

Commercial Litigation



Introduction

This guide provides an overview of some of the key areas of commercial litigation in Jersey. It gives a brief summary of the current law, practice and procedure in areas that frequently affect the conduct of commercial litigation.

It is aimed at the professional, especially the overseas practitioner, wanting some understanding of the approach that the Jersey Court is likely to take.

Our experienced commercial litigation team will be able to assist you with any more detailed questions and tailor their advice to your personal circumstances. The details of our team can be found at the end of this guide.

This publication is intended for general information purposes only and should not be relied upon as a source of legal advice. Information correct as of February 2018. Independent legal advice should be sought before taking any action based on information contained within this publication.

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The Offshore Perspective

Jersey is a self-governing British Crown Dependency, with its own legal system, legislature and laws. Jersey uses customary law [similar to common law], derived from a variety of sources.

One of those sources is frequently English law, particularly in commercial litigation, but Jersey Law may also look to sources such as Norman customary law and the French Code Civil. None of these sources create binding precedent in Jersey.

The Royal Court of Jersey is presided over by the Bailiff, assisted by jurats, who are the judges of fact in civil cases. Jurats need not be legally trained. Two jurats sit with the judge in civil trials to constitute the Inferior Number. Civil matters are dealt with by the **Samedi** division of the Court.

Other officers of the Court include the Master of the Royal Court, who deals with interlocutory matters in civil cases; the Viscount, who is the executive or enforcement officer of the Royal Court; and the Judicial Greffier, who is the administrative officer of the Court and whose department is known as the Judicial Greffe. Its functions include taxing costs, registering foreign judgments and maintaining the list of actions before the Royal Court.

The Basics of Commencing a Commercial Dispute in Jersey

Civil procedure is governed by the **Royal Court Rules 2004** ('RCR').

Many of these rules are modelled on the Rules of the Supreme Court of England and Wales 1999 [from pre-CPR days]. The **RCR** are supplemented by Practice Directions, often reflecting practice and procedures set out in the CPR of England and Wales. For example, the concept of the over-riding objective¹ and protocol for pre-action conduct have recently been adopted in Jersey.²

Civil proceedings may be brought in one of three ways³:-

1. Simple summons (for straightforward debt claims);
2. Order of Justice (similar to a particulars of claim in England: applicable to commercial disputes); or
3. Representation (for other proceedings, including non-contentious trust applications).

The standard procedure for commencing an action is as follows:

An Order of Justice is served personally on the defendant (by the Viscount's Department)⁴, together with a summons actioning the Defendant to appear before the Royal Court, normally on the next Friday afternoon sitting. Four clear days must fall between service on the defendant and the Friday hearing⁵. Time for limitation purposes stops running upon service.

The plaintiff must deposit a **billet** with the **Judicial Greffier** by midday on the day preceding the hearing⁶ [except for urgent cases or where the Court considers the interests of justice do not require it], together with the Order of Justice and court stamps [equivalent to issue fee].

The case is then placed on the **Table** [literally a list of cases displayed in the Court building], which is read out in Court on Friday afternoon.

A defendant wishing to defend the claim, or contest service/jurisdiction, will ask for the action to be placed on the **Pending List** and thereafter the **RCR** and

1 RCR 1/6, in force 1st June 2017

2 Practice Direction RC 17/01, in force 1st June 2017

3 RCR 6/2

4 CR 5/4(a) and RCR 5/5(a)

5 RCR 5/15

6 RCR 6/5

Practice Directions set out the timetable to be followed for filing of Answers [21 days]⁷; disputing jurisdiction [now reduced to 21 days]⁸; and subsequent directions hearings⁹. The number and timings of adjournments by consent are set out in Practice Direction **RC 17/02**.

The Plaintiff must issue a summons for directions within one month after the time limit for filing pleadings has expired.

An action may be dismissed if not completed within two years from the date it was placed on the hearing list.¹⁰ The Court expects straightforward actions to conclude within 12 months.¹¹ An Order of Justice remains in force for one year, though may be renewed annually by the Bailiff.¹²

Bodies corporate may appear and be represented by an authorised director, upon lodging a copy of the authorising resolution and the director's name and address.¹³

Derivative actions require the plaintiff to apply to the Inferior Number for leave to continue proceedings after the matter is placed on the pending list.¹⁴ Unfair prejudice claims under the **Companies (Jersey) Law 1991, articles 141 and 143** [modelled on former sections 459 and 461 Companies Act 1985] require the plaintiff to apply to the Inferior Number for directions within 21 days after the matter is placed on the pending list and the usual rules on the timing of filing of an Answer by the defendant do not apply.¹⁵

7 RCR 6/6[4]

8 RCR 6/7[3][1][ii], as amended 1st June 2017

9 RCR 6/26[1][b]

10 RCR 6/25[2]

11 *Ybanez and Mompo v. BBVA Privanza Bank [Jersey] Limited* 2007 JLR N [45].

