

# THE JERSEY LAW COMMISSION

## CONSULTATION PAPER

### THE JERSEY LAW OF CONTRACT

**JERSEY LAW COMMISSION  
CONSULTATION PAPER No 5**

**October 2002**

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

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**PART I - Background**

## 1. *The origins of Jersey law*

In order to understand the development of Jersey contract law it is necessary first to examine the origins of Jersey law as a whole.

The common law (or customary law) of Jersey is based upon the customary law of the ancient Duchy of Normandy. Despite the fact that the English sovereigns ceased to be Dukes of continental Normandy in 1204, the Channel Islands remained attached to the English Crown. However, Jersey still retained its ancient Norman law, except in so far as it had in the course of time been modified or corrupted by subsequent enactments or usages.

The loss by the English Crown of its French possessions in 1204 was the time when Jersey was historically regarded as "separated" from France. It is at this time that many writers also talk of Jersey law developing independently and separating from Norman law. In reality, for a significant time after 1204, developments in Norman law were in fact, wholly adopted into the law of Jersey.

The Jersey commentator Le Geyt, writing in the 17<sup>th</sup> century, explains that Jersey originally turned to the adjacent province of Normandy because its law was most in accordance with that of its own. Prior to 1204 Jersey practitioners had little or no written law to which to refer. In contrast, Norman law had been formed into a definitive oral body by 1090 and was finally expressed in written form around 1200 in a text entitled *Le Très Ancien Coutumier de Normandie* (the "Très-ancien Coutumier"). It was this written customary law text to which the Jersey practitioners of the time would refer.

## 2. *The development of Jersey Customary Law*

The customary law of Normandy continued to evolve through to the sixteenth century and was contained in a number of works. Fifty years after the Très-ancien Coutumier, a second version of the Norman Coutumier, *Le Grand Coutumier de Normandie* (The "Grand Coutumier") or the *Summa de Legibus*, was produced. These "coutumiers" (ie. unofficial compilations which did not receive the Royal assent) are collectively referred to as the "Ancienne Coutume". Finally, the *Coutume Reformée* was produced in the 1580's which, unlike the Coutumiers, received Royal assent.

Not all writers are in agreement as to the importance and reliability of each of the works. Certain writers place a high degree of significance on the fact that the *Coutume Reformée* received Royal assent. Routier argued that because the *Coutume Reformée* had official status it was a safer authority. He argued that because customary law always changes without the Royal assent the coutumiers would constantly change to reflect the customary law. As far as Jersey is concerned it is arguable that only the Très-ancien Coutumier is a true indication of Jersey law.

It may therefore be argued that unless a Jersey common law authority can be traced back prior to 1204, then its value as an authority is limited. However, in practice there is in fact little difference between the *Coutume Reformée*, the Très-Ancien Coutumier and the Grand Coutumier and any differences that there are, can be detected <sup>[1]</sup>.

What is apparent, is that after 1204 Jersey began to develop its law independently from that of the law of Normandy. The Jersey commentator Poingdestre pointed out in the 17<sup>th</sup> Century that four hundred years earlier his ancestors could rely on the Grand Coutumier but that as time had passed its reliability in certain areas was questionable. He added that Jersey's separation from Norman Law was assisted by the fact that Norman law began to move towards a more mainstream French or civil law which was modelled on the law prevailing in Paris at that time, whereas Jersey did not adopt the same approach.

This particular point, in relation to the development of Jersey law as a whole was emphasised by the Jersey Court of Appeal in Maynard -v- Public Services Committee of the States of Jersey<sup>[2]</sup> where the court warned:-

" ..care has to be taken when referring to French legal texts in connection with the law of Jersey. After the Channel Islands were severed from the rest of the Norman territories in what is now France, Norman Customary law continued to develop in Jersey, Guernsey and Normandy in parallel but not with identical developments. In Normandy development was naturally affected by doctrines prevailing in other parts of France... "

Furthermore, as Jersey law developed as a whole, Jersey contract law did not develop in the same way as other areas of Jersey law. This may have been as a result of the fact that although the Coutumiers and Coutume Reformée contained sections devoted to certain aspects of contract law their contents were not sufficiently comprehensive to determine all contractual issues.

### 3. *Contract law in the Norman Coutume*

In areas of contract law where the Norman Coutume was found lacking the general practice was to turn to the *ius commune*. The *ius commune* has been described as a "complex result of the coming together ...of local custom with feudal law, Roman law in modified and elaborated form, canon law and the law merchant"<sup>[3]</sup>.

It has been suggested that despite contrary belief, Jersey law was not restricted to pre-1204 customary law and "Le Geyt and Poingdestre make it clear that Jersey law had, by the seventeenth century, quite pragmatically, moved on: in some respects Jersey had developed its own law, but in other respects it continued to follow developments in Normandy and this included looking into the '*ius commune*' on matters of contract law ... It is thus with the sanction of local and Norman commentators on the Norman Coutume that Jersey law looks to mainstream civil law for its law of contract."<sup>[4]</sup>

In practice, when looking at mainstream civil law for the purposes of contract, it means looking to Pothier, the well-known jurist of the 19<sup>th</sup> century who wrote on the Coutume d'Orleans.

### 4. *The further French influence*

It is not immediately apparent precisely which French authorities should be referred to when discussing the continued French influence. In the Law Commissioners Report of 1861, the Commissioners reported as follows:-

"The principal authority as to the ancient customary laws of Normandy is "Le Grand Coustumier du Pays et Duché de Normandie", a work to which different dates have been assigned, but which was compiled probably late in the reign of Henry III.

The Coutume Reformée, a French compilation of a much later period (circa 1585), representing the then existing state of the law of continental Normandy, and the commentaries thereon of Basnage, as well as the works of other French writers, are constantly referred to by the Jersey lawyers. The latter declare, it is true, that such works are not of authority on Jersey law; yet in point of fact they are frequently used as books of reference, and this has naturally, perhaps unavoidably, led to the gradual introduction of much foreign matter, so that what is now practically received as the common law of Jersey, may be described as consisting of the ancient Norman law, with subsequent accretions, some of which are mere development of the earlier customs, and others interpolations of French law. It may be added, that the circumstance of the Jersey lawyers receiving their legal education chiefly in France, helps to impart a modern French complexion to the Jurisprudence of the Island."

