcome was to give the Respondent an option as to whether to return the vehicle and receive payment, or simply pay the Appellant the value assessed.

92. In our view, the Royal Court was correct to balance the views and interests of both the Appellant, as owner, and the Respondent, as innocent purchaser, in making the orders that it did as an exercise of its discretion. There is nothing in the approach adopted by the Jurats that would justify intervention by this Court.

The Deputy Bailiff erred in permitting the expert evidence from the Respondent's experts as to English law to be adduced before the Jurats, before he had first determined that Guernsey law was the applicable law (Ground 4)

93. The background to the Appellant's complaint is as follows. Before the Royal Court, the Respondent sought to rely on the evidence of two experts on English law. The first, Mr Dominic Dowley QC, in a report dated 17 May 2018, addressed the remedies for conversion available in English law. The second, Mr James Mather, in a report dated 10 October 2018, addressed the English Sale of Goods Act 1979 and the English Limitation Act 1980. Immediately prior to the trial, the Appellant objected to the inclusion of Mr Dowley QC's report in the Jurats' bundles until its relevance had first been determined by the Court. Despite this objection, the Deputy Bailiff permitted the expert report of Mr Dowley QC (and the report of Mr Mather) to be adduced before the Jurats because there was an issue concerning the governing law. As matters transpired, the Deputy Bailiff concluded that the case was governed by Guernsey law and he directed the Jurats that they need not consider any of the expert evidence. In these circumstances, the Appellant submits that the Deputy Bailiff's directions to the Jurats were contradictory, wrong in law and led to the Jurats being confused. The contradictory nature of the directions is said to arise from the direction to disregard the expert evidence, and the subsequent discussions of the English case law and relevance of the 1977 Act.

94. In our view, there is no basis for the submission that the directions were contradictory or that the Jurats were confused, which in any event is manifestly not the case. The direction in relation to the experts was the inevitable result of the Deputy Bailiff's ruling that any question of remedy would be decided by reference to Guernsey and not English law. The legal direction was of a type that is commonplace in the Royal Court and it is obvious from the Jurats' reasoning that they had no regard to the contents of the expert reports.

95. The Deputy Bailiff's directions on remedy were no more than an attempt to guide the Jurats to a just and equitable conclusion. He expressly directed the Jurats that they should regard their task as being to reach a just outcome with the aim of putting the Appellant into the

position as if the wrong had not been committed against him. Similarly, his directions in relation to the English case law and the significance of the 1977 Act were entirely appropriate. The English common law decisions provided assistance on the nature of the remedies available in claims for detinue and conversion, while the 1977 Act provided some indication of what the Westminster Parliament regarded as a fair approach to remedies in cases involving the wrongful interference with goods. These authorities were of obvious assistance to the Royal Court (as they were to the parties), and the Deputy Bailiff did not instruct the Jurats to apply English law. This is apparent from the direction he in fact gave to the Jurats on the types of relief available.

> *"Because Guernsey law follows English law in relation to torts, the choices are between the three types of relief summarised in Clerk & Lindsell. The first decision for them, therefore, would be whether or not to grant the primary relief sought by the Plaintiff of the delivery up of the Jaguar and, if so, on what terms. Such a remedy is discretionary – there is no absolute entitlement in Guernsey to an order for specific restitution – which means that any decision to grant that remedy must be rational and the discretion of the Court exercised judicially. If they decided to make an order for delivery up, on whatever terms, the Jurats could also consider giving the option to the Defendant to decline to deliver up the Jaguar but instead pay compensation to the Plaintiff for its value and, if so, the Jurats would need to determine what amount the Defendant would have to pay."*

96. These directions accurately summarised the position in law and fairly left the question of remedy to be determined by the Jurats in the exercise of their discretion. Accordingly, we see no merit in the Appellant's argument under this ground and reject it.

The Deputy Bailiff erred in the exercise of his discretion by permitting the Respondent to adduce expert evidence of English law from two experts (Ground 5)

97. The Deputy Bailiff had given the Respondent leave to adduce expert evidence at the case management conference on 6 April 2018. There was no appeal against his ruling. The Appellant has failed to explain why the exercise of the discretion to admit the evidence was wrong, nor has he explained why it had any unfair impact on the trial.

98. As with the previous ground of appeal, we see no reason to conclude that the expert evidence in relation to English law had any impact on the Jurats' reasoning or conclusions and, similarly, we consider this ground of appeal to be without substance.

The Deputy Bailiff erred in the exercise of his discretion in permitting the Respondent to adduce evidence from one of these English law experts (Mr James Mather) so late in time, namely the second day of the trial, that the Appellant was deprived of the necessary safeguards afforded to him by the relevant law and rules of evidence (Ground 6)

99. As noted above, the Deputy Bailiff gave the Respondent leave to adduce expert evidence on 6 April 2018. Mr Mather's report, dated 10 October 2018, was principally directed at two issues. First, whether by reference to the English Sale of Goods Act 1979, the Respondent had acquired good title to the Jaguar. Second, whether the claim was barred having regard to the English Limitation Act 1980. In fact, the Jurats decided both of these issues in the Appellant's favour (albeit as matters of Guernsey law). It follows that there is no substance in the Appellant's unparticularised assertion that he was deprived of the necessary safeguards, afforded to him by the *"relevant law and rules of evidence"*, and this ground of appeal is dismissed.

The Deputy Bailiff misdirected the Jurats by stating that they could determine the remedies available as if section 6 of the Torts (Interference with Goods) Act 1977 applied, having earlier directed them that customary law could not be abrogated without the intervention of the legislature (Ground 7)

100. The Appellant submits that the Deputy Bailiff misdirected the Jurats as to the appropriate remedies to be applied in holding that they need not be "*hidebound by references to English law decisions that have been supplemented by statutory interventions*". The effect of this direction, so the Appellant submits, is that the Jurats could proceed as though the provisions of section 6 of the 1977 Act, which deals with allowances for improvements, formed part of the customary law of Guernsey.