12 RCR 20/6[2]

13 RCR 4/2A.

14 RCR 6/39[9]

15 RCR 6/40[3]

Interim Applications

Injunctions

Injunctions are commenced by Order of Justice which must be signed by the Bailiff.¹⁶ They must contain a prescribed form of words [set out by Practice Direction¹⁷].

The Royal Court applies the **American Cyanamid**¹⁸ principles to an application for an interim injunction,¹⁹ recently restated in **Crociani v Crociani**.²⁰ is there a serious issue to be tried; whether damages would be an adequate remedy for the plaintiff, and if not, for the defendant; the balance of convenience, i.e. which party will suffer more 'uncompensatable' damage from the grant or refusal of the injunction; and where appropriate the relative strength of the parties' substantive cases.

Search Orders

Practice Direction RC 15/05 sets out the procedure for the grant of a search order [formerly called an Anton Piller injunction]. A standard form of wording is annexed to **RC 15/05** and any variation thereto must be drawn to the attention of the Court.

The test is derived from English law and restated in **Nautech Services Ltd v CSS Ltd & Four Others**.²¹ Evidence must show an extremely strong *prima facie* case; any damage, potential or actual, must be very serious for the plaintiff; there must be clear evidence that the defendant possesses incriminating material and that there is a real possibility that it may be destroyed before any *inter partes* application.

16 RCR 20/5[1]

17 RC 05/08

18 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396

19 *Alpha Print v Alphagraphics* 1989 JLR 152

20 [2017] JRC 010

21 2013 [1] JLR 462

RC 15/05 borrows many concepts from the English **CPR PD 25A.7**, including, for example, the need for an independent supervising advocate, with at least ten years' experience in commercial litigation and the need for another female present if the defendant is likely to be an unaccompanied female.

Freezing Orders²²

The nature of Jersey as an offshore financial centre, means that the Royal Court frequently deals with interim orders in a commercial context restraining a party from removing or dealing with assets to preserve them to pay the claim if successful. These can be limited to Jersey or in appropriate cases they can cover assets worldwide.

The test the Royal Court applies follows English law²³ and is exercisable in cases where it appears just and convenient to the Court to grant the injunction and the plaintiff shows, on the evidence as a whole, that there is at least a good arguable case that he will succeed at trial and that a refusal of an injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied.

The guidelines the Royal Court observes on an application are also derived from English law²⁴. The plaintiff should give full and frank disclosure;²⁵ the particulars of his claim; his grounds for believing the defendant has assets within the jurisdiction; that there is a risk of the assets being removed before the judgment or the arbitral award is satisfied (beyond the mere fact that the defendant is abroad); and an undertaking to pay damages if loss is caused by an injunction wrongly granted.

Typically a freezing order includes an order that defendants and/or third parties disclose the defendant's assets by affidavit. This enables the 'policing' of the freezing order.

Practice Direction **RC 15/04** contains the standard form of wording for an

Order of Justice seeking a freezing and disclosure order and the Court's attention must be drawn to any amendments.

An undertaking will ordinarily be required to serve the Order of Justice as soon as is practicable. Provisions may be made for the ordinary living and business expenses of the Defendant and to pay his legal representation.

The Order of Justice may at the same time seek leave for service out of the jurisdiction.

Parties Cited

It is common in Jersey for "parties cited," for example, banks and trust companies against whom there is no claim as such, to be made the subject of freezing and disclosure orders in respect of the assets of defendants against whom substantive relief is sought.²⁶

In Aid of Foreign Proceedings

In the absence of statutory intervention, the Jersey Court has developed a line of authorities giving the Royal Court the power to grant a freezing injunction in aid of foreign proceedings, even if there are no other proceedings before the Jersey court, other than the seeking of the **injunctive** relief itself.²⁷

Jersey law therefore broadly achieves, through case law and its own practice directions, the position in England derived from statute.²⁸ In so doing, the Royal Court has placed particular emphasis on comity and safeguarding Jersey's reputation as an offshore financial centre with enormous deposits.

