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Guernsey: Law & Practice
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GUERNSEY

Law and Practice

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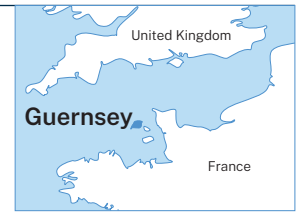

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1. General

1.1 General Characteristics of the Legal System

The Bailiwick of Guernsey is a British Crown dependency. It is made up of three separate legal systems: Guernsey (together with some smaller islands), Alderney and Sark. Each island has its own laws, court system and rules, although a significant proportion of laws are passed on a Bailiwick-wide basis.

Sources of Law

The Bailiwick is a mixed law jurisdiction, combining civil law traditions from its time under Norman French rule with elements of English common law stemming from the influence of the British Crown post-1066. Various Royal Charters through the centuries have confirmed the Bailiwick's right to self-determination. As such, although the British Crown asserts a residual right to interfere in order to maintain good governance, in real terms the Bailiwick largely operates as an independent self-governing territory. All three jurisdictions have their own directly-elected legislative assembly, legal systems and courts of law.

Norman customary law remains influential in private law rights such as inheritance, succession and property law and, albeit to a lesser extent, in contract and tort law. Commercial law is heavily influenced by UK legislation although regard will still be had to French contract law. The Bailiwick's legal regime can therefore be said to be a fusion between the civil and common law systems.

Procedure

Guernsey's system of courts and tribunals is adversarial in nature, with cases being dealt with by written and oral submissions. In civil matters, the main provisions regulating procedure are found in the Royal Court Civil Rules, 2007 (as amended). Although these draw on the rules of procedure applicable in England and Wales, there are important differences specific to Guernsey.

1.2 Court System

As noted, the Bailiwick of Guernsey comprises three distinct jurisdictions: Guernsey, Alderney, and Sark. In this chapter, the focus will be on the civil courts and system of Guernsey.

The Magistrate's Court of Guernsey

The Magistrate's Court was established under a 1954 Law and is presided over by a full-time judiciary. Almost all criminal cases start in the Magistrate's Court, with the more serious cases being reserved for or remitted to the Royal Court. The Magistrate's Court also deals with civil matters where the sum in dispute does not exceed GBP10,000, commonly known as Petty Debts cases. The Magistrate's Court also has jurisdiction over certain domestic proceedings and is responsible for conducting inquests.

The Royal Court of Guernsey

The Royal Court sits in three main divisions:

- Full Court (civil and criminal matters);
- Ordinary Court; and
- Matrimonial Causes Division.

Most commercial matters and the majority of the Royal Court's business is listed before the Royal Court sitting as an Ordinary Court. Many appeals under statutory provisions lie to the Royal Court sitting in Ordinary Court and the Ordinary Court also hears appeals in civil matters from the courts in Alderney and Sark.

The Ordinary Court is normally constituted by a single judge and a minimum of two or three jurats. Jurats are lay members of the court whose role is to determine questions of fact. In some circumstances a judge will sit alone, without jurats. Procedural and interlocutory matters are usually heard by a judge sitting alone.

Guernsey Court of Appeal

An appeal from a decision of the Royal Court of Guernsey will generally lie to the Guernsey Court of Appeal. An automatic right of appeal is available except where the sums involved are under GBP200, or the appeal relates to a consent order or an interlocutory order (in which cases leave to appeal will be required).

Judicial Committee of the Privy Council

A right of appeal may lie from the Guernsey Court of Appeal to the Judicial Committee of the Privy Council, depending on the financial value of the order being appealed.

Ecclesiastical Court of Guernsey

The Ecclesiastical Court deals with matters of probate and estates; previous proposals to amalgamate its functions into the Royal Court were rejected in 2021 and, as such, these functions will continue to be serviced by the Ecclesiastical Court.

1.3 Court Filings and Proceedings

Court filings are generally open to inspection for the public unless the court orders that the court file should be sealed. Similarly, cases are generally heard in public, with the fundamental principle of open justice being applied in the majority of cases.

However, the Royal Court may, in certain circumstances, seal the court file and/or conduct hearings in private. Such circumstances may include:

- non-contentious trust applications;
- cases concerning children or persons with capacity issues;
- matrimonial matters;
- cases involving confidential information (eg, IP disputes and/or competition litigation); and
- ex parte applications.

1.4 Legal Representation in Court

Guernsey advocates have exclusive rights of audience in the Royal Court and Court of Appeal, although a litigant in person can conduct litigation on their own behalf subject to certain procedural steps. Foreign lawyers have no rights of audience in Guernsey's courts.

In practice, however, many advocates' firms employ lawyers qualified in other jurisdictions to work under the supervision of Guernsey advocates and, additionally, parties may make use of counsel in other jurisdictions should they wish to do so and in some limited circumstances (some of) the cost of foreign counsel may be recoverable.

In contrast, several tribunals (eg, the Employment and Discrimination Tribunal) in Guernsey permit representation by non-advocates.

2. Litigation Funding

2.1 Third-Party Litigation Funding

Third-party litigation funding is permitted but it is important to note that the rules of maintenance and champerty have not been abolished by statute or at common law in Guernsey. In deciding whether or not a funding arrangement is champertous or amounts to maintenance the Royal Court is likely to follow English principles.

