
THE DISPUTE RESOLUTION REVIEW

THIRD EDITION

EDITOR
RICHARD CLARK

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

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THE DISPUTE RESOLUTION REVIEW

Third Edition

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Chapter 31

JERSEY

*Fraser Robertson 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 (particularly where Jersey law closely mirrors English statute) 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

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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.

be satisfied that the need for confidentiality outweighs the public interest in access to 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 or that are of general public importance.

In addition to the formal court processes, the Jersey Employment Tribunal² 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 *New Media Holdings v. Capita Fiduciary*³

In this case, the Court was concerned with *Norwich Pharmacal* jurisprudence. On 12 May 2010, the Court made a *Norwich Pharmacal* order *ex parte* in chambers against the defendant, directing that it disclose to the plaintiff certain information regarding a series of entities established, organised or incorporated under the laws of a number of different jurisdictions. The plaintiff had launched proceedings in New York against those entities and the defendant sought that the *Norwich Pharmacal* be set aside. The Court restated that the test for whether a *Norwich Pharmacal* should be granted was:

- a Was there a good arguable case that the Plaintiff was the victim of wrongdoing?
- b Was there a good arguable case that party against whom the order is sought was mixed up in the wrongdoing?
- c As a matter of discretion, is it in the interests of justice to order that party to make disclosure?

The court noted that the jurisdiction was not available to provide pre-action disclosure, nor was it generally available to supplement discovery in aid of existing foreign proceedings and in this case to the extent that disclosure was sought for use in the New York proceedings, the correct approach was to obtain relevant orders from the New York court, including, if necessary, the taking of evidence pursuant to the Hague Convention by means of a request to the Jersey court for assistance. The Court confirmed that a third party need not be innocent, but may be a wrongdoer himself. However, where *Norwich Pharmacal* relief is sought against a defendant who is asserted to be a wrongdoer, that is

2 See www.jerseyemploymenttribunal.org.

3 [2010] JRC 117.

a material fact and it is a matter for the Court's discretion whether to exercise its powers or not. In an appropriate case, it may be relevant to make a *Norwich Pharmacal* order in order to assist proceedings that are taking place in another court, whether that court is in Jersey or elsewhere. The case of *Lucas*⁴ is authority for that proposition in Jersey. It would be a matter for the Court to determine, in the exercise of its discretion, whether it is appropriate to make an order on those grounds, and it will do so if it considers that it is convenient in the interest of justice.

ii *Re Lochmore Trust*⁵

This was an application by the settlor to set aside the Lochmore Trust on the grounds of mistake as to the way the trust had been set up. The settlor believed that trust assets had been by way of a sale whereas, in fact, it had been effected by way of a gift. He was therefore mistaken in a fundamental way as to the nature of the transaction. The Court applied the test set out in the earlier important decision of the Royal Court in *Re the A Trust*.⁶ In that judgment, Commissioner Clyde-Smith reviewed the different tests as set out in *Gibbon v. Mitchell*⁷ on the one hand and *Ogilvie v. Allen*⁸ on the other. The Commissioner adopted the test set out in the latter case, 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'. In applying that test, the Court must be satisfied that the donor or settlor would not have entered into the transaction 'but for' the mistake. The Court rejected the distinction between a mistake as to the 'effect' of a transaction and a mistake as to the 'consequences' of a transaction as formulated in *Gibbon*. The Court in *Re Lochmore* recast the test formulated in *Re A* into a three-fold test:

- a Was there a mistake on the part of the settlor?
- b Would the settlor not have entered into the transaction 'but for' the mistake?
- c Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?

The settlor in *Lochmore* would not have agreed to establish the trust and contribute to the shares in the company to the trust 'but for' the mistake. He had been subsequently advised that a transfer by way of gift would lead to an immediate charge to inheritance tax of 20 per cent of the value of the shares and he did not wish to incur such a charge. It was, accordingly, a case of a mistake of so serious a character as to render it unjust on the part of the trustee and beneficiaries to retain the property.

4 [1981] JJ 83.

5 [2010] JRC 068.

6 [2009] JRC 245.

7 (1991) 1 WLR 1304.

8 (1889) 15 TLR 294.

iii *In the Matter of DD*⁹

In this case, the representors sought rectification of the trust and the declaration or, in the alternative, that the trust be set aside on the basis of a mistake. The Court cited that the well-established three stage test to be satisfied on rectification is as set out in *Sanne*¹⁰ is as follows:

- a the court must be satisfied that there is sufficient evidence that a genuine mistake has been made so that the document does not carry out the true intentions of the parties;
- b there must be full and frank disclosure; and
- c there should be no other practical remedy. The remedy of rectification remains a discretionary remedy.