In **Matthey v Ayra Holdings**²⁹ and subsequently in **Solvalub Ltd. v. Match Invs. Ltd.**³⁰ the Court held that where there were adequate grounds for believing that the defendant had assets in Jersey and that alone was sufficient to make the

²² Jersey also abandoned the term *Mareva* with effect from 5th January 2015

²³ *Matthey v Ayra Holdings Ltd* 1985-6 JLR 208 citing *Ninemias Maritime Corp. v. Trave Schiffahrts G.m.b.H., The Niedersachsen* [1983] 1 W.L.R. at 1412

²⁴ *Matthey v Ayra Holdings Ltd* 1985-6 JLR 208 citing *Halsbury's Laws of England*

²⁵ *Goldtron Ltd. v. Most Invs. Ltd* 2002 JLR 424

²⁶ *Dalemont Ltd v Senatorov* 2012 [1] JLR 168

²⁷ *Solvalub Ltd. v. Match Invs. Ltd.* [C.A.] 1996 JLR 361, *Krohn G.m.b.H. v. Varna Shipyard* [Royal Ct.], 1997 JLR 194, *State of Qatar v. Al Thani* [Royal Ct.], 1999 JLR 118

²⁸ Civil Jurisdictions & Judgments Act 1982, section 25

²⁹ 1985-86 JLR 208

³⁰ 1996 JLR 361

Island an appropriate *forum* in which to make an application to protect those assets, notwithstanding the freezing order was in aid of foreign proceedings.

In **Krohn GmbH v Varna Shipyard**³¹ the Court confirmed that injunctions made in aid of foreign proceedings could be served on a Defendant outside Jersey under the **Service of Process Rules 1994, Rule 7(b)**, which allows service out of the jurisdiction whenever – “*an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction.*”

Post-Judgment Freezing Orders

The Court will apply a different standard depending on whether the freezing order is sought pre-action or post-judgment to aid enforcement. The threshold for obtaining a freezing injunction pre-action will clearly be much higher than in the case where the court has already held that the amount is due, and it is simply a question of enforcement.³²

Post-Judgment Disclosure Orders

The Royal Court has a wide discretion in a post-judgment situation to order disclosure of assets both from the defendant and third parties believed to have relevant information. Ordinarily it will be just and convenient to do so to effectively police a freezing order and so that a judgment creditor has all the information he needs to execute the judgment anywhere in the world.³³

The Court regards its jurisdiction to make a disclosure order as arising both as a power ancillary to and in support of the injunction and, independently of the injunction, as a power in support of the execution of the judgment or award. In cases where it is inappropriate to extend the freezing injunction to assets outside the jurisdiction, very different considerations may apply to disclosure orders in aid of execution in respect of world- wide assets.³⁴

31 1997 JLR 194

32 ENRC NV v Zamin Ferrous Ltd 2015 [2] JLR 153; **Goldtron Ltd. v. Most Inv. Ltd.** 2002 JLR 424

33 **Africa Edge S.a.r.l.v. Incat Equipment Rental Ltd [2008] JRC 175**

34 **Apricus Investments and others v. CIS Emerging Growth Limited**[2003] JRC 151, citing Gidrxsime [above]

Pre-Action Disclosure

Save in relation to limited pre-action disclosure in death or personal injury cases,³⁵ pre-action disclosure in Jersey is restricted to the following:

Norwich Pharmacal Orders

Norwich Pharmacal orders are recognised and granted by the Royal Court to enable a plaintiff to bring an action against a wrongdoer.

Such orders may be made against a third party who, through no fault of his own, has become mixed up in and facilitated another's wrongdoing and therefore owes a duty to the plaintiff to provide full information, which included not only the identity of the alleged wrongdoer but also other information relating to whether the plaintiff had a cause of action against the wrongdoer or to the discovery and preservation of traceable funds.³⁶ In appropriate circumstances **Norwich Pharmacal** relief may be available to identify a potential defendant in foreign proceedings or to establish a cause of action or claim to assets for the purposes of foreign proceedings, but it will not be granted if the predominant purpose is to supplement the disclosure process in an overseas court.³⁷

The Jersey Court considers the following test on an application for a Norwich Pharmacal order:

- whether it is satisfied that there is a good arguable case that the plaintiff was the victim of wrongdoing;
- whether it is satisfied, to the same standard, that the defendant was mixed up in that wrongdoing; and
- whether, as a matter of discretion, it is in the interests of justice to order

35 Law Reform [Disclosure and Conduct before Action][Jersey] Law 1999, Article 2, together with the RCR 2004 r.6/18

36 **Macdoel Investments Ltd & Others v Federal Republic of Brazil & Six Others** 2007 JLR 201

37 **New Media Holding Company LLC v Capita Fiduciary Group Ltd** 2010 JLR 272

the defendant to make disclosure. The focus is on whether it is just to make the order.

