
THE DISPUTE RESOLUTION REVIEW

THIRD EDITION

EDITOR
RICHARD CLARK

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

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This article was first published in The Dispute Resolution Review, Third Edition
(published in April 2011 – editor Richard Clark).

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THE DISPUTE RESOLUTION REVIEW

Third Edition

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN: 978-1-907606-05-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL

AKINCI LAW OFFICE

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ISLE OF MAN

*Christopher Cope, Fletcher Craine and Claire Collister**

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Isle of Man is a self-governing Crown dependency and has its own parliament, ‘Tynwald’, which dates back to 979AD. Acts of Tynwald and orders and regulations made under these acts are the principal source of Manx law. Each act of Tynwald requires the assent of the Queen.

The Isle of Man is not part of the European Union. It has a limited relationship with the EU through Protocol 3 to the United Kingdom’s Treaty of Accession. This provides for movement of goods between the Island and EU countries. Otherwise, EU legislation does not extend to the Island.

The Island’s legal system is based on common law but has a jurisdiction distinct from England. Decisions of English courts are not binding on Manx courts but they are of highly persuasive authority. English decisions are generally followed unless there is a Manx provision to the contrary or if there is a local condition which would give good reason not to follow the English decision.¹

The principal civil courts are the High Court and Staff of Government Division. The High Court has jurisdiction to hear matters at first instance, with the Staff of Government Division hearing the appeals. Senior judges are known as deemsters.

The High Court has four separate procedures – small claims, summary, chancery and ordinary. The allocation is not made automatically by the Court and must be selected by the claimant on the claim form at the commencement of proceedings.

The small claims procedure is for all disputes regarding claims of up to £10,000 (or £5,000 in the case of a claim for personal injury). Where a defence is filed to the claim, or an application is made for the assessment of damages or the determination

* Christopher Cope is a partner and Fletcher Craine and Claire Collister are advocates at Appleby.

1 *Re Frankland and Moore* (1987) AC 576 (PC).

of any other matter in dispute, the claim is automatically referred to adjudication. The adjudication is conducted informally and the strict rules of evidence do not apply. If a case is unsuited to this procedure its reference may be rescinded by the Court. Legal representation is permitted but is rare at small claims because generally very limited legal costs are recoverable from the other side.²

A practice direction was introduced in June 2010 dealing specifically with the costs recoverable in personal injury claims falling into the small claims proceedings. Legal costs can be claimed at a maximum hourly rate equivalent to the current applicable legal aid rate. In addition, parties will be able to claim up to a maximum of £500 toward fees for a medical expert and £300 for any other expert.

A claim which is allocated to the summary procedure must be below the limit of £100,000 and should normally have a time estimate for hearing of less than two days. In the summary procedure, oral expert evidence at trial is usually limited to one expert per party in relation to any expert field (and expert evidence in only two expert fields). Each claim allocated to the summary procedure is normally given standard directions and a timetable, including the trial date, is fixed by Court without application and without parties' attendance. Costs may be limited if judgment is obtained in default of acknowledgment or defence.

The chancery procedure is used for all claims which are unlikely to involve a substantial dispute of fact, including, claims under the companies legislation, claims concerning land, administrative law claims and applications for injunctions. Chancery claims are typically dealt with on written evidence alone. Any claim which is not covered by the small claims, the summary or the chancery procedure is allocated to the ordinary procedure.

The Staff of Government Division hears appeals in civil cases from the High Court. The final court of appeal is the Judicial Committee of the Privy Council (the Privy Council). Permission is required to appeal to the Privy Council either from the Staff of Government Division or from the Privy Council itself. Permission will only be granted where the appeal raised an arguable point law of general public interest.³

In addition, there are several statutory tribunals on the Island, for example, the Employment Tribunal, the Data Protections Tribunal and the Copyright Tribunal.

II THE YEAR IN REVIEW

i *Du Preez Limited and Kaupthing Singer and Friedlander (Isle of Man) Limited (In Liquidation) and Michael Simpson and Peter Norman Spratt*

This case considered what should happen where, pursuant to a customer's instructions, a bank debits the customer's account in order to make payment to a third party in circumstances in which the debited funds never actually reach the third party's account.

2 In *RPS v. Hexagon* (2010) it was ordered that the Court's discretion to order costs to be assessed either on a summary or indemnity basis is preserved despite the general limitation.

3 Judicial Committee (Appellate Jurisdiction) Rules Order 2009.

Du Preez instructed KSF to transfer money held by KSF on trust to a third party. When KSF went into liquidation, Du Preez claimed that they were entitled to that sum from KSF's liquidators. They claimed that they did not need to prove in the liquidation and only receive partial payment as a *Quistclose* trust had been created and the full amount was owing to them.

