
THE DISPUTE RESOLUTION REVIEW

SECOND EDITION

EDITOR
RICHARD CLARK

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

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THE DISPUTE RESOLUTION REVIEW

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JERSEY

*Fraser Robertson, Natasha Clark and Davida Blackmore**

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Jersey is a common law jurisdiction, whose legal system draws on both the common law of England and the ancient customary law of Normandy. In areas such as the law of torts, trusts and criminal law, the court draws heavily on English law whereas in cases involving disputes over land and contract law, it draws on Norman customary law principles, which have been adapted and developed to deal with modern day disputes.

The Royal Court is the principal court of Jersey and has the following divisions:

- a* *Héritage* (dealing with property issues);
- b* Family;
- c* Probate; and
- d* *Samedi* (which deals with all other matters including criminal).

The nature of the dispute determines in which division the matter will be heard, but in general, large commercial disputes are heard in the *Samedi* division. The Bailiff is the President of the Royal Court who determines questions of law whereas questions of fact are decided by a permanent panel of Jurats, who are a type of lay judge.¹

In large commercial cases, the general rule is that all court proceedings are conducted in public, unless otherwise ordered by the court or on the application of one or other of the parties. If a party wants a hearing conducted in private, the court has to be satisfied that the need for confidentiality outweighs the public interest in access to

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1 Jurats are generally persons of high standing within the local community and need not be legally qualified. There are 12 Jurats. Their Inferior Number comprises a judge plus two Jurats, and the Superior Number (convened for serious matters where custodial sentences are likely to exceed four years) comprises judge plus at least five Jurats.

open justice. In certain circumstances, judgments may be anonymised, as in matrimonial disputes or cases involving the welfare of children.

Appeals from decisions of the Royal Court are made to the Court of Appeal of Jersey, and from there to the Judicial Committee of the Privy Council. Any decisions of the Privy Council are final and binding on all the courts below. This is unusual as Jersey law does not recognise the concept of *stare decisis* in the same way as the courts in England and may depart from earlier decisions (although they will not do so unless the matter is plainly wrong). The Privy Council will generally only hear cases that involve a point of law of general public importance.

In addition to the formal court processes, the Jersey Employment Tribunal has been established to hear disputes arising under the jurisdiction granted to them by the relevant legislation. It comprises a legally qualified chairperson who sits with two lay members with appropriate experience. It is possible to appeal a decision made by the Tribunal to the Royal Court, but on a point of law alone. There is no right to appeal any decision made by the Royal Court and their decision is final.

II THE YEAR IN REVIEW

*i Peter Michel v. Her Majesty's Attorney General*²

On 14 May 2007, after a 30-day trial before the Inferior Number of the Royal Court (Sir Geoffrey Nice QC, as Commissioner), Mr Michel was convicted on nine counts of money laundering contrary to Article 32 of the Proceeds of Crime (Jersey) Law 1999 and was later sentenced (by the Commissioner and five Jurats) to six years' imprisonment.

Mr Michel appealed against his conviction (but not against the sentence or the confiscation order), but this was dismissed by the Court of Appeal on 13 December 2007. He was, however, granted special leave to appeal against that decision.

Commissioner Nice was strongly criticised by the Privy Council for his unfair handling of the trial of Mr Michel and the central ground of appeal as to the fairness of the trial focused entirely on the Commissioner's conduct of the hearing and his continual interruptions of the evidence, of prosecution witnesses, as well as the appellant himself, of evidence in chief as well as cross-examination. The court looked at the statistics and determined that Commissioner Nice had 'intervened with substantive questions on no fewer than 273 occasions, 138 of them during evidence in chief. Generally, this was with a whole series of questions, taking up in all just over 18 per cent of the appellant's eight-and-a-half days in the witness box.'

The court quashed the conviction against Mr Michel in a judgment that said that Commissioner Nice had been snide and sarcastic and that his actions had rendered the trial unfair. As Lord Brown stated:

Not often is defence counsel, appealing against conviction on the grounds of an unfair hearing, able to turn the appeal court's feeling from initial rueful concern to eventual deep dismay simply by reference to the number and character of the judge's interventions in the course of the trial. Such,

2 [2009] UKPC 40.

alas, is the position in this case and, overwhelming though the evidence against the appellant may appear to have been, the Board can see no alternative but to set his conviction aside.

ii *B v. C, D & E: In the matter of the A trust*³

This case concerned a settlor who established the A Trust and made a voluntary disposition into it under advice, which subsequently gave rise to a substantial unforeseen tax liability. The settlor sought a declaration by the court that the voluntary disposition had been made under a mistaken belief and that the trust should be invalidated insofar as it related to her voluntary disposition.

