
THE ASSET TRACING AND RECOVERY REVIEW

SECOND EDITION

EDITOR
ROBERT HUNTER

LAW BUSINESS RESEARCH

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For further information please email
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TRACING AND
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ROBERT HUNTER

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EDITOR'S PREFACE

'Fraud' is a word that people find easier to use than to define. Partly for this reason, it is difficult for lawyers to summarise the way in which their particular jurisdictions deal with it. Some of the sources of their laws will be domestic and will have evolved over time. Others will be recent international conventions where regard must be had to the decisions of other jurisdictions.

But these difficulties aside, the problems that 'fraud' generates pose unique challenges for the legal system of any country. First, there will be forensic issues: to what lengths should the court go to discover what actually happened? Here different jurisdictions place different priorities on what their courts are for. Some treat the court process as an almost sacrosanct search for truth. The courts of my own jurisdiction tend towards this end of the spectrum. Others regard it as a means of resolving disputes efficiently and providing certainty for the litigants. Often courts in this category allow no witness evidence and no procedure for disclosure of documents, regarding both as disproportionately burdensome for any benefit they might provide.

Second, there is the question of whether the court should mark conduct that is 'fraudulent' as particularly abhorrent, in civil proceedings. All will criminalise fraudulent behaviour, but not all will penalise fraudulent conduct by enhancing the victim's compensation or by depriving the fraudster of arguments that might have been available to them if they had been careless, rather than dishonest.

Third, there is the question of innocent parties: to what extent should victims of fraud be given enhanced rights over 'victims' of ordinary commercial default? In some jurisdictions it is said that victims of fraud part with their assets – at least to some extent – involuntarily while commercial counterparties take risks with their eyes open. Hence, victims of fraud can, in some circumstances, be allowed to retrieve assets from an insolvency before ordinary trade counterparties or 'general creditors' do so.

Lawyers have been mulling over the rights and wrongs of solutions to the problems that fraud presents for centuries. They will never stop doing so. The internationalisation of fraud in the past 40 years or so, however, has meant that they argue about these problems not only with lawyers of their own country, but also with lawyers from other jurisdictions.

Rarely nowadays will a fraudster leave the proceeds of fraud in the jurisdiction in which they were stolen. The 1980s and early 1990s saw quite pronounced attempts by fraudsters to 'arbitrage' the various attitudes and priorities of different jurisdictions to retain what they had taken. Perhaps the highest-profile example of this was the use of jurisdictions in which banking secrecy was a priority as a conduit to which the proceeds of fraud would be transmitted. Another well-known strategy was the use of corporate devices and trusts as a means of sheltering assets from those who deserved to retrieve them.

A number of factors have served to make this more difficult. The growth of international conventions for the harmonisation of laws and enforcement of judgments is clearly one. Perhaps more notable, however, has been the international impetus to curb money laundering through criminal sanctions. These have, however, been first steps, albeit comparatively successful ones. There is still a huge amount to be done.

I have specialised in fraud litigation – virtually exclusively – since the late 1980s. My chosen area has brought me into contact with talented lawyers all over the world. I remain as fascinated as I was at the outset by the different solutions that different countries have to the problems fraud creates. I am sometimes jealous and sometimes frustrated when I hear of the remedies for fraud that other jurisdictions offer or lack. When I talk to lawyers who enquire about my own jurisdiction, I frequently see them experiencing the same reactions too. The comparison is more than a matter of mere academic interest. Every month brings some study by the government or private sector tolling the cost of fraud to the taxpayer or to society in general. My own interest goes beyond ordinary 'balance sheet' issues. When I deal with fraudsters, particularly habitual or predatory ones, I still retain the same appalled fascination that I experienced when I encountered my first fraudster and I share none of the sneaking admiration for them that I sometimes see in the media; they are selfish, cruel and immature people who not only steal from their victims, but also humiliate them.

No book sufficiently brief to be useful could ever contain all the laws of any one jurisdiction relating to fraud. The challenge, unfortunately, for a contributor to a book like this lies as much in what to exclude as what to say. This guide contains contributions from eminent practitioners the world over, who have, on the basis of their experience, set out what they regard as critical within their own jurisdictions. Each chapter is similarly structured for ease of reference with similar headings to enable the reader to compare remedies with those in other jurisdictions, and each contributor has been subject to a strict word limit. Despite there being a huge amount more that each would have been perfectly justified in including, I still believe this book to be an enormous achievement.

The first edition of this book featured contributions from writers from 16 different jurisdictions, and each had done an extraordinarily able task in focusing their contributions upon what a potential litigant in an asset-tracing case would want to know. This second edition is an updated and improved work. I have come across a number of the authors in practice and they are unquestionably the leaders in their fields. I hope that other readers will find the work as useful and impressive as I do.