The French jurist Pothier seems to be a consistent and favoured authority in the Jersey courts. It is not altogether clear why Pothier is so frequently preferred but his influence cannot be underestimated. A statistical analysis shows that Pothier has been cited in almost 50% of the contract cases which have become before the Royal Court and therefore with reference to Jersey case law, it appears safe to say that the works of Pothier on *Obligations* "provide the backbone to Jersey's law of contract".<sup>[5]</sup>

### The Code Civil

The introduction of the Code Civil in France has had its own influence on Jersey contract law.

The French revolution marked the end of the customary law system in France. On the 5<sup>th</sup> July, 1790, the *Assemblée Nationale* decided –

"... that a code of laws simple and clear and appropriate to the Constitution should be drawn up"

This resulted in the Code Civil of 21 March 1804, which drew heavily on pre-existing law, including the works of Pothier. Much of this pre-existing law had already taken root in Jersey.

The Code Civil itself has frequently been referred to and used as an authority in Jersey contract cases. It is however a foreign statute and should therefore be treated with care.

Perhaps the most notorious cases which referred to the Code Civil are Kwanza Hotels -v- Sogeo Co. Ltd.<sup>[6]</sup> and Selby -v- Romeril<sup>[7]</sup>. At first instance in Kwanza -v- Sogeo<sup>[8]</sup> the court stated as follows:-

"Although the "Code Civil" represents the law of modern France and not the "Ancienne Coutume" of Normandy from which the law of Jersey is drawn, I feel that, on a question such as the one I now have to decide, he [sic] and the other authorities quoted are a surer guide to the discovery of the Law of Jersey than is the Law of England, where, as here, the Laws relating to real property have diverged to a real extent."

The Royal Court in Selby -v- Romeril went one step further than Kwanza. The court was considering the requirements for a valid contract under Jersey law and noted that Pothier referred to 3 requirements. It went on to look at Article 1108 of the French Civil Code, which provides for an additional requirement, stating that:

"It is true that Pothier has often been treated by this court as the surest guide to the Jersey law of contract. It is also, however, true that Pothier was writing two centuries ago and that our law cannot be regarded as set in the aspic of the 18<sup>th</sup> century. Pothier was one of those authors upon whom the draftsman of the French Code Civil relied and it is therefore helpful to look at the relevant article of that code.....In our Judgment it may now be asserted that by the law of Jersey, there are four requirements for the creation of a valid contract, namely, consent, capacity, objet and cause."

No doubt by extending the three requirements of a valid contract referred to by Pothier in this way, counsel will in future cases argue that further articles of the Code Civil should be relied upon. Whether following the Code Civil's lead will pose future problems remains to be seen. It is clear that some members of the legal profession believe that the prospect of following France's lead would leave Jersey unattractive as an offshore jurisdiction which has close links to England. However, it has equally been suggested that if reference to the Code Civil "makes the Jersey law of contract clearer and more accessible, and if it allows the Royal Court to tap into the vast amount of French jurisprudence and doctrine, this can only be in the interests of justice." [\[9\]](#)

There is, of course, the practical problem that the vast majority of Jersey lawyers now receive their legal training in England and French law is therefore to them an alien concept.

## **PART II - Recent Practice**

### 5. *The use of French authorities*

The following summary of cases provides an illustration of the continued use of French authorities to decide modern day contract issues. These cases can be contrasted with those cases referred to later in this paper that make reference to English law (albeit that English law was not always preferred).

#### Ewart -v- Satchwell [\[10\]](#)

This was an action to recover unpaid rent. The court cited Pothier (French authority) and Le Gros (Jersey authority) in relation to the principle of "*tacite reconduction*" (by which a new lease is formed by

reason of a presumed tacit agreement). The Plaintiff also argued for the existence of a "tenancy on sufferance" (a concept under English law). Neither Counsel were able to cite any Jersey authorities showing this to be a part of the law of Jersey and the court, accordingly, held that it was not.

#### Scarfe -v- Walton [\[11\]](#)

This was an action to set aside a contract on the grounds of error induced by misrepresentation. The court referred to Terrien (Norman customary law authority) and Poingdestre (Jersey authority) to the effect that civil law may be referred to where Norman law is silent. The court therefore considered Domat (French authority) on the civil law on error. The court also had regard to English law (see further comments on the use of English law below).

#### Groom et uxor -v- Stock et uxor [\[12\]](#)

The court held on the authority of Pothier (French authority) that an obligation to pay a bonus in a contract of employment, which was entirely discretionary, was unenforceable.

#### Wallis -v- Taylor [\[13\]](#)

With regard to a restraint of trade clause in a contract of employment, the court referred to the customary law maxim "*la convention fait la loi des parties*" and to Pothier (French authority) on the enforceability of contracts. The court also referred to English authorities on restraint of trade (see further comments on the use of English law below).

#### Golder -v- Société des Magasins Concorde [\[14\]](#)

This was an action to set aside a disposition made by a debtor in fraud of his creditors. The court referred to Pothier (French authority) on the enforceability of contracts and stated that: "The principles stated by Pothier we believe to be the principles of our law". The court also referred to Pothier (French authority) and Dalloz (French authority) with regard to the "Pauline action" of Roman Law (i.e. an action to set aside dispositions in fraud of creditors). The court stated that: "the principles of the civil law speak for us when the custom of the Duchy of Normandy is silent".

#### Arbaugh -v- Leyland [\[15\]](#)

With regard to the interpretation of the terms of a contract, the court referred to the rules of interpretation cited by Pothier (French authority).

#### H.M. Viscount -v- Treanor [\[16\]](#)

The Viscount brought this action to enforce a debt, transferred to him in bankruptcy, for monies due from the defendant in respect of the *en désastre* company having built a house for him. The defendant counter-claimed, relying on a penalty clause in the contract for late completion. The court cited Pothier (French authority) on '*obligation pénale*' (i.e. penalty clause) and the court stated that it believed "Pothier to be a surer guide to the Jersey law of contract than are the English authorities".