Guernsey advocates are expressly prohibited by the Guernsey Bar's Rules of Professional Conduct from entering into any arrangement under which payment of a fee is contingent on success in the claim, commonly called "no win, no fee" agreements.

2.2 Third-Party Funding: Lawsuits

Subject to the rules of maintenance and champerty, in principle it is permissible for a third party to fund a claim.

2.3 Third-Party Funding for Plaintiff and Defendant

In principle, third-party funding is available for both the plaintiff and defendant, subject to the rules of maintenance and champerty.

2.4 Minimum and Maximum Amounts of Third-Party Funding

There is no provision by way of rules, practice directions or guidance relating to third-party funding.

2.5 Types of Costs Considered Under Third-Party Funding

The third-party funding market is not well established in Guernsey given the lack of formal recognition and, as such, there is no firm guidance on what costs a funder will be willing to consider funding.

2.6 Contingency Fees

Contingency fees are not permitted, per **2.1 Third-Party Litigation Funding**.

2.7 Time Limit for Obtaining Third-Party Funding

The third-party funding market is not well established in Guernsey and, as such, there is no firm guidance on the stages by when a party should obtain third-party funding.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

There are no specific rules in Guernsey which require parties to engage in certain pre-action conduct and, in particular, no pre-action protocols. Nonetheless, it is generally recommended to issue a letter before action in order to give the defendant an opportunity to address their failing; a failure to provide an opportunity to respond may impact on the costs that would otherwise be recoverable.

3.2 Statutes of Limitations

Limitation is known as "prescription" in Guernsey; in contrast to limitation (which bars a remedy), prescription extinguishes a claim completely. As such, where prescription applies, it operates as a complete defence to a claim.

A prescription period will stop operating when a claimant hands a summons setting out the claim to His Majesty's Sergeant for service on the defendant, or when an application for leave to serve out of the jurisdiction is filed with the court.

Prescriptive Periods

Prescription periods vary depending on the nature of claim. The main periods relevant for present purposes are those relating to:

- contractual claims – six years from the date on which the breach or actionable damage occurred;
- claims in tort – six years from the date on which the breach or actionable damage occurred;
- trust disputes – three years, but in claims for the recovery of trust property, or if there is fraud to which the trustee was privy, no prescription period will apply; and

- rights in realty (ie, in respect of right to and in land) – 20 years from the date of the action arising.

Where a party was prevented from commencing a claim through some legal or practical impediment, the customary law principle of *empêchment d'agir* may apply. The principle operates by suspending prescription from running during the period of the impediment. An impediment can last for several years, although the precise limits of the doctrine have not yet been fully determined.

3.3 Jurisdictional Requirements for a Defendant

An entity or natural person resident in Guernsey will generally be subject to the jurisdiction of the court through the standard service mechanisms.

Where an entity or person is not resident in Guernsey, the Guernsey courts may still exercise jurisdiction in certain cases. In broad terms, the Guernsey courts will do so, and grant permission to serve proceedings outside the jurisdiction, where satisfied that the case is a suitable one to exercise the court's discretion in this way (Royal Court Civil Rules, Rule 6). In determining an application for permission to serve out, the Guernsey courts will broadly apply the same principles as apply in England and Wales under the Civil Procedure Rules (prior to the 2021 amendments) and look to English case law for guidance, as well as Practice Direction 6B issued under those Rules. As yet, there is no reported case law in Guernsey on the impact, if any, of the April 2021 changes to the relevant provisions in the English Civil Procedure Rules.

3.4 Initial Complaint

The initial complaint is set out in a "cause". The cause must contain three elements:

- the material facts relied on (but not the evidence used to establish those facts, which will follow in due course);
- the relief sought by the plaintiff, including any damages; and
- the plaintiff's address for service (known as the *election de domicile*).

Once the plaintiff has settled the terms of the cause, it is attached to a summons which is then served on the defendant with a date for the defendant to appear in court to indicate whether or not the cause is to be defended. The plaintiff then files ("tables") the cause before the court, to be heard on that date.

The plaintiff may amend the cause at any time, provided the other parties and/or the court agree to this. As the case proceeds towards key procedural milestones, it generally becomes more difficult to satisfy the court that it is appropriate or just for the amendment to be permitted, especially if there are any prescription issues.

3.5 Rules of Service

Different arrangements for service of proceedings will apply, depending on whether service is to happen within or outside Guernsey.

Within Guernsey

Different provisions apply for service on an individual, body corporate or partnership and the States of Guernsey. Service is done through the offices of His Majesty's Sergeant. There are three types of service and the Sergeant's report will confirm which type of service has been effected in their report (called a relation). "A" service means the cause has been served personally on the defendant, "B" service means the Cause has been left at the defendant's home address, and "C" service is for all other types of service.

Where A or B service is achieved, the case can proceed in all respects. In contrast, C service allows the case to be tabled before the court but only if the court is satisfied that the defendant has had notice of the cause or the defendant appears, will the court permit the case to proceed. In appropriate cases, the court may also grant permission for substituted service within Guernsey, for example by advertisement, email or otherwise, where it thinks it just to do so (Royal Court Civil Rules, Rule 7).

Outside Guernsey

The court may grant permission to serve a document out of the jurisdiction where it is satisfied that the matter to which the document relates is properly justiciable before the court and is a proper one for service out of the jurisdiction (Royal Court Civil Rules, Rule 8).