Robert Hunter

Herbert Smith Freehills LLP

London

September 2014

Chapter 12

JERSEY

*Stephen Baker*¹

I OVERVIEW

As a major offshore financial centre, the Island of Jersey has, unfortunately, all too often been one of the jurisdictions of choice for those seeking to hide assets that have been fraudulently obtained from others and to launder their ill-gotten gains. Encouragingly the Island's regulatory, legislative and judicial bodies have in recent years adopted a robust approach to financial crime and to ensuring that, through the civil court process, victims of fraud are properly compensated for the wrong done to them.

Jersey has enacted legislation to specifically combat money-laundering offences relating to drug trafficking and terrorist activity, in addition to its 'all crimes' money laundering legislation (see the Drug Trafficking (Jersey) Law 1988; the Terrorism (Jersey) Law 2002; and the Proceeds of Crime (Jersey) Law 1999, respectively). Furthermore, legislation such as the Investigation of Fraud (Jersey) Law 1991 (the 1991 Law), confers upon officers, such as the Attorney General, far-reaching investigative powers. Under the 1991 Law, the Attorney General is permitted to seize documents that are believed to be relevant to an investigation and to interview any individual, including third parties, believed to possibly have information relevant to an investigation. Individuals who are interviewed pursuant to the 1991 Law may not refuse to answer questions put to them.

Such legislation is of course only as strong as the will to enforce it. Jersey has become well known for pursuing to their logical conclusion investigations that bear fruit. Over the past decade numerous civil and criminal asset recovery actions have come

1 Stephen Baker is senior partner at Baker & Partners.

before the Royal Court, including *Brazil v. Durant*,² *Attorney General v. Michel*,³ *Attorney General v. Bhojwani*⁴ and *In Re the Representation of Lloyds TSB Offshore Trust Company Limited*.⁵

Asset recovery cases by their nature, at times, raise difficult legal concepts. Cases such as *Lloyds v. Fragoso* and *Brazil v. Durant* have shown that the courts of Jersey are prepared to depart from outmoded or overly formalistic approaches to such concepts and be innovative in order to ensure justice between the parties. In *Brazil v. Durant*, which is discussed at length below, the key concept dealt with was tracing.

II LEGAL RIGHTS AND REMEDIES

As outlined above, Jersey law recognises a number of rights and remedies that may be employed by the victims of financial crime to recover their misappropriated assets.

i Civil and criminal remedies

Civil causes of action and remedies

Jersey law provides civil remedies at all possible stages of a fraud claim. Interlocutory injunctions (including freezing and *Anton Piller* orders) are available with very short notice to the court. The Jersey Royal Court also has a long-established practice of granting injunctive relief to assist proceedings in other jurisdictions. As regards substantive remedies available in Jersey, Jersey law recognises the concept of a constructive trust as established in *Re Esteem*.⁶ The Royal Court in *Re Esteem* also held that a beneficiary of a constructive trust has an equitable proprietary interest in the assets that are subject to that trust. The Royal Court further held that in Jersey, as in English law, when property is obtained by fraud and contrary to a fiduciary duty, equity will impose a constructive trust over that property for the benefit of the victim of the fraud, meaning that they have an equitable proprietary interest in that property.

Jersey also recognises concepts of accessory liability. An equitable claim can be made against a third party if they have dishonestly assisted or knowingly received property, both causes of action establishing a constructive trust for the benefit of the victim of the fraud to claim directly against the third party who has received or assisted with the transmission of the funds.⁷

Jersey law also allows a claim in restitution based on ‘unjust enrichment’. This does not require an element of fault on the part of the recipient. It means that where property in respect of which a person has an equitable proprietary interest is received by an innocent volunteer, the beneficiary has a personal claim in restitution against

2 *Federal Republic of Brazil and Anor v. Durant International Corporation and Anor* [2012] JRC 211.

3 [2011] JRC 093.

4 [2010] JRC 116 (*Lloyds v. Fragoso*).

5 [2013] JRC 211.

6 [2002] JLR 53.

7 See *UCC v. Bender* 2006 JLR 242.

the recipient even where the recipient is not guilty of any fault in their receipt or handling of the property. This is, however, only a personal claim and no proprietary interest by way of constructive trust is established between the beneficiary and the innocent recipient. Thus, if the monies have been paid away by the innocent recipient they cannot be claimed from that recipient directly. A defence of change of position is therefore available.

There is a mature and extensive civil confiscation regime in aid of international civil recovery actions over assets that are the subject of a foreign civil judgment determining them to be the proceeds of unlawful conduct. This allows a foreign government to apply to the Attorney General of Jersey to make applications to the Royal Court to freeze and eventually confiscate the assets in question.

The Jersey Royal Court has consistently recognised its responsibility to assist in the prevention, detection and remedying of fraud. Hence, in actions involving civil remedies for fraud, it has gone further than English law currently permits, and is likely to be one of the most progressive jurisdictions for pursuing civil fraud claims, particularly in light of the recent stance taken by the Royal Court in respect of evidential issues such as tracing and ‘reverse tracing’ (see *Brazil v. Durant*), and its advanced restitutionary jurisdiction.