This claim was rejected and it was found that a *Quistclose* trust had not been created because monies were not paid to the bank subject to the condition that those monies would be used for a specific purpose.

The general rule is that where a bank holds funds for a customer, the customer does not own the money in the bank; he merely has a chose in action against the bank. It was found that the monies in this case belonged throughout to KSF and were instructed to be transferred to a third party in accordance with common banking practice. No new funds were injected a short time prior to the bank ceasing business and therefore it was found that the monies fell into the general fund for the benefit of the creditors generally.

Du Preez later appealed the decision. The appeal was dismissed, the court affirming that in order for there to be a *Quistclose* trust, monies must be transferred by a payer to a recipient on a common understanding that monies are to be used for a specific purpose. If they are to be used freely by the recipient then the trust does not arise. In this case the funds belonged to the bank and could be used freely by them, as their own.

ii Petition of Singer & Friedlander Investment Management (IOM) Limited

Singer & Friedlander Investment Management (IOM) Limited, an investment management company registered in the Isle of Man, held client funds in accounts at a number of banks including the collapsed Icelandic bank Kaupthing Singer & Friedlander ('KSF').

Under Manx regulatory legislation,⁴ client monies could be held in client bank accounts or designated client bank accounts. The legislation provided that in the event of a failure of a bank where client bank accounts were maintained all client bank accounts (wherever situated) would be pooled and shared *pari passu*. Monies held in designated client bank accounts would not form part of the pool.

Upon the collapse of KSF in October 2008, issues arose as to whether client funds were held in client bank accounts or designated client bank accounts, with important ramifications for investors.

The Financial Supervision Commission (General Requirements) Regulatory Code defined a 'designated client bank account' as one that:

- (a) *holds money of one or more clients;*
- (b) *includes in its title the word 'Designated' (but not the words 'Designated Fund');*
and
- (c) *the clients whose money is in the account have each consented in writing to the use of the bank with which the client money is to be held.'*

⁴ The Financial Supervision Commission (General Requirements) Regulatory Code ; Investment Business (Clients' Money) Regulations 1996; Investment Business Act 1991.

Funds held on behalf of certain Isle of Man Authorities and private investors were held in accounts which did not include the word ‘designated’ in the title; nevertheless, their evidence and that obtained on their behalf from former officers of Singer & Friedlander Investment Management (IOM) Limited established that they had intended to protect their funds in the event of a banking failure and had intended the accounts in question to have been designated client bank accounts.

The Court was asked to consider the relevance of the parties’ intentions and consequent upon that whether the funds fell into the pool of assets to be distributed *pari passu*. This involved an analysis of whether the funds were held by Singer & Friedlander Investment Management (IOM) Limited subject to ‘purpose’ trusts and whether when that purpose failed, a resulting trust of the *Quistclose*⁵ type arose.

It was held that *Quistclose*-type trusts should not be confined to specific circumstances and that it would be unconscionable under the circumstances to allow the funds in question to form part of the pool of assets. Singer & Friedlander Investment Management (IOM) Limited had never treated the funds as being at their free disposal and it was specifically and in common intended that the funds would be maintained outside the pool.

iii *Michael Simpson and Peter Norman Spratt (as Joint Liquidators and Deemed Official Receivers of Kaupthing Singer & Friedlander (Isle of Man) Limited) and Kaupthing Singer & Friedlander (Isle of Man) Limited (In Liquidation) v. Light House Living Limited and Elle Macpherson*

In this important case, it was held that US dollar deposits held by the insolvent Kaupthing Singer & Friedlander (Isle of Man) Limited (‘KSF’) and standing to the credit of Elle Macpherson could be (and automatically had been) set off against a mortgage debt owed by the Light House Living Limited (‘LHL’) (a special-purpose vehicle registered in the Isle of Man set up to assist with Miss Macpherson’s tax planning).

At the time of the winding-up order (granted in May 2009), LHL owed £7,801,727.19 to KSF in respect of the mortgage loan, repayment of which had been secured over a property in London held by LHL as trustee and nominee for Miss Macpherson. The property was Miss Macpherson’s London home. Meanwhile, KSF held deposits on behalf of Miss Macpherson of US\$4,075,327.86.

Upon the granting of the winding up order, insolvency set-off provisions applied.⁶ These provisions provide that mutual credits and debts could be set off against one another.

