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# THE DISPUTE RESOLUTION REVIEW

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SEVENTH EDITION

EDITOR  
JONATHAN COTTON

LAW BUSINESS RESEARCH

# THE DISPUTE RESOLUTION REVIEW

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For further information please email  
[Nick.Barette@lbresearch.com](mailto:Nick.Barette@lbresearch.com)

# THE DISPUTE RESOLUTION REVIEW

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Seventh Edition

Editor  
JONATHAN COTTON

LAW BUSINESS RESEARCH LTD

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## EDITOR'S PREFACE

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*The Dispute Resolution Review* covers 48 countries and territories. Disputes have never respected national boundaries and the continued globalisation of business in the 21st century means that it is more important than ever before that clients and lawyers look beyond the horizon of their home jurisdiction.

*The Dispute Resolution Review* is an excellent resource, written by leading practitioners across the globe. It provides an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is written with both in-house and private legal practitioners in mind, as well as the large number of other professionals and businesspeople whose working lives bring them into contact with disputes in jurisdictions around the world.

This Review is testament to the fact that jurisdictions face common problems. Whether the issue is how to control the costs of litigation, which documents litigants are entitled to demand from their opponents, or whether a court should enforce a judgment from another jurisdiction, it is fascinating to see the different ways in which different jurisdictions have grappled with these issues and, in some cases, worked together to produce a harmonised solution to international challenges. We can all learn something from the approaches taken by the 48 jurisdictions set out in this book.

A feature of some of the prefaces to previous editions has been the impact that the turbulent economic times were having in the world of dispute resolution. Although at the time of writing the worst of the global recession that gripped many of the world's economies has largely passed, it has left its mark. Old and new challenges and risks remain in many parts of the world such as renewed speculation on the future of the eurozone, the sanctions imposed on Russia, and falls in the price of oil. In some regions, the 'green shoots' of recovery have blossomed while in others they continue to need careful nurturing. Both situations bring their different challenges for those involved in disputes and, while the boom in insolvency-related disputes and frauds unearthed in the recession remain, the coming year could see an increase in investment and acquisitions with a subsequent focus on disputes concerning the contracts governing those investments.

I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at p. 739 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research, in particular Nick Barette, Eve Ryle-Hodges and Shani Bans, who have impressed once again in managing a project of this size and scope, and in adding a professional look and finish to the contributions.

**Jonathan Cotton**

Slaughter and May

London

February 2015

## Chapter 28

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# JERSEY

*William Redgrave and Charles Sorensen*<sup>1</sup>

### I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Jersey is a self-governing British Crown Dependency. It is the largest of the Channel Islands. It is not part of the United Kingdom and is not a member of the European Union. Originally part of the Duchy of Normandy, it has owed its allegiance to the British Crown for over eight centuries. It has always maintained a separate legal system from Britain, as well as its own legislature and tax system.

Jersey law derives from legislation and customary law (a concept similar to common law). Most modern legislation emanates from the Island's legislature, the States of Jersey. Occasionally the UK parliament extends its legislation to Jersey, but only with the consent of the States of Jersey.

Jersey customary law derives from a variety of sources, including Norman customary law, the French Code Civil and English common law and statute. The sources relied upon vary depending on the area of law: typically the areas of law with the oldest origins – such as immovable property and succession – rely most heavily on Norman customary law, while areas that have developed more recently, such as tort, administrative law and criminal law, are heavily influenced by English authorities. Jersey contract law is a blend of English and French law. The law of trusts has developed relatively recently and is rooted in English law and procedure, but it has been governed by a Jersey statute since 1984 and there are significant differences from English trusts law.

Jersey's principal court is the Royal Court, presided over by the Bailiff, the Island's chief judge. All but the most minor civil and criminal cases are heard there.<sup>2</sup> The Bailiff is

---

1 William Redgrave is an advocate and Charles Sorensen is an associate at Baker & Partners.

2 The Petty Debts Court hears civil claims for under £10,000 and rent arrears cases of under £15,000, and the Magistrate's Court hears less serious criminal cases; its sentencing powers are limited to imprisonment of 12 months. There is also a Jersey Employment Tribunal.

assisted by jurats, who are the judges of fact in all civil cases. There are 12 full-time jurats, elected by the Jersey legal profession and the legislature. Jurats need not be legally trained but typically have long experience of professional, business or civic life. Two jurats sit with the judge on civil trials.

