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# Litigation

Jersey

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## Law and Practice

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## 1. General

### 1.1 General Characteristics of the Legal System

Jersey is one of the relatively few jurisdictions which have a “mixed” legal system. Its legal system is broadly based on elements of common, civil and customary law.

The legal process is conducted through a combination of both written submissions and oral argument, however principally through oral argument.

### 1.2 Court System

#### The Royal Court

The Royal Court is Jersey’s principal and superior court. It has original and unlimited jurisdiction (equivalent to the High Court in England and Wales).

The Royal Court has four Divisions.

- Heritage (dealing with land disputes).
- Probate (dealing with succession disputes).
- Family (dealing with family and matrimonial disputes).
- Samedi (dealing with all other matters).

In practice, however, these divisions have common judicial personnel except for certain family division registrars.

The constitution and procedure of the Royal Court in civil matters is principally regulated by the Royal Court (Jersey) Law 1948 and the Royal Court Rules 2004 (as amended) (RCR). The RCR are supplemented by “Practice Directions” issued by the Royal Court, which all parties conducting litigation in Jersey must have regard to.

As the customary law court with original and unlimited jurisdiction, the Royal Court has “inherent jurisdiction” which is not limited to that conferred expressly by the RCR. This inherent jurisdiction of the Royal Court is generally called upon as a residual source of powers to be used when it is just, equitable and necessary to do so.

#### The Petty Debts Court

The Petty Debts Court has non-exclusive jurisdiction in respect of small civil claims up to a value of GBP10,000. It also has jurisdiction and specialisation as the court dealing with landlord and tenant matters.

#### The Magistrates Court

As a general rule, all criminal cases in Jersey will initially be brought before the Magistrates Court in the first instance. The matter may subsequently be referred to the Royal Court if the Magistrate considers his or her sentencing powers to be insuffi-

cient in respect of the matter in question. In some instances, the Attorney General may commence criminal proceedings directly in the Royal Court where the case is particularly complex, or if there are otherwise compelling reasons to do so.

#### The Court of Appeal

A first instance decision of the Royal Court may be appealed to the Jersey Court of Appeal.

### 1.3 Court Filings and Proceedings

Court proceedings and court judgments are open to the public as a general rule. In exceptional circumstances on the request of a party, proceedings may be held in private if it is necessary in the interests of justice. Many applications in respect of the administration of trusts are heard in private on this basis.

Proceedings will only be held in private, and/or judgments may be withheld from circulation or redacted or anonymised, if the court is satisfied that that is necessary in the interests of justice. The onus to satisfy the court in this regard rests with the party or parties who is or are requesting the confidentiality.

Any person may apply to the Judicial Greffier (the clerk to the Court) for access to a court file, including to obtain copies of pleadings filed and/or for evidence or documents referred to in a public court hearing. The applicant must set out all reasons why those copies are requested. The Judicial Greffier may agree to release the document(s), but may stipulate that the requesting party pays a reasonable fee for provision of the document(s).

### 1.4 Legal Representation in Court

Only Jersey advocates may appear and have rights of audience in the courts of Jersey. Foreign lawyers cannot conduct or appear in cases in the Jersey courts.

## 2. Litigation Funding

### 2.1 Third-Party Litigation Funding

Litigation funding by a third party is permitted in Jersey, on the condition that such arrangements are properly structured. Furthermore, the agreement must not prejudice any potential defendants. Case law in this area indicates that in order for an arrangement to be valid, it is important that the plaintiff and its advocates retain control of the proceedings and obtain the benefit of a substantial proportion of any sums awarded in the proceedings, and the funder agrees to satisfy any adverse cost orders against the plaintiff.

For example, a litigation funding agreement was upheld by the Royal Court in *In The Matter of the Valetta Trust* [2012] (1) JLR 1] where:

- the litigation funder agreed to pay the legal costs of the plaintiffs and would meet any adverse costs orders against the plaintiffs;
- control of the litigation remained with the plaintiffs, although they had to keep the funder informed and agreed to conduct the litigation in accordance with the reasonable advice of the plaintiffs' lawyers;
- the funder had the right to terminate the agreement if satisfied that there had been a material adverse decline in the prospects of success but would remain liable for all costs incurred during the existence of the agreement and for adverse costs to the date of termination; and
- the funder was entitled to share in any damages recovered.

## 2.2 Third-Party Funding: Lawsuits

There are currently no express restrictions as to which civil lawsuits are available for third-party funding, save that any litigation funding agreement must meet the requirements set out in

### 2.1 Third-Party Litigation Funding.

## 2.3 Third-Party Funding for Plaintiff and Defendant

Third-party funding is available for a plaintiff in Jersey. The availability of third-party funding for defendants has not yet been considered in Jersey.

## 2.4 Minimum and Maximum Amounts of Third-Party Funding

Please see 2.5 Types of Costs Considered under Third-Party Funding. Jersey law does not presently stipulate any minimum or maximum amounts of third-party funding in the context of Jersey litigation.

## 2.5 Types of Costs Considered under Third-Party Funding

It is open for a third-party funder to finance all or part of the costs associated with the legal action in question.

## 2.6 Contingency Fees

Contingency fee arrangements are not presently permitted in litigation in Jersey.

## 2.7 Time Limit for Obtaining Third-Party Funding

Currently there are no particular time limits in Jersey by which a party to a litigation must obtain third-party funding.