Wood -v- Wholesale Electrics (Jersey) Ltd. <sup>[17]</sup>

This was an action for breach of contract by reason of defective goods. Both counsel referred to English authorities on the question of warranty, but the court stated that "We think that on this issue Pothier is to be preferred in this jurisdiction." The court referred to Pothier on '*vices redhibitoires*' and the conditions necessary to found an '*action redhibitoire*' (i.e. an action to set aside the contract on the ground of defects). The court held that there is no reason why this type of action should not apply to the sale of manufactured goods, and cited Dalloz (French authority) in support of this view. The court felt that this was simply an extension of the principle into modern society and accordingly found for the plaintiff on liability.

Channel Hotels and Properties Ltd. -v- Rice <sup>[18]</sup>

The plaintiff sued for damages, in relation to an agreement to purchase the share capital in the controlling company of a hotel, on the basis of misrepresentation, express or implied warranty, and negligence. The court declined to apply the English doctrine of negligent misrepresentation, and instead applied the Jersey law on misrepresentation as set out in *McIlroy -v- Hustler* <sup>[19]</sup>. The court also referred to Domat (French authority) on contracts of sale and "*vices redhibitoires*".

La Motte Garages Ltd. -v- Morgan <sup>[20]</sup>

This was an action to recover the balance due in respect of the purchase of a car. The court stated that "mistake has long been accepted as negating agreement" and referred to Pothier (French authority) on "*erreur*". In this regard the court observed that: "It is perhaps somewhat disappointing that neither party chose to mine the rich lodes of our ancient French law but to rely on English law. It may well be that their conclusions would have been the same if they had". The court similarly stated in relation to the equitable assignment of a debt that: "Had we had an opportunity to examine Pothier, Domat and the doctrines of *novation* we feel that our conclusion [sic] would have led us by more familiar paths to this conclusion".

Fort Regent Development Committee -v- Regency Suite <sup>[21]</sup>

This was an application for a contract lease to be cancelled for breaches of covenant. The court stated that: "We do not think ... that in the circumstances it is necessary to examine English case law in any depth. We are quite satisfied that we can draw sufficient from the French authorities which have been stated time and time again in this court to be preferred". The court referred to Dalloz (French authority) and to *Nicholas on the French Law of Contract* (1982) with regard to the remedy of "*résolution*" under French law (i.e. the setting aside of a contract for non-performance).

Le Cornu -v- Heat Pump Bureau <sup>[22]</sup>

This was an application for a contract lease to be cancelled for breaches of covenant. The court criticised counsel for relying almost exclusively on English authorities rather than Jersey authority. The court itself cited Pothier (French authority) on the obligations of a tenant, Dalloz (French authority) on the cancellation of leases, and Halsbury (English authority) on repair.



Dempster -v- City Garage Ltd. [23]

This case concerned a contract for the sale of a car. The question was whether the car was roadworthy when sold and whether there was a *vice caché* (a hidden defect). Norman French authorities were referred to in preference to English authorities. The court said: "It is enough, I think, to refer to our own Court of Appeal and, although I am not saying one ignores the English authorities, where we have our own authorities and our own Norman French authorities, those are to be preferred in cases of this nature, in contract." The court referred to *Kwanza Hotels v Sogeo* (1983), and Pothier on "*vice cachés*".

Maynard -v- Public Services [24]

The court considered the customary law maxim of "*a qui est empêché d'agir la prescription ne court point*" (i.e. prescription of an action does not run against a person who is impeded from acting) and referred to Terrien (Norman customary law authority) and Pothier (French authority) in this regard.

## 6. *The influence of the English law of contract*

During the nineteenth century there are signs that English law was regarded as of relevance, if not as authority, with regard to contract law itself. Indeed, it is a popular misconception on the part of the layman that the law of Jersey does in fact derive from English law.

During that period it was however recognised that there was a need to protect Jersey's Norman origins. For example, the Privy Council, which until the latter part of the twentieth century was the only court of appeal from the Royal Court, was by and large careful not to import English law gratuitously into the Jersey system:-

"If their Lordships were to reverse these decisions without being able clearly to show that they were contrary to the Norman law, we might not only refuse the Respondent a right to which he is by the law of his country entitled, but might raise a suspicion that we were desirous of changing the laws of Jersey, by forming our decisions, not according to those laws, but according to our English notions of justice ...". [25]

Whatever the reason, it cannot be ignored that in many of Jersey's contract cases, counsel have quoted English authority. As Stephanie Nicolle QC wrote:-

"at times..[it] was difficult to escape the feeling that this owed as much to the inability or disinclination of counsel to cite proper authority to the courts as to any considered conviction that English law was the appropriate authority to cite, as in College -v- Little Grove Hotel Ltd [26] [master and servant] and Denny -v- Hodge [27] [breach of contract], where the judgments record that the parties agreed that the principles of English law applied but not why. In other cases English law was simply cited without comment, as in United Dominions Corporation -v- Pinglaux [28] [hire purchase]". [29]

It is interesting to note that prior to the time that English influence became particularly marked in Jersey law, local lawyers trained in France. Today, the majority of Jersey lawyers study law in England and obtain a professional qualification in that jurisdiction prior to training locally. The influence of English law today is therefore explicable on the same basis as the influence of French law referred to by the Commissioners of 1861 (supra).

There are few areas of contract law where it can be said with confidence that English law will definitely be followed. It appears that English law will be followed in cases which are regarded as of a "specialist nature", for example actions arising out of building disputes where the Royal Institute of British Architects contract has been used, as in Jersey Steel Co. Ltd. -v- Holdyne Ltd.<sup>[30]</sup>. This only serves as another example of the confusion the Jersey courts have created with regard to their random acceptance of English principles.

### *The use of English authorities*

#### Scarfe -v- Walton<sup>[31]</sup>

As has been observed above, in this action to set aside a contract on the grounds of error induced by misrepresentation, the court referred to Terrien (Norman customary law authority) and Poingdestre (Jersey authority) to the effect that civil law may be referred to where Norman law is silent. The court added that: "It has been the practice of the court for many years, in extension of the principles enunciated by Terrien and Poingdestre, to have regard also to the law of England where no clear precedent is to be drawn from the law of Jersey ... and, in arriving at our judgment, we have had regard to both the civil law and to the law of England." In this case, the court justified its reliance on English law on the grounds that the principles expounded by Domat (French authority) had much in common with the English law of misrepresentation and mistake although it is difficult to see how the court came to that conclusion.