The Deputy Bailiff and a number of Commissioners also exercise the Bailiff's judicial function. As well as local Commissioners drawn from the Jersey Bar there are a number of specialist overseas Commissioners, appointed from time to time to hear particular types of case. They are typically British QCs or retired High Court judges.

Civil appeals are to the Jersey Court of Appeal. Its members include the Bailiff and Deputy Bailiff of Jersey, the Bailiff of Guernsey, and a number of lawyers from Commonwealth jurisdictions, the majority being British QCs or former judges.

The ultimate appellate court in civil matters is the Judicial Committee of the Privy Council, in London. Decisions of the Privy Council on appeals from Jersey are binding in Jersey.

## II THE YEAR IN REVIEW

### i Security Interests (Jersey) Law 2012

This Law came into force in January 2014. It reforms the previous 1983 regime governing the creation of security over intangible moveable property. It provides for the creation of security interests by either (1) control, in the case of registered securities, bank accounts and securities accounts; (2) possession, in the case of negotiable instruments and bearer securities; or (3) registration, in respect of any type of collateral. The introduction of a registration system is a key new development: where security cannot be taken by possession or control, a security interest must be registered to be enforceable against any party other than the grantor.

The new law also increases the types of collateral that can be used as security. Previously there was no equivalent in Jersey law to an English floating charge and, while the law does not recognise a floating charge *per se*, it permits a security interest to be created over both present and after-acquired property in a single agreement.

The law removes previous areas of uncertainty by confirming that third-party security is permitted without a guarantee, that a company may take security over its own shares and that the grantor can retain the right to deal with the collateral without affecting the validity of the security.

Under the old law the enforcement rights of a secured party were effectively limited to a power of sale. The new legislation permits a secured party to appropriate the collateral or take ancillary measures, including exercising the rights of the grantor in relation to the collateral.

### ii **Crociani, Foortse, BNP Paribas Jersey Trust Corporation Ltd & Appleby Trust (Mauritius) Ltd v. Crociani & Others [2014] JCA 089**

In April 2014 the Jersey Court of Appeal clarified the meaning of 'exclusive jurisdiction' and 'forum for administration' in the context of a trust deed.

In January 2013 a breach of trust claim was brought in Jersey to recover assets that had been removed from a trust. There had been several changes of trustee and proper law

of the trust since its creation in 1987. The transactions in question principally took place between 2007 and 2011, when the trust was governed by Jersey law. In 2012 the first to third appellants had purported to retire as trustees in favour of the fourth appellant, which was in Mauritius, and to change the proper law of the trust to that of Mauritius. In March 2013 the appellants sought to stay the Jersey proceedings on the grounds of *forum non conveniens*, and to have the matter determined in Mauritius.

The basis of the stay application was a clause of the trust instrument that gave the trustees power to appoint new trustees in a different jurisdiction and change the proper law of the trust:

*so that the Trust Fund shall continue to be held upon the trusts hereof but subject to and governed by the law of the country of residence or incorporation of such new Trustee or Trustees and thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country, which shall become the forum for the administration of the trusts hereunder.*

The appellants claimed that from the 2012 change of trustee onwards this clause conferred exclusive jurisdiction for the resolution of all disputes upon the Mauritian courts, because the current trustees were in Mauritius. In October 2013 the Royal Court refused to stay the Jersey proceedings, holding that the clause did not amount to an exclusive jurisdiction clause and that even if it did, there were exceptional circumstances that militated against staying the Jersey proceedings. The appellants appealed.

The Court of Appeal dismissed the appeal. It held that properly construed the provision was concerned only with a change in the proper law of the trust. The word ‘jurisdiction’ related to the law of the country, not to the courts of that country. The term ‘the forum for the administration of the trusts’ referred to the country in which the trust was administered and whose court might be called upon to exercise its supervisory jurisdiction; it did not exclude other fora for settling hostile disputes between trustees and beneficiaries. This result may not have been what the draftsman (or the settlor) intended, but it was the effect of the drafting.

This decision is a warning to draftsmen to take care that any clause designed to confer exclusive jurisdiction upon the courts of a particular country is drafted in such unambiguous terms as to afford no scope for alternative interpretation.