Criminal offences and remedies

A generic offence of fraud has long existed in the common law of Jersey and continues to be charged in appropriate circumstances. To establish this generic offence of criminal fraud it is necessary to show that the defendant deliberately made a false representation with the intention of causing thereby – and with the result in fact of causing thereby – actual prejudice to someone and actual benefit to himself or somebody else.

It is additionally the case that the usual range of specific fraudulent activity is criminalised by Jersey common law and continues to be charged in appropriate circumstances. Fraudulent conversion, obtaining by false pretences, false accounting and forgery are all prime examples of this.

Quite apart from this comprehensive range of common law offences, various statutes are in place to provide investor protection. The Banking Business (Jersey) Law 1991, for example, criminalises unregistered deposit-taking business and fraudulent inducements to invest money. Fraudulent inducement is also criminalised by the Investors (Prevention of Fraud) (Jersey) Law 1967. Heavy penalties are consequent upon conviction (up to seven years’ imprisonment or an unlimited fine).

The provision of false or misleading information under the Collective Investment Funds (Jersey) Law 1988 is criminalised and punished by up to five years’ imprisonment or an unlimited fine.

By way of further example, offences relating to insider dealing, market manipulation, and providing misleading information, in respect of financial matters are created and made punishable by the Financial Services (Jersey) Law 1998.

As to money laundering, the full range of offences is in place by virtue of the Proceeds of Crime (Jersey) Law 1999 and the Drug Trafficking Offences (Jersey) Law 1988. It is of course the money-laundering offence that gives territorial jurisdiction so that the locus of the predicate offending is immaterial to the charging of the money laundering and the freezing of assets within the jurisdiction.

Confiscation orders are available under the legislation and are widely made following conviction. In cases with an overseas component the Jersey authorities work closely and constructively with the governments and agencies of other countries in the locating, securing, managing and ultimate disposition of assets.

Local legislation gives wide powers to the Jersey authorities to cooperate with other governments and their agencies in the investigation and prosecution of crime and the recovery of the proceeds thereof. The provision of information and evidence and the securing of assets held in the Island are all enabled by the Investigation of Fraud (Jersey) Law 1991 and the Criminal Justice (International Co-operation) (Jersey) Law 2001.

Local legislation also enables the enforcement in Jersey of overseas forfeiture and confiscation orders.

The relevant authorities in Jersey are authorised to enter into asset sharing agreements with other governments when there has been anything in the nature of a combined operation resulting in the confiscation or forfeiture of assets.

As to the initiation of a criminal prosecution, initial complaints are characteristically made to the States of Jersey police or to the Law Officers' Department. Depending on the subject matter the complaint may come to the attention of those authorities by another route, for example a complaint made to the Jersey Financial Services Commission. The complaint is ideally made through the intermediary of a local lawyer, although nothing prevents a direct approach to the relevant authority by the complainant.

Following such investigation as is required by the nature of the complaint, it is for the Attorney General to decide whether to bring a prosecution and, like the prosecuting authorities in the United Kingdom, his decision is taken by reference to transparent published guidelines.⁸

Proceedings are brought in the name of the Attorney General and are prosecuted by a Crown Advocate, an appointee of the Attorney General assigned to the case either from within his department or from the private sector.

It is a feature of Jersey law that common law offences are tried by a jury and statutory offences are tried by a standing panel of lay justices (jurats), an office well known within European jurisprudence.

In either case an appeal against conviction and sentence is available and is invariably heard by the Jersey Court of Appeal, a tribunal made up predominantly of eminent lawyers from the various United Kingdom internal jurisdictions.

ii Defences to fraud claims

Criminal proceedings

Like English law, the criminal law of Jersey recognises a number of general defences that may be raised in relation to criminal charges. A summary of certain of the key defences is provided below.

8 www.gov.je/Government/NonexecLegal/LawOfficers/Pages/DecisionProsecute.aspx.

Criminal intent

Generally speaking it is for the prosecution to prove beyond reasonable doubt that the defendant had the requisite state of mind at the time of committing the offence. Failure by the prosecution to discharge this burden entitles the defendant to be acquitted. That said there are certain offences that impose a 'reverse burden' on the defendant to prove that he or she had an innocent state of mind at the relevant time. In such circumstances the standard of proof to be applied is the civil one, namely, on the balance of probabilities.

Mistake

A genuine mistake of fact may entitle a defendant to be acquitted in circumstances where that mistake prevents him or her from possessing the requisite state of mind at the material time. Where a mistake is raised by the defendant, the burden of proof generally shifts to the prosecution to show that no such mistake was made.

Ignorance of the law

A defendant in Jersey criminal proceedings is not permitted to plead ignorance of the law in his or her defence.

Limitation periods

Under Article 2 of the Criminal Procedure (Prescription of Offences) (Jersey) Law 1999, no prescription period exists in Jersey in respect of criminal charges. This law, however, does not have retrospective effect in relation to those offences prescribed prior to the enactment of the legislation.