101. Section 6(1) and (2) of the 1977 Act, provide:

> *"(1) If in proceedings for wrongful interference against a person (the "improver") who has improved the goods, it is shown that the improver acted in the mistaken but honest belief that he had a good title to them, an allowance shall be made for the extent to which, at the time as at which the goods fall to be valued in assessing damages, the value of the goods is attributable to the improvement.*
>
> *(2) If, in proceedings for wrongful interference against a person ("the purchaser") who has purported to purchase the goods—*
>
> > *(a) From the improver, or*
> >
> > *(b) Where after such a purported sale the goods passed by a further purported sale on one or more occasions, on any such occasion,*
>
> *it is shown that the purchaser acted in good faith, an allowance shall be made on the principle set out in subsection (1)."*

102. Section 6(3) provides:

> "*If in a case within subsection (2) the person purporting to sell the goods acted in good faith, then in proceedings by the purchaser for the recovery price because of failure of consideration or in any other proceedings founded on that failure of consideration, an allowance shall, where appropriate, be made on the principle set out in subsection (1).*"

103. Unusually, section 6 contains an example of how it is intended to operate in practice:

> *"… where a person in good faith buys a stolen car from the improver and is sued in conversion by the true owner the damages may be reduced to reflect the improvement, but if the person who brought the stolen car from the improver sues the improver for failure of consideration, and the improver acted in good faith, subsection (3) … will ordinarily make a comparable reduction in the damages he recovers from the improver."*

104. The Deputy Bailiff's direction on this point was in the following terms:

> *"Section 6 of the 1977 Act may not be explicit as to how to deal with improvements by more than one person in a chain of improvers, but if the Jurats considered that it*

would be reasonable and pragmatic to recognise that the [Respondent] "purchased" the improvements of Mr Goldie, so that they could be viewed as if they were his own, then they were at liberty to do so if they thought it would fairly reflect what has happened."

105. Despite the obvious fact that the Deputy Bailiff was using section 6 as merely illustrative of what might be regarded as fair, it is submitted by the Appellant that this was inconsistent with the principles set out in *Greenwood v Bennett* (*supra).* It is also submitted that following the English common law position would not lead to an unjust result: the Appellant's Jaguar would be returned to him and he would reimburse the Respondent for the cost of the improvements for which he (the Respondent) was personally responsible, namely the amount of £3,660.82. Furthermore, as an additional reason for not recognising the claim for improvements, the Appellant points to the fact that the Respondent has had use of the Jaguar from 1 November 2013 for a nominal payment of £100.

106. In response, the Respondent submits that the Royal Court's approach was merely an example of the court developing the customary law by adopting principles to be found in the English authorities. The Appellant's approach, it is said, would lead to unwelcome rigidity in Guernsey's law of the type that was deprecated in *Morton v Paint* (*supra).*

107. For our part we are of the clear view that the Deputy Bailiff was correct to proceed on the basis of the long-established principle of Guernsey law that the law must be developed in a way which is in the interests of those who live in and visit Guernsey. There is nothing novel in this approach; nor is there anything novel in the Deputy Bailiff taking cognisance of English law. It is, however, important not to overstate the effect of the direction. The Deputy Bailiff was careful not to state that the Jurats were bound by English law; it was merely something they could take into consideration. As the express terms of the judgment make clear, the Jurats were directed that they were able to assess the justice of the position between the parties in order to reach an outcome that appropriately compensated them for what had taken place. The significance of section 6 of the 1977 Act is that it provides an illustration of what is or might be considered just as a matter of English law. This was clearly something to which the Jurats were entitled to have regard, as an indication of what is fair, when exercising their discretion as to the remedy. We reject the Appellant's complaint under this ground.

The Royal Court erred in rejecting the Appellant's arguments that the Respondent has an action for breach of warranty as to title against Mr Goldie (Ground 8)

108. Under this ground of appeal, the Appellant contends that the appropriate course of action would have been for the Royal Court to proceed on the basis that the Respondent was in a position to bring an action against Mr Goldie, from whom he bought the Jaguar in November 2013, and recover the purchase price of the vehicle (£65,000), with the result that he would not suffer any financial loss that might otherwise be occasioned by an order for delivery up of the vehicle.

109. By way of response, the Respondent makes two submissions. First, that any possible cause of action against Mr Goldie is simply irrelevant to the question of remedy in the current proceedings. Second, it is based upon a misunderstanding of English law. In support of this second submission, the Respondent makes reference to section 6 of the Torts (Interference with Goods Act) 1977, which we have set out above, and which governs allowances for improvement of goods. The Respondent's simple point is that in proceedings in England by reason of the operation of section 6 of the 1977 Act, the Respondent would not have the

right to bring an action in respect of the sums innocently expended by Mr Goldie on improving the vehicle, namely the sum of £43,325.58. The Respondent also makes the point that the Appellant's submission overlooks the fact that the order sought by the Appellant (that is delivery up of the vehicle in return for the payment of £3,660.82) fails to address the issue of unjust enrichment, which formed an essential part of the Jurats' reasoning.

110. In our view, any suggestion that the Respondent should be required to embark on yet more litigation (in this case against an innocent friend) is both unrealistic and disproportionate. Quite apart from whether the Respondent would be able to bring proceedings against Mr Goldie in England, it is necessary to consider the overall justice of requiring the Respondent to adopt such a course. The Royal Court took the view that it would be artificial to require the Respondent to bring proceedings against Mr Goldie, who in turn would have to bring proceedings against Mr Day, who would then have to find the person who sold the vehicle to him. The Jurats considered that they were in a position to do justice between the parties and that to require additional litigation, with all the consequential expenditure and use of resources, would be a backwards step. We respectfully agree. This litigation has already consumed large sums of money and taken up several days of court time. In advance of the appeal hearing, we were provided with nine lever arch files of documents and legal materials. We have no hesitation in concluding that the Royal Court was correct to reject the Appellant's argument on this point. We are also of the view that to adopt the course proposed by the Appellant would lead to injustice. It would result in the Appellant receiving a vehicle that was worth over three times as much as the one he lost. This increase in value was attributable in large measure to the improvements carried out by both Mr Goldie and the Respondent. It was this unjust enrichment that the Jurats were striving to avoid.

The Royal Court erred in finding that the Respondent "purchased" the improvements of Mr Goldie (Ground 9)

111. The Appellant's submission under this ground, based on the decision in *Greenwood v Bennett (supra)*, is that the Respondent is only entitled to the financial benefit of the improvements that he personally made to the Jaguar (the sum of £3,660.82) and, accordingly, the Royal Court erred in concluding that he was entitled to an allowance for the improvements made by Mr Goldie.

112. In response, the Respondent submits that the decision in *Greenwood v Bennett* in fact supports his position. He submits that the remedy sought by the Appellant would lead to him being unjustly enriched, something that Lord Denning M.R. (with whom Phillimore L.J. and Cairns L.J. agreed) was unwilling to countenance: "*The law is hard enough on [the defendant] when it makes him give up the car itself. It would be most unjust if the Plaintiff could not only take the car from him, but also the value of the improvements he has done to it – without paying for them*".