#### Wallis -v- Taylor<sup>[32]</sup>

As stated above, the court referred to English law with regard to the validity of a restraint of trade clause in a contract of employment. The court simply stated that "by reason of the paucity of precedents in Jersey, we have had regard to precedents in the common law of England".

#### United Dominions Corporation -v- Pinglaux<sup>[33]</sup>

This case concerned an exclusion clause in a contract for the hire purchase of a motor vehicle. English case law was cited by the court.

#### College -v- Little Grove Hotel Ltd.<sup>[34]</sup>

In this action for breach of a contract of employment, the court noted that the matters which justify summary termination of such a contract are set out in Halsbury's Laws of England.

#### Denny -v- Hodge<sup>[35]</sup>

In this claim for breach of contract relating to the sale of a company, the court noted that counsel agreed

that the principles to be applied were those established by English case law.

Jersey Steel Co. Ltd. -v- Holdyne Ltd. <sup>[36]</sup>

In this claim concerning a building contract, the court accepted that where the Royal Institute of British Architects contract was used, the relevant English case law applied. The court stated: "Having examined closely the judgments delivered in Dawnays -v- F.G. Minter "[an English case]", we wholly accept the reasoning and the decision itself, and we would think it right to apply the same principles to any case before us where the facts were similar."

MAB Investments Ltd. -v- Vibert <sup>[37]</sup>

This was an action to recover monies from the defendant under a guarantee. Le Gros (Jersey authority), Pothier (French authority), Halsbury (English authority), Chitty on Contracts (English authority) were all cited. The court stated that: "because we find that in all material respects the laws of Jersey or of England are similar, we shall refer to authorities in both jurisdictions".

Jersey Tools -v- Unipat <sup>[38]</sup>

This case concerned the sale of aluminium cases in accordance with a sample, the buyer rejecting the goods. The court stated that: "We find assistance in section 35 of the Sale of Goods Act 1893 ...." (relating to sale by sample)"..... That Act does not, of course, apply to Jersey, but we think that its provisions are generally in conformity with the law in Jersey on the sale of goods".

Kwanza Hotels Ltd. -v- Sogeo Company Limited <sup>[39]</sup>

The Bailiff, at first instance, commented that in considering the law relating to misrepresentation, "I shall confine myself to the law of England which I believe, on this matter, to be the same as the law of Jersey".

## 7. *French influence –v- English influence*

From the summary of the cases above, it is perhaps not surprising that members of the legal profession in Jersey have referred to an apparent inconsistency in the court's approach to contract matters (see the further discussion below on the possible reform of contract law). It only proves to be a further complication in determining Jersey contract law issues.

What is clear from the examples above, is that French law has played, and still does play, a significant role in the development of Jersey contract law. Given the origins of Jersey law it is of no surprise that the *Ancienne Coutumier*, the *Coutumé Reformée*, French writers or the *Code Civil* are frequently used as authority. However it is noteworthy that English law has in recent years influenced Jersey contract case law. It is questionable, however, from a strict jurisprudential view, whether there are any circumstances when English law should be followed.

One could perhaps be excused for thinking that the court itself is unclear even when looking at French law. For example, in *Warner v Hendrick*. <sup>[40]</sup> (a building case), the Royal Court recognised the principle

of "réception" relying on a passage in Dalloz's Répertoire, which post-dates the Napoleonic Code. The Court began its excursion into French law in that case with the remarks "looking at the common law of Normandy..." but then referred first of all to a modern dictionary of French juridical terms and then to a passage in Dalloz, neither of which could be said to represent "the common law of Normandy".

Later on in its Judgment the court referred to a further passage from Dalloz which dealt with "verification." This particular passage referred to a provision in the French Civil Code and having cited the passage the Court said:

"of course, that is an actual codification which cannot apply for we must keep ourselves tied to the common law itself."

Thus the Court appears to have disregarded one article of the Code on the ground that it did not represent the common law yet almost immediately followed another, presumably on the ground that it did represent the common law, but without any obvious justification.

A few years later in *Fort Regent -v- Regency Suite*<sup>[41]</sup>, which was another contract case, this time dealing with the question of alleged breaches of covenant in a lease, the Royal Court stated that:

"in the absence of local authority we look for assistance either to French or English law".

The court then went on to consider a number of English cases and passages from Dalloz. The court noted that:

"Mr Fielding (counsel for the Defendant), in the absence of Norman Customary Law, looked to English law. Mr Pallot (counsel for the Plaintiff) was able to argue that he felt there was sufficient in Dalloz to retain us within the French sphere of influence."

Eventually Dalloz prevailed, the Court finding that:

"We are quite satisfied that we can draw sufficient from the French authorities which have been stated time and time again in this Court to be preferred".

If one were to summarise the present position, as demonstrated by the cases referred to above, it would seem that whilst the Royal Court is not averse to looking at English cases when dealing with contract matters it has shown a marked tendency to look across the water to France, albeit that it is receiving modern French authorities without any apparent reference to whether or not such authorities reflect principles of Norman Customary Law which pre-date the French Civil Code. Whilst looking at French law is slightly more justifiable than looking at English, bearing in mind the origins of the Jersey law of contract, to look at the provisions of the French Civil Code in isolation must be highly suspect given the warning sounded by the Court of Appeal in the case of *Foster -v- Attorney General*.<sup>[42]</sup>

Finally, it is worth noting that a practitioner may need to concern himself with authorities from other jurisdictions than England and France. Stephanie Nicolle in "The Origin and Development of Jersey Law" has this to say:-

"As a general rule the customary law of Guernsey will, because of the considerable similarities in origin and development, both Islands being part of insular Normandy, be of the highest persuasive authority unless some reason to the contrary appears, and when the court is dealing with older areas of customary law will supplement and complement local authority, as in Le Cocq -v- Att. Gen.<sup>[43]</sup>, where the Royal Court turned to a Guernsey case to determine the ambit of the role of the Attorney General....."