Civil proceedings

Lack of knowledge

As noted above, Jersey law recognises actions for accessory liability in knowing receipt and dishonest assistance. As its name suggests, 'knowing receipt' requires the plaintiff to prove that the defendant had knowledge of the tainted origin of the assets in question. Therefore, if the plaintiff is unable to prove knowledge to the civil standard his or her claim will fail, but a claim in dishonest assistance will not necessarily fail because the defendant was not consciously or knowingly dishonest. Instead, the plaintiff must prove that the defendant, when judged objectively, acted beyond the standards of honest conduct of reasonable people.

Change of position

Furthermore, Jersey law recognises a personal claim in restitution on the basis of unjust enrichment. Knowledge is not a requisite ingredient of a claim in unjust enrichment and as such liability may arise in cases where no fault or blameworthiness can be attributed to the unjustly enriched person. No proprietary remedy arises in respect of such claims. A claim in unjust enrichment is subject to a change-of-position defence, such that a person who receives money without knowledge is only required to make restitution to the plaintiff to the extent that he remains unjustly enriched.

Limitation periods

Unlike criminal proceedings, civil proceedings in Jersey remain subject to limitation periods. For the most part, these periods arise from the Island's customary law and as a result, it is necessary to determine the cause of action to ascertain whether an established limitation period applies. Generally speaking, in Jersey the following limitation periods will apply:

- a* actions for possession of immovable property: a year and a day;
- b* actions relating to title of immovable property: 40 years;
- c* actions relating to the recovery of moveable property (*action personnelle mobilière*): 10 years;
- d* actions in tort and for breach of trust: three years; and
- e* actions to recover trust property from a trustee: no limitation period applies.

Such periods will be suspended where the plaintiff can show that he was impeded either in law (*empêchement de droit*) or as a matter of fact (*empêchement de fait*) from bringing his claim. Typically an *empêchement de droit* will arise in respect of plaintiffs who are minors or where a plaintiff is of unsound mind.

An *empêchement de fait* arises in the event that a plaintiff is able to show that it was practically impossible for him or her to exercise his or her rights as a result of certain facts, peculiar to the case. Such circumstances are particularly common in the case of fraud, where a fraudster will do all in his or her power to conceal the fraud for as long as possible. Prescription periods shall therefore be suspended so long as the defrauded party is ignorant of the fraud against him or her.

As favourably as this doctrine may be applied in respect of victims of fraud, it remains, however, for the victim to establish the fact of his or her ignorance and that he or she could not have discovered the fraud against him or her, or his or her right of action with reasonable diligence.⁹

Of particular relevance is the limitation period applicable to actions for dishonest assistance or knowing receipt. While the Jersey law remains unsettled on this point, it would appear that recent judicial opinion suggests that such claims should be treated as actions for the recovery of moveable property (an *action personnelle mobilière*) such that a 10-year limitation period will apply.¹⁰

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Interlocutory injunctions can be obtained at very short notice on an *ex parte* basis to secure assets, preventing their dissipation, prior to the determination of substantive proceedings (see Section II.i, *supra*). The Jersey courts apply English principles in granting such injunctions and therefore the principles laid down in *American Cyanamid*

⁹ See *Eves v. Le Main* [1999] JLR 44.

¹⁰ See *Federal Republic of Brazil and Anor v. Durant International Corporation and Anor*, [2012] JRC 129A.

*Co v. Ethicon Ltd*¹¹ must be met before an injunction is granted in Jersey. The Jersey courts will allow an injunction (including so-called freezing orders) to be granted in aid of foreign proceedings even if the only proceedings in Jersey are for the injunction itself.¹² It further allows leave to serve out of the jurisdiction if the defendant is outside the territory and the only Jersey process is that of the injunction.

Banks and financial institutions are often made parties cited to injunctions in Jersey and are only bound by the injunction by service of the proceedings upon them.

A caveat (or 'opposition') is also available that is in effect a *Mareva* injunction on the sale of Jersey real property. It is available when there is a risk of Jersey real property being sold to the detriment of the plaintiff.

Each of these injunctions are granted by the Bailiff or the Deputy Bailiff of the Royal Court and must be applied for by way of Order of Justice with an affidavit in support that must comply with the duty of full and frank disclosure.

ii Obtaining evidence

Civil proceedings

Wide disclosure orders are also available as ancillary orders to freezing injunctions. In this regard, the jurisdiction of the Royal Court is not limited to the Island's territorial boundaries and as such the Royal Court may order worldwide disclosure orders against defendants, even if they are not Jersey residents.¹³

Equally wide disclosure orders may also be granted for the provision of disclosure by any party cited as ancillary orders to the injunction.

If there is insufficient information to obtain an interlocutory injunction, an Order of Justice can be served against a third-party financial service provider who has been 'mixed up' in the wrongdoing, under the authority in *Norwich Pharmacal Co v. Customs and Excise Commissioners*.¹⁴ In appropriate cases the Jersey courts will order third parties to disclose relevant information they hold, in order to assist the victim of suspected fraud. Once the information has been obtained it may then be used to obtain an injunction over relevant property.