Permission is obtained by applying for leave to serve out of the jurisdiction. The application should be supported by affidavit evidence explaining why the matter is a proper one for permission to be granted, for example identifying any exclusive jurisdiction cause. The order for service out must identify the form, manner and time in which – and any conditions subject to which – service is to be effected, as well as the minimum period before the matter comes back to the court. Recent case law in Guernsey has clarified the exceptional circumstances in which service "in some other manner" (ie, outwith the prescribed methods in the Royal Court Civil Rules and the Hague Convention) is permissible.

3.6 Failure to Respond

In every proceeding a defendant will be summonsed to appear at court on a specified date in order to respond to the claim against them. Should a defendant fail to attend on the return date and/or fail to indicate that the matter is to be defended, the plaintiff may apply to the court for judgment by default; similarly, judgment in default may be given if a defendant fails to table their defences on the due date.

Where judgment in default of appearance or in default of defences is obtained, a defendant may apply to the court for the judgment to be set aside upon affidavit evidence setting out the reasons for the application.

3.7 Representative or Collective Actions

Representative actions are permitted where more than one person has the same interest in a claim (Royal Court Civil Rules, Rule 33).

Unless the court directs otherwise, any judgment or order given in a claim where a representative party is acting shall be binding on those represented in the claim. However, a judgment may only be enforced by or against a person who is not a party to the claim with the court's permission.

There is also provision for representation of interested parties who cannot be ascertained, for example in actions concerning the estate of a deceased person or property subject to a trust (Royal Court Civil Rules, Rule 34). The Rules also make provision for beneficiaries to be represented by trustees in appropriate cases, and for any judgment or order given to be binding on the beneficiaries (Royal Court Civil Rules, Rule 35).

3.8 Requirements for Cost Estimate

There is no provision in Guernsey's court rules which requires advocates to provide a cost estimate or budget at the outset of litigation. However, under the rules of professional conduct applicable to Guernsey advocates, clients should be given information about the likely costs at the beginning of a matter.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

It is possible to make interim applications before the trial or substantive hearings in a claim and such applications are frequently made. Applications range from case management matters, such as further and better particulars or disclosure, to standalone substantive issues, such as strike out, hearings of preliminary issues or interim injunctions.

4.2 Early Judgment Applications

Guernsey's Court rules contain provision enabling early judgment applications. In particular, an application can be brought for summary judgment (Royal Court Civil Rules, Rule 20) or to strike out a party's pleading in whole or in part (Royal Court Civil Rules, Rule 52).

Summary Judgment

The Rules permit the court to give summary judgment at any time after the pleadings have closed, where the court is satisfied that the other party has no real prospect of succeeding on the claim or defence and there is no other compelling reason why the claim should be disposed of at a trial.

An application needs to be served on the defendant a minimum of four clear days before the application is to be heard. It must be supported by an affidavit which sets out the effect of the application, if successful. The affidavit should also identify concisely any point of law or any provision of a document on which the applicant relies. It should state that the application is made because, on the evidence, the applicant believes the respondent has no real prospect of succeeding and, further, that the applicant is not aware of any other reason why the case must be disposed of at a trial.

Strike Out

The court may exercise its discretion to strike out a pleading where it appears to the court that the pleading discloses no reasonable grounds for bringing or defending the action or is an abuse of the court's process or there has been a failure to comply with the court's process.

Although there is no specific provision dictating how an application to strike out should be progressed, in practice an application under Rule 52 should be supported by an affidavit outlining the abuse of process or failure to comply that is relied on.

4.3 Dispositive Motions

The most common dispositive applications are for summary judgment or to have the claim (or part of the claim) struck out (see **4.2 Early Judgment Applications**). The court may also be willing to have a trial of a preliminary issue (effectively a form of summary judgment) where this would dispose of all or a substantial part of a case.

4.4 Requirements for Interested Parties to Join a Lawsuit

Intervention

Where a third party considers that they are a necessary or proper party to proceedings, they may apply to intervene in the proceedings. The court will only permit a person to intervene where satisfied that they are indeed a necessary or proper party. For example, where a beneficiary's interests are represented by a trustee, the court may refuse an application for joinder by a beneficiary unless the beneficiary can point to some other factor justifying their separate involvement.

Joinder

Where a defendant considers that a person who is not a party is liable to make a contribution or

indemnify them, they may apply to join that person to the proceedings (Royal Court Civil Rules, Rule 36).

Joinder may also be permitted where a defendant considers that they are entitled, against such a person, to claim a relief or remedy connected to the original subject matter of the proceedings, or which is substantially the same as that which the plaintiff is claiming.

Finally, the defendant may seek joinder where there is a question or issue connected with the original subject matter of the proceedings which they consider should be determined not only between the plaintiff and defendant but also between either or both of them and a person who is not a party.

Joinder applications are initiated by summons. Where granted, the court will make "such order as it thinks just" in relation to, inter alia, the filing of pleadings and disclosure. Once added as a third party, a person is a party to the action as though they were an original defendant.

4.5 Applications for Security for Defendant's Costs

The court has a broad discretion to make an order against a party that they should provide security for costs "in such amount, on such terms and in such manner" (Royal Court Civil Rules, Rule 82).

Accordingly, the court may order security to be provided on a full or partial indemnity basis, where satisfied that it is appropriate to do so. Generally, the method of giving security is left to the parties and it is common for a bank guarantee to be given to cover the security ordered.