Because Jersey law has, at any rate during the latter part of its development, assimilated much English law, the courts have been receptive to the case law of other jurisdictions whose legal systems have drawn upon English law."

More recently Richard Southwell Q.C., a judge of the Court of Appeal, drew attention to the relevance of case law from Commonwealth countries whose law derived in whole or in part from English common law –

"... although the influence of English law has been and continues to be profound, the courts of Jersey will undoubtedly wish to examine also developments of the common law elsewhere than in England and Wales so as to ensure that the law of Jersey develops rationally and in a way consonant with the needs of the Island. This can be seen in Maynard<sup>[44]</sup> in Solvalub Ltd -v- Match Investments Ltd<sup>[45]</sup> (declining to follow the House of Lords in The Siskina<sup>[46]</sup>), and the decision of the Bailiff in Knight -v- Thackeray's Ltd.<sup>[47]</sup>. At a time when the common law is being developed so effectively in the leading Commonwealth jurisdictions, to the extent that common law decisions are relevant in Jersey there is an advantage in a wider citation of relevant authorities from those jurisdictions. Such citation has greatly enriched English law, and will in the future equally enrich the law of Jersey."<sup>[48]</sup>

Thus case law from lower Canada [Quebec], (including cases decided by the Privy Council on appeal) may provide guidance in areas of law where Jersey could properly look to French law, because the law of Quebec derived originally from France. The Quebec Act 1774 provided for the continued application of French civil law in matters relating to civil rights and property, and in 1866 Quebec adopted a civil code based upon the French Code Civil.

From the above, it has been seen that in the case of Commonwealth jurisdictions the link is the fact that such jurisdictions and Jersey have both been influenced in the relevant area of law by English law. In the case of former French territories, the link is the fact that such jurisdictions and Jersey have both been influenced in the relevant area of law by French law.

As Stephanie Nicolle points out:

"Where there is no true link between the law of Jersey and the law of a foreign jurisdiction the courts will be unlikely at the present day to seek guidance from the law of that jurisdiction. In *Foster -v- Attorney General* [49] the Court of Appeal was faced with an appeal against a Judgment of the Royal Court where the Royal Court had had regard to the laws of South Africa, Scotland and Canada in determining the ambit of the Jersey offence of fraud, the justification being that Roman law was the common stock of the jurisdictions. The Court of Appeal, though dismissing the appeal on other grounds, rejected this invocation of the law of civilian jurisdictions in matters of criminal law."

In *Vaudin -v- Hamon* [50] an appeal from Guernsey, Lord Wilberforce said:

"If an argument based on analogy is to have any force, it must first be shown that the system of law to which appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter.

While it might be true, in a very general sense, that there is some basic similarity between Roman law, at various periods, the various customary laws applicable in different parts of France, the Civil Napoleonic Code, the law applicable in Jersey and that which governs in Guernsey, this similarity is of a too general and approximate character to be of much assistance in a particular case: it covers, quite clearly, large differences in matters not only of detail but of principle."

#### 9. *Recent judicial comment on sources of law*

A recent approach to the court's use of the various sources of law is illustrated in the case of *Re Estate Father Arthur Hyne Amy* [51]. This case was concerned with a will under the Jersey law of succession, but the following views of the court may well be of general application and may be readily applied to an analysis of the law of contract.

At first instance, M C St J Birt, Deputy Bailiff said:

"It has, on a number of occasions, been said by the Court that, in one context or another, Pothier (for example) is a "surer guide" to discovery of the law of Jersey than is the law of England. What exactly does this mean? In my judgment it does not mean that the Court looks to the relevant text and follows it without more ado. By definition, in such cases, the law of Jersey is silent. The Court therefore has a choice. In the absence of local authority, it must look for guidance elsewhere. In matters, such as succession, where the customary law of Jersey is derived substantially from Norman law, it is natural that the Court should look first to writers on Norman

law and that, in the absence of guidance from the law of Normandy, the Court should look to Pothier and to authorities on French law such as Dalloz. But it is not bound to follow these authorities. The Court's sole duty is to declare the law of Jersey and it must do so for a community of the 21st century. To insist on adopting some rule laid down or derived from principles laid down several centuries ago, if they are clearly inappropriate for modern times would, in my judgment, be an unsatisfactory way of proceeding and is not required by authority."

The Deputy Bailiff continued to say that:

"In my judgment, the use of phrases such as "a surer guide" means simply that there is an inclination or predisposition to follow the source said to be the surer guide. But the Court has a choice as to whether to follow the "surer guide" or whether, in a particular case, not to follow it and adopt principles from some other system of law (usually, in this context, although not necessarily, English law). For example, in the law of contract, Jersey law has chosen to follow principles of Pothier or modern French law in some areas (e.g. cause, penalties) and principles of English law in other areas (e.g. remoteness and measure of damages).

It follows that, in order to enable the Court to undertake its task properly, counsel must, in all those cases where there is a realistic possibility of the Court deriving assistance from both English law and Norman or French law, cite authorities from both."

The approach expounded by the Deputy Bailiff in Re. Amy has the advantage of being pragmatic and flexible. However, this may be at the expense of certainty as to what exactly the law is on any given point. Taken to its logical extreme, the Deputy Bailiff's approach may result in the parties to a dispute being unable to ascertain what the law is (and whether reference may be made on a given point to French, English or other authorities) until the court is asked to decide the point. The Deputy Bailiff's line of reasoning is arguably difficult to justify on jurisprudential grounds, since it must be an essential requirement of an effective legal system that there is certainty as to the law.

The approach expounded by the Deputy Bailiff in Re. Amy may be said to simply be an acknowledgment of what the court has always done. That is to say, it illustrates a flexible approach which allows for the "cherry-picking" of legal principles from Norman, French, English and other sources of law. The cynic may regard this as a device employed by judges for the adoption or rejection of doctrine according to the inclination of the judges to do justice in the particular circumstances of a case.

