THE BANKING LITIGATION LAW REVIEW

Editor
Christa Band

THE LAWREVIEWS

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Chapter 11

JERSEY

Stephen Alexander and Jonathan Speck[1]

I INTRODUCTION

Over the past 50 years, Jersey has developed into a leading international finance centre. Sectors of the industry include banking, collective investment funds, private equity, and trust and company administration, as well as associated legal, accountancy and other professional services. As of 2015, there were 32 banks registered in Jersey (representing a third of the top 25 banks in the world by tier 1 capital) holding a total of £126.5 billion in sterling and non-sterling deposits. The total value of collective investment funds administered from Jersey was £226 billion. In addition, private equity funds, companies, trusts and other vehicles administered in Jersey hold substantial assets.

Banks, and other financial services providers, are regulated by the Jersey Financial Services Commission (JFSC). The standard of regulation in Jersey has been endorsed by the International Monetary Fund (IMF) and other international agencies. Jersey achieved a top-tier ranking by the IMF in 2009 (higher than the UK or the US) and has been on the Organisation for Economic Co-operation and Development (OECD)/G20 'white list' since 2002. To date, Jersey has signed tax information exchange agreements (TIEAs) with 31 other countries. In 2013, Jersey signed an agreement with the US to implement its Foreign Account Tax Compliance Act. In the same year, Jersey also signed an inter-governmental agreement with the UK for similar exchange of information and, in relation to the UK and other participating jurisdictions, has moved from this to automatic reporting of financial account information under the Common Reporting Standard established by the OECD.

Banking-related legal services in Jersey are required in two broad contexts. The first concerns the establishment, regulation and operation of banks licensed to conduct deposit-taking business in, or from within, Jersey. This includes such matters as lending and security arrangements entered into by such banks, relations with customers, obligations of confidentiality, group restructuring and the position where funds held by a bank in Jersey are subject to an injunction or a disclosure order made by the Jersey court or pursuant to legislation, such as that which applies where Jersey has entered into a TIEA. The second context concerns lending and security arrangements entered into by banks outside Jersey where a Jersey entity is the borrower or giver of security, or where security is taken over assets that are legally situated in Jersey, such as shares in Jersey companies or a deposit account in a Jersey bank. Litigation in the Jersey courts can arise in both these contexts. Section II, *supra* highlights some recent developments that are relevant to banking litigation, and litigation generally, in Jersey.

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II PROCEDURAL ISSUES

Jersey civil procedure, to a large extent, follows English civil procedure. The rules that govern the conduct of civil litigation in Jersey, the Royal Court Rules 2004 (as amended) (RCR) draw heavily from the English Supreme Court Practice (subsequently replaced in England by the Civil Procedure Rules of April 1999). However, there are certain distinctions that make Jersey civil procedure particular in itself. A summary of the Jersey procedural rules that, from time to time, give rise to specific issues in litigation is set out below.

i Commencing proceedings

Proceedings in Jersey are commenced by summons, order of justice or representation.

A summons is used in straightforward actions, such as the recovery of liquidated debts (where the details of the claim are likely to be brief). More complicated claims are dealt with by way of an order of justice (which can both institute proceedings and include injunctions, where sought and ordered). Representations are generally used where no specific cause of action is pleaded, to seek the court's direction or order on a particular state of affairs, rather than a specific remedy against a particular defendant party.[2]

The procedure for the future case management of the proceedings is dependent, in part, on which of these originating processes is used. Most banking litigation proceedings will be commenced by way of order of justice.

ii Parties cited

Banks often appear in Jersey litigation as 'parties cited' (particularly in the context of injunction proceedings). Parties cited are 'neutral' defendants who are joined to an action to ensure that they are bound by the terms of any resulting order, but against whom the plaintiff may have no direct cause of action or complaint.