The Court is mindful that the *Norwich Pharmacal* jurisdiction is an extraordinary one which should not be exercised lightly.³⁸ The Court has held that it would be more likely to exercise the *Norwich Pharmacal* jurisdiction in cases [whether criminal or civil] in which there was suspected criminality to preserve the reputation of Jersey as a financial centre. In the absence of criminality, the public policy factors were more evenly balanced.³⁹

The Royal Court recognises the English Bankers Trust⁴⁰ principle under which third parties may be ordered to disclose information to enable a plaintiff to identify Property to which he has a Proprietary claim, albeit it has now become conflated with the *Norwich Pharmacal* principle. In **Republic of Brazil v Citibank**⁴¹ the Court said that the bank had become mixed up in the wrongdoing and could therefore be ordered to give discovery in accordance with Norwich Pharmacal relief. It could also be ordered to give discovery under the equitable jurisdiction for the purpose of protecting traceable funds. The Court said it considered that the Norwich Pharmacal jurisdiction had to a considerable extent subsumed the equitable jurisdiction, not least because it is very much wider.

Other Means of Obtaining Disclosure

The Service of Process and Taking of Evidence (Jersey) Law 1960 sets out the Royal Court's power to assist overseas courts in obtaining evidence for overseas civil and commercial proceedings (including insolvency cases) seeking evidence at the request of a foreign court through a letter of request. Jersey is bound by the 1970 Hague Convention on taking evidence abroad.

The Bankers' Books Evidence (Jersey) Law 1986 allows parties to inspect and obtain copies of bank records.

³⁸ New Media Holding Company LLC v Capita Fiduciary Group Ltd 2010 JLR 272

³⁹ Viken Securities Ltd & Six Others v New World Trustees (Jersey) Ltd 2011 JLR N3

⁴⁰ *Bankers Trust Co. v. Shapira* [1980] 1 WLR 1274

⁴¹ [2006] JRC 156

Jurisdictional Issues

Service Out of the Jurisdiction

Article 2 of the **Service of Process and Taking of Evidence (Jersey) Law 1960** provides that any process summoning a person outside the Island to appear before the courts of the Island may be served on that person in such manner as may be prescribed by the Rules of Court. The relevant Rules are the **Service of Process (Jersey) Rules 1994**.

Permission is required to serve a Defendant out of the jurisdiction, **Rule 5**. Such application is made by summons (save for where the originating process is by Representation, where it should be included in the prayer).

Rule 7 lists the circumstances in which the Court may allow such service out of the jurisdiction.

The Court will need to be satisfied that there is a good arguable case that the plaintiff's claim falls under one or more of the paragraphs in **Rule 7**. The Court will assess whether there is a serious issue to be tried, as against the non-resident defendant. Whilst the Court will not look in depth at the merits of the plaintiff's claim, the Court is not precluded from considering the legal merits of the claim. For example, whether a strike-out application under **RCR 6/13** might be successful. The court will finally consider whether Jersey is the *forum conveniens* for the hearing of the action.⁴²

The standard form of summons to be used is set out in the Schedule to the **Rules**, together with a prescribed affidavit of service. The order of justice should be annexed to the summons. The summons will specify the date when the Defendant must appear before the Royal Court or by which an answer must be filed. The time allowed to do this will depend on where the Defendant is in the world (**Rule 10**).

Rule 16 allows for substituted service where personal service is not practicable.

⁴² Nautech Services Ltd v CSS Ltd & Four Others 2013 (1) JLR 361

Disputes as to Jurisdiction

On an application to set aside an order granting leave to serve proceedings on a defendant out of the jurisdiction, the burden of proof falls on the plaintiff to show that Jersey was clearly the natural or appropriate forum in which the case could be suitably tried in the interests of all the parties and the ends of justice.⁴³

RCR 6/7 deals with disputes as to jurisdiction. Note should be taken of the time limits allowed to dispute jurisdiction (if a date for appearance is fixed: 21 days from setting the matter down on the pending list; in the absence of a date for appearance: not later than 7 days after the expiry of the time for filing a pleading).

The time limits will be strictly applied by the Court, but it does not preclude a later application challenging *forum* (see below).

The application should be made by summons to the Bailiff/Deputy Bailiff.⁴⁴

Forum Conveniens

Jersey is not a member of the EU and not a signatory to the Brussels Regulations. The Jersey Court is not therefore obliged to refuse jurisdiction on the bases set out in the Brussels Regulations. However, the Jersey Court is always keen to acknowledge the importance of comity between countries' courts and applies the following principles to forum challenges:

Where the defendant has been properly served within or outside the jurisdiction, the burden is on the **defendant** to prove that the Jersey proceedings should be stayed. He must show that there is another competent jurisdiction that is clearly or distinctly more appropriate than Jersey for the trial of the action. [Note the differing burden from disputing jurisdiction, where the burden falls on the plaintiff].