Care must be taken when using documents recovered pursuant to Jersey proceedings for the purpose of other proceedings (for example in another jurisdiction). Use of such documents requires the express permission of the Jersey Royal Court. This permission can and should be sought when the disclosure is obtained. Using documents for the purpose of other proceedings without the permission of the Jersey Court may amount to a contempt of court.

In extreme cases *Anton Piller* relief can be obtained. This allows the search of property and the seizure and preservation of evidence in the context of civil proceedings.¹⁵

11 [1975] AC 396.

12 See *Solvalub Ltd v. Match Invs Ltd* [1996] JLR 361.

13 See *Dalemont Limited v. Senatorov and Ors* [2012] (1) JLR 108.

14 [1974] AC 133.

15 See *Nautech Services Ltd v. CSS Limited and Ors* [2013] JRC 089.

Criminal proceedings

Provision is made in the 1991 Law for the obtaining of evidence by the Attorney General in relation to investigations concerning alleged fraud (see Section I, *supra*). The provisions in the 1991 Law supplement the general powers of search and seizure conferred upon the States of Jersey Police by virtue of the Police Procedures and Criminal Evidence (Jersey) Law 2003.

Under Article 2(3) of the 1991 Law, the Attorney General may, by giving notice in writing, require any person under investigation, or any third party for that matter (including employees of the company under investigation), to produce any specified document that in his or her opinion is relevant to his or her investigation.

This power is of course subject to the usual requirement to respect any legal privilege that might arise in respect of certain documents. However, in practice and as a matter of pragmatism, such material is often seized in addition to non-privileged material and later subjected to an independent review. If, following a review, privileged material is identified, it must be returned. This practice of wholesale removal of documentation is likely to be challenged as unlawful.

Article 2(2) of the 1991 Law allows the Attorney General to issue written notices compelling individuals whom he believes have relevant information in respect of his investigation to answer questions or otherwise furnish him with information. As stated above, individuals are not permitted to refuse to answer questions if interviewed pursuant to this article.

In interviews other than those conducted under the 1991 Law, suspects are usually questioned under caution and therefore have the right to refuse to answer any questions put to them. If the matter proceeds to trial, no adverse inferences may be drawn in respect of the suspect choosing to exercise the right to silence.

IV FRAUD IN SPECIFIC CONTEXTS

i Financial service providers and money laundering

The Island's financial services industry is regulated by the Jersey Financial Services Commission (JFSC), which monitors compliance with local legislation and best practice, and where necessary takes appropriate enforcement action.

Financial services providers are subject to onerous anti-money laundering and counter-terrorist financing obligations. These obligations include duties of internal and external reporting of any suspicious activity. Indeed under the Money Laundering (Jersey) Order 2008 a person may commit an offence if he or she receives information or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering or terrorist financing and fails to report the same to the relevant authority.

ii Insolvency

Jersey recognises two principal forms of insolvency procedure:

- a* a creditors' winding up under the Companies (Jersey) Law 1991; and
- b* *désastre* under the Bankruptcy (*Désastre*) (Jersey) Law 1990.

A liquidator (or the Viscount in the case of a *désastre*) has a wide range of powers, including undertaking investigations into the affairs of a company. If, after such investigation (which ordinarily has to be funded either from the company's assets or by creditors directly), it appears to the liquidator that there has been a transgression of the Companies Law, be it a transaction at an undervalue, a preference payment or wrongful or fraudulent trading,¹⁶ the liquidator may apply to the Court to seek redress against the relevant parties. Such redress may include ordering the parties implicated in the transaction to restore the company to the position had the transaction not taken place. Whether a liquidator undertakes such investigations and takes any subsequent action will depend upon an assessment of the likely benefit to creditors.

Further to these investigative powers, liquidators are obliged by virtue of their office to report to the Attorney General any acts committed by a company or its directors that they believe amount to a criminal offence. The liquidator also has the power to recommend that a disqualification order be made in respect of a director on account of his or her conduct.

In the context of insolvency, a director is most likely to commit either wrongful trading (where a director knew that there was no reasonable prospect or, on the facts, was reckless as to whether the company would avoid one of above insolvency procedures) or fraudulent trading (where the director intends to defraud creditors).

In respect of wrongful trading, the Court may order that the offending directors are personally liable for the debts of the company. As regards fraudulent trading, the Court may order the offending directors to make such contributions to the company as it sees fit. Such orders do not prevent further criminal charges or civil actions from being brought.

In recent years the court's power has been used to order that a company be wound up on just and equitable grounds. Several local trust and corporate service providers have been wound up under this principle. A liquidator is appointed and the business wound up. This involves a liquidator dealing with the underlying trust and company structures.¹⁷

iii Arbitration

The Arbitration (Jersey) Law 1998 makes provision for the enforcement of foreign arbitration awards.

iv Effect of fraud on evidentiary rules and legal privilege

Evidentiary rules

Generally speaking, the Jersey courts do not adopt special evidentiary rules in cases involving allegations of fraud. However, the Civil Evidence (Jersey) Law 2003 substantially relaxes the rules on the admissibility of hearsay evidence in civil proceedings. Therefore where proper notice is provided, hearsay evidence is admissible, subject to the usual rules of relevance.