This is often the case, for example, where a plaintiff seeks a freezing order over assets that are held by a bank for a defendant customer. In such circumstances, it is normal (and often desirable for the bank) that the bank be joined as a party to the proceedings so that it is directly bound by the court's order (and not called to exercise any discretion). As a party cited, the bank will usually not be subject to the same directions as the principal defendant, and can therefore take a more passive approach to the matter, without becoming involved in the dispute between the plaintiff and the defendant. Parties cited will usually be entitled to their costs.

iii Service

Service on parties in Jersey (or on representatives in Jersey authorised to accept service on their behalf) is effected by either ordinary or personal service.[3] Ordinary service can be effected by the serving party itself by posting or faxing[4] the relevant document to, or leaving it at,

2 For example, directions proceedings brought by trustees or beneficiaries under Article 51 of the Trusts (Jersey) Law 1984 or the Companies (Jersey) Law 1991.

3 It is also possible to apply to the court for substituted service (eg, by email) where necessary.

4 Amendments to the RCR, which came into effect on 1 June 2017, make express provision for service by way of email.

the proper address.[5] Where personal service is required,[6] service must be effected through the Viscount's department. The Viscount's department is a public office that performs a number of functions for the court, including service of legal process. Personal service can only be validly executed through the Viscount's department.

Where the party to be served is outside Jersey, the leave of the court must be obtained before service can be validly effected. An application must be made (and this additional step should be kept in mind where applicable) showing, *inter alia*, that there is a good, arguable case; there is good reason to subject the overseas defendant to the jurisdiction of the Jersey court; and Jersey is the appropriate forum for the proceedings. The court will often deal with such applications on the papers alone.

iv Prescription

The defence of 'prescription' operates in a similar manner in Jersey to the defence of 'limitation' in England and elsewhere. Its precise nature and effect is a matter of debate,[7] but ultimately if a claim is prescribed, it cannot be successfully prosecuted.

Prescription starts to run as soon as the cause of action is complete, but can in certain circumstances be suspended by impediment of law or fact. As long as an impediment is operative, prescription will be suspended. As in other jurisdictions, the relevant prescription periods vary in respect of different causes of action; accordingly, plaintiffs must be careful to identify which applies in each case. In the context of banking litigation, relevant prescription periods are likely to be 10 years for a breach of contract and three years for a claim in negligence.

v Appeals

In civil matters in Jersey, certain judicial functions can be exercised by the Judicial Greffier and his department (the Greffe), who are subordinate officers of the court who formally provide administrative support to the court. The Greffier and his delegate the Master, do, however, have jurisdiction to hear various preliminary and interlocutory matters (e.g., issues relating to directions and case management, as well as more substantive applications such as those for general and specific discovery) and are therefore, in practice, heavily involved in matters before trial.

Accordingly, appeals from decisions of the Master are not uncommon. The RCR[8] allow appeals from a decision of the Master to the Royal Court[9] as of right. The approach the Royal Court may take in considering such appeals is not codified. In practice, the Royal Court will have due regard of the Master's expertise in interlocutory matters, but retains unfettered discretion to consider the matter as it sees fit.

5 What constitutes the proper address is prescribed by the RCR.

6 This is set out in the RCR.

7 There is some authority that prescription serves as a procedural bar to the bringing of a claim, even though the existence of the underlying cause of action may be unaffected. Other commentary suggests, however, that prescription operates more substantively to extinguish the underlying cause of action.

8 See RCR 20/2.

9 Such appeals must be made by summons appending a notice of appeal setting out the grounds of appeal and the relief sought.

There is generally an automatic right of appeal of final orders of the Royal Court to the Jersey Court of Appeal (which is entitled to hear the matters appealed *de novo*). In those limited cases where the right of appeal is not automatic,[10] the appellant must apply for permission to appeal.

The ultimate appellate court for Jersey is the Privy Council. An appeal of a decision of the Court of Appeal can only be made with leave from either the Court of Appeal, or the Privy Council itself. Leave will only be granted in exceptional cases, usually involving matters of public importance.

III PRIVILEGE AND DISCLOSURE

The principles of privilege applied in Jersey closely follow those of England. As in England, a distinction is drawn between legal advice privilege (which generally applies to confidential communications between lawyer and client with the principal purpose of communicating legal advice) and litigation privilege (which generally applies to confidential communications between lawyer and client, and third parties that post-date the institution or contemplation of litigation, and that have the principal purpose of obtaining legal advice or gathering information for such litigation[11]). Joint and common interest privilege are also recognised and applied in Jersey, as are the circumstances identified in English law in which privilege can be deemed to have been waived.