### **iii In the matter of Strathmullan Trust [2014] JRC 056**

This was the first case decided after the Trusts (Amendment No. 6) (Jersey) Law 2013 created a statutory regime governing applications to set aside transfers into a Jersey trust, or the exercise of a power in relation to a Jersey trust, on the grounds of mistake.

The Royal Court had to decide whether these provisions applied where an applicant sought to set aside the creation of the trust itself on the grounds of mistake under Article 11 of the Trusts (Jersey) Law 1984. The Court held that relief under the new provisions required the pre-existence of a trust. In contrast Article 11 applied where the validity of the trust itself was in question. On this basis the Court concluded that the applicable formulation of mistake under Article 11 had not been replaced by that

contained in Article 47E. The Court applied the three-stage test set down by the Royal Court in *Re Lochmore Trust*,<sup>3</sup> namely to establish:

- a* whether there was a mistake on the part of the donor;
- b* whether the settlor would not have entered into the transaction ‘but for’ the said mistake; and
- c* whether the said mistake was of so serious a character as to render it unjust on the part of the donee to retain the property.

Although the result would almost certainly have been identical if the new provisions had been applied, the significance of this decision is that Article 11 remains independent of the new provisions.

**iv Investec Trust (Guernsey) Limited et al. v. Glenalla Properties Limited et al.**  
**[28/2014 and 41/2014]**

The Guernsey Court of Appeal has given judgment on the effect of Article 32(1)(a) of the Trusts (Jersey) Law 1984, which limits a trustee’s liability to a third party with whom it contracts as trustee. The judgment only has effect in Guernsey but is of obvious wider interest. The relevant provision reads as follows:

*32 Trustee’s liability to third parties*

*(1) Where a trustee is a party to any transaction or matter affecting the trust –*

*(a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property*

Liquidators of BVI companies brought a debt claim against Guernsey trustees of a Jersey law trust. In an earlier ruling<sup>4</sup> the Guernsey Court of Appeal held that Jersey law, rather than the law governing the contracts under which the debts arose, governed the nature and extent of the trustee’s liability to the BVI companies. Despite the fact that trusts have no legal personality of their own, unlike companies or partnerships, there was no injustice in applying Article 32(1)(a) to limit the trustee’s liability under a foreign law debt. The BVI companies knew they were contracting with a trustee and not a person dealing on his own account, and were therefore on notice that there might be limitations on his liability: ‘from the time of the formation of the contract, the parties knew or ought to have known that they were contracting upon the basis that such a potential cap on liability exists’.

In the second decision<sup>5</sup> the Court held that the effect of Article 32(1)(a) is that the trustee has no personal liability: his or her own assets are never at risk. He or she is liable in his or her capacity as trustee only, and the liability is to pay no more than the value of the assets in the trust ‘at the time’ (presumably this means the time the claim is enforced). A former trustee would have an equitable entitlement to access the trust fund

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3 [2010] JRC 068.

4 28/2014.

5 41/2014.

to satisfy any such judgment, or could subrogate this right to the creditor. This recourse to the trust property exists regardless of any breach-of-trust claim that might be brought.

It may very well be that Jersey courts would reach the same conclusions, given the apparently clear wording of the provision. However, courts in jurisdictions whose laws do not protect trustees in this way may find the conclusions less appealing.

v **Nolan and others v. Minerva Trust Company and others [2014] JRC078A**

In this case the plaintiffs succeeded in a dishonest assistance claim against a Jersey trust company that had provided directors for a number of Jersey companies beneficially owned by a fraudster (GW). In a substantial judgment the Royal Court found that the trust company's officers had, on the instructions of GW, dishonestly assisted GW by making payments out of the companies, to GW's benefit and to the detriment of the plaintiffs who had provided these funds, when on notice that those payments could be fraudulent.

The Court held that the essential elements of dishonest assistance in a breach of trust were:

- a* the existence of a trust in the plaintiffs' favour;
- b* a breach of that trust;
- c* that the defendant assisted in that breach; and
- d* that in providing that assistance the defendant acted dishonestly.

The Court first had to find that a trust existed, in favour of the plaintiffs, over the funds that they had been fraudulently induced to invest into the Jersey companies. The facts here could give rise to two types of constructive trust: a *Halley* trust or a *Quistclose* trust. A *Halley* trust arises where funds are paid over as a result of a fraudulent promise, and the payer receives nothing in return. A *Quistclose* trust arises when money is paid over on the mutual understanding that it will be used for a specific purpose, such that if it cannot be used for that purpose, it must be returned. The use of such funds for an alternative purpose therefore constitutes a breach of trust.