113. In our view, at the forefront of the English Court of Appeal's reasoning in *Greenwood v Bennett* is the need to do justice in any particular case. An aspect of this is to ensure that one innocent party is not unjustly enriched at the expense of another. The Royal Court (at paragraph 89) was alert to this point. It would have been wholly unjust if the respondent had been ordered to deliver up the vehicle with no allowance being made for the costs of the repairs carried out in 2012 and 2013. The effect that such an order would have is obvious: it would have enriched the Appellant at the Respondent's expense. In our view, the Royal Court was correct to avoid such an unfair outcome. When the Respondent bought

the vehicle from Mr Goldie, for the sum of £65,000, the purchase price reflected the earlier repairs which had cost over £43,000. It is obvious that the purchase price paid by the Respondent included the amount spent on the repairs and it is both accurate and fair to say that he purchased the improvements. As Lord Denning explained in the *Greenwood* case, a claimant should not be allowed to take the benefit of improvements at the expense of an improver who honestly believes himself to be the owner of the property and who carries out the improvements on the basis of that honest belief. Other authorities also make clear (see, for example, *Munro v Willmott* [1949] 1 K.B. 295, cited by the Royal Court at paragraph 85) that the measure of damages in detinue is to be assessed by reference to the value of the property which the owner has lost with the result that sums spent by a defendant on improvements are to be taken into account when determining the appropriate remedy.

114. While we acknowledge that there is no authority which deals directly with improvements made by more than one person in a chain of improvers, we consider that such authorities as there are (which were fully considered by the Royal Court) provide ample support for the direction given by the Deputy Bailiff to the Jurats:

> *"… If the Jurats considered that it would be reasonable and pragmatic to recognise that the Defendant "purchased" the improvements of Mr Goldie, so that they could be viewed as if they were his own, then they were at liberty to do so if they thought it would fairly reflect what has happened."*

115. Put simply, the Jurats were directed to assess the respective positions of the parties in order to reach an outcome that was fair. The Jurats were entitled to adopt a reasonable and pragmatic view when exercising their discretion. This approach is unimpeachable, and it follows that we reject the Appellant's complaint and this ground of appeal is dismissed.

The Royal Court lacked the necessary independent expert evidence to enable it to determine an appropriate level of compensation to be paid by the Respondent to the Appellant and therefore fell into error (Ground 10)

116. In support of this ground, the Appellant submits that any proper determination of the appropriate level of compensation placed a burden on the Respondent to adduce expert evidence as to the condition and value of the Jaguar as at the relevant date, that is the date of judgment, particularly if it was intended that the Appellant should be deprived of his property. Accordingly, he submits that because the Royal Court did not have expert evidence of the condition and value of the Jaguar, it lacked the necessary evidential basis upon which to exercise its discretion to deprive him of ownership of his property.

117. The Jurats' approach to the valuation of the vehicle is clearly set out in the Judgment (at paragraph 103):

> "*The Jurats have noted the evidence of the Jaguar's value in 2018 given by Mr Francis. His view is that in 2018 the Jaguar was 'a current ongoing project' and that he valued it in the region of £70,000. The Jurats have noted that the value of such a vehicle in Classic Car in the summer of 2018 in concours or dealer condition was stated as £70,000 and that in mint condition it would be £54,000. The Jurats have noted the incompatibility of a vehicle being an ongoing restoration project whilst having a value reflecting 'concours condition'. In their view, this illustrates the difficulty of valuing such an asset. While they realise that the Defendant has now insured the Jaguar for £85,000 and the Plaintiff has estimated the value at £90,000, they prefer the evidence of Mr Francis and from Classic Car which they regard as*

the most knowledgeable sources about such matters. Accordingly, for the purpose of assessing the value to be given to the Jaguar in its present state, the Jurats find that the value is a little below the £70,000 to which Mr Francis referred, a figure of £65,000 being preferred."

118. The evidence given by Mr Francis was contained in a statement dated 28 March 2018. This evidence was unchallenged by the Appellant, with the result that Mr Francis was not required to give evidence in person and his statement was read to the Jurats. The ability of Mr Francis to speak with some authority as to the value of the Jaguar was apparent from the first paragraph of his statement, which noted that he is a Vintage and Classic Car Restoration specialist with experience dating back to 1969. His most recent noteworthy instruction was to visit and assess the condition of a large private collection of vehicles in the Middle East. He was known to Mr Goldie (who had been a client of his for several years), and had first met the Respondent when he bought the Jaguar in 2012, since when he had carried out repairs on the car.

119. Against that background, we take the view that the Royal Court was in a position to determine the value of the Jaguar in 2018 on the basis of the evidence given by Mr Francis. The Appellant's submission, advanced at the hearing of the appeal, to the effect that the Royal Court should have disregarded the evidence of Mr Francis because he was not an independent expert is undermined by the fact that his evidence was not disputed. Moreover, there is nothing on the face of his statement to suggest that he was *parti pris*; his relationship with both Mr Goldie and the Respondent arose because of their involvement with classic cars. In any event, the Appellant did not seek to explore in cross-examination the nature of the relationships or the basis of his valuation. In the absence of any challenge it is unsurprising that the Jurats attached weight to his opinion. The additional resort to the use of Classic Car magazine was a conventional and unobjectionable exercise of taking into account an authoritative and publicly available price guide. We note that no objection was, or could have been, taken at the trial to its admissibility or use. For these reasons we see no substance in this ground of appeal and reject it.

In determining the compensation to be paid to the Appellant, the Royal Court erred in that it took into account evidence which it should not have done and/or failed to have regard to evidence it should have done (Ground 11)

120. In advance of the appeal hearing this ground of appeal was unparticularised. In the course of his oral submissions, Advocate Ferbrache made clear that he was directing his argument solely to the evidence given by Mr Francis. We have addressed this evidence when considering Appeal Ground 10. For the same reasons as those set out above, we reject the Appellant's complaint and dismiss this ground of appeal.

Having preferred the evidence of the value of the Jaguar given by Mr Francis, the Royal Court erred by failing to give any or sufficient reason for doing so such as to enable the Appellant to understand its decision (Ground 12)

121. In the course of the Royal Court's judgment on the issue of the Jaguar's value in 2018, the Jurats explained their reasoning in paragraph 103, which we have set out above, at paragraph 117 above.