In Jersey, banks also owe a robust duty of confidentiality to their customers. This militates against the disclosure of any confidential customer information to third parties. While not enshrined in legislation, this duty (and limited exceptions to it) has developed through case law, founded on the principles and derogations that were identified and set out in the English case of *Tournier v. National Provincial and Union Bank of England*.[12] Banks are accordingly under a strict duty to preserve the confidentiality of their customers' information unless they are compelled otherwise by law, disclosure is necessary for the protection of the public or to protect the bank's own interests, or the customer has given his or her consent to disclosure.

Conflict can occur (and litigation can therefore be in prospect) where banks are compelled to disclose customer information against the customer's express wishes. While the authorities in Jersey have various statutory information-gathering powers in the context of criminal investigations (which are generally difficult to resist), the proliferation of tax information exchange agreements (which, by mid-2017, are likely to be in force with 39 countries), and the refinement of the legislation that gives effect to them (the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 (the Regulations)), has also given rise to an increased number of notices being issued to banks (and other financial services providers) by the Jersey Comptroller of Taxes requiring disclosure of confidential customer information pertinent to civil (and criminal) tax investigations being conducted in other jurisdictions.

10 As set out in Article 13 of the Court of Appeal (Jersey) Law 1961.

11 A notable recent case in Jersey in this regard is *Smith v. SWM Limited* [2017] JRC026, in which the court held that a report the defendant was ordered to obtain by its regulator (as part of separate but related regulatory action being taken against the defendant) was not covered by litigation privilege, since the 'dominant purpose' test was not met (the dominant purpose of the exercise by the regulator of its regulatory powers was not the obtaining of legal advice or the conduct of litigation).

12 [1924] 1KB 461.

Historically, the scope for challenging notices issued under the Regulations was relatively broad, but this narrowed further to amendments to the Regulations in 2013. Any appeal of a notice must now be by way of judicial review, on an accelerated timescale, and without disclosure to the appellant of the underlying request for information made by the overseas authority to the Comptroller of Taxes. Even where an appeal is made, disclosure must still be made to the Comptroller within the deadlines of the notice; the Comptroller will then hold the information pending the outcome of the appeal.

The Regulations do not, however, oblige the disclosure of any information that is subject to legal professional privilege (as with disclosures required further to data subject access requests under the data protection legislation). This not only protects communications over which the bank itself is able to claim privilege, but also communications the bank may hold over that the customer is able to claim privilege (but the bank is not).

IV LEGISLATION

Jersey is recognised as being one of the best regulated financial centres in the world, a position underpinned by a sophisticated, secured creditor-friendly statutory framework. In the context of banking, this statutory framework addresses, among other things, the licensing and supervision of banks and other financial services businesses, the protection of secured creditor interests, and confidentiality and disclosure of banking information.

i Banking Business (Jersey) Law 1991

All banks in Jersey are licensed and supervised under the Banking Business (Jersey) Law 1991 (the 1991 Law). A bank, as a deposit-taking business, must be registered under the 1991 Law with the JFSC. The JFSC can refuse or revoke an application for registration, and has the power to make an application to the Royal Court under the 1991 Law for orders that a registered person be subject to the supervision of the JFSC if the registered person is not deemed fit and proper to carry on a deposit-taking business. The JFSC also has other powers to investigate banks or deposit-taking businesses under the 1991 Law.

The JFSC publishes a detailed Code of Practice for Deposit-taking Business (the Banking Code) in accordance with the powers given to it under the 1991 Law. The Banking Code covers, among other things, conduct of business, corporate governance, financial resources and the effective risk management of all activities conducted by a registered person. It is a criminal offence under the 1991 Law to provide false or misleading information to the JFSC, or to fraudulently induce someone into making a deposit.