The claimants argued that set-off had not occurred and sought a declaration that US dollar deposits held by KSF standing to the credit of Miss Macpherson had not been set off the mortgage debt. They contended that LHL was liable for the full amount owing to KSF and that Miss Macpherson would have to participate in the liquidation

5 See *Barclays Bank Limited v. Quistclose Investments Limited* [1970] AC 567.

6 See Section 248 of the Companies Act 1931 referring to Section 22 of the Bankruptcy Code 1892.

proceedings in order to prove her debt. It was very unlikely she would recover the full amount owing to her.

LHL and Miss Macpherson contended that as a result of the insolvency legislation, the deposits held by Miss Macpherson were automatically set off by the mortgage debt owed by LHL, reducing its liability to the bank. They argued that set-off should occur in the circumstances of the case because Miss Macpherson should be regarded as the real party with whom the bank was mutually engaged, for its mutual benefit, giving rise to mutual debts and credits.

The bank argued that LHL as trustee or nominee could not act as the agent of the beneficiary (Miss Macpherson) and enter into the obligation on her behalf. Thus, it argued, she could not be personally liable to the bank and the bank's only cause of action to enforce the obligation is against the trustee or nominee. Consequently, it could not be said that Miss Macpherson had a beneficial interest in the obligation to establish the necessary mutuality.

Relying upon English and Australian case law, the Court held that it had long been established that the purpose of the set-off provisions was to do substantial justice between the parties to mutual dealings upon the insolvency of either of them. When deciding whether there was mutuality between the parties, the Court would look to the equitable interests of each of the parties in the transactions out of which the subject debts and credits arose. Thus, when deciding whether a party is genuinely engaged in mutual dealings with another, the Court will look for and find the parties who are the real and substantive parties behind the transaction being those that derive the real and substantial benefit or owe the real and substantial obligations.

In this case, notwithstanding the interposition of LHL, the Court held that those parties were KSF and Miss Macpherson, and as such the provisions would operate to allow the deposits standing to Miss Macpherson to be set off as against the liability of the nominee company. Particular factors that led the Court to make this decision included that:

- a* LHL was a nominee company with no substantial assets and zero indebtedness. KSF was aware at the time it entered into the transactions that LHL was a nominee company acting on behalf of Miss Macpherson. An agreement confirming the nominee arrangement had been entered into between LHL and Miss Macpherson (the Nominee Agreement) with the knowledge and involvement of KSF and its lawyers. That Nominee Agreement formed part of the bible of documents relating to the completion of the facility agreement.
- b* Miss Macpherson had the entire beneficial interest in the loan funds and then the property acquired with them. KSF was well aware of this, for among other things Miss Macpherson had charged her beneficial interest in the property to it as part of the security suite.

This awareness on the part of the bank was very relevant as to the justice of the case, the Court holding (contrary to the submission of the claimants) that it lay squarely with Miss Macpherson, observing:

if Miss Macpherson were to fail to secure a set off by dint of the late interposition of LHL into her dealings with the bank, it would be a purely inadvertent technical legal consequence of her reasonable wish to preserve her anonymity in ownership of property, which the Bank in promotion

of its business and the making of its profits, was entirely happy to go along with; knowing that the money was still to be loaned entirely and exclusively for the benefit of Miss Macpherson and that it would be wholly repaid by her through her nominee upon the realisation of her beneficially owned asset, purchased and improved with that money. It would, in my judgment, be the hardest of hard cases and not achieving substantial justice [...]

This is a novel decision based on an unusual set of circumstances and may be relevant to other commonwealth countries with similar set-off provisions.

iv *In the matter of Comhfhorbairt (Gaillimh) (1) and Michael McAteer (2)*

This matter involved an Irish company (part of a group of companies operating a well known airline serving the Isle of Man and Ireland) and its examiner, Michael McAteer. By way of a letter of request the Irish High Court sought the assistance of the High Court of the Isle of Man in order to confirm that the Isle of Man would recognise the examinership of the company and the appointment of the examiner.

The company in question had been put into examinership (the Irish equivalent of administration) in Ireland and Michael McAteer was appointed as examiner. The Isle of Man does not provide for administration within its legal framework.

The company had a number of assets in the Isle of Man, most notably aircraft held on long leases. There was concern that should the examinership of the company not be recognised in the jurisdiction, such assets may fall outside the examinership and may become the subject of subsequent legal proceedings.

In line with the Isle of Man's ongoing ethos of assisting foreign courts, the Isle of Man recognised the examinership and Mr McAteer's status as examiner despite the lack of any administration laws in the Isle of Man.

While the Isle of Man has previously recognised the administration of a company in England, this is the first time the Isle of Man has recognised examinership in Ireland, which has close business links with the Isle of Man.