⁴³ RA Campbell v. R Campbell and Longton Holdings 2014 [2] JLR 465

⁴⁴ RCR 6/7(3) and 6/7(5)

The court will consider with which forum the issues in the action have the more real or substantial connection, which will include factors such as the relevant law that governs the issues; where the causes of action arose; the convenience of witnesses; the law governing relevant transactions; the places where the parties respectively reside or carry on business and the location of evidence. This list is not an exhaustive list of factors which may be relevant in any particular case.⁴⁵

If the defendant fails to show that the other jurisdiction is clearly more appropriate, a stay will ordinarily be refused; if he succeeds, the burden will fall on the plaintiff to show that justice nevertheless requires that the proceedings continue in Jersey.

Ultimately, the question for the court is whether the case can be tried more suitably in the interests of all the parties and the ends of justice in Jersey, rather than in another jurisdiction.⁴⁶

The application for a stay should normally be made promptly after the close of pleadings, but before directions for discovery and trial. Whilst there is no prescribed time limit, the Court may refuse to stay proceedings if there has been significant delay.

Conduct of the Case

Letter Before Claim

A recent **Practice Direction RC 17/01** places an obligation, for the first time in Jersey law, on the parties to provide a letter before claim.

It loosely follows the **CPR Practice Direction Pre-Action Conduct and Protocols**. As would be expected, the letter before claim should identify the parties, summarise the facts, the cause of action and sum claimed etc. The potential defendant has 14 days to acknowledge receipt of the letter and

⁴⁵ Brazil [Federal Republic] v. Durant Intl. Corp. 2010 JLR 421

⁴⁶ **Crociani v. Crociani** 2013 [2] JLR 369

any substantive response shall be provided as soon as reasonably practical - 14 days in a straightforward case and no more than 3 months for the most complex cases.

The letter before claim should include an invitation to explore settlement. Following the exchange of the communications the parties are obliged to consider negotiation or some form of alternative dispute resolution and this is a continuing requirement.

Any failure to comply with the **RC 17/01** may be taken into account on a question of costs.

The Practice Direction applies to all disputes other than applications for injunctive relief made without notice to a potential defendant, applications for directions pursuant to the Trusts (Jersey) Law 1984 [as amended], administrative appeals and judicial review.

Applications for Summary Judgment and Striking Out

The two applications outlined below will be commenced by summons, which may be served by ordinary service:⁴⁷

Summary Judgment

Summary judgment applications are dealt with by the recently amended

RCR 7:

- a. (i) the plaintiff has no real prospect of succeeding on the claim or issue, or

(ii) the defendant has no real prospect of successfully defending the claim or issue; and

⁴⁷ RCR 5/6

- b. there is no other compelling reason why the case or issue should be disposed of at a trial. [Replacing a previous test modelled on the old Supreme Court Rules of whether the Defendant had 'no defence' to the plaintiff's claim].

Note the requirement for 14 clear days' notice between service on the defendant of the application and the hearing.⁴⁸ Plaintiff may not apply for summary judgment before the matter is placed on the pending list without the leave of Court,⁴⁹ and if an application is made before an Answer is filed, the defendant need not file an Answer before the hearing.⁵⁰

Striking Out

RCR 6/13. A claim or pleading or anything in any claim or pleading may be struck out at any stage of the proceedings on the following grounds –

- a. it discloses no reasonable cause of action or defence as the case may be;
- b. it is scandalous, frivolous or vexatious;
- c. it may prejudice, embarrass or delay the fair trial of the action; or
- d. it is otherwise an abuse of the process of the Court.

Category [d] includes inordinate delay, which is inexcusable and gives rise to a substantial risk that it will not be possible to have a fair trial of the action or is likely to cause serious prejudice to the defendant will lead to strike out.⁵¹ A claim will only be struck out if it is plain and obvious the claim will not succeed. Weakness of the case is not grounds for striking out, particularly if it involves an uncertain and developing field of law.⁵² The application should be

⁴⁸ RCR 2004 7/2[6]

⁴⁹ RCR 2004 7/2[1]

⁵⁰ RCR 2004 7/2[2]

⁵¹ *Viera v Kordas* 2014 [1] JLR N9

⁵² *Trant v. Att. Gen.* 2007 JLR 231

made in good time and normally before close of pleadings.⁵³ No evidence is admissible in a claim under category (a).

Discovery & Inspection

RCR 6/17(1), recently amended, states as follows:

The Court may order any party to any proceedings to furnish any other party with a list of the documents which are or have been in his or her possession, custody or power relating to any matter in question in the cause or matter and to verify such list by affidavit.