16 All of which are prohibited under the Companies (Jersey) Law 1991 in Articles 176–178.

17 See *In re Centurion Management Services Limited* [2009] JRC 227.

Jersey has also adopted a more flexible and pragmatic approach to tracing than is provided for in other jurisdictions (see Section VI, *infra*).

Legal privilege

Jersey law follows the English law of privilege. As such Jersey law recognises the crime or fraud exception restated by the English Court of Appeal¹⁸ that ‘if a person consults a solicitor in the furtherance of a criminal purpose then, whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client (or his agent) and the solicitor do not attract legal professional privilege’.

In the Jersey Court of Appeal case of *Hume v. Attorney General*,¹⁹ the Court held that there was no distinction to be drawn between civil and criminal proceedings in relation to issues of privilege.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Forum non conveniens

Generally speaking, asset recovery actions will include an international element; it is therefore not uncommon for parties to actions to seek a stay in the Jersey proceedings on the grounds of *forum non conveniens* on the basis that an action could be more suitably tried in an alternative available forum.

In *Brazil v. Durant*,²⁰ the Royal Court held that the test to be applied in respect of applications for a stay on the grounds of *forum non conveniens* was that set out by Lord Goff in *Spiliada Maritime Corp v. Cansulex Limited*²¹ such that the Court will consider in which forum ‘the case may be tried most suitably in the interests of all parties and the ends of justice’. In applying this test the Court will have in mind the following ‘connecting’ factors:

- a* matters concerning convenience or expense (e.g., location of witnesses and documents relative to the proposed forum);
- b* the governing law of the transaction; and
- c* the jurisdictions where the respective parties reside and carry on their business.

Choice of law

As to the choice of applicable law, the Jersey courts will follow the principles set out in *Dicey, Morris & Collins on the Conflict of Laws* and the associated English common law. The choice of law to be applied in proceedings will largely depend on the cause of action before the Royal Court; by way of example:

18 *Kuwait Airways Corporation v. Iraqi Airways Corporation*, [2005] 1 WLR 2734.

19 [2006] JCA 162.

20 *Federal Republic of Brazil and Anor v. Durant International Corporation and Anor*, [2010] JLR 421.

21 [1987] AC 460.

- a* The judgment in *Brazil v. Durant* states that when dealing with cases of unjust enrichment and knowing receipt the Royal Court will consider the law of the jurisdiction in which the relevant enrichment occurred to be the applicable law.
- b* In *FG Hemisphere Associates LLC v. DR Congo*²² the Royal Court held that the correct law to be applied in respect of a debt owed by a corporate body is the place where the corporate body carries on business.
- c* In *SGI Trust Jersey Ltd v. Wijsmuller*²³ the Royal Court held that it is desirable for a case involving tortious acts to be heard in the jurisdiction in which the majority of the alleged tortious acts occurred.

Proof of foreign law

Any issue that arises in Jersey proceedings as to the application of foreign law, must be proved as fact by expert evidence.

ii Collection of evidence in support of proceedings abroad

In criminal cases requests for international cooperation in the matter of investigation, evidence and the pursuit of criminal assets are made in the first instance to the Attorney General.

The time taken to bring such requests to a conclusion will depend on the nature of the case and the levels of resistance encountered on the part of those who are the subject of the proceedings in question. What can be said with certainty is that the Jersey authorities continue to have a good record of attention to the matters addressed here, be it domestically or internationally. Their history of cooperation with responsible partner jurisdictions is good and has been recognised by reporting international bodies such as IMF and FATE, and continues to be a matter in which they take great pride.

In civil cases evidence can be gathered under the provisions of the Service of Process and Taking of Evidence (Jersey) Law 1960. Incoming letters of request should be addressed to the Royal Court. Where the Royal Court is satisfied that (1) the request has been issued by or on behalf of a court or tribunal outside the jurisdiction and (2) the evidence is sought in respect of civil proceedings that have either been or whose institution is contemplated before the court issuing the request, the Royal Court can make orders for:

- a* the examination of witnesses, either orally or in writing (such evidence is taken on oath by the Viscount);
- b* the production of documents;
- c* the inspection, photographing, preservation, custody or detention of any property; and
- d* the taking of samples of any property and the carrying out of any experiments on or with any property.

22 [2010] JLR 524.

23 [2005] JLR 310.

In appropriate cases *Norwich Pharmacal*-type relief will be given in support of prospected proceedings abroad.²⁴

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

See Section III.i, *supra*.

iv Enforcement of judgments granted abroad in relation to fraud claims

Judgments of a limited number of courts, including the English High Court, can be registered in Jersey by statute and will be enforced unless they are set aside. As regards judgments of other courts the Jersey court will largely apply the principles of *Dicey, Morris & Collins*.