122. In our view the Jurats' reasoning is clear and unobjectionable and, accordingly, there is no substance in the Appellant's complaint. This ground of appeal is dismissed.

The Royal Court erred in that it failed to give any or sufficient reasons as to why it rejected Mr Francis' valuation and instead 'preferred' a reduced valuation of £65,000 (Ground 13)

123. The Royal Court's reasoning (set out above) explains that the reduction applied to the value given by Mr Francis (and Classic Car) was based on the fact that the Jaguar was not in concourse or dealer condition and that it was an ongoing restoration project. The range of value given by Classic Car was between £54,000 (in mint condition) and £70,000 (in concours condition). The Jurats acknowledged the difficulty of conducting a valuation exercise in relation to a sixty year old car, and their conclusion is readily understandable. For these reasons, we see nothing of substance in this ground of appeal and it is, accordingly, dismissed.

The Royal Court erred in that having found that being an action in detinue the date for assessing the value of the Jaguar was the date of judgment, it proceeded to assess the damages payable to the Appellant by reference to the value of the Jaguar when it was taken by the Appellant to Mr Freitas (Ground 14)

124. We consider the Appellant's complaint of the Jurats' reasoning to be misconceived; it is based on a misreading of the Jurats' careful reasoning. The Royal Court's Judgment clearly explained how the ongoing value of the lost and unimproved Jaguar was in the region of £20,000. Put simply, the Jurats engaged in a conventional exercise of calculating the value of the asset at the time it was first taken and then went on to assess what its market value would be at the time of the trial, that is if it had remained in the Appellant's hands in an unimproved state. This exercise was carried out in order to assess the Appellant's claim on a pure damages basis. In other words, it was carried out for the purpose of considering the price to be paid by the Respondent in the event of his election to pay damages instead of returning the vehicle. The Jurats approached the issue in two ways. The first was to take the value as assessed at the date of judgment (£65,000) and deduct from it the allowances to be made for the improvements (£46,986), which resulted in a net value of the returned Jaguar in the Appellant's hands of £18,014. The Jurats' second method for assessing the claim is set out in paragraph 105 of the Judgment:

> *"The second is to consider what it was that the Plaintiff lost when the Jaguar was removed from where he thought it still was with Mr Freitas in storage. In that regard, the Jurats first note that the Plaintiff paid £16,700 for the Jaguar at auction in 2003 and that it was insured at an Agreed Value of £20,000. However, the Plaintiff then did not provide to his insurers the photographs that were required to enable to Agreed Value to be maintained. The Jurats find the Plaintiff's explanations for the absence of photographs as unconvincing. Even if, when requested, the Jaguar was not available to photograph, once it returned to the Plaintiff's possession it would be a simple step to have then taken the required photographs. The Jurats do not think that the Plaintiff never had the opportunity to take photographs, which leads them to infer that he chose not to photograph the Jaguar at any of these times, more likely than not because it would have shown the condition of the vehicle as below that he indicated when renewing his insurance without photographs. This leads them to conclude that the state of the vehicle was not even in mint condition (which Classic Car describes as "Shiny and bright, but not concours condition. Any defects should be small. You'll get a fine example for this money.") and more likely at best in average condition (which is defined as "Tidy and ready to use, but needing cosmetic attention. You'll have to spend more money if you want it to look smart."). Indeed, they have noted the definition of rough condition ("Usually a runner, but with an untidy body or needing parts. Extra spending may now be a more serious*

consideration"), which they find to be below the condition of the Jaguar as it was in 2008. Having regard to what is set out in Classic Car, they find that the best indication of the value of the Jaguar when it was taken by the Plaintiff to Mr Freitas is the £17,000 value for such a model in average condition. The Classic Car valuation at the end of 2011, by which time average condition had been replaced with good condition (albeit with the same definition), had risen to £20,000. On the basis that the Jaguar would have stayed approximately in the same condition during its time with Mr Freitas (although three or more years off the road would have resulted in some ageing and probably further work being required to make it roadworthy again), the Jurats are satisfied that the value of what the Plaintiff lost at around that time was no more than £20,000. Although it is not particularly relevant, given the passage of time to the present, the Jurats think it more likely than not that, if the Jaguar had not had the work carried out to it by Mr Goldie and then the Defendant, its condition could well have deteriorated to rough condition, or worse, where the value in 2018 in Classic Car is at £22,500. As such, the Jurats take the view that the ongoing value of the lost and unimproved Jaguar as it would now have been returned to the Plaintiff can properly be put in the region of £20,000."

125. Both methods of calculating the loss actually suffered by the Appellant resulted in broadly similar amounts of damages, and the Jurats concluded that the damages payable by the Respondent to the Appellant were to be assessed at £20,000. This amount was intended to represent a fair reflection of how to compensate the Appellant for the loss of the Jaguar, taking into account its condition when delivered to Mr Freitas and how its value would have been updated by the time of the Judgment. We see nothing in the Jurats' reasoning to call into question their approach or conclusions. They were striving to ensure a just outcome. For these reasons this ground of appeal is dismissed.

The Royal Court further erred in that having assessed the condition of the Jaguar as "average condition", which was replaced with "good condition" (albeit with same definition) in Classic Car, it then proceeded to value the Jaguar on the assumption that "its condition could well have deteriorated to rough condition or worse…" The Court failed to give any or sufficient reasons for doing so and it was against the weight of evidence which was that the Appellant had maintained the Jaguar (Ground 15)

126. We have set out the Jurats' reasoning which explained in clear terms why they were of the opinion that if the Jaguar had not had the work carried out to it by Mr Goldie and the Respondent, its condition could well have deteriorated to rough condition or worse. Contrary to the Appellant's submissions, the weight of the evidence was not that the Appellant had maintained the Jaguar. He accepted that he had delivered it to Mr Freitas in 2008 and, apart from seeing it once in 2009, he made no serious effort to seek its return over a period of years. He had not provided photographs of the vehicle to his insurers; nor had he taken steps to add to the documentary record relating to its provenance. There was ample support for the Jurats' conclusions and we reject the Appellant's complaint.

The Royal Court erred in that it failed to give sufficient weight to the fact that Mr Goldie and the Respondent were working together in relation to the proceedings and that Mr Goldie had made a payment in the order of £20,000 to the Respondent (Ground 16)

127. In support of this ground of appeal, the Appellant submits that although Mr Goldie was not a party to the proceedings, he and the Respondent admitted at trial that they were working together in defence of the action. Moreover, Mr Goldie disclosed in cross-examination that he had paid the Respondent £20,000 as a contribution towards his costs.