#### 10. *A case in point: the remedy of "résolution"*

A consideration of the contractual concept of "*résolution*" may be used further to illustrate both the issues discussed above and also the uncertainties that are inherent in seeking to ascertain the Jersey law of contract. "*Résolution*", under French Law, is a remedy by which a contract may be set aside on the ground of non-performance. The question of whether the general principles of "*résolution*" under French Law should be applied in Jersey has been the subject of recent academic debate <sup>[52]</sup>. The issue that is central to the debate is that, under French law, a creditor must normally apply to the court for an order

resolving the contract, and he may not (unlike "rescission" under English law) simply treat the debtor's breach as discharging the contract. Under French law, the decision as to whether the contract should be rescinded is at the discretion of the court.

In the Jersey case of Hotel de France -v- Chartered Institute of Bankers <sup>[53]</sup> the court referred to Nicholas on "The French Law of Contract" and appeared to imply that under Jersey law a party must apply to the Royal Court for an order to rescind a contract for non-performance, save in exceptional circumstances.

In an article in the Jersey Law Review, Advocate T J Le Cocq argued that there is no such requirement (with the exception of contracts relating to land and leases) to commence proceedings before the Royal Court to cancel a contract for non-performance or fundamental breach:

"There appear to be no examples contained in the Jersey Law Reports or in the *Table des Décisions* of cases in which the Royal Court has been asked to rescind a contract (other than a lease) or in some other way has been asked by a plaintiff to declare that he is no longer bound by the terms of such a contract. [...] It is submitted that it is highly suggestive that neither the judiciary nor the legal profession in Jersey has believed since 1885 that there was a requirement to apply to court to be released from a contract where the other party had failed to perform [...] Not only are there no examples of the court being asked to cancel a contract for non-performance by one of the parties but, indeed, there is clear indication that the Royal Court has proceeded on the basis that Jersey law tends to follow English legal principles when considering the circumstances and manner in which a contract may be rescinded for want of performance by one party to it."

The article refers to several local cases in support of this view (Hanby -v- Moss, United Dominions -v Le Comte, New Guarantee -v- Birbeck, and R. H. Edwards -v- Tretol Paint Systems). The author submits that Jersey law deals with the termination of a contract (other than a contracts relating to land or leases) on the basis of English principles, and he concludes that:

"The importance of a cogent, modern and efficient contractual context for Jersey cannot be over emphasised. It would seem to be unnecessarily burdensome on the courts of our small jurisdiction to raise the spectre of a French practice when we appear to have done pretty well applying the more English method."

In a subsequent article in the Jersey Law Review, Advocate J Kelleher wrote, with regard to the local cases to which Advocate Le Cocq referred in support of his view that English principles are applicable, that:

"[N]o reference to Pothier or other French authority appears to have been placed before the Court in these cases. And here is the catch. How can it be that decisions of the Court where the appropriate authorities were not considered, let alone referred, are to be considered as authority for the Jersey law on the subject matter concerned."



With regard to Advocate Le Cocq's opinion that Jersey law has developed in such a way that it deals with the termination of contracts (excluding contracts for land or leases) on the basis of English principles, Advocate Kelleher argued that:

"If this were so, it would lead to an odd result: contracts are created following French principles [i.e. as per Selby -v- Romeril <sup>[54]</sup>, see above] but are terminated following English principles; a recipe for confusion if ever there was one. More importantly however, is not the reality that for one reason or another, the Court's decisions are flawed: flawed because they rely on no relevant authority; because the proper sources were not put before them; and because ultimately the legal reasoning (such as there is) places pragmatism ahead of consistency with Jersey contract law roots?"

Advocate Kelleher concluded on a general note as follows:

"Ultimately, the argument as to reliance upon the English law of contract rather than the French law of obligations rests on a legitimate concern to ensure consistency and a uniform approach, coupled with a desire not to embarrass a small jurisdiction keen to show its calibre to the outside world. However, in my submission the real cause for concern is the attempts to adopt English contract law on an *ad hoc* basis. It may be that an English speaking Island whose courts are peopled with lawyers and judges trained in England would, ultimately, be better served by following the English law of contract. But, that is a debate for another day and, ultimately, a question for the legislature."

The most recent judicial comment made by the Royal Court with regard to the question of "*résolution*" is to be found in R A Rossborough (Insurance Brokers) Ltd -v- Boon & Aziz <sup>[55]</sup> where M C St J Birt, Deputy Bailiff said:

"To insist that, however serious the breach by the other party, a party to a contract cannot treat the contract as being at an end so that he is relieved of his obligation to continue to perform his side of the bargain, but has to go to Court to seek a discretionary decision as to whether the contract should in fact be ended, would seem to be very undesirable. It would mean that the innocent party would not know where he stood until a decision by the Court some months or even years later. We must emphasise that we have not heard any argument on this matter but our initial reaction is that we would be reluctant to find that the law of Jersey was to such effect unless there were binding precedent to that effect. The Court should develop the law of contract in accordance with the requirements of a modern society insofar as it is open for it to do so. The French approach would appear to leave all the parties in a state of complete uncertainty."

From the above, it has been seen that a consideration of the contractual principle of "*résolution*" clearly illustrates the dichotomy between an approach which holds the Norman French roots of Jersey law as sacred, as compared with a more modern, pragmatic approach which does not hesitate to refer to the laws of other jurisdictions, principally the law of England.

The debate on the proper sources of the law of contract may be further illuminated by a comparison with the position in Jersey regarding the law of tort.

Under English law, the law of tort provides that a liability arises from the breach of a duty towards persons generally which is fixed by the law. A breach of such a duty (e.g. by reason of negligence, nuisance or trespass to the person) is redressible by damages.

With regard to the influence of English law on the law of tort in Jersey, Stéphanie Nicolle, in her book "The Origin and Development of Jersey Law" (1999), observes that:

"Though English influence may have come late to the law of tort [in Jersey], when it came it came in an overpowering wave."

In Watson -v- Priddy<sup>[56]</sup>, the Court cited the definition of a "tort" from an English authority. The Plaintiff had argued that the court should apply the wider Norman conception of a "tort", but the court held that the definition of "tort" from the English authority equally applied to a tort in Jersey. In Arya Holdings -v- Minorities Finance<sup>[57]</sup> the Royal Court acknowledged that over time Jersey law has moved ever closer to the English concept of tort, and that from the 1970's, the English concept of tort governs Jersey legal thinking, although on an appeal in the same proceedings the Court of Appeal stressed that there were nevertheless differences between the two concepts.