Save in certain defined circumstances, Article 41 of the 1991 Law prevents the regulator from disclosing information relating to the business of a customer which has been acquired for the purposes of the 1991 Law. This restriction also extends to the affairs of the bank. In the case of *Mayo Associates SA v. Finance & Econ Cttee* (Royal Court) 1995 JLR 333 the representor sought an order for discovery in judicial review proceedings against the respondent. The court rejected the contention that the provisions of the 1991 Law were intended to protect only customers and not a bank and found therefore that a bank should not suffer a disclosure disadvantage merely by virtue of being a bank, albeit that it is open to an any party to waive any advantage from which it may otherwise benefit.

ii Security Interests (Jersey) Law 2012

The Security Interests (Jersey) Law 2012 (the 2012 Law), as amended, is a major development of the Jersey law of security interests, which came into force on 1 October 2013. The 2012 Law replaces the Security Interests (Jersey) Law 1983 (the 1983 Law) and provides Jersey with a new, modern security interests regime.[13]

The 2012 Law is modelled on the Personal Property Security Acts of New Zealand and certain Canadian states. The well-established jurisprudence in these jurisdictions allows the courts and practitioners in Jersey to look to existing modern practice and precedent in those jurisdictions for guidance.

Since its introduction, the 2012 Law has succeeded in enhancing Jersey's attractiveness as a jurisdiction in which to undertake secured lending, through the adoption of a clear and comprehensive regime for the creation and enforcement of security interests.

iii Bankers Books Evidence (Jersey) Law 1986

The ability to obtain banking records is often important in litigation in a large financial centre such as Jersey. The Bankers Books Evidence (Jersey) Law 1986 establishes a well-recognised regime for the Royal Court to make an order for the inspection and copying of a bank's records to assist litigants, where appropriate. When considering an application, the Royal Court will weigh the interests of maintaining confidentiality in banking matters against the public interest in achieving justice. Disclosure of bank information may also be made under the *Norwich Pharmacal* jurisdiction, as set out in Section V.iii, *infra*.

V FREQUENT CAUSES OF ACTION AND PROCEDURAL APPLICATIONS

i Negligence

Litigation in Jersey sometimes arises in the context of alleged negligent conduct by a bank in dealing with payment instructions.

The standard of care owed by a bank is to act on payment instructions unless a reasonable and prudent banker would consider that there is a serious or real possibility (not necessarily a probability) that the customer is being defrauded. The standing of the customer, the bank's knowledge of the signatory, the amount of money involved, the need for a prompt transfer, the presence of unusual features, and the scope and means for making inquiries might also be relevant in determining whether a bank has fallen below the standard of care owed to its customer. The facts of *Izodia Plc v. Royal Bank of Scotland International Limited* were that a Jersey based holding company had taken control of a 29.9pc stake in an AIM listed company (Izodia), the latter being a shell company casualty of the dotcom boom left with no business but £40 million cash. Nominee directors were swiftly appointed and £27.3 million was transferred from the AIM company to a new offshore account. The money was then transferred into yet another account by the controlling mind of the Jersey holding company. Izodia came to the court to seek recovery of the money initially stolen from its account from

13 However, the 1983 Law has not been repealed and it continues to apply to certain security agreements, principally, those entered into while it was in force.

the bank with whom the deposit was held. The court took the stance that it should avoid using hindsight to find that, in complying with a payment instruction, the bank had failed to exercise the skill and care of a reasonably competent bank.[14]

The court found that a bank's primary obligation is to honour the customer's payment instructions in accordance with the mandate on instructions. Caution needs to be applied where the authorised signatories on a mandate seek to delegate authority to a third party. Authorised signatories are not authorised to delegate authority to a third party to authorise payment instructions without express or implied authority to do so. Very clear wording is required in order for authorised signatories to designate other persons as additional signatories. In the instant case, the court found that the bank did not act in accordance with its mandate and that there was no actual authority for the transfers.

ii Injunctions

In leading financial centres such as Jersey, litigants will often wish to obtain the assistance of the court to prevent a defendant debtor removing assets from the jurisdiction for the purposes of evading eventual enforcement of the debt. Such assistance will often take the form of an application for a freezing injunction.