The test is thus a wide one borrowed from the former **Rules of the Supreme Court 'Peruvian Guano'**⁵⁴ 'train of enquiry', rather than the more (arguably) limited standard disclosure of the modern **CPR**.

If it is desired to claim that any documents are privileged from production, the claim must be made in the list of documents with a sufficient statement of the grounds of the privilege [see further below].⁵⁵

General guidance on discovery and inspection is set out in **Practice Directions RC 17/07** and **RC 17/08** (which does not apply to disclosure under an injunction order or to legal entities).

The recent amendments to the **RCR** now specify that the Court may order inspection to take place by delivery of copies of documents in an electronic format.⁵⁶

RC 17/08 sets out the process and procedure to be adopted in relation to electronic discovery and the management thereof, particularly in complex cases. The general principle is that electronic discovery should be managed efficiently in order to minimise costs.

Any party who obtains discovery from any other party is taken to have

53 *Stephens v Stephens* 1989 JLR 284

54 [1882] 11 (QBD) 55

55 RCR 6/17[3]

56 RCR 6/17[6]

undertaken to the Royal Court and to all other parties only to use the documents disclosed to him for the purpose of conducting his own case and not for any other purpose. An order of the Court is required to depart from this undertaking, in order to use documents for any other purpose.⁵⁷ Any party found to have misused documents obtained through the discovery process may face adverse consequences or sanctions imposed by the Court including being restrained by injunction.⁵⁸

Privilege

The Jersey Court consistently applies English law to questions of privilege, both legal advice and litigation privilege.⁵⁹ Recently in **Smith v SWM Limited**⁶⁰ the Royal Court followed the approach in **Three Rivers District Council v Governor and Company of the Bank of England**,⁶¹ ruling that litigation privilege did not attach to an expert accountant's report that the defendant had been required to obtain pursuant to powers exercised by the Jersey Financial Services Commission and that the plaintiff sought disclosure of. [The claim related to the standard of advice received in entering into an investment product]. The Court held that litigation privilege requires a claim or dispute in an adversarial sense. A report obtained by the exercise of powers by a regulator, was not adversarial in nature. The Royal Court is therefore likely to follow the narrow interpretation of litigation privilege and legal advice privilege in the recent English High Court decision of **Serious Fraud Office v Eurasian Natural Resources Corporation**⁶²

57 *Grupo Torras S.A. v. Royal Bank of Scotland Intl* [Royal Ct.], 2001 JLR N[5]

58 RCR 17/07 [25]

59 See for example *Café de Lecq Limited v Rossborough [Insurance Brokers] Limited* 2011 JLR 182

60 [2017] JRC 026

61 [2004] UKHL 48

62 [2017] EWHC 1017

Offers to Settle

Whilst there is no equivalent to **CPR Part 36** in the **RCR**, a recent **Practice Direction RC 17/10** deals with offers to settle. Any offer must be in plain English, set out the terms of the offer clearly and identify the possible consequences for the other party if the offer is not accepted, including costs orders that may be made against the other party and that the offer can be brought to the attention of the Court on a question of costs.

RCR 6/33 sets out the procedure in relation to a payment into Court and that such payment may be taken into account on a question of costs. However, **RC 17/10** states that an offer to settle made in compliance with the practice direction will generally have the same effect as a payment into court, provided the criteria set out in **Cole v The Chief Officer of The States of Jersey Police**⁶³ have been met, namely:

- a. the offer must set out the parts of the claim or counterclaim or issue to which it applies and whether it takes account of any counterclaim and whether or not it includes interest;
- b. the offer must be open for a reasonable time;
- c. the offer must be genuine and not a sham;
- d. the person making the offer must be good for the money when the offer is made.

Costs and Funding

Costs

Costs are dealt with in **RCR 12**, which sets out the process of taxation of costs by the Greffier on a standard or indemnity basis. The Royal Court's rules on costs

⁶³ 2008 JLR N [47]

are broadly based on the English **Rules of the Supreme Court**, pre CPR and may be awarded on a standard or indemnity basis. The test for a standard basis is one of reasonableness and for an indemnity basis, all costs are allowed except where of an unreasonable amount or if they were unreasonably incurred⁶⁴.