III COURT PROCEDURE

i Overview of court procedure

Civil procedure in the Isle of Man is governed by the Rules of the High Court of Justice 2009 ('2009 Rules'). They came into operation on 1 September 2009. They introduced the overriding objective that the Court must deal with all cases justly. The Court should ensure that parties are on an equal footing. It will also endeavour to deal with cases in a manner proportionate to value, importance and complexity. Parties are required to assist the Court in the furtherance of the overriding objective.

ii Procedures and time frames

Actions are subject to the Limitation Act 1984, which specifies a general limitation period of six years for tort and contract. In personal injury matters, a claim cannot be brought after the expiration of three years from the later of the date of action or the date of knowledge.

All proceedings are commenced when the Court issues a claim form at the request of a claimant. The claim form must then be served within four months of the date of issue from the Court or six months if it is to be served out of the jurisdiction. The Court will only grant an extension to this time frame if the claimant has taken reasonable steps to serve but has been unable to do so.

The claim form must contain a concise statement of the nature of the claim, the specific remedy the claimant is seeking and if claiming for money a statement of value. This statement should disregard any possibility that he may recover interest or costs or that the value may be reduced by a filing of a counterclaim, set-off or contributory negligence.

The particulars of claim are ordinarily served with the claim form or set out within the claim form itself. The particulars may be served separately within 14 days of the claim form and in any event no later than the latest time for serving the claim form (i.e. 4 months). When the claim form is served on the defendant it, must be accompanied with forms for defending, admitting and acknowledging service.

A defendant may file an acknowledgement of service within 14 days of service of the claim form if he is unable to file a defence in that time period or if he wishes to dispute the Court's jurisdiction. If the particulars of claim are served separately, the defendant has 14 days to acknowledge from the service of the particulars.

An admission must be served within 14 days after service of the particulars of claim. A party may admit the truth of the whole or any part of another party's case.

Where a defendant wishes to defend all or part of the claim, he must file his defence either 14 days after service of the particulars of claim, or if he has served an acknowledgement of service, then 28 days after service of the particulars of claim. The parties may agree to extend the period for filing a defence by up to 28 days.

If the claimant wishes to serve a reply to the defence, he must do so within 14 days after the defence is served. A claimant who does not file a reply to the defence is not taken to admit the matters raised in the defence.

iii Class actions

Representative Actions

Representative actions are permitted under Part 3, Chapter 6 of the 2009 Rules where a number of individuals have the same interest in an action. One or more representatives will act on behalf of the group and any Order of the Court will be binding upon each and all of those represented, although an Order will only be enforceable against an individual who is not party to the proceedings with the permission of the Court.

Where potential parties to an action cannot be ascertained (e.g., unborn potential beneficiaries under a trust), the Court may appoint a representative to act on their behalf.

Derivative actions are permissible, but require the permission of the Court.

Group Litigation

Part 3, Chapter 7 of the 2009 Rules deals with Group Litigation which is permissible where a group of individuals have claims in relation to common or related issues of fact or law. The Court may make a Group Litigation Order where there are likely to be a

number of claims giving rise to group issues and only with the permission of the First Deemster. Orders made in respect of group litigation may be binding on all or some members of the group as the Court decides. Such an order can be appealed by any person adversely affected by that order unless that person is one who is registered as part of the group, in which case they can apply for an order that the original order does not apply to them.

iv Representation in proceedings

Manx law is very similar to that of England and Wales in this regard. With certain exceptions, any person may represent himself in an action. Minors and patients under the Mental Health Act 1998 act by a litigation friend.⁷

The Court may treat a litigant in person with some leniency to ensure parties are on an equal footing.⁸

Otherwise, litigants must appear by an Isle of Man advocate.

In exceptional cases, a licence may be issued to an English barrister.

v Service out of the jurisdiction

The rules for service out of jurisdiction are set out at Part 2, Chapter 9 of the 2009 Rules and apply to all defendants whether a natural or non-natural person. A claimant must apply for permission from the Court to serve the claim form out of the jurisdiction and the Rules set out 21 circumstances under which permission may be granted. If the circumstances do not fall within those specified in the Rules, there is a 'catch all' provision whereby the Court will grant permission if it is satisfied that there are special grounds that warrant service.

Every application for service out of the jurisdiction must be supported by written evidence setting out the grounds under which the application is made and stating that the claimant believes they have a reasonable prospect of success. The claimant must make full and frank disclosure in making his application and the Court must be satisfied that the Island is the proper place in which to bring the claim. In consideration of *forum conveniens*, the Island's courts will follow *Spiliada Maritime Corp v. Cansulex Ltd.*⁹

If the Court grants permission, the claim form may then be served by any method permitted by the law of the country in which it is to be served. If the country is a party to the Hague Convention, then the claim form may be served through the authority designated under the Convention in respect of that country or if the law of that country permits through the judicial authorities of that country or through a British consular authority in that country.