Where an order for security is made, the court may stay the proceedings unless and until the security is provided; should the party required to give security not then do so, the court may dismiss the proceedings.

4.6 Costs of Interim Applications/ Motions

There are no specific costs rules in respect of interim applications. The court has an overall discretion to make costs orders as it thinks just, in relation to the costs of the proceedings or any stage thereof or indeed of any specific application (Royal Court Civil Rules, Rule 82(1)(a)).

4.7 Application/Motion Timeframe

The overriding objective of Guernsey's Rules require cases to be dealt with expeditiously. Guernsey's courts are extremely responsive and willing to sit as required to accommodate civil business, including on an urgent basis.

Unless an application is subject to any particular provision, a person intending to apply for an order shall give notice of that fact to the respondent by serving a notice (a "signification") on the respondent with no less than four clear days' notice (Royal Court Civil Rules, Rule 81).

Routine case management or interim applications are heard on the Friday of each week at the routine Interlocutory Court, and the applicant's advocate is obliged to file an agenda of all such business with the court each Wednesday.

However, parties can and often do request that hearings be listed on an urgent basis on a specific date and/or before a particular judge where that judge has dealt with prior issues in the case. In that event, the court will generally seek to accommodate such requests, subject to availability.

5. Discovery

5.1 Discovery and Civil Cases

Disclosure forms a key part of civil proceedings in Guernsey and is broadly modelled on the regime established by the Civil Procedure Rules in England and Wales, albeit the Rules are less detailed and proscriptive. The Rules are found in Part X of the Royal Court Civil Rules, 2007.

Unless the court otherwise directs, an order for disclosure is an order to give standard disclosure (see **5.3 Discovery in This Jurisdiction**). Where the court considers it appropriate, it may dispense with or limit standard disclosure. Parties are obliged to undertake reasonable searches as part of their duty to search for documents. The process should take place out of court, with the court only intervening where resolution between the parties is not possible.

In practice, parties will typically agree the timing and format of disclosure but, in the absence of agreement, the court may issue directions at a case management conference on any matters in dispute. In all but the simplest cases disclosure is generally given electronically, using an e-disclosure platform.

The recent case of Popat v Popat & Oths (2021) GCR033 examines the legal principles behind the disclosure regime in Guernsey, and in particular applications for specific disclosure. The confirmation of the applicable principles in Popat follows the English guidance in Berkley Administration Inc. v McCelland in affirming that there is no jurisdiction to make an order for the production of documents unless:

- there is sufficient evidence that the documents exist;
- the document relates to matters in issue in the action; and
- there is sufficient evidence that the document is in the possession, custody or power of the other party.

Where these three prerequisites are met, the court has discretion as to whether or not to order specific disclosure. Any such order must identify with precision the document or documents required to be disclosed.

Documents given on disclosure are generally subject to the codified "implied undertaking" against collateral use for any purpose other than the proceedings.

5.2 Discovery and Third Parties

Guernsey does not have any provision within the Royal Court Civil Rules, 2007 for disclosure from a third party who is not named as a party, although there are other well-recognised circumstances whereby disclosure from non-parties can be obtained (eg, Norwich Pharmacal, Anton Piller and Bankers Trust orders).

5.3 Discovery in This Jurisdiction

Unless the Court orders otherwise, parties should give "standard disclosure". This requires parties to disclose any documents:

- on which they rely;
- which adversely affect their own case;
- which adversely affect another party's case;
- which support another party's case; and/or
- which are required to be disclosed by a relevant practice direction.

The duty to disclose extends to documents that are or have previously been under a party's control. A "document" includes anything in which information of any description is recorded and

therefore encompasses any electronic media, mobile devices, as well as data stored on cloud services.

Disclosure Lists

Disclosure is done via a list, often using an e-disclosure platform. Although there is no prescribed form for the list, it must identify:

- documents which the party claims to be able to withhold from inspection under a right or duty (eg, because the document is subject to legal professional privilege) (see **5.5 Legal Privilege**); and
- any documents which are no longer in their control (and an indication of what has happened to those documents).

The list must also include a disclosure statement, which explains the extent of any search that has been undertaken and a certification that the person giving the statement understands their duty to make disclosure and has fulfilled that duty to the best of their knowledge.

5.4 Alternatives to Discovery Mechanisms

Guernsey has a disclosure regime and as such there is no need for an alternative mechanism for discovery.

5.5 Legal Privilege

Guernsey recognises the concept of legal professional privilege. A claim to privilege will generally be upheld where a person seeks legal advice from a lawyer (legal advice privilege) and/or where advice is sought in relation to threatened or actual proceedings (litigation advice privilege).

In broad terms, Guernsey adopts English principles in relation to legal privilege. As such, although there is no reported case law in relation to the position of external and in-house counsel, it is anticipated that Guernsey will follow the position adopted in England and Wales including the tests set out in the RBS Rights Issues and Three Rivers District Council litigations.

Where, within the context of a disclosure exercise, a party claims that a document is covered by legal professional privilege, this claim to privilege should be set out in the list of documents and inspection resisted. In that event, the Guernsey court will generally be slow to interfere with a prima facie valid claim to privilege.

In the event that a party accidentally discloses a privileged document, the inspecting party may (in rare cases) be permitted to make use of the document or its contents and then only with the leave of the court.