An application for an injunction is usually made by the plaintiff filing an order of justice containing an injunction signed by the bailiff. However, the granting of an injunction is discretionary and the bailiff has absolute discretion when signing an order of justice as to whether or not to grant an immediate interim injunction. There are no fixed rules as to when an injunction should be granted. When considering whether to grant an interlocutory or interim injunction, the factors to be considered by the court are those that were endorsed in England by the House of Lords in *American Cyanamid Co v. Ethicon Ltd*.[15] The principles are: (1) whether there is a serious issue to be tried; (2) whether damages would be an adequate remedy; and (3) where the balance of convenience falls.

The court has inherent jurisdiction to grant an injunction in all cases where it appears just and convenient to do so, whether unconditionally or with conditions as it thinks just. Modern cases are apt to describe this inherent jurisdiction as being at least as wide as that of the High Court in England and adopt, apply and in some cases adapt the principles for the grant of injunctions as developed by the English courts.

More recent authority in the Court of Appeal and Royal Court takes the view, largely on grounds of policy, that the Royal Court has jurisdiction to grant an injunction where the substantive rights in question are the subject of litigation elsewhere and the only link to Jersey is the presence of assets on the island.

All applicants for an injunction have a duty of candour to bring to the attention of the court all facts bearing on the decision to grant the injunction; this is particularly pertinent

14 *Izodia PLC v. Royal Bank of Scotland International Limited* [2006] JLR 346. The case further stated that 'a failure to act promptly upon a customer's instructions may often lead to difficulties or embarrassment for that customer and for the bank. The basis of the relationship is one of trust, not mistrust. The fact that, after a careful and painstaking analysis with the benefit of hindsight, it can be seen that an erroneous decision was taken by a bank does not mean that the bank acted negligently in making that decision during the course of a busy day.'

15 [1975] AC 396.

where the application is made *ex parte*. Failure to comply with the duty of candour may be sufficient of itself to discharge the injunction even where there are good grounds for that injunction.

Failure to comply strictly with the terms of an injunction is a serious contempt of court to be treated accordingly.

iii Disclosure orders

Common applications regarding disclosure of information held by banks are for *Norwich Pharmacal* relief or *Bankers Trust* orders.

The *Norwich Pharmacal* jurisdiction enables the court to make orders that require a person who is not party to an action to provide discovery to assist a plaintiff or potential plaintiff to formulate his or her action. Such orders can be made when it is necessary to do justice, whether of a third party to an action or potential action, or a person who is a potential party to an action not yet instituted. Jersey has followed English law in this area, based on the principles in the *Norwich Pharmacal* case.[16]

Bankers Trust orders are a type of disclosure order that require a bank to provide customer information to enable defrauded parties to trace funds through bank accounts. Jersey has again followed English law in this area, based on the principles in the Bankers Trust case.[17] The Bankers Trust principles have been applied in a number of Jersey decisions, in particular to order the provision of information to assist in tracing actions.[18]

The Jersey treatment of the *Bankers Trust* and *Norwich Pharmacal* cases arises from the same underlying principle; namely, to grant such discovery only when it is necessary to prevent a denial of justice to the applicant. The courts have made it clear that applications for *Bankers Trust* and *Norwich Pharmacal* relief will not be granted lightly.

VI ENFORCEMENT OF FOREIGN JUDGMENTS

Given the number of asset-holding vehicles in Jersey, and the value of those assets, it is perhaps not surprising that judgment creditors who have obtained judgment from a court outside Jersey may wish to enforce over assets situated in Jersey. Depending on the foreign court concerned, foreign judgments may be enforced in Jersey in one of two ways: either under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (the 1960 Law) or at common law.

16 *Norwich Pharmacal Co v. Customs & Excise Commrs* [1974] AC 133.