In deciding whether to set aside the trust on the grounds of mistake, the starting point is Article 11(2) of the Trusts (Jersey) Law 1984, which states that ‘a trust shall be invalid... to the extent that the court declares that... the trust was established by... mistake...’. The Royal Court then considered the test for setting aside a voluntary disposition under Jersey law, and looked at the English case *Sieff v. Fox*⁴, which stated:

*According to Gibbon v. Mitchell,*⁵ *the mistake must be as to the effect of the disposition, and a mistake as to its consequences is not sufficient. If that is the correct test, this would not justify setting the disposition aside. According to Ogilvie v. Littleboy, the test is more general, namely whether the donor or settlor ‘was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him’. That formula might allow fiscal consequences to be taken into account, if they were sufficiently serious...*

The court held that ‘there is no good reason to restrict the Court’s jurisdiction under Article 11(2) of the Trusts Law to the narrow *Gibbon v. Mitchell* test’, and concluded that under Jersey law the test when considering an application to set aside a voluntary disposition on the grounds of mistake by an individual is that set out in *Ogilvie v. Littleboy*.⁶ It was clear that there had been a mistake of law regarding the settlor’s liability to UK tax and the mistake was serious since it gave rise to an immediate charge to UK tax of up to £1.2 million, a sum which represented a material proportion of the settlor’s wealth. ‘But for’ the mistake, the settlor would never have agreed to make a disposition with such consequences.

iii *AG v. Warren & Ors*⁷

This case attracted an enormous amount of media interest and is interesting, not only because of the notoriety and ‘celebrity’ of the defendant, but also due to the unusual actions of the Jersey police in intercepting the plot. Curtis ‘Cocky’ Warren, a notorious gangster who is the only drug trafficker to appear on the ‘*Sunday Times* Rich List’ was convicted at assize trial of conspiracy to fraudulently evade the prohibition on the importation of a controlled drug, namely cannabis, contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law 1999.

3 2009 JRC 245.

4 (2005) 1 WLR 3811.

5 [1990] 1 WLR 1304.

6 (1897) 13 TLR 399.

7 [2009] JRC 234.

Warren was previously jailed in Holland over a £100 million drugs plot, a sentence that was lengthened when he was convicted of killing a fellow prisoner. Warren had only been out of prison for five weeks when he was arrested by Jersey police and accused of being the ringleader and mastermind of a gang that was trying to import cannabis into the island from Holland via a boat from France. The sentencing court was strongly disapproving of the actions of the Jersey police, who had carried out a bugging operation in France without the lawful authority, but the Jersey Court of Appeal had already ruled that the illegal recordings should be admitted in the interests of justice.

Ultimately, he was sentenced to 12 years' imprisonment.

*iv MacKinnon v. MacKinnon*⁸

In this case, the court examined the circumstances in which an order for costs ought to be made against an executor personally and whether an executor ought to be prevented from recovering his or her own costs, incurred in contesting the litigation, out of the estate. The testatrix, Dorothy MacKinnon, died on 15 October 2002. Part of her estate was contained within certain family trusts. These trusts became the subject of dispute between the testatrix's sons, James and Andrew. They reached a compromise in April 2006, and, as part of that compromise, a grant of probate was issued to Andrew on 10 May 2006. James, who was unhappy with the way in which Andrew was carrying out the administration of the estate issued a representation, then sought an order that the costs of and incidental to the representation be met by Andrew on the indemnity basis, and further, that Andrew be prevented from claiming his costs out of the estate.