128. By way of response, the Respondent submits that he and Mr Goldie were not "*working together*" as alleged by the Appellant. They were long-standing friends, and the payment of £20,000 was a voluntary payment made by Mr Goldie because he had sold the Jaguar to the Respondent, and it was this sale that led to the litigation before the Royal Court.

129. For our part we see nothing in this point. The Jurats heard evidence from both the Respondent and Mr Goldie. The latter accepted they were working in concert. In their Judgment, the Jurats made reference (at paragraph 101) to Mr Goldie's evidence:

> *"Although the Court has not been told the precise terms of the arrangements the two have agreed, they noted that Mr Goldie referred to having taken steps to stop any limitation period for pursuing Mr Day and to there being a financial contribution to [the Respondent] to fund the proceedings."*

130. Whatever the precise terms of the arrangement, the key issue for the Jurats' determination was the appropriate remedy in circumstances where the Appellant had lost his vehicle as the result of a tortious act and the Respondent was a blameless purchaser. The essential facts were not in dispute and whether or not the Respondent and Mr Goldie were working together in relation to the proceedings was immaterial to the question of remedy. Nor has the Appellant explained otherwise. We can see no reason to fault the Jurats' approach and we reject this ground of appeal.

The Royal Court erred in holding that it was material to the exercise of the discretion whether to order delivery up that the Respondent "cherishes" the Jaguar (Ground 17)

131. The Appellant's submission on this ground is that the Respondent's attitude to the Jaguar was irrelevant to the exercise of the Jurats' discretion in relation to remedy. For their part, the Jurats recognised that the remedy of delivery up was discretionary and that the decision to grant the remedy must be rational and the discretion exercised judicially (paragraph 94 of the Judgment). The Jurats went on to consider the Appellant's attitude to the Jaguar (paragraph 97) and had regard to the Respondent's position (paragraph 98). In our view the parties' attitude to the vehicle was self-evidently relevant to the exercise of the Court's discretion and the fact that the Appellant regarded the car as *"an asset with an inflated value to be realised"* as opposed to the Respondent who *"cherishes"* the vehicle were relevant factors to weigh in the balance. There is no merit in this ground of appeal and it is dismissed.

The finding of the Royal Court that the Respondent cherished the Jaguar was against the weight of the evidence which was to the effect that the Respondent had allowed the conduct of the Jaguar to deteriorate having taken possession (Ground 18)

132. In our view this ground of appeal is unarguable. The evidence before the Royal Court was that the Respondent had purchased the vehicle from Mr Goldie at a price that reflected the improvements carried out at the Carrosserie Centre and that, thereafter, he had continued to expend money on the vehicle. While it is right to acknowledge (as the Jurats did) that the Respondent used the vehicle, for example for his daughter's wedding, (with the implication that it was not a mere chattel and had sentimental value), and that it was not in concours (that is, unused) condition, this is a very different thing from *"allowing it to deteriorate"*. There was no evidence to support a finding that the Respondent had neglected the vehicle and all the evidence was to the contrary.

Having held that the increase in value of the Jaguar was as a result of the improvement effected by Mr Goldie, the Royal Court erred in awarding to the Respondent the increase in value arising therefrom when such increased value belonged to the Appellant as owner (Ground 19)

133. The Appellant's submission in relation to this ground of appeal is that he was entitled to delivery up of the Jaguar, including the benefit of the improvements made to the vehicle by Mr Goldie.

134. The short answer to the Appellant's argument is that he is seeking the very outcome that the Jurats regarded as oppressive and unjust. It would result in the Appellant being unjustly enriched as a result of the improvements carried out by Mr Goldie. The Jurats, by a process of careful reasoning, reached an outcome that they considered to be fair and equitable. This was a matter for them to determine in the exercise of their discretion. The Order made by the Jurats was consistent with authority and properly balanced the competing interests of the Appellant and the Respondent. There is no reason to interfere with the Order as made and this ground of appeal is dismissed.

Conclusion

135. As is apparent from what we have said above, the grounds advanced by the Appellant fall into two broad categories: those of law and those of fact. Each is directed at the decision of the Royal Court in relation to the remedy in circumstances where both parties were likely to view the outcome as imperfect and where the Jurats were working to reach an outcome that was most just. The grounds advanced by the Appellant on the issues of law are without substance. The Appellant was successful in his principal claim for detinue and sought a discretionary remedy. The Jurats were entitled to give the Respondent the option of electing to pay the Appellant £20,000 thus resolving the dispute in a manner that was equitable. The approach taken by the Jurats, at the direction of the Deputy Bailiff, ensured that the Appellant was not unjustly enriched at the Respondent's expense while at the same time ensuring that he was fairly compensated for his loss. We see no basis for interfering with the Royal Court's order on the basis of any error of law.

136. So far as the factual issues are concerned, the conclusions reached by the Jurats were based on the evidence adduced by the parties and there is no reason to disturb their factual findings. They saw and heard the Appellant and Respondent give evidence in support of the respective cases and were in the best possible position to assess the competing cases. They received careful instructions from the Deputy Bailiff and they set out their factual conclusions with conspicuous clarity.

137. For all these reasons the appeal brought by the Appellant in relation to remedy is dismissed.

The Respondent's Cross-Appeal

138. The Respondent, by way of cross-appeal, submits that the Appellant's title to the Jaguar was extinguished by May 2016 (that is, prior to the commencement of the proceedings), pursuant to section 3 of the English Limitation Act 1980 and/or Guernsey law. The effects of section 3 of the 1980 Act were explained in a report produced by the Respondent's expert, Mr Mather. The essence of the Appellant's point is that the limitation period began to run when Mr Freitas first failed to surrender the Jaguar on demand, some time prior to May 2010, and the claim was prescribed against the Respondent when the proceedings were eventually issued against him in May 2016.

139. The relevant background to the cross-appeal is as follows.

140. By application dated 10 April 2017, the Respondent sought leave to amend his defences to plead an exception *de fond* in relation to the claim in *"conversion"*, namely that it was prescribed under section 3 of the Law Reform (Tort) (Guernsey) Law 1979. The Respondent made a further application, dated 19 April 2017, to re-amend his defences again pleading an exception *de fond* that the claim in *"conversion"* was prescribed under section 3 of the 1979 Law.