In accordance with English authority the Court held that dishonesty was to be determined objectively by reference to the 'ordinary standards of honest behaviour', regardless of whether or not the defendant himself considered his own conduct dishonest. The Court found this to be the case in circumstances that would have led an honest trust officer to seek further information before making the payment concerned, and held that making the payment without making those inquiries constituted dishonest assistance.

The Court also held that the limitation period for dishonest assistance claims is three years, drawing an analogy with economic torts. However, the doctrine of *empêchement de fait*, which prevents limitation running against a plaintiff who is unaware of the facts that would enable him or her to bring a claim, applied until the plaintiff had received documentary disclosure from the defendant, under a disclosure injunction attached to a *Mareva* order. Before receipt of that disclosure the plaintiff would have been unable to plead dishonesty against the defendant, given the professional ethical restrictions on counsel pleading fraud without sufficiently strong evidence.

### III COURT PROCEDURE

#### i Overview of court procedure

The civil procedure of the Royal Court is governed by the Royal Court Rules 2004. These rules are modelled on the Supreme Court Rules that existed in England and Wales before the introduction of the Civil Procedure Rules there. Though Jersey does not have the CPR, the Royal Court broadly applies their spirit in seeking to ensure the prompt and proportionate resolution of disputes. Claims that remain dormant for a year are liable to be struck out.

#### ii Procedures and time frames

Civil proceedings may be brought either by simple summons (for straightforward debt claims); order of justice (like a statement of claim in England: applicable to actions including commercial disputes); or representation (for other proceedings, including non-contentious trust applications).

Actions brought by summons or order of justice proceed by a fixed timetable, which may be varied by agreement or by the Royal Court. All cases have an initial hearing on the first Friday afternoon four clear days after service. If the case is defended the answer is due within 21 days, with a further 21 days for any reply. After pleadings have closed the plaintiff has five weeks to apply for a directions hearing at which the Court will give further directions to trial, for example on discovery and exchange of evidence. Failure to indicate an intention to defend can lead to judgment in default.

The Royal Court has stated<sup>6</sup> that actions should generally be concluded within 12 months, and that even a complex case should be concluded within 24 months. A delay exceeding 24 months is likely to be inordinate and result in the case being struck out for want of prosecution. If a delay exceeds 36 months, it would only be in wholly exceptional cases that the delay would not be inordinate.

Most procedural remedies available in England are also available in Jersey, including striking out claims for abuse of process or disclosing no reasonable cause of action; summary judgment; security for costs; and stays for mediation.

Interlocutory injunctive relief is available in support of both Jersey claims and overseas claims, including *Mareva* (freezing and disclosure), *Anton Piller* (search and seizure) and *Norwich Pharmacal* orders (disclosure from non-party to help bring a claim against others). Urgent orders can be obtained *ex parte* and at very short notice, with a subsequent *inter partes* hearing to confirm, vary or discharge the injunctions; full and frank disclosure and an undertaking to compensate for damage and costs of compliance will be required.

#### iii Class actions

Rule 4(3) of the Royal Court Rules permits a person to represent other persons with identical interests in the same proceedings. A plaintiff may apply to the court to appoint

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6 *Ybanez and Mompo v. BBVA Privanza Bank (Jersey) Limited* [2007] JLR Note 45].

a specific defendant to represent other defendants. Any judgment will be enforceable on all those represented, but will only be enforceable with leave of the Court.

Where there are a number of similar cases before the Royal Court it may stay all but one and use that as a test case, if doing so will effectively dispose of the issues in the other cases.

#### iv Representation in proceedings

Only Jersey-qualified advocates have rights of audience before the Royal Court. Litigants who are not minors nor under an incapacity may represent themselves.