The court interestingly followed and applied principles of trust law in considering when it might be appropriate for an award of indemnity costs against an executor, and followed previous decisions where it was held that a trustee's breach of fiduciary duty was, of itself, a sufficiently 'special' or 'unusual' circumstance to justify such an order.⁹

The court confirmed that the general principle is that an executor is entitled to recover the costs of the administration from the estate, citing Article 15 of the Wills and Successions (Jersey) Law 1993, but in cases where an executor is ordered to pay the costs of a legatee personally, it would be wrong to allow an executor to recover his own costs from the gross estate at the expense (in whole or in part) of the same legatee.

III COURT PROCEDURE

i Overview of court procedure

There are no pre-action protocols such as those in England and Wales in relation to civil litigation. Civil litigation is governed generally by the Royal Court Rules 2004 and accompanying Practice Directions, which are available on the Jersey Law website¹⁰ and which are generally based on England's Supreme Court Practice pre-Woolf Reforms.

8 [2009] JRC 218.

9 *Ogier Trustee (Jersey) Limited v. CI Law Trustees Limited* [2006] JRC 158 and *In Re the H Trust* [2009] JRC 158.

10 www.jerseylaw.je.

ii *Procedures and time frames*

Legal proceedings in the Royal Court can be commenced by summons, order of justice or representation. A summons is only used when suing for a liquidated sum, and generally most actions are initiated by order of justice, which sets out the plaintiff's claim and is signed by the locally qualified advocate or solicitor.

If proceedings are commenced by summons, service by post is permissible. However, an order of justice must be served personally on the defendant and will be via the Viscount.

Upon service of the order of justice, the defendant is served with a summons giving a date for appearance before the Royal Court. The matter is then 'tabled' by the plaintiff by 12p.m. on the Thursday before the date on the summons. Assuming the defendant wishes to defend the claim, then the matter may be placed on the Pending List evidencing an intention to defend, or adjourned *sine die* (to a date to be fixed). If the matter is placed on the Pending List, the defendant has 21 days to serve its answer (and counterclaim if required). The plaintiff then has 21 days to file its reply, should it wish to do so. If the defendant does not appear on the Friday afternoon then judgment can be taken in its absence. The matter then proceeds through the usual stages of discovery and so on until the matter settles or the parties are ready for trial.

There is little statutory framework for limitation periods and prescription periods in Jersey are, in most cases, based on case law rather than statute. The majority of commercial claims are based on tort and contract law. The prescription period for tort claims is three years from the date on which the cause of action accrued.¹¹ The prescription period for contract claims is regulated by Jersey customary law and is 10 years from accrual of the cause of action.

Numerous interim remedies are available on the application of either party before trial and include (among many others) interim injunctions, orders for the freezing of property and search orders. It is not possible, however, to ask for pre-action disclosure.

If the defendant fails to file an answer, the plaintiff can apply for judgment in default. A party can also apply to strike out the other's case, because the opposing pleading:

- a discloses no reasonable cause of action or defence;
- b is scandalous, frivolous or vexatious;
- c may prejudice, embarrass or delay the fair trial of the action or any other proceedings; and
- d is otherwise an abuse of court process.

It is also possible to apply for strike out on the grounds that two months have passed since the close of pleadings and no summons for directions has been issued and can also be struck out for want of prosecution.

11 Law Reform (Miscellaneous Provisions) (Jersey) Law 1960.

iii Class actions

Representative proceedings may be brought where one individual wishes to represent a number of individuals with identical interests in the same proceedings¹² and a plaintiff in proceedings can apply to the court for the court to appoint a defendant to represent other defendants.¹³ The judgment obtained will be binding on the people who are represented, but that judgment will only be enforceable with the leave of the court.¹⁴ In the exercise of its inherent jurisdiction, the Royal Court may stay an action in circumstances in which there are numerous similar cases and one of them may be used as a test case, which will effectively dispose most of the issues of liability in all the cases.¹⁵

iv Representation in proceedings

Only locally qualified Jersey advocates have rights of audience in the Royal Court, but any person who is not a minor or under an incapacity has the right to commence civil proceedings without professional representation and the court will adopt a fairly lenient approach to litigants appearing in person.