7 Part 3 Chapter 4 Rule 3.13 of the Rules of the High Court of Justice 2009.

8 Part 1 Rule 1.2 of the Rules of the High Court of Justice 2009.

9 [1968] 1 AC 389. See *inter alia* *Manco Limited v. Institute of Chartered Accountants*, 1987-89 MLR 252 and *Kyrgyz Mobil & Others v. Fellowes Int & Others*, Staff of Government Division, 28 November 2008.

vi Enforcement of foreign judgments

The enforcement of judgments issued by overseas courts is governed by the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968 and the common law.

The 1968 Act applies to the United Kingdom, Italy, Jersey, Guernsey, Israel, Suriname and the Netherlands.

Any person, being a judgment creditor, may apply to the Court within six years of the judgment to have it registered in the Isle of Man. The application is made by claim form and may be made without notice. It must be supported by written evidence exhibiting the judgment and a translation of the judgment if it is not in English.

If the judgment is registered, the registration order must then be served on the judgment debtor. In the case of a company, it will typically be served by leaving it at, or sending it by post to, the registered office. The judgment cannot be enforced before the end of a period specified by the Court, which is typically 14 days. During this period, the judgment debtor can apply to have the registration set aside.

For judgments of courts other than those covered by the 1968 Act, a fresh action may be commenced suing on the judgment as the debt. The defences to such an action are very limited, for example, that the judgment was obtained by fraud or that its enforcement would be contrary to public policy.

The Isle of Man is not party to the Brussels or Lugano Conventions.

vii Assistance to foreign courts

The Isle of Man courts have long recognised their global responsibilities and they have been assisting foreign courts for many years.

The Isle of Man is party to the Hague Convention Taking of Evidence Abroad in Civil and Commercial Matters 1975. The Convention was given domestic effect in England and Wales by the Evidence (Proceedings in Other Jurisdictions) Act 1975. This was extended to the Isle of Man by Order in Council – Proceedings in Other Jurisdictions) (Isle of Man) Order 1979 (SI 1979 No. 1711).

Foreign courts will seek the assistance of the Isle of Man courts by letter of request. A list of questions should be annexed to the letter. Questions must be framed precisely. Requests for documentation and information must not be based on speculation or conjecture.

Other than in the most straightforward cases, it is desirable for a draft letter to be reviewed by an Isle of Man advocate prior to issue to ensure compatibility with Manx law and procedure.

The letter of request is enforced under the procedure set out in Part 8 of Chapter 5 of the 2009 Rules.

The application should be supported by written evidence, together with a copy of the request.¹⁰ The Court may order examination of the evidence or witness, or both.¹¹

10 Part 8 Chapter 5 Rule 8.46.

11 Part 8 Chapter 5 Rule 8.47.

The examiner will file the deposition of the witness.¹² A certified copy of the deposition will be transmitted to the requesting court.

The 1975 Act contains important safeguards for witnesses. A witness cannot be asked to answer any question he would not be obliged to answer under Manx procedure.¹³ A witness may also claim that he is exempt from giving evidence.¹⁴

The courts also frequently grant letters of request issued by foreign courts or authorities exercising criminal jurisdiction.

viii Access to court files

Access by any person

The 2009 Rules provide that the Court must keep an indexed register of all claims issued by it, which may be inspected by any person subject to the payment of a fee. In addition, any person may, with the permission of the Court, obtain a copy of the claim form (but not any related or attached documents filed or served with it) and copies of any communication between the Court and parties to an action or any other person. A copy of claim forms, judgments and orders may also be obtained subject to certain conditions relating to the claim itself.¹⁵

Access by parties

Parties to a claim are given much broader rights of access to documents filed at Court. A number of documents are viewable without the permission of the Court (unless the Court orders otherwise) including all statements of case and documents filed or served with them, application notices, any written evidence and any judgments or orders. Parties may also gain access to correspondence between the Court and parties or others with permission.

ix Litigation funding

There are no rules allowing contingency fees or conditional fees.

The rules on third-party funding are similar to those of England and Wales. Where the costs of a party who fails in litigation have been financed by a third party, the Court has power to order costs against that third party, even if he is out of the jurisdiction.¹⁶ In *Tomlinson v. Thane Investments Ltd and others*,¹⁷ the Court directed that the name of the third party funding the action be disclosed. The Court may also order the disclosure of the basis and conditions of such funding.

12 Part 8 Chapter 5 Rule 8.48.

13 Section 2(3).

14 Section 3 and Rule 8.49.

15 Part 2 Chapter 6 Rule 2.21(3).

16 *Clucas Food Service Limited and Ice Mann* (CPL 2004/6 unreported judgment delivered on the 15 December 2005).