## 3. Initiating a Lawsuit

### 3.1 Rules on Pre-action Conduct

Prior to commencing any legal action in Jersey, potential litigants need to comply with the pre-action requirements stipulated in Practice Direction 17/01 (PD 17/01). PD 17/01 requires the following by way of pre-action steps:

- A prospective plaintiff must issue a claim letter to a proposed defendant, which must include, amongst other things, a summary of the facts and legal basis of each claim being made.
- A defendant must acknowledge receipt of the claim letter within 14 days of receipt, failing which the plaintiff may commence proceedings with no further need to comply with PD 17/04.
- If the defendant wishes to provide a substantive response to the claim letter, it will have a further 14 days (or up to three months in complex cases) to do so.
- If the defendant's response contains a counterclaim or allegation of contributory negligence, the plaintiff must respond within 14 days (or within six weeks in complex cases).
- The parties must thereafter consider the possibility of the dispute being resolved by ADR rather than court proceeding.
- If no settlement is reached and proceedings are commenced, the court may take into account the extent to which each party took reasonable steps to comply with the requirements of PD 17/01.

Failure to comply with PD 17/01 may lead to adverse cost orders being made against the party in question.

### 3.2 Statutes of Limitations

There are no comprehensive statutes of limitations in Jersey. Instead, the law of limitation (known as prescription under Jersey law) is principally a matter of customary law and precedent.

Jersey law assigns different prescription periods for different causes of action. There is no inherent principle which allows the calculation of an appropriate period in any given situation. Instead, in any given case, it is necessary to identify the cause of action and whether Jersey law has recognised a prescription period in respect of that cause of action. If not, a period may be applied by analogy. If there is no recognised period or appropriate analogy, the court will apply a standard prescription period of ten years (Re Esteem Settlement 2002 JLR 52; Rockhampton Apartments Ltd v Gale 2007 JLR 332).

The recognised prescriptive periods for common causes of action in Jersey are as follows.

- Contract – ten years.
- Torts – three years.
- Breach of trust – three years.

Prescription starts to run as soon as the cause of action is complete.

There is some uncertainty in Jersey as to whether the plaintiff must be aware of the cause of action before the prescriptive time period will start to run. Recent authorities indicate that the cause of action will be deemed to be complete for the purposes of prescription when the facts have occurred which give rise to the plaintiffs' claim for the relief sought (irrespective of the plaintiff's awareness of same). However, if the plaintiff is unable to bring an action by reason of a factor or factors beyond their control, this may suspend the commencement of the prescriptive period. This will depend on the facts of the case.

It is, however, reasonably clear that the prescriptive period will not be suspended in circumstances where a plaintiff is ignorant of the existence of their cause of action due to their own negligence.

### 3.3 Jurisdictional Requirements for a Defendant

The Royal Court's jurisdiction is territorial and is limited to those found within Jersey unless it gives permission to serve out of the jurisdiction.

An application to serve out of the jurisdiction is made under the Service of Process Rules 2019 (the Service Rules). As a general rule, the court will only allow the plaintiff to serve proceedings on that defendant if it is satisfied that one of the grounds specified in the schedule to the Service Rules applies, and that Jersey is the proper place in which to bring the claim. The court must also be satisfied that the proceedings raise a serious issue to be tried, and that the plaintiff believes that the claim has a reasonable prospect of success.

### 3.4 Initial Complaint

There are two types of proceedings in Jersey: an action, and proceedings by way of representation. There are three types of originating process which are used to commence the different types of proceedings.

#### Summons

A summons is the initial document which may be used to commence an action. It is intended to be used only in simple matters (eg, a simple debt claim). The form of a summons is prescribed by the RCR.

#### Order of Justice

An order of justice may alternatively be used to commence an action. It is intended for more complex matters, and more common as it is suitable for all but the simplest cases. Unlike a summons, an order of justice may also include injunctions against the defendant. If injunctions against the defendant are sought in terms of the order of justice, it must be lodged with the Bailiff of the Royal Court for signing.

#### Representation

A representation may be used to commence representation proceedings in Jersey (as opposed to an action). A representation does not assert a cause of action against a defendant, but is a means of applying to the court to bring a certain state of affairs to its attention and to ask the court to intervene and/or order some form of relief (akin to a "petition" in other jurisdictions). A representation is particularly suitable where the applicant seeks orders which only affect themselves, or where the identity of other individuals who should be party to the proceedings are not yet known.

#### Amending Pleadings

There is no automatic right for a party to amend its pleadings at any stage of the proceedings in Jersey. A party who wishes to amend its pleadings must either obtain the consent of all of the other parties or seek permission from the court, which may be granted at the court's discretion.

### 3.5 Rules of Service

Actions are commenced by service of the summons or order of justice, summoning the defendant to a first hearing of the action in a general list which takes place on Friday afternoons.

Proceedings by way of representation are commenced on lodging the representation at Court (although service is still important for prescription purposes), and the court will usually give directions as to service on relevant parties at the first hearing of the representation.

Once a plaintiff commences an action in Jersey by way of a summons or order of justice, the plaintiff must arrange for it to be served on the defendant and thereafter convene a first hearing by "tabling" the action (notifying the court).

#### Service in the Jurisdiction

Service in the jurisdiction can be effected either by ordinary service or by personal service, depending on the process to be served.

A simple summons may be served by ordinary service. This involves serving the documents at an address by post or by fax,

or by leaving the document at the defendant's "proper address" as defined in the RCR.

An order of justice must be served by personal service. This involves attending in person and leaving the document (or a copy, if an order of justice) with the person to be served. Where personal service is required under the rules (such as for an order of justice), it must be carried out by the Viscount of Jersey (the executive officer of the Courts of Jersey). However, where personal service is not required under the rules, a party may effect personal service by attending in person themselves and leaving the document with the person to be served, without the Viscount's involvement.