v Service out of the jurisdiction

Any civil or commercial matter summoning or citing a person outside Jersey to attend before a court in Jersey may be served in such manner as prescribed by Rules of Court.¹⁶ Under Rules 5 of the Service of Process Rules 1994, leave must be sought from the court in order to serve out and such leave is governed by Rule 7 of the Service of Process (Jersey) Rules 1994. The case must fall within one of the specified circumstances of Rule 7 and, for example, may be allowed where the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction but the defendant resides outside Jersey. The summons must be in the appropriate format¹⁷ and accompanied by affidavit¹⁸ and stating the belief that the plaintiff has a good cause of action,¹⁹ showing the country in which the defendant can be found and detailing the grounds under Rule 7 upon which the application is made.

vi Enforcement of foreign judgments

The Judgments (Reciprocal Enforcement) (Jersey) Law 1960 provides for the registration and enforcement in Jersey of judgments given in the superior courts of countries that give reciprocal treatment to judgments given in Jersey:

12 Rule 4/3(1) of the Royal Court Rules 2004.

13 Rule 4/3(2); *ibid.*

14 Rule 4/3(3); *ibid.*

15 *Labia v. Jefferson Seal Ltd* [1997] JLR n3.

16 Article 2 Service of Process and the Taking of Evidence (Jersey) Law 1960.

17 Form 2A or 2B, Schedule, Service of Process Rules 1994.

18 Form 3, *ibid.*

19 See also the case of *Koonmen v. Bender* [2002] JLR 407, citing *American Cyanamid v. Ethicon re* where there is a serious issue to be tried.

The reciprocating countries and their superior courts are:

- a* England and Wales: House of Lords, Court of Appeal, High Court of Justice;
- b* Scotland: Court of Session, Sheriff Court;
- c* Northern Ireland: Supreme Court of Judicature;
- d* Isle of Man: Her Majesty's High Court of Justice (including the Staff of Government Division); and
- e* Guernsey: Royal Court, Court of Appeal.

However, the recent judgment of Jersey's Royal Court in *Brunei Investment Agency and Bandone v. Fidelis and Ors*²⁰ has significantly extended its inherent jurisdiction to enforce foreign judgments in Jersey. The court acknowledged that the Law was limited in application to the above territories and the court was therefore concerned with its inherent jurisdiction to enforce foreign judgments. The court noted that in the area of private international law, regard would be given to the English common law position. Dicey, Morris and Collins' *The Conflict of Laws* is the principle authority on this area, in particular Rule 35(1).²¹ However, the court departed from this rule having looked at other Commonwealth decisions in this area, but importantly the court made it clear that this jurisdiction would not be confined to being exercised in the context of Article 51 of the Trusts (Jersey) Law 1984.

These arrangements do not apply to matrimonial cases, the administration of the estates of deceased persons, bankruptcy, winding up of companies, mental health or guardianship.

The judgment creditor must apply to the Royal Court (*ex parte* to the Judicial Greffier²²) within six years of the date of the judgment itself or, where the judgment has been appealed, the date of the last judgment in the appeal proceedings and must be supported by an affidavit exhibiting a certified copy of the foreign judgment. A foreign judgment will not be registered if the debt has been wholly satisfied at the date of application, or could not be enforced in the foreign country itself. To be registered, the judgment must be for a money sum and must be final and conclusive between the parties.

Once registered, a written notice of registration must be served on the judgment debtor, who has usually 14 or 28 days, subject to any extensions, in which to apply to set aside the registration. A registered judgment cannot be enforced until that time period has expired or any application to set aside the registration has been disposed of but it can then be enforced in the same way as a judgment given in Jersey.

In relation to foreign judgments to which the 1960 Law does not apply, the foreign judgment creditor must sue in Jersey on the foreign judgment.

20 [2008] JRC 152. In this case, proceedings were brought in Jersey by the Brunei Investment Agency to enforce aspects of an order made by the Bruneian Courts against Prince Jefri Bolkiah, the youngest brother of the Sultan of Brunei.

21 Which provides that foreign judgments may be enforced if (1) for a debt or definite sum of money; and (2) the judgment is final and conclusive.

22 The Judicial Greffier's office is similar to that of the Master in the English High Court.

vii *Assistance to foreign courts*

The Service of Process and Taking of Evidence (Jersey) Law 1960 was amended in 1985 to enable Jersey to fulfil its international obligations under the Hague Convention, the purpose of which is to improve international judicial cooperation in civil and commercial matters. Where the relevant criteria are met, the requesting court may apply to the Royal Court for assistance in obtaining evidence. The Royal Court has power to make provision for the obtaining of such evidence in Jersey as appears to it to be appropriate in the circumstances.