17 (Chancery 2005/1 unreported judgment delivered on the 2nd March 2006).

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Under the Advocates Practice Rules 2001, Isle of Man advocates must not act in a way that may compromise or impair their integrity or independence or their duty to act in the best interests of their clients. Therefore, advocates must not act when there is a conflict or a risk of conflict. Generally, if a conflict arises during the course of a matter, Advocates should cease to act for one or both parties.

There are no specific rules relating to conflict of interests in the 2001 Practice Rules except relating to property matters. The English Law Society's Solicitor's Code of Conduct is of general guidance.

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

The Island has been proactive in establishing international standards of supervision and in 2009 was commended by the IMF for its robust regulatory regime.

Lawyers are subject to stringent obligations under the Criminal Justice (Money Laundering) Code 2008 in order to identify and prevent money laundering. The 2008 Code imposes a duty for lawyers to carry out a money laundering and terrorist financing risk assessment for the purpose of determining the measures which are to be taken when undertaking customer due diligence.

Lawyers must not form a business relationship unless they establish, operate and maintain identification, record keeping, internal reporting and staff screening procedures. Each firm must have a Money Laundering Reporting Officer who has a duty to report any suspicious transaction to the Isle of Man Constabulary's Financial Crime Unit.

It is a criminal offence, subject to a fine and/or imprisonment for a person to enter into or become concerned in an arrangement which the person knows or suspects, facilitates the acquisition, retention, use or control of criminal property.¹⁸ Although the Island is not a member of the Financial Action Task Force, it fully endorses its recommendations on money laundering and terrorist financing.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The 2009 Rules permit parties to object to disclosure on grounds of privilege.

There are a number of circumstances in which privilege is recognised by the common law. The circumstances in which privilege arises in the Isle of Man mirror those of England and Wales and can be categorised as follows.

Litigation privilege

Protection is afforded to communications between an advocate and his client or an advocate or his client and a third party when such communications relate either to a legal action which has commenced or is in contemplation.

18 Section 140 Proceeds of Crime Act 2008.

Legal advice privilege

This covers advice given by an advocate to his client. It differs from litigation privilege in that the protection does not extend to third parties. As such, in order to fall within legal advice privilege it is necessary to identify exactly who the client is. This is particularly important in the context of large organisations and corporate entities. Protection will not be afforded if the communication took place with someone other than the client. At an early stage in the litigation, it is essential to define the person who will give instructions and to restrict circulation of advice to them.

Common interest privilege

Confidential communications between parties who share a common interest in legal advice received or given in the context of actual or contemplated litigation will fall into this category. Protection will also arise where legal advice is received in respect of a transaction in which parties have a common interest.

Privilege against self-incrimination

This category protects individuals from disclosing information by which they may incriminate themselves. Incrimination in this context relates to criminal proceedings only. The protection extends not only to documents which would actually incriminate an individual, but also to those which may expose a person to the risk of self-incrimination.

Public interest immunity

Under Part 7, Chapter 5, Rule 7.48(1), a person may make an application to the Court for permission to withhold a document on the basis that disclosure would damage the public interest. In deciding whether the immunity applies, the potential damage which may be caused by disclosure must be weighed against the public interest in the administration of justice, which would normally require such documents to be disclosed.

Without prejudice communications

Bona fide offers to settle or compromise are protected by privilege. They cannot be disclosed while liability remains at issue, but may be relied upon once liability has been determined and while costs remain at issue. The mere fact that a document or communication is marked 'without prejudice' does not in itself afford the document protection.

Waiver of privilege

In most cases (other than public interest immunity), a party may waive its right to privilege in whole or in part. If so, the document or information should be disclosed and may be used against that party in proceedings.¹⁹

19 *Montpelier Tax Planning v. Jones & Others* (2007) SGD as to waiver of legal advice privilege.

Where a privileged document is accidentally inspected, the party who has inspected it may only use it with the permission of the Court.²⁰

ii Production of documents

The 2009 Rules have codified the rules relating to disclosure and inspection of documents.

Disclosure of documents

Each party to a claim is under a duty to disclose documents. ‘Document’ in this context means anything in which information of any description is recorded.²¹ The duty of disclosure is ongoing and so any new documents which come to light after initial disclosure has been made must also be disclosed.²²

A duty in respect of disclosure is not only placed upon a party to a claim, but also an advocate representing that party. An advocate must adopt a proactive approach and should supervise discovery. The advocate should ensure from the outset that his client is aware of his duty to disclose and thus keeps all documents that may potentially fall to be disclosed. This forms part of the advocate’s duty not to purposefully or recklessly mislead the Court.²³ The advocate’s duty is discussed in detail in *MTM v Jones & Others*²⁴ (a judgment given under the old court rules).