Where personal service is required by the RCR but is not possible, the plaintiff may apply to the court for an order permitting "substituted service". This allows the document to be brought to the attention of the party to be served by some other means, as determined by the court.

### Service Out of the Jurisdiction

The process for applying to the court for permission to serve a party outside of the jurisdiction of Jersey is considered in **3.3 Jurisdictional Requirements for a Defendant**.

Where permission to serve the party outside of the jurisdiction is granted by the court, the court will generally specify the means through which service shall be effected, typically by post and possibly by email. The court will also stipulate a return date upon which the defendant is to appear.

### 3.6 Failure to Respond

There is no need for a defendant to respond prior to attending the first hearing of an action to which they have been summoned. If they do not attend, the plaintiff may apply for judgment by default against the defendant at the first hearing.

### 3.7 Representative or Collective Actions

Collective actions (such as class actions) are not currently permitted in Jersey.

Jersey law does, however, permit representative actions. Where several individuals have the same interest in any proceedings, the proceedings may be commenced and continued by or against any one or more of them, as representing some or all of them.

A judgment or order given in representative proceedings is binding on all the persons who are represented, but is not enforceable against any person who was not a party to the proceedings without leave of the court.

### 3.8 Requirements for Cost Estimate

There are no requirements in Jersey to provide clients with a cost estimate of the potential litigation at the outset. In practice, however, this is commonly provided at the request of a client. Where the value of the claim (including any counterclaim) is less than GBP500,000, all parties are required to file and exchange cost budgets at least seven days before the first directions hearing. There is currently no requirement to do so in cases worth more than GBP500,000.

## 4. Pre-trial Proceedings

### 4.1 Interim Applications/Motions

During the course of proceedings, any party may make an interlocutory application to the court, which is any application made in the intermediary stage after commencement but before the final determination of the action, in which the applying party seeks some form of relief from the court.

Interlocutory applications are not limited to case management issues and may be used to obtain interim remedies. An interlocutory application may include an application:

- for directions from the court as to the timeline and manner in which the action should progress;
- to strike out all or part of the other side's case; or
- for an order that the plaintiff provides security for the defendant's costs.

### 4.2 Early Judgment Applications

A party may apply for summary judgment in respect of some or all of the issues in dispute.

Under the RCR, an application for summary judgment will only be granted if the court is satisfied that:

- the plaintiff has no real prospect of succeeding on the claim or issue, or the defendant has no real prospect of successfully defending the claim or issue; and
- there is no other compelling reason why the case or issue should be disposed of at a trial.

In order to grant summary judgment, the court will effectively need to be convinced that it is clear that the plaintiff or defendant has no case in respect of the claim or issue in question, and that there is no serious conflict between the parties as to matters of fact and/or law.

An application for summary judgment must be made by way of an interlocutory summons supported by an affidavit verifying the facts to which the application relates and stating that,

in the applicant's belief, the other party has no real prospect of succeeding on or defending the claim or issue (as the case may be). The summons and a copy of the affidavit must be served on the other party at least 14 clear days before the day on which the summary judgment hearing is to take place.

An application for summary judgment can be made at any stage in the proceedings, save that a plaintiff may not apply for summary judgment until the defendant has notified the court of its intention to defend the claim and has placed the matter on the court's pending list.

### 4.3 Dispositive Motions

Please see **4.2 Early Judgment Applications**.

### 4.4 Requirements for Interested Parties to Join a Lawsuit

A defendant may request that the court convene as a third party a person (other than either the plaintiff or the defendant) who is implicated in the subject matter of the action but is not yet before the court. If the third party is convened, the position as between the defendant and third party is akin to plaintiff and defendant, respectively.

The court may make an order convening a third party if the defendant, in their answer to the plaintiff's action:

- claims any contribution or indemnity against that third party;
- claims against that third party any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
- requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant, but also as between either or both of them and the third party.

Once convened, the third party may itself apply (as if it were a defendant) for an order convening a further party not currently before the Court (known as the fourth party) on the same basis as a defendant. As may that fourth party against a fifth party, and so on.

### 4.5 Applications for Security for Defendant's Costs

A defendant may apply for an order that the plaintiff must pay a sum of money as security for the defendant's costs incurred in defending the action (a security for costs application).

The court has an absolute discretion whether or not to grant an order for security for costs. However, it will generally be more inclined to order the plaintiff to provide such security:

- where the plaintiff is resident overseas and it is shown that it would be difficult to enforce a Jersey costs order against it by reason of its overseas residence;
- where the plaintiff is a corporate plaintiff; or
- where, in all the circumstances, it is considered by the court to be in the interests of justice.

In deciding whether to order a plaintiff to provide security, and the amount of security the plaintiff must provide, the Court must balance the risks of: (i) stifling the plaintiff's access to justice by ordering them to provide security beyond their means; against (ii) the injustice to the defendant should they defeat the plaintiff's claim but have no recourse against them for the costs they have incurred. This balancing exercise is normally carried out by reference to:

- the prospects of success of the plaintiff's claim;
- the amount of security required by the defendant (noting that the court has discretion to order security of any amount, and need not order substantial security);
- the stage of the action at which the security is sought, and whether the defendant has been guilty of any unacceptable delay in making their application; and
- the balance of risks to the plaintiff and defendant respectively.

The burden lies with the plaintiff with regards to satisfying the court that an order for security would unfairly stifle its claim, and that its claim is genuine. The court must then be satisfied that, in all the circumstances, the claim would probably (and not just possibly) be stifled.

### 4.6 Costs of Interim Applications/Motions

Please see **4.1 Interim Applications/Motions** in respect of the rules concerning interlocutory applications.