Bodies corporate may be represented by specific authorised directors, upon lodging a copy of the authorising resolution and the director's name and address.<sup>7</sup> Directors can if successful claim on a limited basis for their personal costs.<sup>8</sup> Non-party cost orders may be made against those who fund or control litigation on behalf of another, so a director may be made personally liable for costs awarded against the company he or she represented, if the litigation was conducted other than purely for the company's benefit.<sup>9</sup>

#### v Service out of the jurisdiction

Leave of the Court is required to serve process on persons outside Jersey. This applies equally to natural and non-natural persons. Rule 7 of the Service of Process Rules 1994 lists a number of circumstances in which it will be proper to grant such leave: for example where the subject matter of the dispute is connected to Jersey, or where the overseas defendant is a necessary or proper party to a claim involving another defendant who is already duly served; or to enforce a foreign judgment against assets in Jersey. The Court may order substituted service if personal service is not practicable. The application is made by summons supported by an affidavit exhibiting the order of justice. Full and frank disclosure must be given of possible arguments against the grant of leave. The applicant must establish: a good arguable case that at least one of the situations in Rule 7 applies; that there is a serious issue to be tried on the merits; and that Jersey is an appropriate forum to try the claim.

Once the overseas person has become a party to the proceedings and the Royal Court's jurisdiction over them has thereby been established, service on that party's Jersey advocate is ordinarily sufficient in respect of further documentation in the proceedings.

#### vi Enforcement of foreign judgments

Foreign judgments can only be enforced in Jersey if they have been either registered or recognised by the Royal Court. Registration is applicable only to judgments of superior courts of the following jurisdictions, which afford the same treatment to Jersey judgments:<sup>10</sup> England and Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey.

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7 RCR 4/2A.

8 RCR 12/6(b).

9 *Leeds v. AdMatch and Weston* [2014] JRC167.

10 Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

The judgment must be final and conclusive and for a sum of money, not payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty. The application must be brought within six years of the judgment or appeal. If registration is not set aside for one of the reasons set out in the law, which include enforcement being contrary to public policy, then it can be enforced as if it were a Jersey judgment.

Judgments from any other jurisdiction must be recognised under common law. The plaintiff must bring fresh proceedings in Jersey by order of justice. If satisfied that the foreign court had jurisdiction according to the established Dicey and Morris conflict of laws rules, the Royal Court will ordinarily recognise an *in personam* money judgment (unless it is in respect of taxes<sup>11</sup> or state penalties) that is final and conclusive. The merits of the claim will not be considered. If the application succeeds, a Jersey judgment is given in the same terms as the foreign judgment, and is liable to be enforced in Jersey. The Royal Court has a discretion under its inherent jurisdiction to enforce non-money judgments, but will exercise that jurisdiction cautiously.<sup>12</sup>

#### vii Assistance to foreign courts

Jersey is bound by the 1970 Hague Convention on taking evidence abroad. The Royal Court's power to assist overseas courts in obtaining evidence for overseas civil and commercial proceedings (including insolvency cases) is set out in the Service of Process and Taking of Evidence (Jersey) Law 1960. The Court may order, for example, the inspection or seizure of property, the production of specified documents and the oral examination of witnesses in Jersey. Oral examination takes place in a closed Court, and (unusually for Jersey) foreign lawyers may conduct the examination. The Court will not make an order if it is contrary to public policy to do so.

The established procedure is that the letter of request from the requesting court is submitted (usually through official channels) to the Attorney General of Jersey, together with the sealed, original order. If it is in order, the request will either be presented to the Court by the Attorney General's department or an independent Jersey advocate will need to be instructed to make the application.

The same Law also prescribes a procedure for the service within Jersey, by the Royal Court's executive officer the Viscount, of process from outside Jersey. Where a convention is in force the documents must be sent to the Attorney General of Jersey for him to vet and present to the Court; otherwise it must go via letter of request to the UK government, and the Royal Court will only act on a request from the UK Home Secretary.

#### viii Access to court files

Most proceedings are held in public, and any adult may attend. Proceedings may be held *in camera* if the interests of justice require it (typically family cases, non-contentious

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11 Given the international trend towards mutual assistance in preventing tax evasion and aggressive tax avoidance, it is open to question how long the widely followed and long-established common law rule against civil enforcement of overseas tax liabilities will last.

12 *Brunei Investment Agency v. Fidelis* [2008] JRC152.

trust representations or cases involving highly confidential material). Many decisions of the Royal Court and Court of Appeal, interlocutory and final, are reported promptly on the Jersey Legal Information Board website. Where appropriate, identities of parties or witnesses may be anonymised in the reported judgments.