The 2009 Rules provide that an order for disclosure means an order for standard disclosure. Standard disclosure can be limited or dispensed with by the Court or by agreement between the parties.²⁵

The procedure for standard disclosure is set out in Rule 7.39 and involves each party to an action making a concise list of documents for disclosure presented in a convenient order and manner. The list must identify which of those documents the party claims a right to withhold and which are no longer in the party’s control and why. A disclosure statement must also be made on the list stating that the party understands and has complied with their duty of disclosure. An action for contempt of court may be brought against any person who makes or causes to be made a false disclosure statement knowing it to be untrue.²⁶

Under standard disclosure, parties are obliged to disclose documents upon which they rely, documents which adversely affect their case, documents which adversely affect another party’s case and those documents which support another party’s case.²⁷

Disclosure is limited to those documents which are within the party’s control. A document is said to be in the party’s control if it is in the party’s physical possession, he

20 Part 7 Chapter 5 Rule 7.49.

21 Part 7 Chapter 5 Rule 7.31.

22 Part 7 Chapter 5 Rule 7.40.

23 Advocates Practice Rules 2001 Rule 19.

24 CLA 2001 Judgment dated 16 February 2006 CLD Superior Business.

25 Part 7 Chapter 5 Rule 7.34.

26 Part 7 Chapter 5 Rule 7.52.

27 Part 7 Chapter 5 Rule 7.35.

has or has had a right to possession of it or he has or has had a right to inspect or take copies of it.²⁸

In order to identify the documents which must be disclosed, each party is under a duty to carry out a reasonable search.²⁹ Proportionality is the deciding factor in whether a search is reasonable and under Rule 7.36, the following are taken into account: the number of documents involved, the nature and complexity of proceedings, the ease and expense of retrieval of any particular document and the significance of any document which is likely to be located during the search. Each party must indicate the extent of the search which has been undertaken in their list of documents. If any category or class of documents has not been searched for, as it is felt that to do so would be unreasonable, this must also be stated.

Inspection

A party has a right to inspect any document that has been disclosed in the list of documents, except where the party who has disclosed the document claims a right to withhold inspection (e.g., due to the document being privileged) or that the document is no longer in the party's control.³⁰ A party may also refuse to disclose a document on the grounds that it would be disproportionate to the issues in the case to require inspection.³¹

A party may also inspect any document referred to in a statement of case, witness statement, witness summary or affidavit and may apply for inspection of any document referred to in an expert report which has not been disclosed during the course of the case.³²

Specific disclosure and inspection

Any party may apply for an order of court for specific disclosure or inspection of documents. The Court may also make such an order of its own volition.

An order for specific disclosure will require a party to disclose documents, carry out a search or disclose any documents located in that search.

A party may defend an application for specific disclosure or inspection on the grounds that:

- a* he claims a right to withhold disclosure or inspection;
- b* the document is not within his control;
- c* disclosure or inspection would be disproportionate to the issues in the claim; or
- d* the applicant is shown to be 'fishing'.

28 Chapter 7 Part 5 Rule 7.37.

29 Chapter 7 Part 5 Rule 7.36.

30 Chapter 7 Part 5 Rule 7.33.

31 Chapter 7 Part 5 Rule 7.33(2).

32 Part 7 Chapter 5 Rule 7.43.

Third-party disclosure

Rule 7.46 provide for orders for disclosure to be made against persons other than the parties to a claim. In order to obtain such an order a party must make an application to Court supported by evidence.

An order for disclosure against a third party will only be made where the disclosure of the documents believed to be in the third party's possession is necessary to dispose fairly of the case or save costs. The order will only be granted where the documents to be disclosed are likely to support the case of one of the parties or adversely affect the case of the parties.

An order for third-party disclosure may provide that security for costs be given in respect of the third party's costs.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration in the Isle of Man is governed by the Arbitration Act 1976 and Part 13, Chapter 6 of 2009 Rules. Once parties have entered into an arbitration agreement, any party may apply to the Court to have any proceedings relating to a dispute to which the agreement applies stayed.³³ Any application under the 1976 Act is known as an arbitration claim.³⁴ Arbitration claims in respect of proceedings already commenced can be made by way of application under the original proceedings and any new claims can be made by way of a claim form under the chancery procedure.³⁵ Any limitation period contained in the arbitration agreement for the commencement of proceedings can be extended by the Court.³⁶

The appointment of an arbitrator will be as per the arbitration agreement unless such appointment is impractical or impossible in which case the Court is given power in certain circumstances to appoint an arbitrator or umpire.³⁷ Such circumstances include when a single arbitrator is to be appointed under an agreement and the parties cannot agree as to the arbitrator to be appointed or where an arbitrator refuses to act.