The court has complete discretion as to the award of costs in litigation generally, including in relation to the costs of interlocutory applications and the time of their payment.

### 4.7 Application/Motion Timeframe

A party making an application to the court during the course of proceedings must do so by way of an interlocutory summons. The applicant must prepare its summons and arrange a listing appointment in respect of the summons before the judicial secretary of the Greffier or the Master (one of the full-time judges of the Royal Court who tends to sit as judge on interlocutory and case management hearings) or Bailiff (if the application

is being made to judges and jurors of the Royal Court). The applicant must give at least two clear days' notice of that listing appointment to the other parties in the case of an application to the Master, and four clear days' in the case of an application to the Royal Court.

All parties attend that listing appointment at which the judicial secretary will fix a date for the hearing of the summons. The applicant must thereafter serve the summons upon all of the other parties at the address given for service, or at their last known address if they have not given an address for service. The summons must be served at least four clear days before the date fixed for the hearing.

In advance of the hearing, it is open to a party to apply to the court in writing to allow the notice period for fixing a listing appointment and/or serving a summons to be shortened. Reasons must be given in respect of that request, and a copy of the request must be copied to the other parties, who may raise objections to the request. The court has discretion as to whether or not it will allow any time periods to be shortened.

## 5. Discovery

### 5.1 Discovery and Civil Cases

Discovery in Jersey is provided by each party to the litigation, exchanging lists of all relevant documents in its possession, custody or control, and verifying by sworn affidavit that the list is complete. The parties have the right to inspect a document listed in another party's discovery list, unless the document in question is privileged.

The court may order discovery either with the agreement of both parties, upon the request of one party or of its own volition.

Discovery is conducted by the parties themselves and their legal advisers. Discovery must be undertaken in accordance with the RCR and Practice Directions RC 17/07 and RC 17/08.

When discovery is ordered, each party to the litigation has a positive duty to search for and disclose all documents which are relevant to any of the issues arising in the court action, irrespective of whether those documents are helpful or harmful to that party's position in the court action. These documents include those in the parties' possession, those formerly in their possession and those held by third parties (which parties have a right to possess, copy or control). Discovery obligations are ongoing and if relevant documents subsequently come to light after the list of documents has been exchanged, they should be disclosed to the other parties.

The expression "document" in the context of discovery in Jersey is given an extremely broad interpretation. It extends to both hard copy and electronic documents, and has been held to include emails, video and audio tapes, Whatsapp messages and other social media communications.

In order to limit the scope of discovery, it is common (and the court expects) that the parties to an action will agree on particular "search parameters".

Following the filing and exchange of each party's respective lists, each party must then allow the other parties to inspect and take copies of the documents, except insofar as those documents are privileged.

### Specific Discovery

The above describes the typical mechanisms for "general discovery" in Jersey. In addition to general discovery, a party may apply for specific discovery in respect of particular documents or a class of document which is believed to be in the possession, custody or power of another party. Such an application will only generally be regarded as appropriate after general discovery has been undertaken.

### 5.2 Discovery and Third Parties

As a general rule, discovery is only obtainable from persons properly joined as parties to a substantive ongoing action.

Information from third parties is generally only obtainable by summoning those third parties to attend as witnesses to produce documents pursuant to a subpoena duces tecum.

Exceptionally, the court has a discretionary power to make an order that a third party shall provide information by making a Norwich Pharmacal order.

The court may grant a Norwich Pharmacal order against a third party to an action if satisfied that:

- the applicant has a good, arguable case that they were the victim of wrongdoing;
- the respondent is mixed up, even innocently, in the wrongdoing; and
- it is necessary in the interests of justice to order provision of the information sought.

An application to the court for a Norwich Pharmacal order may be made during the course of ongoing proceedings, or by a prospective plaintiff prior to its initiation of substantive proceedings. The disclosure ordered pursuant to a Norwich Pharmacal order may take any form.

## 5.3 Discovery in This Jurisdiction

Please see 5.1 **Discovery and Civil Cases**.

## 5.4 Alternatives to Discovery Mechanisms

The legal system in Jersey provides for discovery mechanisms to identify potentially relevant documents, as described in 5.1 **Discovery and Civil Cases**. In addition to discovery mechanisms, evidence for use in litigation is also developed and admitted onto the court record by way of witness testimony in the form of sworn affidavits deposed by witnesses, to which documentary evidence may be exhibited in the form of an “exhibit” to an affidavit.

## 5.5 Legal Privilege

Jersey law recognises the concept of legal privilege and is similar to English principles in this area. Jersey law recognises two types of legal privilege: legal advice privilege and litigation privilege.

### Legal Advice Privilege

Legal advice privilege covers communications made between client and lawyer which are:

- confidential;
- passed directly between them; and
- created for the dominant purpose of obtaining or giving advice on the client’s legal rights and obligations.

### Litigation Privilege

Litigation privilege covers documents which:

- are confidential;
- pass between lawyer and client, the lawyer and third parties or the client and third parties;
- have come into existence after litigation has commenced or become a contemplated prospect; and
- have come into existence for the dominant purpose of obtaining information to be submitted to lawyers for the purpose of giving or obtaining legal advice in relation to or seeking evidence of information for such litigation.

A privileged document remains privileged from the moment of its creation unless and until the privilege in respect of the document is expressly or impliedly waived by a party who is entitled to the privilege.

## 5.6 Rules Disallowing Disclosure of a Document

All relevant documents must be discovered (ie, disclosed in a party’s discovery list). However, there are limited instances in which the production of a document for inspection may be resisted. The main grounds for withholding production following discovery are that:

- the documents are privileged;
- the documents are no longer in the disclosing party’s power (for example, because they have been lost or destroyed); or
- the costs involved in allowing inspection would be disproportionate to the issues in the case.