141. On 5 May 2017, the Respondent filed another application to amend his defences seeking to amend the exception *de fond*, now including reference to "*the general customary law and/or alternatively sections 2 and 3 of the Limitation Act 1980"* (English legislation) and to rely on section 4 of the 1979 Law rather than section 3.

142. These applications were considered by the Royal Court at a hearing on 31 May 2017 and while certain amendments to the defences were permitted *ex tempore*, the Court reserved its judgment in relation to the exception *de fond*. The Court handed down its judgment on 12 September 2017. In the course of his judgment, the Deputy Bailiff held that the question of whether the Plaintiff was out of time was governed by Guernsey law. He also concluded that section 3 of the English statute could not assist the Defendant in any event as there was no factual basis for concluding that any conversion took place before May 2010:

> *"I do not think that the Defendant has any realistic prospect at trial of establishing facts to support the contention or the contention that the first conversion and the Plaintiff's knowledge of it means that the cause of action crystallised on a date sufficiently early that the Plaintiff's cause will be dismissed on the basis that it was out of time."*

143. The Act of Court, also dated 17 September 2017, provides:

> "*That the* [Respondent] *is refused leave to amend in respect of the proposed addition of paragraph 3 of the Further Draft Amended Defence, entitled 'Exception de Fond in Relation To Claim For Conversion"*.

144. The Act of Court was not the subject of any appeal and no exception *de fond* was raised by the Respondent in his defence at trial. Despite the Deputy Bailiff's ruling, Advocate Ozanne, on behalf of the Respondent, sought to rely on section 3 of the Limitation Act 1980 at the trial. The Jurats rejected the Respondent's argument for the same reasons as the Deputy Bailiff and went on to explain their conclusions on the facts (at paragraph 71 of the Judgment):

> *"The Jurats accept that someone has chosen to deal with the Jaguar in a manner adverse to the Plaintiff's ownership of it prior to it leaving Guernsey, and so after Mr Day had re-registered it, in September 2011. However, there is no evidence on which the Jurats could reach the conclusion that that step was taken prior to May 2010. Accordingly, even if this technical argument had any merit (which the Deputy Bailiff rejects in law), it cannot assist the Defendant on the facts. There is, therefore, no basis on which the Defendant can contend that the passage of time means that the Plaintiff's title has been extinguished."*

145. These factual findings are unassailable and, accordingly, the cross-appeal is dismissed.

The Application to Adduce Fresh Evidence

146. At the outset of the appeal hearing, Advocate Ferbrache, on behalf of the Appellant, applied pursuant to rule 12 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964, to adduce into evidence two recent insurance documents (a certificate of motor insurance and a policy schedule). These documents demonstrate that the Respondent, as recently as 1 November 2019, insured the Jaguar for £85,000. Notice of the Appellant's application had been given on 25 November 2019, and was supported by an affidavit sworn by Advocate Cowling, also on 25 November 2019. Advocate Ozanne, on behalf of the Respondent, opposed the application on the basis that the insurance value of the vehicle had not changed since the time of the trial and, accordingly, the most recent insurance documents were irrelevant to the issues raised by the grounds of appeal. We agreed to consider the evidence *de bene esse*, that is conditionally, on the basis that its possible relevance and importance would be assessed following our consideration of the parties' arguments.

147. By reason of Rule 12(2) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964, the Court of Appeal has full discretionary power to receive further evidence upon questions of fact, although in an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted save on special grounds. The test for admitting fresh evidence is well-settled (see, for example, *Smith v Slawther* (1998) 25 GLJ 59). Before such evidence will be admitted; (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) the evidence must be apparently credible, although it need not be incontrovertible.

148. The Appellant submits that the most recent insurance documents are further evidence that the true value of the Jaguar is £85,000, and that the value given to the vehicle by the Jurats was obviously wrong.

149. In our view, the application is to be viewed in the context of what was decided by the Royal Court. In the course of its decision (at paragraph 103) it was found that the Jurats agreed the value of the Jaguar for insurance purposes was of limited relevance in determining the actual value of the car for the purposes of the trial. The Jurats expressly acknowledged that the Respondent had insured the vehicle for £85,000 but went on to prefer the evidence of Mr Francis and the guide to price from Classic Car magazine.

150. In these circumstances, the additional evidence adds nothing more to what was considered by the Royal Court and the application to adduce additional evidence is refused.

The Costs Appeal

151. To avoid confusion, for the purposes of the costs appeal, we refer to the parties by name. Before the Royal Court, Mr Kitching applied for costs on an indemnity basis. For his part, Mr Hindle applied for a tailored set of orders, some of which would be on the recoverable basis, and some on the indemnity basis.

152. On 21 June 2019, following full argument, the Deputy Bailiff, in an *ex tempore* judgment, explained that he had approached the issue of costs by identifying the successful party and determining the basis upon which costs would be awarded to that party. He then determined

whether the successful party should be deprived of some of his costs having regard to other relevant factors.

153. The Deputy Bailiff noted, as a matter of regret, that Mr Kitching had not challenged the jurisdiction of the Royal Court, as the case would have been cheaper had it been conducted in England and Wales. He also expressed the view that both Mr Goldie and Mr Day should have been joined as parties.

154. In terms of the applicable rules, the Deputy Bailiff noted that by reason of Rule 82 of the Royal Court Civil Rules 2007, the Royal Court enjoys a broad discretion as to costs, while Rule 83 gives the Royal Court a discretion whether to order costs on a full or partial indemnity basis. The relevant test for awarding indemnity costs is whether there is something in the conduct of the party in question which takes the case out of the norm in a way which justifies such an order.

155. As a starting point, the Deputy Bailiff observed that there could be no doubt that Mr Hindle was the successful party: he had sought particular relief and obtained it. The only basis upon which it could be said that he was not the successful party was because the Royal Court gave Mr Kitching the option of paying damages in lieu of delivering up the Jaguar, but that was in the alternative, and in any event involves a payment being made to Mr Hindle.

156. The Deputy Bailiff expressed sympathy with Mr Hindle's view that Mr Kitching should not have contested the issue of ownership of the Jaguar; on the basis that there was always likely to be a finding that Mr Hindle was the owner. As such, it was more likely than not that Mr Kitching's conduct on this issue was unreasonable.

157. That said, the Deputy Bailiff acknowledged that difficult questions as to the applicability of Guernsey law fell to be considered. As a result, the Deputy Bailiff did not view the stance taken by Mr Kitching as to the existence of certain tortious remedies to be unreasonable.