Certain terms in respect of the conduct of arbitration proceedings are deemed to be included in any arbitration agreement subject to express contrary terms,³⁸ including a requirement to produce all relevant documents on oath in their possession or power, which may be required or called for and provisions for the examination of parties and witnesses on oath by the arbitrator.

33 Section 5 Arbitration Act 1976.

34 Part 13 Chapter 6 Rule 13.49(1).

35 Part 13 Chapter 6 Rule 13.50.

36 Section 28 Arbitration Act 1976.

37 Section 11 Arbitration Act 1976.

38 Section 13 Arbitration Act 1976.

An award may be made in arbitration proceedings at any time³⁹ and any time limit that may be placed upon the making of an award may be extended by the Court.⁴⁰ Any award made is final and binding upon all parties to the action unless a contrary intention is expressed in the arbitration agreement.⁴¹ Power is given to the Court to remit claims to arbitration or set aside any award.⁴² Any party who wishes to have any award remitted to arbitration or set aside must make an application to the Court within 21 days of the award being made.⁴³

A party may apply to the Court for an order allowing an arbitration award to be enforced as though it were a judgment of the Court.⁴⁴ The rules governing such enforcement are contained in Rule 13.53 of the 2009 Rules.

Special rules apply to arbitration under the Arbitration (International Investment Disputes) Act 1983. These are set out in Chapter 13, Part 6, Rule 13.55 of the 2009 Rules.

ii Mediation

There is no obligation in the Isle of Man for parties to mediate but it is becoming increasingly popular due to the freedom given to parties by the new Rules of Court. At any time after a defence is filed, any party can make an application for the whole or part of the claim to be referred to mediation. The 2009 Rules require all parties to provide written consent that they wish the matter to be referred to mediation and must agree who the mediator is to be between themselves.

Although the parties are free to agree on the manner in which to conduct the mediation, the Court will set directions specifying when the mediator must report on the parties' progress. It is the duty of the mediator to report to the Court if an agreement is reached between the parties or if he believes that the mediation should be terminated. The Court has the overriding power to terminate the mediation at any time if it is satisfied that it is unreasonable or inappropriate to continue.

Parties are being encouraged to explore the mediation process as an effective way of resolving their disputes without recourse to protracted, expensive and sometimes destructive litigation rather than wasting valuable time and costs in court. Unless the costs are agreed between the parties, the Court has the final discretion and will take into account the conduct of each party throughout the proceedings.

VII OUTLOOK & CONCLUSIONS

Arbitration, mediation and other forms of dispute resolution may still be less popular than court action, but the trend is upwards.

39 Section 14(1) Arbitration Act 1976.

40 Section 14(2) Arbitration Act 1976.

41 Section 17 Arbitration Act 1976.

42 Sections 24 & 25 Arbitration Act 1976.

43 Part 13 Chapter 6 Rule 13.51.

44 Section 27 Arbitration Act 1976.

The introduction of the new Rules in September 2009 has been a fundamental change to the Manx legal system. The new Rules are aimed at increasing the effectiveness and value of the courts, to the benefit of litigants and practitioners. This further development of a modern and efficient legal system will serve the Island well in maintaining its position as a highly respected business centre.

Appendix 1

ABOUT THE AUTHORS

CHRISTOPHER COPE

Appleby

Christopher Cope is a partner with the litigation and insolvency group of Appleby in the Isle of Man and specialises in trust litigation, public law, insolvency and fraud and asset recovery. Mr Cope was named as a leader in his field by *Chambers Europe* 2010 and the publication described him as ‘an outstanding lawyer in very high demand’. He is also ranked as a highly recommended individual in *PLC Which Lawyer?* 2009 and is described as a ‘well-respected advocate with particular expertise in trusts and professional negligence’. Mr Cope has spoken at various conferences including the C5 Conference on Fraud Asset Tracing and Recovery.

FLETCHER CRAINE

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Fletcher Craine is an advocate with the litigation and insolvency group of Appleby in the Isle of Man. Having recently qualified as an advocate, he has already been involved in a broad range of matters including contract disputes, debt collection and trust litigation.

CLAIRE COLLISTER

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Claire Collister is an advocate with the litigation and insolvency group of Appleby in the Isle of Man and is involved in general litigation, both personal and commercial, including debt recovery. Ms Collister is also currently handling issues in personal injury, property disputes and general contractual disputes.

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