The Law Officer's Department (the office of the Attorney General – 'the Department') is the central authority for requests for mutual legal assistance, including requests made under the various Hague Conventions, such as the service of documents in civil and matrimonial cases. The letter of request should be remitted with the sealed, original order of the requesting court, to the Attorney General on behalf of the Royal Court and the Department will then arrange for service to be effected and a certificate of service returned to the requesting party.

The Attorney General has further powers under local legislation to assist overseas authorities in a number of ways including, *inter alia*, the obtaining of documentary and oral evidence for use in civil asset recovery investigations and proceedings, as well as freezing and confiscating assets subject to external civil asset recovery proceedings and rendition of suspects.²³

The request or its accompanying instructions may take such form as the requesting court deems expedient.

Nevertheless, an order made under the 1960 Law cannot require any steps to be taken which may not be taken in the context of ordinary civil proceedings before the Royal Court (see *Continental v. Deery*²⁴).

viii *Access to court files*

Members of the public are able to access pleadings held by the court save for those which relate to matters that have been held *in camera*. If a request for copies of pleadings in an action commenced by way of order of justice is to be acted on, it must be in writing and must state the reasons why they are required. On receipt of such a request, the court will release the pleadings, provided that the reasons given are non-contentious and they will only be released where answers have been filed by all the parties to the action.

23 See Attorney General's Guidelines on International Mutual Legal Assistance, www.gov.je/Government/NonexecLegal/LawOfficers/Pages/InternationalAssistance.aspx

24 [2010] JRC 001. The court should, where possible, give assistance under letters of request duly received: 'It should decline to comply with the foreign request only in so far as it is not proper or permissible or practicable under its own law to give effect to it. Observing faithfully the precept of not delivering what the foreign court has not asked for, and restraining any temptation to rewrite the request, the court may amend letters of request by excision, or by adding or substituting words in order to clarify what is being sought without altering the substance of the Letters of Request'.

In the case of actions commenced by way of representation, no copy pleadings may be released until the matter has been concluded, then they may be released subject to the conditions mentioned previously.

ix *Litigation funding*

Fee arrangements are generally set between the advocate and his client, generally with time-based charging. Conditional or contingency fees are prohibited by the Jersey Law Society Code of Conduct. A Legal Aid scheme²⁵ is available to individuals satisfying the appropriate means test, but is different to the structure in England and Wales. In Jersey, depending on an individual's earnings, a person is charged a percentage of a fixed hourly rate which is set by the court.²⁶ Those who fall below the threshold are exempt from any fees.

A company or an individual not in receipt of Legal Aid generally fund its own litigation, although funding can be provided by insurers, but this depends on whether the client's policy covers the relevant claim and whether there is a cap on legal fees payable. There is no after the event insurance cover. There are, however, no restrictions on third-party funding by anybody who is not a relevant party to the litigation.

IV LEGAL PRACTICE

i *Conflict of interest and Chinese walls*

Conflict of interest is governed by the rules contained in the Code of Conduct of the Law Society of Jersey. Generally, lawyers must refrain from acting in circumstances where there is a real or serious risk that a conflict exists between the interests of two or more different clients in either the same matter or a related matter or where there is a conflict between the lawyer's interests and those of his or her client.

There are circumstances where a lawyer may be permitted to act for more than one client, despite a potential or actual conflict between the client's interests, as may be the case with non-contentious commercial matters. In such cases a lawyer must obtain written consent of all clients who are party to such a transaction.

Where an actual or potential conflict of interest exists, an existing or former client can apply to the court for an order that the lawyer cease to act.²⁷

Lawyers have a duty to protect all confidential information regarding their clients' affairs, which can preclude lawyers from representing a potential client if:

- a* they hold confidential information regarding a client (or former client) which may reasonably be expected to be material to the potential client; or
- b* the work to be undertaken for the potential client would be adverse to the interests of a client (or former client) to whom there is an existing duty of confidence as

25 An advocate of less than 15 years' standing must comply with legitimate instructions of the *Bâtonnier* to represent legally aided clients – by oath of office, the advocate has a duty to represent the '*veuves, pauvres, orphelins et indéfendues*'.