5.6 Rules Disallowing Disclosure of a Document

Notwithstanding the general duty of disclosure, a party may assert a right or a duty to not disclose a document. Where a party claims a public interest immunity from disclosure, they should make an ex parte application to the court for an order permitting them to withhold the document from disclosure. Where the court makes such an order, that order must not be served on anyone else and must not be open to inspection by anyone, unless the court orders otherwise.

Where a party claims to have a right or duty to withhold the whole or part of a document from inspection, they must assert both the existence of that right or duty and the grounds on which they claim to have it, in writing.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

Under the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 (as amended) (the LR Law), the Royal Court has the power to grant injunctive relief where it considers it to be just and convenient to do so. Such applications can be made ex parte or on notice, depending on the circumstances.

Principles for Injunctive Relief

The principles whereby the court will determine whether to grant an application for injunctive relief are similar in practice to the circumstances in which the English courts shall grant such relief, albeit there are some differences. For example, where the application is for a prohibitory injunction, the court will adopt the principles set out by the House of Lords in American Cyanamid v Ethicon, such as:

- whether or not there is a serious issue to be tried;
- if damages will be an adequate remedy for the plaintiff or, indeed, for the defendant if the injunction should not have been granted;
- where the balance of convenience lies; and
- any other special factors that may arise.

The court will generally require the plaintiff to provide certain undertakings, for example to commence proceedings within a specified timeframe and/or to pay damages for any loss suffered if the plaintiff does not succeed at trial.

Types of Injunctions

As well as the mandatory prohibitory injunction, a freezing order (or Mareva injunction) may be granted where the plaintiff is concerned at the prospect of the defendant dealing with or otherwise disposing of their assets located within the jurisdiction. Mareva injunctions are often coupled with disclosure orders requiring disclosure of the whereabouts of assets in order that the freezing order can be properly exercised.

Search orders (Anton Piller orders) may be granted permitting forcible access to premises for the purposes of the preservation of evidence which a party may conceal or destroy. In practice, their use in Guernsey is relatively rare.

Anti-suit injunctions may be granted by the Guernsey courts to prevent a respondent from commencing or continuing legal proceedings in another jurisdiction. In this regard, the Guernsey courts have followed the approach of the English courts regarding the circumstances in which an anti-suit injunction will be granted, such as where there is an exclusive jurisdiction clause in an agreement and it would be unconscionable, oppressive, or vexatious to allow foreign proceedings to commence or continue.

Finally, an ancient Guernsey remedy, called the *Clameur de Haro*, is still available today. It is a customary law remedy from the 13th century which protects the occupier of land from a nuisance, trespass or interference with the enjoyment of that land.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

The Guernsey Courts will generally accommodate any urgent application for injunctive relief and sit at short notice where necessary.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

An applicant may apply on an ex parte or on notice basis. Where an application is brought ex parte, it is incumbent on the applicant to provide full and frank disclosure of all material facts

and matters to the court prior to the application being determined, including those which may adversely affect the applicant's prospects.

6.4 Liability for Damages for the Applicant

An applicant may be held liable in damages to the respondent if an injunction is later discharged. To address that risk, the applicant will generally be required to provide an undertaking in damages as a condition of an injunction being granted, to cover any damages that may be payable in the event the applicant is not ultimately found to have been entitled to the relief that was granted on an interim basis.

The Guernsey Court may also order the applicant to provide security for such damages in the form of paying a specified sum into Court to protect the respondent (or a third party's) interests.

6.5 Respondent's Worldwide Assets and Injunctive Relief

While the Royal Court has jurisdiction, in principle, to grant a worldwide freezing order, such orders are rare in the extreme. Such an application, in addition to satisfying the usual tests, will necessitate cogent evidence that there are no assets (or insufficient assets) located within the jurisdiction. More often, the Guernsey Court will be asked to grant an injunction ancillary to a worldwide freezing order granted in a foreign court.

6.6 Third Parties and Injunctive Relief

The court may make an order requiring service on a third party and requiring disclosure/freezing steps to be taken by a third party. Beyond this, it is unlikely that the court would grant an injunction against a third party in the absence of cogent evidence of that third party's involvement in the circumstances such that they are a necessary and proper party to the injunction.

6.7 Consequences of a Respondent's Non-compliance

A failure to comply with an injunctive order will generally constitute contempt of court. If a contempt is established, this may result in a variety of sanctions, most commonly a fine or potentially the striking out of a defence or claim, with the ultimate sanction being imprisonment for contempt of court, although there are no modern examples of this occurring.

7. Trials and Hearings

7.1 Trial Proceedings

Trials are generally undertaken in person, with oral submissions and evidence from lay and expert witnesses. Guernsey has a system of professional jurors called jurats who sit to determine questions of fact, unless the parties agree or the court determines that the matter should be heard by a judge sitting alone.

7.2 Case Management Hearings

Interlocutory applications are generally determined at the routine court sitting on Friday mornings, unless an application is listed before a particular judge or where the application is anticipated to be longer than an hour or so.

Applications are generally resolved after oral argument, often coupled with written submissions, but on occasion parties may agree with the court that the matter can be determined on the papers.

A case management hearing is generally held after the pleadings close to determine what further procedure should be ordered in a case and

often further case management hearings will be ordered, both as a case approaches a trial and, in more complex cases, to monitor progress.