There are limited circumstances when fixed costs are recoverable: namely for an action commenced by summons for the recovery of a debt or liquidated sum, and either with judgment in default or without the matter having been placed on the pending list.⁶⁵

Costs are recoverable for work done by lawyers outside the jurisdiction, but to the extent that the work could have reasonably been carried out by a Jersey lawyer, costs recoverable shall be no greater than those allowable on taxation in respect of a Jersey lawyer's fees. Where the work could not reasonably have been obtained by a Jersey lawyer, costs recoverable shall be no greater than are reasonable in all the circumstances of the case.⁶⁶

Directors can, if successful, claim on a limited basis for their personal costs, albeit the company cannot claim for any payment to the authorized director for appearing and representing the body corporate.⁶⁷

Costs in relation to interlocutory hearings (other than a summons for directions before the Judicial Greffier), lasting not more than one day, will generally be taxed by way of summary assessment.⁶⁸ (For which, see further **Practice Direction RC 17/11**).

The bill of costs should be set out in two parts: a direct cost component [**Factor A**] and a component for care and conduct [**Factor B**]. Factor A rates are set out by **Practice Direction** (currently **RC 13/02**) and are intended to cover salary and general overheads of each person. Factor B uplift relates to the allowance for care and conduct and other circumstances of the case; for example complexity, volume of documents etc and other factors listed in **Practice Direction RC 09/01**.

⁶⁴ RCR 12/4 and RCR 12/5

⁶⁵ RCR 2004 12/14

⁶⁶ RCR 2004 12/7

⁶⁷ RCR 12/6[2][b] and RCR 12/6[3]

⁶⁸ RCR 2004 12/3(1A) and RC 17/11

RC 09/01 states that commercial actions, by their very nature, may involve large sums of money, the assessment of vast volumes of documents and the consideration of complex facts. The actual allowable factor 'B' will depend on the particular facts of the case⁶⁹. Reference is made to a series of English case law from the 1990s on the subject, discussing the appropriate percentage uplift.

In drawing a bill for taxation on the indemnity basis it is not necessary to specify separately Factor A and Factor B rates. Instead, the bill should specify the hourly rate claimed for each fee earner.⁷⁰

Funding

After the Event Insurance

An 'after the event' insurance premium is not currently recoverable, as it does not fall within the definition of 'costs of the action' or 'incidental to the action'.⁷¹

Third Party Litigation Funding

Litigation funding has been approved in principle by the Royal Court in **Re the Valetta Trust**⁷² and **Barclays Wealth Trustees (Jersey) Ltd v Equity Trust (Jersey) Ltd**.⁷³ The Court found that the particular third party funding agreements did not offend the principles of maintenance and champerty. The Court was keen to promote access to justice.

In **Barclays Wealth Trustees**, the Court had regard to three material factors:

[1] The agreement included provision that control of the proceedings should remain with the plaintiffs and their lawyers. [2] The funder would satisfy any adverse costs order against the plaintiffs. [3] The profit recovered by the funder, which was capped at a maximum of 50% of the

69 RC 09/01

70 RC 09/02

71 *Riley v Pickersgill, Le Cornu* [2002] JRC 45; *Civil Proceedings (Jersey) Law 1956*, art 2(1)

72 2012 (1) JLR 1

73 2013 (2) JLR 22

damages or three times the legal costs of the plaintiffs, was not considered to be disproportionate.

Conditional fee agreements ('no win, no fee') and contingent fee agreements remain unenforceable as a matter of Jersey law.

Note that 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.⁷⁴

Cost Budgeting

Newly introduced by **RCR 6/24A**. Not later than 7 days before the first directions hearing, unless the Court otherwise orders, all parties must file and exchange budgets where the value of the claim, including any counterclaim, is less than £500,000.

Practice Direction RC 17/06 states that when making any costs order, the Court will not permit a party to depart materially from such a costs budget, unless satisfied there is good reason to do so and may take into account any such costs budget both in deciding what costs order to make and upon taxation.

Recognition and Enforcement of Foreign Decisions

Foreign judgments are not automatically enforceable in Jersey. Jersey is not a party to the statutory regime giving effect to the Brussels Regulations or the Lugano Convention.

74 *Leeds v. AdMatch and Weston*[2014] JRC 167.

The registering and subsequent enforcement of a foreign judgment in Jersey is governed either by the **Judgments (Reciprocal Enforcement) (Jersey) Law 1960** (“the 1960 Law”) or at customary law.

Statutory registration under the **1960 Law** is available in respect of judgments obtained in England and Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey⁷⁵. 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, which is not a sum payable in respect of taxes, fines or other penalty. Note that judgments emanating from England & Wales must be by a ‘Superior Court’, defined as the High Court, Court of Appeal and Supreme Court. This will include a county court judgment that has been transferred to the High Court under **County Courts Act 1984, s42**.⁷⁶ Any application for registration must be made within six years of the date of judgment.