26 Practice Direction RC 09/04 Factor 'A' rates per hour.

27 See *Abacus (CI) Limited v. Bisson* [2007] JRC 150.

might occur if a client is likely to become a party to a negotiation or dispute resolution process arising out of the new matter.

Although a conflict of interest may exist, a firm may be able to act by implementing a Chinese wall. A Chinese wall refers to a firm's internal arrangement intended to ensure members of the firm acting for one client are prevented from accessing confidential information belonging to another client.

While Jersey does not have any legislation, rules or authority to provide a procedural framework on how to deal with Chinese walls, it will take guidance from the rules as laid out in the English solicitors' Code of Conduct.

Generally a firm must obtain written consent from both clients to proceed in such circumstances. However, a situation may arise where a firm is already acting for a client on a matter, when it discovers it holds confidential information belonging to an existing or former client. If this occurs, it may be possible to create a Chinese wall and continue to act without the consent of the client to whom the existing duty of confidentiality is owed, if it is not possible for that consent to be obtained. The new client must still consent to the firm acting on the circumstances where it is prevented from disclosing all relevant information, and it must be reasonable in all the circumstances.

To establish an adequate Chinese wall, all members of the firm who possess the relevant confidential information must be identified. These members will be precluded from having any involvement in the new matter or disclosing any confidential information to other members of the firm. Access to electronic as well as physical documents will be restricted to those identified members.

ii Money laundering, proceeds of crime and funds related to terrorism

As a well regulated international finance industry, Jersey has a collection of legislation to deal with money laundering and terrorism. Drug Trafficking Offences (Jersey) Law 1988, the Proceeds of Crime (Jersey) Law 1999, and Terrorism (Jersey) Law 2002, and more extensive requirements to prevent and detect money laundering and terrorist financing are set through the Money Laundering (Jersey) Order 2008 ('the Order').

From 1 May 2008, law firms became subject to these laws and together with other finance businesses, now have a greater responsibility for detecting and preventing financial crime; all regulated firms must disclose to law enforcement authorities any knowledge or suspicion of money-laundering activities.

Each firm must put in place a procedure to identify and verify any client's identity. It will look at the type of client (i.e., individual or company), the nature of its instructions (whether or not it deals with financial services business) and, if they are financial services business, the level of risk of money laundering the business poses. If any member of a firm has any knowledge or suspicion regarding a client activities it must report them. Failure to do so is a criminal offence and carries a maximum penalty of five years.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Privilege in Jersey is governed by the common law. The recognised categories of privilege that may be claimed by a party in respect of its documents or communications are:

- a* Legal advice privilege: legal advice privilege protects confidential communication between a lawyer and client made for the dominant purpose of receiving or giving advice in the relevant legal context.
- b* Litigation privilege: Litigation privilege only arises when litigation is in existence or contemplation. In those circumstances, any communication between a lawyer and client, or a lawyer or his client and a third party, is privileged if made for the dominant purpose of obtaining or giving legal advice or collecting evidence or information in relation to the litigation. Litigation privilege is wider than legal advice privilege as it may cover communications with third parties.
- c* Privilege against self-incrimination: documents that incriminate or expose a person to criminal proceedings in Jersey or to the proceedings for the recovery of a penalty in Jersey are generally protected by privilege. It is sufficient if the document has a tendency to incriminate or so expose the person, provided the risk is apparent to the court.
- d* Common interest privilege: Common interest privilege arises where communications are made between parties who share a common interest in the legal advice. This will arise where parties share the same interest in litigation (or potential litigation), or in a commercial transaction to which the legal advice relates. In such cases, communications of privileged information between the parties will be privileged, even if neither legal advice privilege nor litigation privilege applies.
- e* Public interest immunity: This immunity applies where production of the document would be so injurious to the public interest that it ought to be withheld. Jersey follows the law of England in this matter.²⁸
- f* Without-prejudice communications: Any communications made in good faith to attempt to settle proceedings are covered by the without prejudice privilege.

Communications between a company and its qualified in-house lawyers are capable of being privileged, to the extent that the communications concerns the lawyer in his or her legal capacity, rather than some other managerial role.

Communications with qualified lawyers in other jurisdictions may also be privileged in the Jersey courts where they comply with the usual rules of privilege.