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

18 In *IBL Ltd and another v. Planet Financial and Legal Services Ltd and another* [1990] JLR 294 in which judgment, with regard to the protection of the privacy and confidentiality of financial information the court summarised as follows 'confidentiality depends upon legitimate private business affairs being properly conducted'; in *Grupo Torras SA and another v. Royal Bank of Scotland plc and others* [1994] JLR 41, the defendant bank was ordered to assist the plaintiffs by providing full information regarding the dealings which were subject of the litigation; and in *Macdoel Investments Ltd and others v. Federal Republic of Brazil and others* [2007] JLR 201, wherein the Court of Appeal found that the Royal Court had not erred in ordering that the plaintiff companies' banks disclose information and documents concerning the companies' accounts as it had been satisfied that the banks had innocently become mixed up in and facilitated fraud.

i Registration and enforcement under the 1960 Law

Enforcement under the 1960 Law is by way of registration, and is the more streamlined procedure, but it applies only to the judgments of the 'superior courts' of England and Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey.

The 1960 Law is based on (albeit not identical to) the UK Foreign Judgments (Reciprocal Enforcement) Act 1933. It is only available for the enforcement of judgments for a sum of money and *in rem* judgments (though the latter are rarely encountered in this context). This procedure is not, therefore, available for the enforcement of non-monetary judgments *in personam*. Among other conditions, the judgment must be final and conclusive, and must not be:

a in respect of taxes or a fine or other penalty;

b for 'multiple damages' (i.e., damages arrived at by multiplying a sum assessed as compensation (Protection of Trading Interests Act 1980, as extended to Jersey));

c unenforceable in Jersey as a result of Article 9 of the Trusts (Jersey) Law 1984;[19] and

d against a judgment debtor immune from either the jurisdiction of Jersey or the execution of an order in the island as a result of sovereign immunity (State Immunity Act 1978, as extended to Jersey).

Procedurally, an application is made *ex parte* for the registration of the foreign judgment in Jersey. Once registered, notice is given to the judgment debtor, who has a period of time (which is specified in the order of registration, and is usually between seven and 30 days depending on the debtor's location) to apply to the court by summons to have the registration set aside, on various limited statutory grounds. The judgment creditor does not need leave to serve the notice of registration out of the jurisdiction to a non-resident judgment debtor.

ii Enforcement at common law

If the judgment does not fall within the scope of the 1960 Law (the most common reason being that it emanates from a country outside the UK and Islands) it may be enforced at common law by means of the judgment creditor obtaining a fresh judgment in the Jersey courts on the basis that the foreign judgment constitutes a debt, is regarded as conclusive on the merits, and is subject only to a limited number of possible defences. Strictly, therefore, to refer to enforcement of the foreign judgment at common law is a misnomer; it is a fresh Jersey judgment that is enforced.

The proceedings are necessarily *inter partes* from the start. Separate leave to serve process out of the jurisdiction to the non-resident judgment debtor is required, although this should be a formality. The statutory rules under the 1960 Law regarding the foreign court's jurisdiction and the categories of non-enforceable judgments in most respects broadly reflect the common law position as well. Thus, for example, a foreign judgment will not be enforceable at common law if that would amount, directly or indirectly, to the enforcement of a foreign tax law and the foreign judgment will also not be enforceable if the foreign court is considered by the Jersey court to have lacked jurisdiction.

19 Article 9 of the Trusts (Jersey) Law 1984 deals with the extent of the application of Jersey law to, *inter alia*, the creation of a trust and states that any foreign judgments inconsistent with its provisions are unenforceable.

In *Brunei Investment Agency v. Fidelis Nominees Limited*,[20] the Jersey court held that it has, unlike the English courts, a discretion at common law (but not under the 1960 Law) to enforce a foreign judgment *in personam* that is not for a sum of money. However, it is probably the case that effective enforcement of a non-monetary judgment may in any event be achieved by the Jersey court merely recognising the foreign judgment as *res judicata* on the substantive issues and then fashioning its own remedy.

VII COURT SANCTION OF A TRANSFER OF DEPOSIT-TAKING BUSINESS

Group restructuring may necessitate the transfer of a banking business operated in Jersey from one entity to another. Prior to 2008, such transfers had, in practice, to be effected by way of a private law passed by Jersey's legislature (the States Assembly); see, by way of example, the Royal Bank of Scotland International Limited (Jersey) Law 2001. Since 2008, the 1991 Law has included a procedure whereby the Jersey court can, on the application by either the transferor or the transferee, sanction and make effective the transfer of such business.[21]

One of the conditions is, naturally, that the transferee is authorised in Jersey to carry on the transferred business. This therefore requires the early involvement of the JFSC in approving the transfer and authorising the transferee prior to the application being made to the court.