If not emanating from one of the five jurisdictions set out in the **1960 Law**, foreign judgments from other jurisdictions may be recognised and enforced in Jersey in accordance with the common law rules of private international law. The plaintiff must bring fresh proceedings in Jersey by order of justice. If satisfied that the foreign court had jurisdiction applying 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 or state penalties) that is final and conclusive. The Royal Court also has a discretion to enforce a non-monetary judgment and considers itself to have a wide remit under its inherent jurisdiction to enforce a foreign judgment.⁷⁷

The **Arbitration (Jersey) Law 1998** makes provision for the enforcement of foreign arbitration awards either by action [issuing fresh proceedings and seeking a judgement from the Jersey Court giving the same relief] or by applying ex parte for leave to enforce.

75 Judgments(Reciprocal Enforcement) (Jersey) Act 1973

76 In the Matter of the Representation of A Fallows and S Fallows [t/a Marbeck Associates] 2014 (1) JLR 140

77 The Brunei Investment Agency and Bandone Sdn Bhd v Fidelis Nominees Ltd [and Others] [2008] JRC 152

Appeals

Appeals from decisions of the Judicial Greffier are to the Royal Court. Civil appeals from the Royal Court are to the Jersey Court of Appeal.

The relevant law is set out in the **Court of Appeal (Jersey) Law 1961** [‘CAJL’] and **Court of Appeal (Civil) Rules 1964** [‘CAR’], together with consolidated practice direction **CA 05/1**.

Leave to Appeal from decisions of the Royal Court

Leave in civil matters is required only in relation to appeals from interlocutory orders or judgments (save in relation to minors and some other limited areas), costs or orders made by consent.⁷⁸ Where leave is required appellants must first make the application to the lower court, whenever possible, at the time when the decision of the lower court is delivered, and if unsuccessful, any renewal of the application to the Court of Appeal must be made in the first instance to a single judge before being brought before the plenary Court [being not less than three judges, but in any event an uneven number].⁷⁹

A notice of appeal must be served or, if leave to appeal is required, an application for leave to appeal must be made, within 28 days from the date on which the judgment or order of the court below was pronounced.⁸⁰ Time may be enlarged at the discretion of the Court,⁸¹ or abridged under the Court’s inherent power.⁸²

78 CAJL, art 13(1)

79 Practice Direction CA 05/1, para 4.1(a)

80 CAR 3

81 CAR 16

82 *In re A Settlement* 1999 JLR 220

Test for Leave to Appeal

In order to obtain leave to appeal the appellants must show:

- a. the appeal “has a real prospect of success”⁸³;
- b. a question of general principle falls to be decided for the first time; or
- c. there is an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage.⁸⁴

Test on Appeal

The Court of Appeal will only interfere with case management decisions or exercise of discretion, whether final or interlocutory, if the Royal Court:

- a. misdirected itself as to principles applicable;
- b. it had taken into account matters which it ought not to have done or had failed to take into account matters which it ought to have done;
- c. the decision was plainly wrong; or
- d. there has been a change of salient circumstances.⁸⁵

Privy Council

The ultimate appellate court in civil matters is the Judicial Committee of the Privy Council. Only decisions of the Privy Council on appeals from Jersey are

binding in Jersey, although appeals from other jurisdictions may be persuasive.

No appeal shall lie from a decision of the Court of Appeal without the leave of the Court of Appeal or the special leave of Her Majesty in Council.⁸⁶

In ordinary circumstances leave will not be given by the Court of Appeal unless the case involves a point of significance not merely to the parties, but to the public at large. The Court of Appeal enjoys a wide degree of discretion as to whether or not to grant leave.⁸⁷

The test applied for special leave of Her Majesty in Council when deciding whether to give leave is whether or not the case raises:

“an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal.”⁸⁸

83 *Crociani v Crociani* 2014 [1] JLR 426

84 see *Glazebrook v. Housing Cttee* 2002 JLR N[43]

85 *Crichton v. Parker-Smith* [C.A.], 2008 JLR N [13]; *United Capital Corp. Ltd. v. Bender*[C.A.], 2006 JLR 269

86 CAJL, art 14[1] and pursuant to Rule 10 of the Judicial Committee (Appellate Jurisdiction) Rules 2009

87 *Larsen & Others v Volow Trust & Others* [2016] JCA 176A

88 paragraph 3.3.3 of JCPC Practice Direction 3 supplementing the Judicial Committee (Appellate Jurisdiction) Rules 2009

Our Team

The team at Baker & Partners has extensive experience in commercial litigation in Jersey. We are also frequently instructed as part of wider international litigation coordinated from London. We pride ourselves on advising clients clearly and practically in complex cases. Uniquely, many of our Advocates have extensive experience of practice at the English bar and can offer you the highest quality of advocacy and court room experience.

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