158. The Deputy Bailiff also noted that the instructions which were given by Mr Kitching to the expert on English law (Mr Dowley QC) were incomplete (he had dealt with remedies under the 1977 Act and not, as originally envisaged, with the Sale of Goods Act 1979 or the Limitation Act 1980) and this failure was properly to be characterised as unreasonable behaviour. So, too, was Mr Kitching's attempt to re-litigate the issue of ownership, in the face of an earlier ruling on the point.

159. Viewing the matter overall, the Deputy Bailiff concluded that there were some areas where Mr Hindle was entitled to costs on a partial indemnity basis, or specific issue basis.

160. However, before making such an order, Rule 62(11) of the 2007 Rules required the Royal Court to consider any offer of settlement. On 5 July 2016, Mr Kitching had paid £22,000 into court in an offer to settle the Appellant's claim, with each side agreeing to bear its own costs. The difference between the offer and what the Respondent was ultimately ordered to pay the Appellant amounted to £1,900. The Royal Court therefore had to consider whether, bearing in mind that it did not include costs, the offer was one the Appellant should have accepted. The Deputy Bailiff concluded that it was not, bearing in mind the costs the Appellant would have accrued even at what was a relatively early stage in the proceedings.

161. The Deputy Bailiff reasoned that it was of relevance that the primary relief sought by Mr Hindle was not monetary; it was the return of the Jaguar. In these circumstances, a

monetary solution, especially a marginal one, would not have been particularly attractive to Mr Hindle and it became even less so once the costs started to escalate. As a result, bearing in mind the requirement of Rule 62(11), the Deputy Bailiff concluded that the payment into court of £22,000 and its non-acceptance did not shift the costs presumption from Mr Hindle as the successful party to Mr Kitching as the paying in party. It was, however, something he was entitled to take into consideration when considering the position overall.

162. The Deputy Bailiff also acknowledged that Mr Kitching had attempted to settle the proceedings on a monetary basis on a number of subsequent occasions. There was also a mediation, in November 2017, initiated by Mr Kitching. Despite acknowledging these matters, the Deputy Bailiff noted that the overall difficulty with Mr Kitching's approach was that he was not willing to concede Mr Hindle's ownership of the Jaguar. Likewise, an offer made by Mr Hindle to withdraw proceedings on 18 April 2018, on condition that the Jaguar be transferred, while a positive step, failed to reflect the work Mr Goldie had undertaken to improve the Jaguar. The Deputy Bailiff held that Mr Kitching's counter-offer on 25 April 2018 of delivery up of the car in exchange for £53,000 plus interest and £40,000 contribution to costs was unrealistic.

163. The Deputy Bailiff found that Mr Hindle's desire to reach a negotiated settlement was marginally lower than Mr Kitching's and expressed the view that once it became clear that the costs of the proceedings were far outstripping the value of the Jaguar, more intense efforts to settle the claim should have been made.

164. The Deputy Bailiff rejected Mr Kitching's submission to the effect that he was entitled to his costs on an indemnity basis, as this would have failed to reflect the fact that Mr Hindle had succeeded in his claim. He concluded that the proper way to reflect the overall position was not to award costs to Mr Hindle on an indemnity basis and, looking at the issue in the round, he made an order that Mr Kitching pay Mr Hindle's costs on the recoverable basis in respect of all the costs, other than those for which costs orders were already in place.

165. Mr Kitching now appeals on the grounds that the Deputy Bailiff's order was perverse, wrong in both law and in fact, and has resulted in an unjust outcome. He does, however, recognise that the Royal Court enjoys a wide discretion when it comes to make orders as to costs and that, in seeking to overturn the costs orders, the threshold he must meet is a high one. He nevertheless submits that the orders made by the Deputy Bailiff should be overturned.

The Costs Grounds of Appeal

166. Mr Kitching advances no fewer than eighteen grounds of appeal. Reduced to their essentials they amount to four points:

(i) Mr Kitching was the substantial winner at the trial in that he was entirely successful in his defences as he kept the vehicle paying only a realistic assessment of its value with no undue enrichment of Mr Hindle.

(ii) The Royal Court erred in determining that the limitation point was reargued having been the subject of an earlier adverse ruling, when the findings of fact on the point were for the Jurats.

(iii) The Royal Court erred in finding that Mr Kitching had acted unreasonably in relation to the ownership issues, and the instructions given to the expert, Mr

Dowley QC, and erred in failing to find that Mr Hindle had acted unreasonably in failing to provide any breakdown of costs.

(iv) The Royal Court erred in its consideration of the conduct of the parties in their attempts to settle the litigation and Mr Hindle's failure to accept the payment in.

167. The appeal is resisted by Mr Hindle on the basis that the Deputy Bailiff, who had conduct of the proceedings since their outset in 2016, was best placed to make an assessment of the conduct of the parties and properly exercised his discretion.

168. At the hearing of the appeal, Advocate Ozanne focused her submissions on the payment in point, and contended that Mr Hindle's decision not to accept the payment was determinative of the costs issue.

Discussion

169. The starting point in our consideration is the obvious point that the Royal Court has a broad discretion when it comes to making an award of costs of proceedings, and on what scale. The discretion is clearly set out in the Royal Court Civil Rules 2007 Rule 82:

> *"The Court may, in any action… make such order as to the costs of the proceedings… as the Court thinks just."*

170. Rule 83 provides that:

> *"(1) Notwithstanding the provisions of the Royal Court (Costs and Fees) Rules 2000 ('the 2000 Rules'), or any other rule of Court or enactment, the Court may, in the circumstances mentioned in paragraph (2), order that costs or security for costs shall be paid on a full or partial indemnity basis"*

171. The *"circumstances"* mentioned in paragraph (2) are as follows: (a) where, in the special circumstances of the case, it is the opinion of the court that costs should be ordered otherwise than on the basis provided by the 2000 Rules; or (b) where any party has pleaded or otherwise pursued or defended an action, claim or counterclaim unreasonably, scandalously, frivolously, or vexatiously, or has otherwise abused the process of the court.