The court application itself must be accompanied by a report on the scheme by an independent auditor and the court must also be satisfied that the notification requirements set out in Paragraph 4 of the Schedule to the 1991 Law have been complied with. The notification requirements include publication of a notice in the Jersey Gazette, the provision of a copy of the application and supporting documents to the JFSC at least 21 days prior to the hearing and, subject to the court otherwise directing, notification of all customers and shareholders. The first two are not problematic but the third may require careful handling. More specifically, the 1991 Law requires that, unless the court has otherwise directed, a statement setting out the terms of the scheme and a summary of the auditor's report are sent to all the customers (including borrowers) of both the transferor and the transferee, and to every shareholder of both of them as well.

Any application to relax this requirement should be made separately and in advance of the hearing of the main application. The court has been pragmatic in exercising its powers to 'otherwise direct' where circulation of the statutory statement would extend to persons who have no real interest in the outcome.[22]

In considering at the substantive hearing whether to approve the transfer, the court applies a similar approach to that which has been followed both in Jersey and in England to

20 [2008] JLR 337.

21 See Article 48D and the Schedule to the 1991 Law.

22 Thus in the case of *In Re Standard Chartered (Jersey) Limited and Standard Chartered Bank* [2013] JRC 172 the proposed transfer was by a Jersey subsidiary bank to its parent company and the deposits concerned represented only 4 per cent of the total deposits held by the parent. The court directed that the statutory statement did not need to be sent to any customers of the parent bank, as the scheme did not involve the transfer of their accounts and the independent auditor had concluded that the scheme would not have any adverse effect on them. The court also directed that there was no need to send the statement to the shareholders of either bank as the proposed transfer was internal to the Standard Chartered group and the parent companies of both banks had already given their approval.

the transfer of long-term insurance business under (in Jersey) the Insurance Business (Jersey) Law 1996. Ultimately, it is not the function of the court to decide what is, in its view, the best possible scheme as between different schemes, all of which the court might deem to be fair. It is the company's directors' choice which to pursue; the details of the scheme are not a matter for the court provided that the scheme as a whole was found to be fair to interested parties.[23]

VIII OUTLOOK

The next 12 months will see some significant changes to the procedural landscape in Jersey. On 1 June 2017, important changes to the RCR came into force. These changes represent the first significant amendment of the RCR since their implementation in 2004, and follow a consultation and drafting process that has been ongoing for several years.

The intent of the reforms is to improve access to justice for litigants and to reduce, where possible, the risks and costs associated with litigation in Jersey. The reforms, like much of the existing RCR, draw on and reflect developments in the civil procedure process of England and Wales.

The changes include, for example, the creation of an overriding objective for the Royal Court in dealing with proceedings, which is framed in substantially similar terms to the current English overriding objective. There is also to be a new regime for the exchange of costs budgets for litigation with a value below £500,000 (though that process is not expected to be as involved (or penal) as in England), a widening of the scope of summary judgment (extending it to permit applications by a defendant against a plaintiff and modifying the test to a real prospect of success-based approach), together with a range of smaller changes, including the express power to order electronic discovery, and service of court process by email.

New practice directions that accompany the changes to the RCR include a pre-action protocol practice direction (which introduces a new regime of pre-action correspondence between potential litigants), a discovery and electronic discovery practice direction (which codifies the principles and process to be applied by parties in conducting discovery), a summary costs assessment practice direction (which introduces a new process by which the Master will summarily assess the costs of interlocutory hearings), and a budget practice direction (which supplements the new cost budget provisions of the RCR). There are also additional new practice directions addressing offers to settle, expert evidence, directions hearings, and requests for information.