Privilege is a substantive right which entitles its holder to refuse to produce any privileged document for inspection. As a substantive right, it can be relied on in all contexts, including in regulatory investigations.

28 *Deeny v. States of Jersey Health & Social Services* UJ 7 April 2003.

ii Production of documents

Rule 6/17 of the Royal Court Rule 2004 provides that civil litigants must give discovery of documents which are or have been in their possession, custody or power relating to matters in issue, whatever the capacity in which the documents came into the party's possession.

The test of relevance is whether the document relates to matters in dispute in the action. This means any document that it is reasonable to suppose contains information which may enable either party to advance its own case or to damage the case of the opponent. The test is whether the document could reasonably be expected to lead to a line of enquiry which would be of assistance to a party in relation to the matters in dispute.

Parties are obliged to disclose all relevant documents which are or have been in their possession (i.e., they hold the document), custody (i.e., it is not their document but they can get hold of it such as a bank holding documents of a third party) or power (i.e., where a party is holding a document in a bank safe). The fact that a document may be situated outside the jurisdiction is therefore irrelevant.

The meaning of 'documents' in this context is broadly construed. In addition to documents and correspondence, it covers other written materials such as emails, handwritten notes, diaries, meeting notes and the like. It will also extend to plans, drawings, photos and videos. Information and documents that are stored electronically on the memory of computers, or other back up storage media, such as discs or tapes may also be discoverable in proceedings.

There is no authority in Jersey dealing with the position of electronically stored documents; however, it is likely the courts would find the approach adopted by the England courts in deal with such matters, as highly persuasive.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Alternate dispute resolution is defined at Rule 6/28 of the Royal Court Rules 2004 as 'any method of resolving disputes otherwise than through the normal trial process and, without prejudice to the generality of the foregoing, includes mediation and conciliation.' The advantages of ADR – the fact it is usually conducted in private, the parties can agree that the outcome remains confidential and it is often a faster and more cost-effective resolution to a dispute than litigating through the courts – has contributed to it becoming increasingly employed in Jersey.

ii Arbitration

The Arbitration (Jersey) Law 1998 ('the Law') makes general provision for arbitration in the Island and gives effect to international conventions on the recognition and enforcement of foreign arbitration awards. While the Law itself was approved by the States of Jersey in September 1997 and sanctioned by the Queen in Council in October 1998, it was not immediately brought into force. This was because the British Home Office was concerned that certain provisions in the law appeared to contravene the Treaty of Rome, in that domestic and non-domestic arbitration agreements were treated differently. Accordingly, the Arbitration Law was only sanctioned on condition that the

relevant articles of the Law were amended to conform to European Union Law, prior to the Law coming into force. The Arbitration (Amendment) (Jersey) Law 1999 ('the Amendment') was therefore passed to deal with these anomalies, and like the substantive Law, the Amendment also came into force on 1 March 2000.

The Law is based largely on the English Arbitration Acts 1950 to 1982, although in England these have been repealed and replaced by the Arbitration Act 1996. As the Jersey statute had been substantially drafted prior to the legislative changes in England, it was finalised and approved, notwithstanding the introduction of the new Act in England. However, the changes in England were brought in to promote England as a centre for international arbitration; this capacity was not thought to be necessarily appropriate for Jersey.

Part 2 of the Law deals with arbitration within the island and it contains a number of provisions relating to the actual procedure that will be implied in arbitration agreements, unless the parties have expressly agreed otherwise; for example, how proceedings are conducted, specifying the number of arbitrators and provides for umpires, majority decisions, the power to call witnesses, delays, enforcement of awards, costs and interest.

The Law gives the court various powers exercisable at the request of one of the parties to the arbitration: for example, to stay court proceedings pending arbitration, to remove and replace arbitrators, to refer points of law to the court for determination, to grant extensions of time and to tax costs. It also sets out rules of general application to arbitrations, such as the effect of the death or bankruptcy of a party to the arbitrations and it limits the right of the court to review an arbitration award, to mistakes of fact or law, and limits further rights of appeal to special cases.

Part 3 of the Law contains provisions relating to the recognition and enforcement of arbitration awards to which the League of Nations Protocol of 1923 or the Geneva Convention of 1927 applies. The Law contains both the enabling provisions and the full text of the 1923 Protocol and the 1927 Geneva Convention (in Schedules 1 and 2).