Non-privileged but otherwise private and/or confidential documents are not exempted from discovery, and must be searched for and disclosed as part of the discovery process. In exceptional circumstances, such documents may however be withheld from production for inspection if the interests of confidentiality outweigh the interests of the party seeking inspection of the document, and if production of the document is necessary for disposing fairly of the case.

## 6. Injunctive Relief

### 6.1 Circumstances of Injunctive Relief

The court has inherent jurisdiction and discretion to grant injunctive relief in any case where it appears just and convenient to do so, either with or without conditions. It is a prerequisite that the party applying for injunctive relief must have a substantive right, the protection of which is sought by way of the injunctive relief.

An injunction may be granted on an interim basis, to protect the position or status quo between the parties pending final resolution of the dispute at trial, or may be granted as a final order at the conclusion of a trial.

A number of specific types of injunction are available in Jersey, including:

- freezing orders – which restrain the dissipation of assets to defeat a prospective judgment;
- search orders – which require access to documentary evidence; and
- *Clameur de Haro* – a summary injunction to prevent physical interference in respect of land.

### 6.2 Arrangements for Obtaining Urgent Injunctive Relief

The standard means of obtaining an injunction in Jersey is to lodge an order of justice pleading the case and setting out the injunctions sought, for a judge of the court to grant in chambers on the papers.

This typically takes from a couple of days to a week from lodging the papers, but the court can accommodate greater urgency where the need is demonstrated.

## 6.3 Availability of Injunctive Relief on an Ex Parte Basis

Injunctive relief can be obtained on an ex parte basis if two conditions are satisfied:

- There must be strong grounds for proceeding ex parte, which usually require demonstration that notice of the injunction would prompt the action it is intended to restrain, or that there is a need for extreme speed.
- Damage to the respondent must be compensable in damages under a cross-undertaking by the applicant, or the risk of non-compensable damage must clearly outweigh the risk of injustice to the applicant should the order not be made.

On an ex parte application, the applicant is under a duty to give full and frank disclosure of all matters relevant to the exercise of the court's discretion.

## 6.4 Liability for Damages for the Applicant

An applicant for injunctive relief in Jersey may be held liable for damages suffered by the respondent.

Every application for an interim injunction must contain an undertaking in damages. Additionally, the court may order a payment by way of security to be paid to the applicant's advocate to be held by that advocate as an officer of the court until the court orders otherwise.

## 6.5 Respondent's Worldwide Assets and Injunctive Relief

Freezing injunctions are typically sought in Jersey because the defendant has assets held in the jurisdiction: such injunctions can be obtained in support of proceedings in other jurisdictions. Although less common, the Jersey court does have jurisdiction to grant worldwide freezing orders if it otherwise has personal jurisdiction over the defendant.

## 6.6 Third Parties and Injunctive Relief

Injunctive relief can (and typically will) be obtained in order to freeze the assets of a person which are in the hands of a third party, where restraining that third party is considered necessary to ensure the preservation of assets pending the judgment pursued by the plaintiff. In those circumstances, the third party is referred to as "party cited". The consequences for breach of an injunction stated in **6.7 Consequences of a Respondent's Non-compliance** will also apply to a third party who is cited in the order.

## 6.7 Consequences of a Respondent's Non-compliance

Breach of an injunction amounts to a contempt of court and is punishable as such, typically by imprisonment and/or a fine.

## 7. Trials and Hearings

### 7.1 Trial Proceedings

The trial is generally conducted as follows.

- Opening speeches – the plaintiffs' advocate opens the case by making an opening speech, indicating the nature of the evidence which will be led for the plaintiff and the nature of the plaintiff's case.
- The defendant's advocate may then open the defendant's case with a similar speech, although this sometimes takes place after the plaintiff's evidence and before the defendant's evidence.
- The plaintiff's advocate calls each of the witnesses for the plaintiff and carries out examination-in-chief, which is followed by cross-examination by the defendant's advocate (although typically evidence-in-chief is by way of tendering witness statements that have been prepared and served previously).
- The defendant's advocate makes a speech, if he or she has not at the start of the trial, and then calls each of the witnesses for the defendant and carries out examination-in-chief (as above), which is followed by cross-examination by the plaintiff's advocate.
- There are then closing speeches including submissions of law and fact; typically, the plaintiff's advocate closes first, followed by the defendant's, the plaintiff having an opportunity to reply.
- The court delivers judgment, which is generally reserved, with a written reasoned judgment being issued following deliberation by the judge and jurors.

The process at trial is primarily conducted by way of oral argument and witness/expert examination at the hearing. The court may, however, allow affidavit evidence to be submitted.

### 7.2 Case Management Hearings

Following the close of pleadings, there will be a directions hearing. This can be scheduled by the parties or the court of its own motion. The purpose is to set down a timetable for each step of the proceedings up to the trial. The court may also give or update directions at the conclusion of other interlocutory hearings.

### 7.3 Jury Trials in Civil Cases

The lack of jury trials or a jury system is a distinctive feature of the Jersey legal system. In place of juries, Jersey has jurors, who are lay magistrates who are appointed by an electoral college. Jurats need not be legally qualified, however in order to be eligible for appointment, they must have a "known history of sound judgment and integrity which has been consistently

demonstrated throughout a lengthy professional business or civic life” (Snooks v United Kingdom 2002 JLR 475).

The function of jurors in any civil trial is to decide matters of fact, including assessments of damages.