In addition, the Court confirmed that the action of suing a professional adviser, and all the associated costs and risks, was not a sufficiently practical remedy to lead the Court to decline rectification. The Court noted that the discretionary remedy of mistake (the representors' prayer in the alternative) could be described as another practical remedy, bearing in mind the broader test for mistake that now applies under Jersey law. The Court, however, stated that rectification was to be preferred to the remedies available on the grounds of mistake, since rectification preserved the trust the settlor had intended to create.¹¹ Paragraph 16 of the judgment as per Commissioner JA Clyde-Smith stated that:

Rectification has the benefit of preserving that which a settlor intended to establish. Assuming the now broader test for mistake was made out, the Court would have two discretionary remedies at its disposal and in our view the remedy which preserved the trust was to be preferred to a remedy which set aside that which the settler intended to establish.

iv *Barclays v. HSU & Others*¹²

This case confirmed the position that if a Jersey trustee has made no submission to the jurisdiction of the foreign court, the foreign court order will not be enforceable as such against the trustee without a fresh hearing on the merits. The Royal Court could, however, give directions to the trustee regarding the administration of the trust that might achieve the same result as was intended by the foreign court.

v *Philip Eric De Figueiredo v. Commonwealth of Australia*¹³

The appellant was arrested in December 2008 in Jersey and in early February 2009, the Australian authorities filed extradition papers with the Jersey Magistrates Court seeking permission for him to be sent to Australia to face possible charges of tax fraud and money

9 [2010] JRC 193.

10 In re Sanne Trust Company Limited [2009] JRC 025B.

11 see In the matter of the A Trust [2009] JRC 245.

12 [2010] JRC 003A.

13 [2010]JRC146 (but see also [2010] JRC052, [2010] JRC138A, [2010] JRC146, [2010] JRC197 and [2010] JRC198A).

laundering as the Australian authorities believed him to be a key strategist of the offshore schemes at the centre of Operation Wickenby. On 3 November 2010, the appellant, in the first contested extradition case in Jersey's history, was told that he was to be extradited to Australia to face charges of money laundering and tax fraud.

The appellant had never been to Australia and the offences all took place in Switzerland where he was based, but on 3 November 2009, the Assistant Magistrate ruled that all the legal requirements for extradition had been satisfied and on 23 December 2009, the Attorney General made an order for his extradition. An appeal was subsequently launched against both the Magistrate's decision and the Attorney General's order. Firstly, the appellant sought to argue that the Magistrate erred in fact and in law in holding that: (1) the conduct for which extradition was requested amounts to extradition offences under Article 3(2) of the Extradition (Jersey) Law 2004 ('the Law'); (2) it was not unjust or oppressive to extradite the appellant pursuant to Article 19 of the Law; and (3) the extradition of the appellant was compatible with his ECHR rights.

The appeal was dismissed on all three grounds and the Court found that 'the Magistrate was correct in holding that the conduct took place in Australia irrespective of the Appellant's lack of physical presence in that country if, as she found, the effect of his conduct was intentionally felt in Australia' and was therefore appropriately punishable there for the purposes of Article 3(2)(a) and (c)¹⁴ as each of the specified offences was punishable under Australian law by at least 12 months' imprisonment. The Court held that it was not unjust or oppressive to extradite the defendant by reason of the passage of time since the extradition offences were allegedly committed and stated that:

[...] it is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs on the basis of international reciprocity. It is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting state will be held to be an unjustified or disproportionate interference with a right to respect for family life. The consequences of interference with Article 8 rights must be exceptionally serious before this can outweigh the importance of extradition [...].

The appeal against the Attorney General's order on the grounds that (1) the speciality arrangements set out in his certificate did not comply with Article 32 of the Law and (2) the Attorney General's decision was vitiated by a lack of structural impartiality was similarly dismissed. A final application¹⁵ under the ancient Jersey remedy of *doléance*¹⁶ was also dismissed. The Court stated that the Superior Number will only intervene

14 As for conduct to constitute an extraditable offence it must occur in the designated territory

15 [2010] JRC182.

16 *Doléance* is a mode of proceedings where (1) the court disobeyed the law by refusing to hear an appeal where a right of appeal exists or (2) where there is no right of appeal, but the judgment contains a manifest judicial error. In *De Figueiredo*, the application was made under the latter ground.

‘where the petitioner satisfies the heavy burden of showing that a grave injustice will result’¹⁷ and:

[...] although there is no right of appeal against an interlocutory decision in a criminal case, but, if such a decision is wrong and leads to injustice, it can be corrected by the Court of Appeal or, in the case of extradition proceedings, by the Privy Council. It seems to us that it will be very rare indeed that a decision of a judge in a criminal case will be suitable for review by a petition of doléance.

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 (as amended) and accompanying Practice Directions, which are available on the Jersey Law website¹⁸ and which are generally based on England’s Supreme Court Practice pre-Woolf Reforms.