Foreign judgments are not automatically enforceable in Jersey. The registration and subsequent enforcement of a foreign judgment in Jersey is governed by the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (the 1960 Law). Part 2, Article 3 of the 1960 Law provides that any judgment of a superior court of a country to which Part 2 of the Law extends shall be a judgment that is capable of registration (and enforcement) subject to the criteria specified in Article 3(2) of the 1960 Law. The foreign judgment must be final and conclusive as between the parties (notwithstanding that it may be subject to appeal) and it must relate to payment of a sum of money that is not a sum payable in respect of taxes, fines or other penalty.

The Judgments (Reciprocal Enforcement) (Jersey) Act 1973 extends the 1960 Law to the judgments of the courts of England and Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey.

From the date of registration, the 1960 Law confers upon the foreign judgment the same force and effect as if it had been a judgment originally handed down by the Royal Court. There are a variety of circumstances in which such judgments may be set aside; indeed such applications are not uncommon. In particular, the judgment must be set aside if:

- a* the Royal Court is satisfied that the foreign Court did not have jurisdiction to make the Order in the circumstances of the case; or
- b* that the judgment debtor did not (although duly served) receive notice of the proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear (for the purposes of the 1960 Law, the foreign court will only be deemed to have jurisdiction if the judgment debtor submitted to the jurisdiction of the foreign court by agreement or appearance).

In *IMK Family Trust*²⁵ at paragraph 62, the Royal Court recognised that it retains an ‘inherent jurisdiction’ to enforce a foreign judgment allied with principles of comity.

²⁴ See, for example, the Guernsey Court of Appeal decision in *Systems Design Limited and Anor v. President of Equitorial Guinea and Anor*, [2005-06] GLR 65.

²⁵ [2008] JRC 271.

The judgment of *The Brunei Investment Agency and Bandone Sdn Bhd v. Fidelis Nominees Ltd (and Others)*²⁶ comprehensively establishes the wide remit of the Jersey Royal Court's inherent jurisdiction to enforce a foreign judgment. In this case, principles of comity and the English common law principles were said to apply to Jersey but with the variation that the Royal Court also had discretion to enforce a non-monetary judgment. Very little guidance is given in *Brunei* on the factors that a court should take into account in considering this issue. The caution with which the discretion is to be exercised in the incremental evolution of the English common law in Jersey militated against any definition of criteria.

Article 9 of the Civil Asset Recovery (International Co-operation) (Jersey) Law 2007 provides for the Royal Court to register an external civil asset recovery order if the following criteria apply:

- a* the order is in force at the time of registration and not subject to appeal;
- b* if the respondent did not appear in the proceedings, the Royal Court is satisfied that he or she received notice of the proceedings in sufficient time to enable him or her to defend them; and
- c* enforcing the order in Jersey would not be contrary to the interests of justice.

v Fraud as a defence to enforcement of judgments granted abroad

On application by a judgment debtor under Article 6(1) of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, the registration of a foreign judgment shall be set aside if the Royal Court is satisfied that the judgment was obtained by fraud.

VI CURRENT DEVELOPMENTS

As noted above, the Royal Court of Jersey in 2012 passed judgment in relation to multi-million-dollar fraud case *Brazil v. Durant*, concerning bribes paid to the former mayor of São Paulo, Paulo Maluf. The Royal Court's judgment in *Brazil v. Durant*, which has since been upheld by the Jersey Court of Appeal,²⁷ provides a clear statement of intent as to Jersey's approach to those who use the Island to launder money and in particular to the evidential processes the Court will now employ to trace the proceeds of crime through the Island.

Classically, when tracing the proceeds of crime, it has been necessary for a plaintiff to adduce sufficient evidence to show a 'clear link' between his property and the assets in the hands of the wrongdoer as well as identifying the proceeds of his or her property as it passes between persons who have handled it prior to those assets arriving in the hands of the wrongdoer.

i Problems with tracing through mixed funds

In complex cases such as *Brazil* it is not uncommon for illicit monies to pass through multiple bank accounts, which often hold the assets of others, such that it becomes

26 [2008] JRC 152.

27 See [2013] JCA 071.

difficult, if not impossible, to show the exact path the assets took to reach the wrongdoer. It was on this basis that the defendants in *Brazil v. Durant* invited the Royal Court to consider that the plaintiff's tracing exercise failed.

The Royal Court, however, took a different view to the English authority of *Sinclair Investments (UK) Ltd v. Versailles Trade Finance Ltd*²⁸ such that while the 'clear link' principle remains good law, such an exercise should not fail 'simply because the [wrongdoer]... has acted particularly dishonestly or cunningly by creating a maelstrom'. The Royal Court's approach is particularly plaintiff-centric in that once a plaintiff can prove that his or her assets have moved into a 'maelstrom', the burden of proof will shift to the defendant to show what part of the mixed fund is in fact his or hers. Further the Royal Court saw no reason why this principle could not be applied in circumstances where the plaintiff's assets passed through multiple 'maelstroms'.