Jurats will generally sit in all trials. As an exception to the general rule in Jersey, jury trials are permitted in an assize trial for certain offences.

## 7.4 Rules That Govern Admission of Evidence

As a general rule, any fact required to be proved at the hearing by witness evidence must be proved through the examination of the witnesses orally and in open court. The expectation is therefore that witnesses will attend court and give oral evidence. In practice, written witness statements in the form of sworn affidavits and exhibits are exchanged between the parties before trial, the contents of which the witnesses will formally prove at trial.

The court has discretion to permit a party to adduce evidence by video link where there is good reason and it is considered to be in the interests of justice.

Hearsay evidence is admissible in Jersey law, provided that a notice of the party’s intention to lead hearsay evidence is submitted within 28 days of the matter being set down for trial. The fact that such evidence is hearsay, and the degree to which it is hearsay, should however be made known at trial and taken into account when assessing the weight to be attributed to that evidence.

## 7.5 Expert Testimony

The court may, on the application of a party or the parties, grant leave for expert evidence to be adduced at trial. The question of whether expert evidence is necessary and the extent to which it will be permitted in the case is determined in advance of trial at a directions hearing.

The court itself may seek expert testimony or guidance. This forms part of the court’s full discretionary power to receive, at any time before the delivery of judgment, such further evidence as justice may require.

In advance of the hearing, the court may limit the number of expert witnesses that may be called. The court will not generally allow expert evidence from more than two different disciplines to be called.

## 7.6 Extent to Which Hearings are Open to the Public

Please see 1.3 Court Filings and Proceedings.

## 7.7 Level of Intervention by a Judge

Jersey procedure is adversarial, and the conduct of the hearing, presentation of evidence and submission of legal argument is for the parties. However, the judge presiding over the proceedings may (and generally will) intervene to ask questions of the parties, witnesses and advocates.

Invariably, in all but the most straightforward matters, the court will reserve judgment from the date of the trial, and will subsequently produce a reasoned judgment in writing within a number of weeks.

## 7.8 General Timeframes for Proceedings

There is an expectation that actions should generally be concluded within 12 months, with the most complex cases being concluded within 24 months.

# 8. Settlement

## 8.1 Court Approval

The parties may enter into a settlement agreement between themselves, but will have to obtain an order formally disposing of any proceedings which are on foot. If the settlement terms are to be incorporated into an act of court then the parties will file a consent order including them, and the court will issue an act of court. Typically, this can be done simply by filing a consent order dismissing the action pursuant to the settlement agreement which will contain the fuller terms.

## 8.2 Settlement of Lawsuits and Confidentiality

The existence of the action will be public unless it the court has ordered that either all or any part of it shall be private. The terms of the settlement can be kept private.

## 8.3 Enforcement of Settlement Agreements

The settlement agreement is a contract between the parties. If one party breaches its terms then the other party will have an action for breach of contract. This will usually be pursued by way of a separate action. However, where the terms of the settlement agreement have been incorporated into the act of court, the aggrieved party may apply to court within the same proceedings for enforcement.

## 8.4 Setting Aside Settlement Agreements

A settlement agreement may be set aside in the same way that a contract may be set aside. These include:

- that the contract has not been properly formed; and
- that there has been a *vice de consentment* undermining a party’s consent to the contract (eg, error, fraud, misrepresentation or undue influence).

## 9. Damages and Judgment

### 9.1 Awards Available to the Successful Litigant

The three main remedies available at the full trial stage are damages, final injunctions and declarations.

### 9.2 Rules Regarding Damages

Damages are compensatory in nature rather than punitive, and are considered by reference to the loss shown to be suffered. As a matter of law, aggravated or exemplary damages are available in very limited cases but they are very rarely awarded. There are no general rules limiting the maximum amount of damages payable.

### 9.3 Pre and Post-Judgment Interest

#### Pre-judgment Interest

Pre-judgment interest derives from the terms of the contract and/or statute and should be pleaded. It can be awarded from the date that the cause of action arises up to the date of the judgment.

There are no statutory limits on the award of pre-judgment interest per se, however the Court has a customary law power to regulate interest which it considers excessive. Further, statutory interest may not be awarded on unpaid interest. Whether the amount of interest set out in the contract is payable in full will depend upon the enforceability of the relevant terms of the contract (eg, punitive interest rates may not be enforceable).

In certain matters, such as breach of trust claims and accessory liability in respect of breach of trust, the court exceptionally may award compound interest.

#### Post-judgment Interest

Post-judgment interest is payable at the applicable court rate provided for by statute. Currently this is 2% above the Bank of England (BOE) base rate.

Where the judgment was in respect of a debt which was already accruing (eg, an action for repayment of a loan which already provides for the payment of interest), the judgment will typically provide that interest is to continue to accrue at the rate set out in the contract and not the court rate.

#### Interest on a Foreign Judgment

There are slightly different rules for foreign judgments. Where a foreign judgment is registered for enforcement in Jersey, the pre-judgment interest will be that awarded by the foreign court. The post judgment interest is determined by the court and can be up to 4%. This will accrue from the date of registration of the judgment.

Where a fresh action is brought in Jersey for the enforcement of a foreign judgment, the pre-judgment interest awarded by the foreign court will typically be ordered unless punitive. The post-judgment interest will be at the court rate (ie, 2% above the BOE base rate).