With regard to the direct influence of English law in matters of tort in Jersey, Miss Nicolle further observes that:

"By and large this creates no particular problems. It does however run into conceptual difficulties in that area of law where neighbouring property owners dispute over an alleged injury which in the English system is classified as a tort (whether negligence, nuisance or trespass to property), but in Jersey sits more comfortably as part of that area relating to property law known as *voisinage* which deals with reciprocal rights and obligations of neighbouring property owners.

In Searley -v- Dawson<sup>[58]</sup> a case concerned with the right of support owed by neighbouring properties to each other, the Royal Court considered the English principles of negligence before giving it up as a bad job and falling back gratefully onto the familiar authority of Domat and Pothier."

However, it would appear that despite such conceptual difficulties where tort overlaps with property law, the law of tort in Jersey is almost exclusively determined by reference to English law authorities. Jersey lawyers will readily look to English cases on tort (except where such cases are based on English statute). The most notable example is in the field of personal injury law, where local practitioners and the courts frequently make reference to English authorities on negligence and the quantum of damages.

For the purpose of the present analysis of the law of contract, it is arguable that if the adoption many years ago of a system of tort based upon and guided by the principles of English common law has proved to be effective, then perhaps such an adoption of English law principles could work as effectively in the field of the Jersey law of contract.

12. *Summary of present difficulties in ascertaining the law of contract*

(i) **Accessibility of Norman texts**

For a legal system to function efficiently, the law must be readily accessible, both to lawyers and, indeed, to the layman. Although reports of Jersey cases are widely available, access to the early Norman texts is restricted to a small collection housed in the public library, a small collection held in the library of the Jersey Law Society and a small number held privately by local practitioners. There are no modern text books on Norman customary law. Similarly, the works of Pothier are in short supply, albeit that there are a few facsimile editions of English translations of his work extant. This situation can be contrasted with that in relation to works on the English law of contract which are readily available.

(ii) **Language**

Apart from the translations to which we have referred in the preceding paragraph, works on Norman customary law and on more modern French law are almost exclusively written in the French language. Despite the Island's proximity to the coast of France, very few Islanders are fluent in French and in the twenty-first century it may be difficult to justify a legal system where the laws are written in a language which is alien to the majority of the population. In addition, the educational system in the Island is English-based, both in terms of language and content.

(iii) **The Difficulty of Applying Ancient Concepts**

If one is to have regard to the Jersey Law of Contract in its purest form and to accept that the primary source material, in the absence of decided Jersey cases, lies in the ancient customary law of Normandy, there may well be difficulties in applying such law to modern commercial transactions. Where the law of contract overlaps other areas of the law, for example in relation to the law of trusts, there is the added difficulty that one is applying principles of the law of contract which derive from a jurisdiction to which the trust was totally unfamiliar. Whilst adherence to the roots of Jersey's law of contract may well be one of those things which serves to give Jersey a distinct identity, it is arguable that if Jersey is to maintain its reputation as a sophisticated finance centre it should be able to demonstrate that its law of contract is comprehensible, accessible and fully adapted to modern commercial transactions.

(iv) **Uncertainty**

It is fundamental to any legal system that the law should, so far as is practicable, be applied consistently. An examination of the cases referred to earlier in this consultation paper suggests

that in relation to the law of contract the legal system to which the court will look depends to a large extent on the identity of the judges sitting on a particular case and of the counsel appearing before them. Those who have an affinity with Norman concepts are likely to reject any reliance on English contractual principles whilst those who feel less comfortable with Norman concepts seem willing to reject them in favour of the application of English law.

(v) **A legal system for the modern world of commerce?**

Critics of the Island's legal system suggest that it has failed to keep pace with the significant changes in the Island's business.

Some might argue that Jersey's system of referring to comparable systems where Jersey law is silent, is at the least, confusing. For example, Jersey will look towards English law for guidance in company and criminal matters yet will look to Normandy for contract law issues. What is to be done where these areas of law overlap? Although it might be appreciated that contract law reflects the origins of Jersey law it could be argued that there is no significant reason why it should have developed separately from criminal and company law. In an island predominantly inhabited by British nationals it begs the question as to why contract law continues to lean towards French law and, on occasions, modern French law at that.

It is further arguable that if a legal system is to serve the interests of society it must develop with the changing needs of the society but must nevertheless retain a significant degree of certainty. The Royal Court has seemingly failed to provide that certainty.

As one author has said:

"It is clear ... that in the area of contract as in many other areas of Jersey law, the Royal Court has simply "cherry picked" elements from both the English and the French legal systems without laying down or following any consistent guidelines with regard to the sources of law to which the Courts will have regard. Although this approach may have advantages in terms of flexibility, it has resulted in a degree of uncertainty and confusion which cannot but prejudice the interests of litigants before the Jersey courts and which reflects poorly upon our legal system as a whole."<sup>[59]</sup>

Although it is apparent that Jersey does have a wealth of authority and material to draw upon when debating contractual issues, the texts are not necessarily accessible to the average lay person or even to many practitioners.

Whilst it may not necessarily be fair to say that the legal system has failed to keep pace with changing times, there are many reasons why the Jersey law of contract should be made more accessible and perhaps updated.

In one view:-

"the material is there for the taking and for developing it into local jurisprudence. Modern French writers on the code civil are accessible and readily comprehensible. Provided a suitable linkage with Pothier can be traced and it is clear that no statute has interposed to change the '*ius commune*' on the point, an answer to most legal questions is attainable. If Jersey is to hold itself out as a jurisdiction with the appropriate degree of *gravitas* it is beholden on the profession and the Royal Court to establish a sound body of contract law to provide for certainty"<sup>[60]</sup>

### **PART III - Proposals**

13.

#### **(i) Codification**

One solution to the present unsatisfactory state of affairs would be a codification of Jersey contract law.

Given the varying sources used by the Jersey courts in contract cases, the task of identifying particular legal principles is likely to be difficult and time-consuming. Nevertheless, it is certainly not impossible.