Ordinarily, pleadings in proceedings commenced by order of justice are available to the public once all parties to the action have filed their answers. A request must be made in writing to the Judicial Greffier stating the reason for the request. If the reason is adequate, then, unless the proceedings are subject to any restriction placed on them by the Court, the pleadings may be released. Pleadings by way of representation will not be released until the conclusion of the case.

## **ix Litigation funding**

The use of litigation funders is new but is increasing in Jersey following recent decisions approving their use. In *In the matter of Valetta Trust*<sup>13</sup> the Royal Court endorsed the change in approach of the English courts, from regarding such arrangements as corrupting and refusing to enforce them, to approving them as promoting access to justice. It held that such arrangements are acceptable where the funder does not control the litigation, accepts the liability to pay adverse costs if the case is lost, and leaves the plaintiff with a substantial proportion of the winnings if the case is won.

In *Barclays Wealth Trustees (Jersey) Limited v. Equity Trust (Jersey) Limited and others*<sup>14</sup> the Court held that even if a funding agreement were unenforceable, this would not necessarily lead to the proceedings being struck out as an abuse of process. It indicated that funders would still risk being ordered to pay the winning side's costs even if the funding agreement were unenforceable.

The Court stated in *Valetta* that conditional fee ('no win no fee') arrangements between lawyers and clients are still prohibited in Jersey.

## **IV LEGAL PRACTICE**

### **i Conflicts of interest and Chinese walls**

The Law Society of Jersey's Code of Conduct states in Rule 2(3) that:

*A member or a member's firm must not act where the member's or that firm's own interests conflict with those of the client or, subject to the last sentence of this Sub Rule (3), in any matter where a conflict of interests or duty, or a significant risk thereof, arises between two or more clients of a member's firm. Neither a member nor a member's firm may act for two or more clients in relation to matters in which there is dispute between those clients. A member must bear in mind the obligation to advise in the best interests of the client, the duty owed to each individual client and the extent to which such duty continues in respect of a former client following termination of the retainer. In non-contentious transactions, a member or a member's firm may act for more than one client only with the consent of all clients who are party to such a transaction.*

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13 [2011]JRC227.

14 [2013 (2) JLR 22].

Rule 2(4) states:

*A member or a member's firm may act for the adversary of a former client provided that such member or member's firm is not privy to confidential information in respect of the former client relevant to such dispute.*

Confidentiality walls within firms are not uncommon, for example where one member of a firm who has had historic involvement in a related matter is excluded from involvement and denied access to hard copy or electronic files. The relatively small number of firms makes such arrangements an occasional practical necessity. The adequacy of the arrangements may be challenged depending on the facts.

The Royal Court will prevent an advocate or his firm from acting if it is not satisfied that confidentiality can be adequately preserved in the circumstances.<sup>15</sup> The court will find that confidential information held by a firm in relation to one matter 'might be' relevant to another matter if there was a real (as opposed to fanciful or theoretical) risk that it would be relevant. However, in considering whether to bar a firm from acting, it will balance the risk of a significant breach of confidentiality against the public interest in litigants being able to instruct lawyers from among the relatively small number of firms in Jersey.<sup>16</sup>

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

Jersey law firms that conduct transactional work, requiring them to hold and pay out client funds and to enter into arrangements regarding client assets, are subject to the anti-money laundering requirements in the Proceeds of Crime (Jersey) Law 1999 and the Money Laundering (Jersey) Order 2008. They must have systems and controls in place to guard against money laundering and terrorist financing, including measures to identify customers and the source of funds and to monitor transactions. They must appoint a money laundering compliance officer and a money laundering reporting officer.

It is a criminal offence for such a lawyer not to report knowledge or suspicion of money laundering that comes to their notice in the course of their business, unless that knowledge came to them in circumstances attracting legal professional privilege.<sup>17</sup>

## iii Data protection

The Data Protection (Jersey) Law 2005 governs the processing and disclosure of personal data, hard copy or electronic. It is based on English legislation implementing the 1995 EU Data Protection Directive. The Data Protection Commissioner can investigate breaches and can bring civil or criminal actions.

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15 *Le Pas Holdings Ltd v. Receiver General* [1995 JLR 163].

16 *Abacus (CI) Ltd v. Appleby* [2007 JLR 499].