Part 4 of the Law gives effect to the New York Convention on foreign arbitration awards which was adopted by the United Nations Conference on International Commercial Arbitration in June, 1958 but was not previously applicable in the Island. The full text of the convention is set out in Schedule 3 to the 1998 Law.

The Amendment removed the distinction in the substantive Law between domestic and non-domestic arbitration agreements. Now the court is obliged to stay legal proceedings pending arbitration for both domestic and foreign arbitration agreements. In addition, an exclusion agreement (one which restricts recourse to the Royal Court on a matter of law or for judicial review), has effect in a domestic or foreign arbitration. Similarly, the powers of the Royal Court to grant relief in cases of fraud can also be limited by an exclusion agreement in both a domestic foreign arbitration.

iii Mediation

There are no rules governing mediation in Jersey. Parties are free to agree between themselves all aspects of the mediation process.

Mediation in Jersey is a voluntary, informal and confidential process in which parties' discussions and negotiations are assisted by an experienced mediator (usually a

lawyer). Procedure at mediation is as agreed between the parties, but is usually guided on the day by the mediator. Discussions are without prejudice, giving the parties freedom to explore potential settlement options before incurring (or continuing to incur) significant litigation expenses. In certain disputes, the parties sometimes submit to expert determination, and are bound by the experts' decision.

A significant development in the mediation culture in Jersey has been the introduction of rules both in the Royal Court and the Petty Debts Court, under which the procedures of both courts permit proceedings to be stayed to allow an attempt at mediation. The courts cannot compel mediation, but a strong recommendation can persuade the parties to participate. Refusal to participate can persuade the court to exercise its discretion on costs.

Mediation is becoming increasingly popular in the island for disputes of all sizes. Aside from the changes in the court rules to encourage it, there are many obvious advantages as were emphasised by the Bailiff in Jersey in his 2004 speech for the launch of the new mediation rules:

Mediation can often leave the parties in a better position than litigation. First, if a dispute can be mediated at a relatively early stage, there can be a significant saving in cost to the parties. Secondly, a dispute settled confrontationally through the courts will often have a bruising effect upon the parties. There is always a loser, and sometimes there is no real winner. A mediated settlement, while not necessarily leading to total satisfaction on both sides, can enable the parties better to understand the other's point of view and occasionally to offer or to accept an apology. Particularly in a small community, where trading and even personal relationships between the litigating parties may continue, the ability to settle a disagreement in private without creating lasting wounds is, in my view, an important positive factor in favour of mediation.

iv Other forms of alternative dispute resolution

In Jersey, the most common forms of alternate dispute resolution are mediation and arbitration. However, there are a range of other processes available. For example, round table meetings or private negotiations, which are less structured than a formal mediation and are simply without-prejudice discussions between parties to try and resolve matters without the recourse to the courts or a formal mediator.

VII OUTLOOK AND CONCLUSIONS

ADR is becoming an increasingly utilised method in the resolution of disputes and 2010 will undoubtedly see many more parties using this as an alternative to the more formal route of litigation. Conventional litigation before the courts is still the main arena for the hearing of contentious litigation, however, and it is not thought that there will be drop in the amount of cases coming before the courts.

It is anticipated that there will be further significant trust cases this year in respect of beneficiaries' rights and trustees' dispositive and management powers. Jersey will undoubtedly further enhance its position as the leading offshore jurisdiction in the development of trust law and principles.

i *Review of Crown Officers*

At the time of writing, and in accordance with the decision of the States on 4 February 2009, an independent review of the roles of Jersey's Crown Officers (Bailiff, Attorney General and Solicitor General) is underway. The terms of reference show that the review will consider the Bailiff's dual role, as president of both the Royal Court and also the States Assembly. The Bailiff acts as both chief judge and 'speaker' of the House in the island's parliament. The roles of the Attorney General and Solicitor General are also being reviewed regarding their roles as head of the prosecution service, legal adviser to the States, Council of Ministers and scrutiny panels and 'titular head' of the honorary police. The review will consider whether the current roles should be changed, and if so, how they should be changed and what the likely cost implications of any such change might be.

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