Given the Royal Court's predilection to "cherry-picking", codification could refer to the laws of England or France. An interesting model based on English law is to be found in the Indian Contract Act 1872 which appears to be a codification of the then English law of contract. An example based on French law is to be found in the Quebec Civil Code of 1866 based as it was on the French Civil Code. The difficulty of a codification which purports to be a codification of the existing Jersey law of contract is how the courts will deal with cases which do not fall precisely within the terms of the code. Will "filling in the gaps" result in the mixing of legal principles which we are seeking to avoid? A choice would still have to be made as to whether the Jersey law of contract is to lean towards the law of England or France.

#### **ii) Incorporation of English law by statute**

An alternative solution would be to adopt, by statute, the present English common law relating to contract. It is worth noting that in the 1580's a Guernsey work was produced known as the "Approbation des loix" which went through the Ancienne Coutume article by article, approving, qualifying or rejecting its provisions in accordance with the practice in Guernsey. This work was ratified by Order in Council of 27<sup>th</sup> October 1583. There is therefore an ancient precedent for a statute which appears to be part code, part incorporation by reference.

It seems to us that the statutory adoption of the English common law of contract need not be particularly problematic: the Jersey courts have not experienced much difficulty in adopting the English law of tort to the extent that it has not been modified by statute. It may also be possible to retain those aspects of the existing Jersey law of contract which are regarded as useful (for example, the concept of "cause" rather than "consideration").

iii) **A greater degree of consistency**

Finally, the Jersey courts could perhaps be more consistent and true to the origins of Jersey contract law. Past performance casts doubt on the effectiveness of such a solution, particularly given that the vast majority of Jersey lawyers are now trained in England and that the Court of Appeal comprises principally English QC's.

iv) **Conclusion**

Whilst the various possible solutions have their own benefits and disadvantages there is a perception that any move towards English law would be a loss of yet another aspect of the Island's unique heritage. Against that point of view it can be pointed out that the courts, in their use of English authorities, have done little to safeguard that heritage. In addition, there are many who are attracted to doing business in or through the Island because of the perceived "Englishness" of its law. A move towards French law, whether ancient or modern, may well be disadvantageous given that the main legal systems used nowadays in international trade are those of England and New York. Indeed, as Hoffman J.A. pointed out in *Re Barker*:

"I am conscious of the pride which the legal profession in this Island takes in its unique legal system but such pride can only be justified if the legal institutions are sufficiently adaptable to enable the Court to do justice according to the notions of our own time. The Court should not be left with the uneasy feeling that in following the old authorities, it might have perpetrated an injustice upon one of the litigants". [\[61\]](#)

There is no obvious answer to resolving the problem that we have identified. On balance, we presently favour the incorporation of English law by statute on the basis of the relative speed by which it could be carried out, its lack of a negative effect in terms of the Island's suitability for doing business and the fact that it probably reflects the impression, albeit mistaken, that the majority of islanders have of the basis of the Jersey law of contract.

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Responses to this Consultation Paper should be made in writing, by 31<sup>st</sup> December 2002, to:

The Jersey Law Commission  
PO Box 87  
St Helier

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- [1] See J Kelleher, "The sources of Jersey Contract law" 3 Jersey Law Review (1999) 1
- [2] (1996) JLR 343
- [3] See Robinson, Fergus and Gordon's "European Legal History"
- [4] J Kelleher, "The Sources of Jersey Contract Law" 3 Jersey Law Review (1999) 1
- [5] J Kelleher, "The Sources of Contract Law" 3 Jersey Law Review (1999) 1
- [6] (1981) JJ 59 and (1983) JJ 105
- [7] (1996) JLR 210
- [8] (1981) JJ 59
- [9] J Kelleher, "The Sources of Jersey Contract Law" 3 Jersey Law Review (1999) 1
- [10] (1950) JJ 5
- [11] (1964) JJ 387
- [12] (1965) JJ 429
- [13] (1965) JJ 455
- [14] (1967) JJ 721
- [15] (1967) JJ 745
- [16] (1969) JJ 1243
- [17] (1976) JJ 415
- [18] (1977) JJ 111
- [19] (1978) JJ 39
- [20] 1989 JLR 312
- [21] 1990 JLR 228
- [22] 1991 JLR 197
- [23] (24<sup>th</sup> March 1992) Jersey Unreported
- [24] (1996) Unrep 236
- [25] Thornton - v - Robin (1837) 1 Moo 439 at 450
- [26] (1970) JJ 1487
- [27] (1971) JJ 1915
- [28] (1960) JJ 1123

- [29] S Nicolle QC, "The Origin and Development of Jersey Law" at paragraph 15.17
- [30] (1972) JJ 2009
- [31] (1964) JJ 387
- [32] (1965) JJ 455
- [33] (1969) JJ 1123
- [34] (1970) JJ 1487
- [35] (1971) JJ 1915
- [36] (1972) JJ 2009
- [37] (1972) JJ 2127
- [38] (1982) Unrep 1
- [39] (1981) JJ 59 and (1983) JJ 105
- [40] (1985-86) JLR 366
- [41] 1990 JLR 228
- [42] 1992 JLR 6
- [43] 1991 JLR 169 at 195
- [44] 1996 JLR 343
- [45] 1996 JLR 361
- [46] (1979) AC 210
- [47] 1997 JLR 279
- [48] Southwell, "A note on the sources of Jersey Law" [1999] 3 Jersey Law Review 213 at 215.
- [49] 1992 JLR 6
- [50] [1974] A.C. at 581-582
- [51] (2000) Unreported 57
- [52] See Jersey Law Review (2000) Vol 4(2) at 151, and Vol 4(3) at 266.
- [53] (21 December 1995) Unreported
- [54] (1996) JLR 210
- [55] (2001) Unrep 157
- [56] (1977) JJ 145
- [57] (1995) JLR 208 (R.C.); 1997 JLR 176 (C.A.)
- [58] (1971) JJ 1687
- [59] J Kelleher, 3 Jersey Law Review (1999) 1
- [60] J Kelleher, 3 Jersey Law Review (1999) 1
- [61] (1985-86) J.L.R. 186 at 195