17 Proceeds of Crime (Jersey) Law 1999, Article 34D, Schedule 2 Part B.

As data controllers, law firms must register with the Commissioner. Personal data are exempt from the non-disclosure provisions if disclosure is required by law or court order, or if their disclosure is necessary:

- a* for the purpose of, in connection with, or in contemplation of, any legal proceedings;
- b* for the purpose of obtaining legal advice; or
- c* otherwise for the purposes of establishing, exercising or defending legal rights.<sup>18</sup>

## V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

### i Privilege

Jersey law follows English principles and recognises several forms of privilege.

There are two forms of legal professional privilege: legal advice privilege and litigation privilege. Legal advice privilege protects confidential communications passing directly between lawyer and client that were created for the dominant purpose of obtaining or providing legal advice. It is likely that the Jersey courts would follow the English courts in restricting the privilege to communications involving lawyers, and not apply it to other professionals.

Litigation privilege protects confidential documents that pass between lawyer and client, the lawyer and third parties, or the client and third parties. These documents must be generated after litigation has commenced or become contemplated for the dominant purpose of obtaining information to be submitted to lawyers for the purpose of providing or obtaining legal advice in relation to or seeking evidence or information for such litigation. The existence of privileged documents must be disclosed as part of the discovery process, although they are exempted from production for inspection.

Common interest privilege protects communications between parties with a common interest in actual or potential litigation for the dominant purpose of informing each other of the advice received or of obtaining legal advice. This enables a client voluntarily to share privileged information with a third party who shares a common interest, without the waiver or loss of privilege.

In civil or criminal proceedings, no person will be compelled to produce any document for inspection or to answer any question, if to do so would tend to expose that person to a real and appreciable risk of a criminal charge, penalty or forfeiture action being brought against them.

Disclosure of evidence relevant to an issue in court proceedings can be withheld if, as a matter of public policy, the Court decides that the public interest requires that it should be so withheld.

### ii Production of documents

#### *Discovery*

Discovery is the ordinary process by which each party must search for and identify documents that are or have been in their possession, custody or power and that relate

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18 Article 35, Data Protection (Jersey) Law 2005.

to any matter in question in the litigation. This obligation is extremely wide. The term 'documents' extends to anything upon which information can be recorded and retrieved, or may be capable of being retrieved by the use of specialist equipment. Documents in the possession of a party are those that it physically holds (in paper or electronic form). Those in its custody are those that it is holding for another. Those in its power are those that the party has a right to obtain from the person holding them (this probably means 'right, authority or practical ability' to obtain them, though there is no specific Jersey authority on the point). The obligation also extends to identifying documents that the party previously had in its possession custody or power but no longer does.

A document is considered to be relevant if it might lead another party on a train of inquiry that might result in identifying evidence that might help or harm a party's pleaded case. The Court will ordinarily make orders for discovery after the close of pleadings. Discovery is provided by listing relevant documents and verifying on affidavit that that list is complete. Parties then have the right to inspect the documents listed, except for those that are privileged.

Where a party suspects that an opponent has failed to fully comply with his or her general discovery obligation, the Court may order specific discovery of specific documents if it is necessary to dispose of the case fairly.

As a general rule there is no right to pre-action discovery except in personal injury cases. However, it is possible to obtain limited pre-action disclosure from a party that has become mixed up (even innocently) in the suspected wrongdoing of another if such disclosure is necessary to identify the wrongdoer, or to identify assets, or otherwise to enable the applicant to bring a claim. These orders are known as *Norwich Pharmacal* or *Bankers Trust* orders after the English cases on which they are based. Although the scope of this jurisdiction has expanded in recent years, the Jersey courts have emphasised that such relief can only be justified in exceptional circumstances and should not be allowed to undermine the ordinary discovery process by enabling plaintiffs to obtain extensive disclosure at the pre-action stage. *Norwich Pharmacal* relief is available in respect of overseas proceedings, but it will not be granted where the predominant purpose is to supplement the discovery or disclosure process in an overseas court. A disclosure order can also be obtained with a *Mareva* injunction, but only to the extent necessary to police that injunction.

The Bankers' Books Evidence (Jersey) Law 1986 allows parties to obtain copies of bank records. The law further provides that copies of the contents of bankers' records made in the ordinary course of business (whether written, magnetic or electronic) constitute evidence of the entries and transactions they contain.