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 12pm 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.¹⁹ The

17 Per Birt, Deputy Bailiff, in *AG v. Michel and Gallichan* [2006] JLR N 15, [2006] JRC 089.

18 See www.jerseylaw.je.

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

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.²⁰

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 if 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; or
- 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.

iii Class actions

Representative proceedings may be brought where one individual wishes to represent a number of individuals with identical interests in the same proceedings²¹ and a plaintiff in proceedings can apply to the court for the court to appoint a defendant to represent other defendants.²² 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.²³ 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.²⁴

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.²⁵

20 See *New Media Holding Company LLC v. Capita Fiduciary Group Limited* [2010] JRC 117.

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

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

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

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

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

Under Rule 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 format²⁶ and accompanied by affidavit²⁷ and stating the belief that the plaintiff has a good cause of action,²⁸ 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:

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 judgment of Jersey's Royal Court in *Brunei Investment Agency and Bandone v. Fidelis and ors*²⁹ 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).³⁰ 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.

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

27 Form 3, *ibid.*

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

29 [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.

30 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.

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 Greffier³¹) 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.

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 Department³² ('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.³³

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

32 The office of the Attorney General.

33 See Attorney General's Guidelines on International Mutual Legal Assistance, www.gov.je/government/nonexeclegal/lawofficers/pages/internationalassistance.aspx.

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*³⁴).

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 required³⁵. 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.

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 scheme³⁶ 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.³⁷ Those who fall below the threshold are exempt from any fees³⁸.

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.

34 [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'.

35 See the Royal Court circular dated 22 April 2003.

36 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*.

37 Practice Direction RC 10/04 Factor 'A' rates per hour.

38 See guidance on the Jersey Law Society website, www.jerseylawsociety.je/legalaid.htm.

IV LEGAL PRACTICE

i Conflict of interest and Chinese walls

Conflict of interest is governed by the rules contained in the Jersey Law Society Code of Conduct. 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.³⁹

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 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

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

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 the location of 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's 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.⁴⁰

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 that 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.

ii Production of documents

Rule 6/17 of the Royal Court Rule 2004 provides that civil litigants must give discovery of documents that 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 that 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 that would be of assistance to a party in relation to the matters in dispute.

Parties are obliged to disclose all relevant documents that 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 e-mails, 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 dealing with such matters as highly persuasive.

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

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 – have 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 on 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, arguably, 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

i Review of Crown Officers

In the previous edition, it was noted that an independent review of the roles of Jersey's crown officers (Bailiff, Attorney General and Solicitor) had been commissioned. The results of this review were published on 6 December 2010.⁴¹ The terms of reference included, *inter alia*, the consideration of the Bailiff's dual role, not only as president of the Royal Court and Court of Appeal, but also the States Assembly, in which he acts as both chief judge and 'speaker' of the House in the Island's parliament. The most important recommendation was that the Bailiff should cease to be President of the States, and that this should be effected as soon as possible to save Jersey the embarrassment of being forced to make the change by the European Court. Lord Carswell, former Lord Chief Justice of Northern Island and Chairman of the review panel, sought the advice of an English barrister on the legality of the dual role of the Bailiff as President of the States and head of the judiciary. The lawyer, Rabinder Singh QC, said that while he thought Jersey might be able to successfully defend a challenge to the Bailiff's role in the States in Europe now, the position was likely to be less tenable in future years.

ii Relationship with UK

The UK government's response to the Justice Select Committee's report on the Crown Dependencies⁴² was published on 30 March 2010,⁴³ the findings of which were accepted in November 2010 by the UK government as to how the Ministry of Justice administers the relationship between the UK and the Crown Dependencies.⁴⁴

41 See www.gov.je/government/howgovernmentworks/reviewcrownofficers/pages/index.aspx.

42 Jersey, Guernsey and the Isle of Man.

43 See www.gov.je/sitecollectiondocuments/government%20and%20administration/r%20government%20response%20justice%20select%20committee%20crown%20dependencies%20101104.pdf.

44 See www.justice.gov.uk/publications/docs/gov-response-justice-select-committee-crowndependencies.pdf.

Appendix 1

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Fraser Robertson is a commercial litigator and advises on all types of commercial disputes. He primarily specialises in trust and contractual litigation, as well as fraud and asset tracing and regulatory matters. He has acted and appeared before the Jersey courts in a number of significant trust disputes and a number of reported decisions, for example *In the Matter of the Lochmore Trust* [2010] JRC 068 (varying trust on grounds of mistake), *Re Centre Trustees (CI) Limited* [2009] JRC 133 (removal of protector), and *Brunei Investment Agency and Bandone v. Fidelis and others* [2008] JRC 152 (worldwide enforcement of non-monetary judgment).

Fraser was named as a leader in his field by *Chambers UK 2011* and *Chambers Europe 2010*. He has been recognised by several global directories that describe him as ‘a good communicator and an excellent advocate’ with a ‘very direct’ approach and ability to be ‘tough in negotiations’.

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