The Court of Appeal endorsed this approach noting that to require the plaintiff to provide evidence of the property in question 'at every stage of its journey through life' as required by the English case of *Borden UK Ltd v. Scottish Timber Products Ltd*²⁹ was too formalistic. Following the Court of Appeal's ruling 'in appropriate cases, the necessary links can be inferred from the circumstances, even in the absence of direct evidence'.

ii Reverse tracing

There are a number of ways in which wrongdoers can seek to disguise the source of the assets they seek to launder. One such method is to manipulate the timing of payments between certain accounts such that monies are credited to an account after an equivalent or related amount has been debited from that account. In *Brazil v. Durant*, the plaintiffs invited the Court to find that as the defendants had admitted that all the monies had come from one source the sequence in which the monies were received and paid away was irrelevant.

In adopting reverse tracing as a valid evidential exercise, the Court was at pains to reiterate that it 'was not bound by any English rule of tracing and is free to depart from such a rule if convinced that there is a better alternative'.

Taking this starting point, the Court went on to state that when considering matters of tracing the Island's courts should not be limited 'by reference to any preconceptions of what is or is not conceptually possible or arguably supported by English authority, but once again, as a matter of evidence'. The test applied by the Royal Court was whether the plaintiff could provide 'sufficient evidence to establish a clear link between the credits and debits, irrespective (within a reasonable time frame) of the order in which they occur, or the state of the balance of the account'. Further, the Court found no reason to place restrictions on the evidence that might be adduced to prove such links.

The courts of Jersey will therefore look to what 'accords with the justice [of the case] and good sense'. The Court considered that to do otherwise would 'confer on any sophisticated fraudster the ability to defeat an otherwise effective tracing claim simply by manipulating the sequence in which credits and debits are made to his bank account'.

28 [2011] EWCA Civ 347.

29 [1981] Ch. 25.

Most importantly, the Court of Appeal judgment makes clear there is no limit to the ways in which, as a matter of evidence, an aggrieved party may demonstrate the necessary link between his or her property and that which is in the hands of the wrongdoer. The Court will not restrict itself to predetermined requirements to uphold a tracing claim.

What remains unclear is how such principles will be applied in circumstances where the Court will be required to consider competing claims of secured and unsecured creditors or those with mere personal as opposed to proprietary claims against the wrongdoer.

Whatever the outcome of such future cases, the law of Jersey in respect of tracing has now evolved and is distinct from that of the UK and other common law jurisdictions. Indeed Jersey now leads other common law jurisdictions in relation to such matters.

More recently, the Royal Court in *Lloyds v. Fragoso* has signalled its willingness to depart from English authority concerning the nature of the remedy available to plaintiffs seeking recovery of the proceeds of bribes. Again departing from *Sinclair Investments v. Versailles*, the Royal Court in *Lloyds v. Fragoso* held that the proceeds of bribes were subject to a proprietary claim and not merely a personal claim against the wrongdoer. At the time this was a significant departure from the approach currently adopted in England where such claims in cases of bribery were limited only to personal compensation that could be defeated in the event of the defendant's insolvency. The UK Supreme Court in *FHR European Ventures LLP and others v. Cedar Capital Partners LLC*³⁰ has now held proceeds of bribes and secret commissioner were to be subject to a proprietary rather than a personal claim, aligning the position in English law with that of Jersey.

30 [2014] UKSC 45.

Appendix 1

ABOUT THE AUTHORS

STEPHEN BAKER

Baker & Partners

Stephen Baker is an English barrister and Jersey advocate. He is senior partner at Baker & Partners. He specialises in asset recovery actions, particularly those involving political corruption and the unravelling of offshore structures.

He is frequently instructed by foreign governments in asset-recovery actions. In recent years he has acted for the governments of Brazil, and Pakistan, and the Kenyan Anti-Corruption Commission. He is an expert in the interaction between the civil and criminal law in fraud cases. He successfully acted for Brazil in its first substantial asset recovery action outside of the territory seeking the recovery of assets held through a Jersey unit trust, allegedly to the benefit of a senior Brazilian politician (see *Federal Republic of Brazil v. Durant International Corporation & Ors* [2012] JRC 211).

He is regularly instructed by the Attorney General of Jersey in the most complex criminal cases.

Educated at Manchester and Cambridge universities, he has a first-class master's degree in law. He speaks regularly on topics including the misuse of offshore services and corruption, and is a frequent commentator in the national press.

He is the Jersey representative of FraudNet, the fraud prevention network of the ICC Commercial Crime Services. Mr Baker also sits on the board of the Jersey Institute of Law.

BAKER & PARTNERS

PO Box 842

2 Mulcaster Street

St Helier

Jersey

JE4 0US

Channel Islands

Tel: +44 1534 766254

Fax: +44 1534 737355

stephenbaker@bakerandpartners.com

www.bakerandpartners.com