### 9.4 Enforcement Mechanisms of a Domestic Judgment

Mechanisms available for the enforcement of domestic monetary judgments include the following:

- Distraint (*arrêt*) – a process whereby the moveable property of the debtor is placed under the control of the Viscount who may then realise them to satisfy the judgment debt.
- *Arrêt entre mains* – a mechanism whereby a creditor gains rights in respect of a debtor's moveable property resting in the hands of a third party it can extend to tangible or intangible movables (such as debts).
- Judicial hypothec – a mechanism whereby the creditor can enforce against a debtors moveable and immoveable property; the creditor asks the court to create a judicial hypothec and then moves to enforce by way of *dégrévement* or *réalisation*.
- Insolvency proceedings – although not strictly enforcement, bankruptcy may be sought against the debtor following which their moveable and immoveable property may be realised for the benefit of their creditors.

Non-monetary judgments may be enforced through procedural mechanisms and/or committal proceedings.

### 9.5 Enforcement of a Judgment from a Foreign Country

A foreign judgment must be registered in Jersey in order to be enforceable.

Judgments from the UK and the other Crown Dependencies are registrable under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960. The process is set out in the law (and 1961 Rules) and requires an application to the court but no fresh action. The defendant must be given the opportunity to set aside the registration before it can be enforced.

Where a judgment is not registrable under the 1960 Law, a fresh action must be started and summary judgment may be sought.

Once enforceable, the mechanisms available to the creditor for enforcement are those described in **9.4 Enforcement Mechanisms of a Domestic Judgment**.

## 10. Appeal

### 10.1 Levels of Appeal or Review to a Litigation

Decisions of the Royal Court are appealed to the Court of Appeal.

Decisions of the Court of Appeal are appealed to the Privy Council.

### 10.2 Rules Concerning Appeals of Judgments

#### Appeals to the Court of Appeal

Appeals to the Court of Appeal are typically as of right. Article 13 of the Court of Appeal (Jersey) law 1961 sets out the limitations on the right to appeal including where leave to appeal is required. An appeal lies as of right (subject to proper grounds) from final orders. Leave is required to appeal any interlocutory order, consent order, or order as to costs.

#### Appeals to the Privy Council

Appeals to the Privy Council require leave from either the Court of Appeal or the Privy Council. Leave to appeal is sought in that order.

### 10.3 Procedure for Taking an Appeal

#### Court of Appeal

Where no leave to appeal is required, the appellant must serve its notice of Appeal within 28 days of the judgment being appealed. Where leave to appeal is required, this period is within seven days of leave being granted.

In both cases, the appellant must apply to have its appeal set down within seven days of serving the notice of appeal. The respondent then has 14 days to file any cross appeal.

#### Appeals to the Privy Council

The applicant must apply to the Court of Appeal for leave to appeal within 28 days of the judgment being appealed. The respondent has 14 days to file an objection. The Court of Appeal typically refuses permission to appeal to the Privy Council. Assuming this is the case, the applicant has 56 days from the date that permission is refused to apply to the Privy Council for leave to appeal. The respondent then has 28 days to file a notice of objection if it wishes to be able to participate in the application.

If leave to appeal is granted then the Privy Council set down directions for the appeal.

### 10.4 Issues Considered by the Appeal Court at an Appeal

On the face of applicable legislation, an appeal to the Court of Appeal is a re-hearing but in practice an appeal is a review of

the decision below on specific grounds. Decisions of fact may only be appealed in very limited circumstances and therefore appeals are typically on points of law. The Court of Appeal is very reluctant to disturb findings of fact based on oral evidence. It may disturb findings of fact based on written evidence and may also consider further evidence.

New points may be taken on appeal and new evidence submitted. However, the party seeking to introduce further relevant evidence must show that it is new, influential and credible. The threshold is high.

The Privy Council only hears appeals on points of law of general public importance.

### 10.5 Court-Imposed Conditions on Granting an Appeal

The court may impose conditions on granting leave to appeal, such as the payment of security for costs into court. The court has discretion upon granting an appeal as to the order that it makes. Therefore it is possible that court may impose conditions, such as the payment of monies, in its order.

### 10.6 Powers of the Appellate Court after an Appeal Hearing

The court has discretion. If the appeal is successful then the court will typically set aside the original order and substitute it for the orders sought in the appellant's notice of appeal and/or any orders sought by the respondent by way of cross appeal.

The court may also re-open the appeal in exceptional circumstances.

After hearing the appeal, the Court of Appeal has the power to decide whether to grant leave to appeal to the Privy Council.

## 11. Costs

### 11.1 Responsibility for Paying the Costs of Litigation

The court has discretion over who pays the costs of litigation. However, the general rule is that the unsuccessful party pays the winner's costs. Costs awards can be made in respect of all costs incurred during the litigation (ie, legal fees and disbursements).

Costs will be subject to taxation by the court (the court's cost assessment exercise) if the parties cannot agree them. The taxation process usually results in an award of between 55% and 70% of the costs incurred by the unsuccessful party depending on the circumstances of the case.

## 11.2 Factors Considered When Awarding Costs

When awarding costs, the court will typically consider the parties' conduct and any offers made.

The usual costs award is costs payable by the unsuccessful party on the standard basis (on which the receiving party must prove the reasonableness of costs claimed). Less commonly, costs may be awarded on the indemnity basis (on which the paying party must disprove the reasonableness of costs claimed) if the conduct of one of the parties is particularly egregious.

There is no formal regime for automatic costs consequences on making an offer (equivalent to the English "Part 36" offer) but the court may take into account any offers made to settle the matter before trial. These would usually have been made on a "without prejudice save as to costs" basis, meaning that they cannot be used at a trial on the merits but they can be seen by the court when it determines the question of costs.

## 11.3 Interest Awarded on Costs

Interest is awarded on costs at the same rate that it is awarded on damages (ie, 2% above the BOE base rate running from the date of judgment).