172. As is well-known, the power of the Court of Appeal is limited to correcting those costs orders which are plainly wrong, involve an error of principle, or are the result of a failure to take into account relevant matters, or to take into account an irrelevant matter. This was confirmed in *Carlyle Capital Corporation Limited v Conway* [2011-12 GLR 562] in which the Court noted:

> *"Where the discretionary decision of a lower court is involved, the limits of the appellate court are the correction of error of principle, of the taking into account of an irrelevant matter, the failure to take into account a relevant matter or the interference with a decision plainly wrong: e.g. The Abidin Daver [1984] A.C. 398, at 420."*

173. In this connection, it is also relevant to note the decision of the English Court of Appeal in *Tanfern Limited v Macdonald* [2000] EWCA Civ 152; [2000] 1 W.L.R. 1311. In that case, the Court of Appeal considered the test, established in *G v G* [1985] 1 W.L.R. 647, to be

applied by an appellate court when considering the exercise by a judge of his discretion. Brooke LJ repeated what Lord Fraser had said in *G, supra,* (at paragraph 32):

> *"the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted but has exceeded the generous ambit within which a reasonable disagreement is possible."*

174. This was further explained in *Taylor v Burton* [2014] EWCA Civ 21; [2014] 3 Costs L.O. 33 in which the English Court of Appeal noted (at paragraph 44):

> *"An appellate court will only be justified in interfering with his order if he has misdirected himself in principle as to the applicable considerations, or has taken into account a factor he should not have done, or has failed to take into account a factor he should have done, or has reached a judgment that falls outside the range within which reasonable disagreement is possible. The hurdle faced by a challenge to a judge's costs order is a high one."*

175. The key part of the Deputy Bailiff's reasoning in relation to the payment in is set out in paragraphs 16 – 18 of his judgment, which we set out in full:

> *"16. Because there was no offer to pay any of the Plaintiff's legal costs, looking back from what the outcome is, as the Defendant puts it, namely a payment to the Plaintiff of £20,100, involves considering whether £1,900, being the difference between what was recovered as a result of the Defendant electing to keep the Jaguar and pay £20,000 plus the £100 of damages that were in any event awarded, involves what I consider to be quite difficult considerations. There is no evidence before me as to what the costs that had been incurred by the Plaintiff by that time were to know whether the £1,900 excess would match or not the costs that he had incurred. As soon as the proceedings continued beyond that time, it is apparent to me that the offer including no costs is such that it became less attractive because costs have been in issue.*
>
> *17. On balance, I am minded to reach the conclusion that £1,900 was not a particularly attractive margin in those circumstances. The approach that would be taken to a payment in is that it should reflect the recovery that can be expected plus the amount of costs that would have been incurred up to the date of considering that payment in and accepting it and, therefore, in my view one is looking at the costs that would be in issue not up to 5th July itself but up to a time thereafter enabling the Plaintiff to take some advice on the payment in and determine whether or not to accept it.*
>
> *18. I accept the submission of Advocate Mark Ferbrache, who appears on behalf of the Plaintiff, that the costs that would be capable of being considered as being covered within the terms of that payment in would extend to the pre-issuing work which is taking the client's instructions, considering the merits of issuing proceedings, particularly in this jurisdiction where the vehicle is by that time known not to be within the jurisdiction, and although there were costs orders in the Plaintiff's favour by that time because of the procedural steps that had already been taken, on balance, as I say, I am not minded to regard £1,900 as being a sufficient margin to make the payment in hugely attractive. It appears that the £22,000 has*

been derived from the insured value. That is apparent from what is now shown to the Court as without prejudice save as to costs correspondence where £22,000 had been offered on that basis on 20th June 2016."

176. Bearing in mind the high threshold which must be satisfied before the costs order could be disturbed, we see nothing in this approach that can be characterised as perverse, nor is it otherwise flawed. The Deputy Bailiff's *ex tempore* judgment demonstrates that he adopted a thoughtful and careful approach to what was a difficult case. He was familiar with the procedural history and the evidence, and fully addressed the submissions advanced on behalf of Mr Kitching. As the Deputy Bailiff recognised, there was no doubt that Mr Hindle was the successful party. In our view, for the Deputy Bailiff to have awarded costs to Mr Kitching on an indemnity basis would have penalised the successful party and turned the orthodox approach to costs on its head. Mr Kitching's continued challenge to Mr Hindle's ownership of the vehicle was properly characterised as unreasonable. Moreover, it is the case that the Deputy Bailiff had rejected the Respondent's limitation argument in a judgment delivered on 12 September 2017. The Deputy Bailiff had also found that there was no evidence on which the Jurats could find the Limitation Act 1980 was engaged and the Appellant's title extinguished. This was a finding with which the Jurats ultimately agreed. It was also the case that the instructions given to Mr Dowley QC were incomplete and contrary to what had been contemplated at the Case Management Conference. Similarly, the Deputy Bailiff was familiar with the conduct of the parties and there was no misunderstanding of the offers of settlement, including the payment into court. The Deputy Bailiff had before him in evidence all the pre-trial correspondence, both *"open"* and *"closed"*. By the time of the costs hearing, Mr Kitching had been the subject of a number of costs orders, some on an indemnity basis, which had not been appealed. In our view, the Deputy Bailiff, for the reasons he gave, was entitled to make the order he did. As he himself recognised, reaching a just outcome in a case which had occupied many hearings and been fought strenuously on both sides was not easy. His conclusions were well within the scope of his discretion and the complaints advanced by the Respondent are unjustified. For these reasons, the costs appeal must be dismissed.

177. While we have dismissed the costs appeal on its merits, we should also make clear that appeals to this Court as to costs may only be pursued with the leave of the Royal Court. In this case, the Deputy Bailiff expressed the view that an application for leave was not necessary. In fact, while we have every sympathy for the Deputy Bailiff, the position is governed by section 15(c) of the Court of Appeal Guernsey Law 1961 which in material part provides:

> *"An appeal shall not lie to the Court of Appeal under this Part of this law … (c) 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."*

Where a substantive appeal is successful the costs order may of course be overturned as a consequence and no leave is required under section 15(c). But where a party wishes this Court to vary the costs order made below even if the substantive appeal is dismissed, the matter falls squarely within section 15(c) and leave to appeal must be obtained from the presiding judge in the Royal Court. In the absence of such leave, this Court does not have jurisdiction to vary the costs order below if it dismisses the substantive appeal. It follows that, having dismissed the appeal and the cross appeal, we have no jurisdiction to interfere with the costs order made by the Deputy Bailiff

178. Notwithstanding the effect of section 15(c), we have dealt with the appeal on its merits, and, as such, the procedural error has caused no prejudice to the Respondent's position.

179. The parties are invited to make written submissions as to the costs of the appeal proceedings within 14 days of the date of this judgment.