23 One further important preliminary issue that arose in the *Standard Chartered* proceedings concerns the situation where the business to be transferred includes business that is not deposit-taking business, such as, for example, a linked investment management business. The Banking Business Law essentially regulates the business of deposit-taking, so that on one simple reading of the Law the court is not entitled to sanction the transfer of a non-deposit taking side of a bank's business. In *Standard Chartered*, the court analysed this issue as a question of statutory interpretation. It also took into account the approach of the English courts to the same issue under the similar (but not identical) provisions of the Insurance Companies Act 1982 and the Financial Services and Markets Act 2000. The court concluded that under the 1991 Law the Jersey court has power to sanction a scheme that also involves the transfer of business that is not deposit-taking if it is not possible practically to separate the other business from the deposit-taking business (*Re Norwich Union Linked Life Assurance Ltd* [2005] BCC 586, considered). A scheme's predominant or major purpose must be the transfer of deposit-taking business; but that need not be the only thing it does.

Other forthcoming legislative changes of relevance to banking, and potentially banking litigation, include the introduction of the new Capacity and Self-Determination (Jersey) Law 2016 (the Capacity Law) and the Mental Health (Jersey) Law 2016. The Capacity Law will confirm a two-stage test for capacity that is based on the UK's Mental Capacity Act 2005, and that aims to determine whether a person has capacity to make a particular decision at a particular time. It will also open the way for lasting powers of attorney to be executed in Jersey (which cannot currently be granted under Jersey law), in respect of a person's health and welfare and, separately, their property and affairs. Banks will need to be alive to these changes as a matter of business course, but also as a potential avenue of challenge and dispute.

Elsewhere, the Dormant Bank Accounts (Jersey) Law 2017 (the Dormant Accounts Law) will introduce a dormant accounts scheme in Jersey. Unlike the UK's similar arrangements, Jersey's scheme will not be optional for banks, and the Dormant Accounts Law will oblige banks in Jersey to give annual notification of any accounts held that have fallen dormant[24] during the year, and transfer any balance held in those dormant accounts to the Jersey Reclaim Fund (the Fund).[25] Failure to meet these obligations will constitute a criminal offence and give rise to the possibility of a fine. While the customer will no longer have any right as against the bank in relation to any balance transferred (that right will be preserved but will be transferred to the Fund), it will fall to the bank to receive, verify and pay any claims, and claim those amounts back from the Fund. It remains to be seen whether there will be avenues for challenge if a customer has been disadvantaged by any transfer.

STEPHEN ALEXANDER

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Stephen has broad experience in a wide range of commercial disputes, trust issues, investment fund matters, and insolvencies and restructurings. Stephen has been involved in number of high-profile multi-jurisdictional litigation proceedings and insolvencies. He has regularly appeared as an advocate before the English, Cayman Islands and Jersey courts. Stephen was admitted as a solicitor of the Senior Courts of England and Wales in September 2004 (currently non-practising), a Cayman Islands attorney-at-law in August 2008 (currently non-practising) and an advocate of the Royal Court of Jersey in November 2016. Stephen is a member of the Law Society of England and Wales, the Law Society of the Cayman Islands, the Law Society of Jersey, the International Bar Association, Insol International, the Restructuring and Insolvency Association in the Cayman Islands and the Association of Restructuring and Insolvency Experts (ARIES) in Jersey. Stephen currently sits on the Legal and Regulatory Committee of ARIES.

24 Pursuant to Article 5, an account is dormant if it has been open for at least 15 years and during that time there have been no transactions initiated by the account holder, and no evidence held by the bank of any attempt by the account holder to make contact with it.

25 The Jersey Reclaim Fund is to be administered by the states and used to support local charitable causes.

JONATHAN SPECK

Mourant Ozannes

Jonathan was appointed managing partner of the Mourant Ozannes Jersey office in 2014. A Jersey advocate, Jonathan specialises in commercial litigation, principally involving contentious and non-contentious trust cases, about which he has written and lectured around the world. In addition to hostile trust litigation, Jonathan also regularly advises trustees and beneficiaries on issues arising in the course of the administration of trust structures (both contested and non-contested) and has been involved in a number of high-profile cases. He also continues as President of the Law Society of Jersey.

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