The Investigation of Fraud (Jersey) Law 1991 gives the Attorney General power to compel the production of documents and the provision of information to assist the relevant investigating authorities in cases of serious fraud. These statutory provisions can also be used in response to requests for assistance from overseas authorities. The States of Jersey Police can obtain production orders from the Royal Court under statutory powers for the purposes of criminal investigations.

## VI ALTERNATIVES TO LITIGATION

### i Arbitration

Arbitration has for many years been a method of resolving disputes in Jersey. It has most commonly been used in disputes in the construction industry.

The Arbitration (Jersey) Law 1998 governs arbitration in Jersey. It conforms to European Union law. It applies both to Jersey and overseas arbitration agreements. The Court is given various powers, exercisable at the request of one of the parties to the arbitration, (e.g., to stay Court proceedings pending arbitration; to remove and replace arbitrators; to refer points of law to the Court for determination; and to grant extensions of time and to tax costs).

Part 2 contains provisions relating to the procedure that will be implied in arbitration agreements unless the parties have expressly agreed otherwise, including as to the conduct of proceedings, the power to call witnesses and the enforcement of awards, costs and interest. Part 2 also prescribes rules of general application to arbitration, including the right to appeal to the Royal Court to review an arbitration award on grounds of an error of law. The Court will only interfere if there was a misdirection of law or the decision as to the law was one that no reasonable arbitrator could have reached.<sup>19</sup>

Part 3 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. Part 4 gives effect to the New York Convention on foreign arbitration awards.

### ii Mediation

Mediation is the main form of alternative dispute resolution (ADR) in Jersey. It is encouraged by the courts in all forms of civil dispute. Courts will impose a stay for mediation where appropriate even if one party is strongly opposed. While involvement in mediation is not compulsory, a refusal to cooperate may be taken into account when considering costs.

Mediation is voluntary and confidential. The parties agree their own rules. Often the mediators in significant disputes are senior English lawyers in the relevant field. The mediation typically takes place either in England or Jersey.

### iii Other forms of alternative dispute resolution

There are no other formalised forms of ADR. Parties may reach voluntary agreement by any means they choose and can then obtain an order from the Court in the form agreed.

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19 *Jersey Sports Stadium Ltd v. Barclays Private Clients International Ltd* [2013 (1) JLR 190].

## **VII OUTLOOK AND CONCLUSIONS**

Jersey judgments now provide important guidance across the offshore world and this is a development that is expected to continue. The judiciary has demonstrated a consistent willingness to innovate, drawing on both local and foreign authorities, to ensure that Jersey law remains able to meet the demands of modern commercial litigation.

The forthcoming year is likely to see the implementation of new charities legislation currently being considered in the States of Jersey. While the legislation is not yet finalised, it is likely to create an administrative body akin to the English Charities Commission. The new law will have a profound effect on the administration of trusts and foundations with a charitable aspect.

## Appendix 1

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# ABOUT THE AUTHORS

### **WILLIAM REDGRAVE**

*Baker & Partners*

William is a Jersey advocate and English barrister. He practised at the English Bar for 13 years before moving in 2008 to work in Jersey, where he has focused on commercial litigation involving breach of trust or fraud.

He appeared for the successful plaintiff in a recent case (*Dalemont v. Senatorov*) in which an overseas creditor sought to assert a judgment debt against assets held within a structure headed by a Jersey foundation. Issues in the case included the potential to pierce the veil of a Jersey foundation, or to set aside transfers into the foundation for fraud on creditors.

He frequently advises and assists on regulatory matters including fund administration and money laundering. He has conducted regulatory investigations on behalf of both regulated businesses and the Jersey regulator.

### **CHARLES SORENSEN**

*Baker & Partners*

Charles Sorensen is an associate at Baker & Partners. His practice covers a broad spectrum of civil and commercial litigation with a focus on fraud, asset recovery and banking disputes. He was called to the Bar of England and Wales in 2011 and will be sworn in as a Jersey advocate in early 2015.

**BAKER & PARTNERS**

PO Box 842

2 Mulcaster Street

St Helier

JE4 0US

Jersey

Tel: +44 1534 766254

Fax: +44 1534 737355

[williamredgrave@bakerandpartners.com](mailto:williamredgrave@bakerandpartners.com)

[charlessorensen@bakerandpartners.com](mailto:charlessorensen@bakerandpartners.com)

[www.bakerandpartners.com](http://www.bakerandpartners.com)