## 12. Alternative Dispute Resolution

### 12.1 Views of Alternative Dispute Resolution within the Country

Mediation is easily the most popular method of ADR in Jersey. The court may stay proceedings to allow for ADR. The court's procedural rules provide that it may stay proceedings at the invitation of the parties, or of its own motion.

### 12.2 ADR within the Legal System

ADR is encouraged. The court may not specifically order the parties to commit to ADR. However, any party unreasonably refusing to do so can expect that refusal to be taken into account by the court when determining costs.

### 12.3 ADR Institutions

Given the size of Jersey's legal market, the parties will usually look to England and Wales to find a mediator (as that jurisdiction has a large resource of experienced and unconflicted mediators). Mediations will take place in a location convenient for the parties, which may be on island or wherever else in the world is most convenient for the parties.

## 13. Arbitration

### 13.1 Laws Regarding the Conduct of Arbitration

Arbitration is governed by the Arbitration (Jersey) Law (Arbitration Law) 1998.

The 1998 Law provides that a foreign arbitral award handed down in any country which is a signatory to the New York Convention is enforceable as if it were a domestic award. Jersey has been a party to the New York Convention since 2002.

In addition, the Law provides that awards under the Geneva 1927 Convention are also enforceable.

Awards from the International Centre of the Settlement of Investment Disputes are enforceable under the Arbitration (International Investment Disputes) (Jersey) Order 1979.

### 13.2 Subject Matters Not Referred to Arbitration

Criminal matters may not be referred to arbitration. In addition, it is possible that the existence of an arbitration clause will not prevent certain legal processes (eg, an application for *désastre*) from being pursued.

### 13.3 Circumstances to Challenge an Arbitral Award

The court is generally supportive of, and upholds, arbitral awards. There are no specific provisions in the Arbitration Law for setting aside or refusing to enforce domestic awards. However, an arbitral award may not be enforceable if the court considers that the defendant was not given proper notice of the arbitration proceedings and, therefore, that the award was improperly procured, or where there was a procedural flaw. Similarly, where there is a pending challenge to an award, the court will also not enforce.

The court can set aside enforcement of foreign awards where the conditions for enforcement set out in Article 37 of the Arbitration Law are not met. These include that:

- it must have been made in accordance with the applicable arbitration procedure;
- the defendant was given proper notice of the arbitration proceedings;
- the award was not improperly procured;
- there was no procedural flaw; and
- the award was final.

It is also a requirement that the award be made in respect of a matter which may lawfully be referred to arbitration under Jersey law.

The court will only review a domestic award if an appeal is made on a point of law and even then, only if the parties have not excluded appeal rights. The court will not review a foreign award unless it is clearly invalid or unenforceable.

### **13.4 Procedure for Enforcing Domestic and Foreign Arbitration**

The enforcement of both foreign and domestic arbitral awards requires the leave of the court. Foreign arbitral awards must satisfy some basic criteria of enforcement (eg, concerning the validity of the arbitration process and award).

The time limit for enforcement of domestic awards is ten years from the date of the award. The time limit for the enforcement of foreign awards is determined with reference to the rules of the foreign arbitration/jurisdiction.

There are no specific procedural rules governing the enforcement of domestic or foreign arbitral awards, but the Arbitration Law allows them to be enforced in the same manner as a domestic judgment.

As to the form of the arbitral awards, applications for enforcement must specify the proposed manner of enforcement. Typically, at least a copy of the award and the underlying arbitration agreement will be included with the application. The exact evidence and information required depends on the type of award and the Arbitration Law sets out requirements specific to whether a foreign award falls outside the New York Convention or not.

Where the leave of the court is granted, the act of court will specify the manner of enforcement. Enforcement options are the same as those set out in **9.4 Enforcement Mechanisms of a Domestic Judgment**.

## **14. Recent Developments**

### **14.1 Proposals for Dispute Resolution Reform**

There are no major pending proposals for dispute resolution reform in Jersey. The RCR are regularly reviewed by a committee.

In August 2020, the Privileges and Procedures Committee invited comments on draft legislation designed to enable all legislation displayed on the Jersey Law website as being currently in force, to be the official version of the legislation for citing in court. The consultation period ended in October 2020 but there are no further developments at the time of writing.

### **14.2 Impact of COVID-19**

COVID-19 has had a relatively limited impact on the operation of court hearings. As of November 2020, the vast majority of hearings are being conducted in person within court buildings, subject to certain distancing measures, and hearings before the Master of one hour or less are being held by video link. This has been the case since July 2020. However, the reduction in the number of hearings earlier in 2020 has meant that the court has limited availability until Spring 2021.

No legislation has been passed or orders issued generally suspending the operation of limitation periods in Jersey.

All affidavits going before the court in Jersey must be sworn. In April 2020, an order was made to permit this to be done remotely where not possible in person.

# JERSEY LAW AND PRACTICE

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**Carey Olsen** has one of the largest dispute resolution and litigation teams in Jersey, representing clients across the full spectrum of contentious and semi-contentious work. The firm is recognised for its expertise in both international and domestic cases, including investment funds; corporate, commercial and civil disputes; banking, financial services and trusts litigation; restructuring and insolvency; fraud and asset tracing claims; regulatory investigations; employment disputes; and advisory work. From mediation to trial advocacy, the dispute resolution

and litigation team guides clients through the full range of disputes, from multi-party, cross-jurisdictional corporate litigation to domestic claims before the local courts, and has also represented clients before the Privy Council. Many of its cases have established precedents that are referred to in jurisdictions around the world. Carey Olsen advises on Bermuda, British Virgin Islands, Cayman Islands, Guernsey and Jersey law across a global network of nine international offices.

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