7.3 Jury Trials in Civil Cases

As noted in **7.1 Trial Proceedings**, the Guernsey court uses a system of professional jurors called jurats who may sit to determine questions of fact, unless the parties agree and the court orders that the matter should be determined by a judge sitting alone. Where jurats sit, there are usually three in number.

7.4 Rules That Govern Admission of Evidence

Guernsey's rules of evidence largely follow those in place in England and guidance is often drawn from English precedents. There are some legacy customary law evidentiary rules which are still relevant but to a limited extent. Hearsay evidence is permitted, and the Rules lay down a mechanism for facilitating the inclusion of hearsay evidence together with any objections thereto.

7.5 Expert Testimony

Parties may, in appropriate cases, seek an order that expert evidence be adduced. This may be done on a single or joint basis. Although the court could seek expert evidence, in practice this is not done.

7.6 Extent to Which Hearings Are Open to the Public

Hearings in the Guernsey courts are generally always held in public unless one of the recognised exceptions to public hearings applies, such as cases involving minors, private trust matters, trade secrets or matters of national security. Transcripts are available of right to parties (unless the court directs otherwise) and on request by a non-party where the court is persuaded that this is appropriate.

7.7 Level of Intervention by a Judge

Guernsey trials are generally conducted on the basis that the parties' advocates make such submissions as are deemed appropriate, with the court generally intervening to obtain clarification or assistance where it considers this necessary in the interests of justice. In straightforward matters, a decision may be issued immediately, but in other matters it is more likely that the court will retire to consider its judgment, which is issued in writing in due course.

7.8 General Timeframes for Proceedings

A simple matter such as a debt recovery action could be taken from commencement to trial in six to 12 months. In other cases, proceedings will take longer depending on the number of issues raised and the complexity of those issues. Realistically, most commercial disputes take around 18 months to two years to conclude.

8. Settlement

8.1 Court Approval

In most cases there is no requirement for the court to approve a settlement reached between the parties. However, the court may wish to obtain details of a settlement where there are questions of capacity or a minor or the settlement terms are important to ensure that there is no risk of further dispute. For example, in a boundary or construction dispute, the court may wish to understand the nature of the settlement reached in order to ensure that all key aspects have been addressed. Beyond these possibilities, in general, the only involvement of the court is to approve a consent order withdrawing the claim.

8.2 Settlement of Lawsuits and Confidentiality

As settlements are ordinarily dealt with by way of settlement agreement but disposed of via a consent order, the terms of most settlements usually remain confidential. Less commonly, the parties wish to have the terms of settlement set down in a "Tomlin order".

8.3 Enforcement of Settlement Agreements

Settlement agreements commonly provide that an aggrieved party may sue the other for performance under that agreement; if a Tomlin Order is in place, this can be enforced through application to the court.

8.4 Setting Aside Settlement Agreements

Depending on the terms of a settlement agreement, it is likely that to set aside an agreement a party will be required to issue fresh proceedings seeking declaratory and associated relief.

9. Damages and Judgment

9.1 Awards Available to the Successful Litigant

A plaintiff has the full range of remedies available to them, including damages, declaratory orders and injunctive relief. There remains debate in Guernsey as to whether or not specific performance or mandatory injunctions are available as remedies.

9.2 Rules Regarding Damages

Generally, the court will follow English rules and approaches to damages. In the absence of specific statutory legislation permitting damages that are punitive in nature (for example, under the image rights regime), the general presumption is against punitive damages.

Under Rule 62A of the Royal Court Civil Rules, the court has the power to order interim payment of damages, usually where liability is admitted and/or where it seems to the court that the plaintiff is likely to obtain judgment for a substantial award at trial.

The Guernsey courts recently provided clarity in Pilatus (PTC) Limited v RBC Trustees (Guersney) Limited (2021) GRC012 on the issue of reflective loss in which it confirmed that the legal principle of reflective loss does form part of the law of Guernsey, following the UK Supreme Court decision in Marex, as a set of principles that can properly be adopted as part of Guernsey law.

The commencement of the Damages (Assumed Rate of Return and Related Matters) (Enabling Provisions) (Guernsey and Alderney) Law has introduced a statutory discount rate in personal injury claims, bringing the law into line with the UK and Jersey (such rate being the subject of regulations).

9.3 Pre- and Post-judgment Interest

A party may claim pre- and post-judgment interest. The judicial rate is presently 8% but pre-judgment interest is generally reduced from this figure. As interest rates begin to rise, that position may also change; in this respect, it is anticipated that the Guernsey court would probably follow the approach of the English courts in respect of pre-judgment interest.

Interest may be recovered on costs awards. Where a contractual provision permits interest on interest this will generally be upheld in the absence of a good reason to the contrary.

9.4 Enforcement Mechanisms of a Domestic Judgment

Where a judgment has been obtained against a defendant, a plaintiff can enforce against wages or other assets such as bank accounts, boats or airplanes. A plaintiff may also enforce against a defendant's real property through a process known as *saisie*.

9.5 Enforcement of a Judgment From a Foreign Country

There are two potential routes to enforcement of a foreign judgment: through common law and through a statutory regime.

Under common law methods, a judgment creditor must sue on the judgment in the same way that a creditor would sue on a simple debt in Guernsey. It is unusual for a foreign judgment to be challenged. The only scope for so doing is where:

- the foreign court had no jurisdiction;
- the judgment was obtained through fraud;
- the proceedings in the foreign court breached natural justice requirements; or
- enforcement would be contrary to public policy in Guernsey.

The statutory method is only available for a small number of jurisdictions and provides a streamlined method for having such judgments recognised and enforced. The judgment must be of a superior court, be final and conclusive and be one the foreign court had jurisdiction to grant.

10. Appeal

10.1 Levels of Appeal or Review to a Litigation

There are various levels of appeal depending on where proceedings originate. The Royal Court hears civil appeals from the Magistrate's Court, legislative "judicial review" type appeals under, for example, various regulatory and planning law regimes, appeals from the Court of Alderney and appeals from the Court of the Seneschal of Sark.

Appeals from the proceedings originating in the Royal Court go to the Guernsey Court of Appeal and from there to the Judicial Committee of the Privy Council.

In addition to these appeal procedures, Guernsey also recognises judicial review as a remedy in respect of executive action and continues to recognise a customary law appellate device known as a *requête civile*. This is a specific procedure equivalent to an application to set aside a default judgment, and can be used where the challenge is not to the merits of the decision but for some other reason such as fraud or wrongdoing.

10.2 Rules Concerning Appeals of Judgments

There is a right of appeal from the Magistrate's Court to the Royal Court and from there to the Court of Appeal where the value of the claim exceeds GBP200, or if there is a point of law. Otherwise, leave to appeal is required (for example, on consent orders and costs orders).

No appeal can be brought against a decision of the Guernsey Court of Appeal without special leave of His Majesty in Council or of the Court of Appeal, unless the value of the matter in dispute is GBP500 or more.

Specific rules apply for appeals from the Court of Alderney and the Court of the Senechal in Sark.

10.3 Procedure for Taking an Appeal

Magistrate's Court to Royal Court

The appellant must file a form of notice of appeal with the court within seven days of the decision subject to appeal. This should state the grounds of appeal and if the appeal is against all or only a part of the decision. Copies must be served on all parties affected within 48 hours of the notice being filed with the Greffe (court records). The respondent can apply for security for costs within seven days following receipt of the notice of appeal. The Court can extend the relevant time limits, on whatever conditions justice requires.

Royal Court to Court of Appeal

The appellant has one month to file and serve their notice of appeal on all parties to the proceedings below who are directly affected by the appeal. Within seven days of the notice, the appellant must apply to set down the appeal by giving notice. The registrar then sets down the appeal. Within two days of being set down, the appellant must notify that fact to each party on whom the notice of appeal was served. The respondent may serve a respondent's notice on the appellant within 14 days after service of the notice of the appeal.

Within four months after the appeal was set down, the appellant shall lodge an appeal bundle including a skeleton argument. Thereafter, the respondent has one month to lodge its skeleton argument, following which a date to hear the appeal will be fixed, usually at least 28 days later.

These directions may be varied on application to the court.

10.4 Issues Considered by the Appeal Court at an Appeal

On appeal from the Magistrate's Court, the Royal Court has wide powers. It can confirm, reverse, or vary the determination, or make such other order as it thinks fit. In matters involving the lower court's exercise of discretion, the Royal Court should not interfere unless the decision is clearly based on a misunderstanding of the law/evidence, or there has been a wrong inference drawn from the facts, or circumstances have changed materially since the original hearing. The Royal Court should not overturn findings of fact unless there was no evidence on which reasonably to base such findings or that they were – for other reasons – obviously perverse.

An appeal to the Court of Appeal is by way of a rehearing, unless the appellant seeks an order for a new trial or to set aside a verdict, finding, or judgment. Typically, an appeal will engage the "setting aside" option.

10.5 Court-Imposed Conditions on Granting an Appeal

The court may impose conditions on the granting of an appeal, such as provision for security for costs and/or for consequential orders regarding enforcement. An unsuccessful party may seek a stay of execution pending an appeal's outcome, if otherwise the appeal would be rendered nugatory.

10.6 Powers of the Appellate Court After an Appeal Hearing

The Court of Appeal has power to order a rehearing, a new trial, or the setting aside of the judgment.

It will invariably also make an order for costs of the appeal, and in appeals from the Magistrate's

Court it will also make an order on costs of the proceedings at first instance, at its discretion.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

Advocates' fees incurred in the Magistrate's Court are not recoverable; instead, there are only (limited) disbursement-type costs recoverable.

In proceedings before the Royal Court, the Court has a wide discretion to make such order for costs as it thinks just. It is usual for the Court to make an order that the successful party recovers its costs from the losing party (costs follow the event), but the courts have also adopted an issue-based approach to costs where appropriate.

The maximum advocates' fees that are "recoverable" are "the costs of and incidental to the proceedings which have been incurred" (the Royal Court (Costs and Fees) Rules, 2012); such costs must be both reasonable in their amount and incurred reasonably. Not all costs are likely to be recoverable and those that are will be capped by the need to be assessed as to their reasonableness.

The amount of advocates' fees incurred per hour that are recoverable are capped overall, currently at an hourly rate of GBP278. Non-Guernsey lawyers' costs are generally disallowed, unless there is some specific and legitimate reason for foreign lawyers to have been involved, such as a novel or complex issue of law.

Guernsey courts can make orders as to costs on a number of bases – principally the standard or indemnity basis. Where costs are awarded on an indemnity basis then, on any taxation, all of that party's costs will be allowed unless the costs are shown to be of an unreasonable amount or to have been unreasonably incurred, with any doubt being resolved in favour of the receiving party. By contrast, only recoverable costs are awarded on the standard basis and any doubt is resolved in favour of the paying party.

The Court can also make flexible costs orders, for example making an award on a partial rather than full indemnity basis.

Where the parties cannot agree on the amount of costs to be paid under a costs order, the paying party should seek to have the costs "taxed". An application for taxation must be made within one month immediately following the receipt of the opponent's bill.

11.2 Factors Considered When Awarding Costs

The court will have regard to all relevant circumstances when awarding costs, including the outcome, the process undertaken and the extent to which costs have been incurred due to a party's conduct. For example, where a party has pleaded or pursued or defended an action, claim or counterclaim unreasonably, scandalously, frivolously or vexatiously, or otherwise has abused the process of the court, this is likely to result in costs being awarded against that party, including potentially on an indemnity basis.

11.3 Interest Awarded on Costs

Interest is available on any costs ordered pursuant to a judgment, with the applicable interest rate being the current judgment rate of 8%.

12. Alternative Dispute Resolution (ADR)

12.1 Views of ADR Within the Country

The overriding objective of Guernsey's Rules encourages the parties to resolve disputes as early as possible and it is therefore common in Guernsey for parties to be encouraged to undertake ADR, such as mediation, arbitration and/or expert determination.

12.2 ADR Within the Legal System

At all times, the court must have the overriding objective in mind of dealing with cases justly and to save expense. The court is expected to be an active case manager, which includes "encouraging the parties to use any appropriate form of ADR and facilitating the use of such procedures" (Rule 38(2)(e) Royal Court Civil Rules, 2007). Where a party refuses to engage in ADR and subsequently settles or is found liable, the failure to engage is a factor the court may take into account when determining the question of costs.

12.3 ADR Institutions

There are a number of local qualified mediators in Guernsey and, in addition, the Chartered Institute of Arbitrators has a Channel Islands committee which offers access to qualified mediators and arbitrators. In practice, parties will often use a mediator from one of the recognised bodies based in the UK, such as the Centre for Effective Dispute Resolution.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitration

The Arbitration (Guernsey) Law, 2016 provides a framework for arbitration of disputes in Guernsey and is similar in structure to the Arbitration Act 1998 in England and Wales, and the UNCITRAL Model Law on International Commercial Conciliation 2002.

Parties who have entered into an arbitration agreement or clause can apply to the Royal Court for a stay of proceedings in relation to the dispute. The court must grant the stay unless it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. The arbitration will be confidential and hence conducted in private unless the agreement stipulates otherwise.

13.2 Subject Matters Not Referred to Arbitration

There are no non-arbitrable subject matters in Guernsey, albeit in practice there remain some doubts over the use of arbitration in some areas.

Subject to the parties' agreement, the arbitrator can decide all matters of procedure and evidence and may appoint experts or legal advisers, or assessors to help with technical matters.

13.3 Circumstances to Challenge an Arbitral Award

A dissatisfied party can apply to the court to challenge an arbitral award within 28 days thereof, giving notice to the other party and the tribunal. The grounds for so doing include where the court has substantive jurisdiction (to confirm/vary or set aside the award in whole/part) or where there is a serious irregularity affecting the tribunal/proceedings/award.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

Enforcement of foreign arbitral awards under the Geneva Convention is done under the Arbitration (Guernsey) Law 1982, Part II. Enforcement

of awards under the New York Convention is under Part VII of the 2016 Arbitration Law.

14. Outlook and COVID-19

14.1 Proposals for Dispute Resolution Reform

The rules applicable to civil procedure were last reviewed in 2008 and recently a committee has been formed to review these. The reform committee commenced work in 2020, and although interrupted by the COVID-19 pandemic, it continues to work on the holistic reform of civil procedure in Guernsey. Recommendations for the introduction of a digital court filing platform are expected in early 2023, in addition to recommendations for changes to the Royal Court Civil Rules. Although the reform will look at all aspects of civil procedure, particular points of interest are potential reforms to service provisions and, as indicated, the use of technology.

14.2 Impact of COVID-19

Guernsey was extremely fortunate in its experience of COVID-19 in that the lockdown period was very short and there have been no practical restrictions on ordinary life in Guernsey since 2021.

During the lockdown period, Guernsey's courts initially operated a triage system in order to ensure essential hearings were able to proceed, and thereafter hearings took place in person for the most part, albeit with the ability to use video hearings where necessary. Most filings were able to move temporarily to an electronic system. Should a further lockdown occur, it is anticipated that Guernsey's courts would be able to resume delivery of service through virtual hearings as before.

Carey Olsen has the largest dispute resolution and litigation team in Guernsey, representing clients across the full spectrum of contentious and semi-contentious work. The firm is recognised for its expertise in domestic and international cases, including investment funds; corporate, commercial and civil disputes; banking, financial services and trusts litigation; fraud and asset tracing claims; restructuring and insolvency; regulatory investigations; employment disputes; competition investigations and litigation; and advisory work. From mediation to trial advocacy, the dispute resolution and litigation team guides clients through the full range of disputes from multiparty, cross-jurisdictional corporate litigation to domestic claims before the local courts, all the way through to advocacy before the Privy Council. Many of the firm's cases have established judicial 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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