

GIN Members' Newsletter

An update on key issues for in-house Counsel in Guernsey as at 8 June 2020

1 New Bailiff and Deputy Bailiff

We couldn't really start off this newsletter in any other way than to celebrate the changing of Guernsey's judicial guard on 12 and 14 May 2020. With the retirement of Sir Richard Collas as Bailiff, Richard McMahon became the Bailiff at a ceremony beamed to the community from a sparsely occupied Royal Court using Microsoft Teams.

However we are sure that the new Bailiff will forgive us if we trumpet the appointment of our own Jessica Roland as the island's first female Deputy Bailiff two days later on 14 May 2020. Jessica joined Ozannes (as it then was) in 1998, becoming a partner in 2005 and Managing Partner from 2013 until taking on her new role. She is well known for her expertise in employment law but, as was highlighted in her admission ceremony, she is a rarity at the Guernsey Bar in having such a wide spread of work experience – ideal for a judge.

We wish her all the best in her new job but will of course miss her singing in the corridors.....

2 Business as Usual at the Royal Court

With the arrival of Phase 4 of release from lockdown, the Royal Court is now operating close to normality:-

- The Greffe and Court building are open from 9am – 4pm.
- The HM Sergeant and HM Sheriff team are back at full service;
- The backlog of criminal and civil litigation has started to be cleared – a Judge and three Jurats can sit and still observe social distancing – and parties who need hearings are getting them relatively quickly;
- General Petty Debts will recommence on 11 June 2020 and Petty Debt Hearings started on 1 June 2020.
- Conveyancing Court continues to operate using Powers of Attorney so that parties do not need to attend in person.
- The ordinary service for the Legalisation of Documents and Apostilles resumed on 18 May

3 Trustees and Legal Professional Privilege

As reported in [Issue 2](#) of the GIN newsletter, important matters did proceed during lockdown, including Gordon Dawes's matter before a virtual Court of Appeal.

Another matter which came to its conclusion was the Appeal to the Privy Council in the long-running TDT litigation. In this matter the Royal Court of Guernsey considered the principles that apply to the creation of privileged documents when advice is obtained by trustees of a trust. Read more in the article written by Jeremy Wessels on [trustees and legal professional privilege](#).

4 Guidance on responsible contractual behaviour

In an unusual step, the Cabinet Office and the Infrastructure and Projects Authority in England has released a document entitled "[Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency](#)".

The Guidance is non-statutory and non-binding and therefore not really law at all! It applies to both the private and public sectors and, in essence, encourages all parties to behave in a proportionate and reasonable way in their contractual dealings and enforcement of contractual obligations. It doesn't use the phrase "good faith" but the sense of the Guidance seems to try and imply such a term. It remains to be

seen quite how it might be dealt with by a Court, as the Guidance is expressly subject to the terms of the contract.

However in a world where dispute strategies are often led as much by public relations concerns as legal obligations, the Guidance is not to be ignored. For the offshore world, it is most likely to be relevant in the area of funding – for example, a restructuring transaction under loan documentation governed by English law.

5 E-Signatures

In the new world where wet ink signatures have been logistically difficult, some of you may have wondered how Guernsey law would treat e-signatures? Look no further than this client briefing on the [use of electronic signatures by a Guernsey company](#) written by one of our Corporate partners, [John Lewis](#).

6 Wrongful Trading

Many of you will know that the UK Business Secretary announced a temporary suspension of the wrongful trading rules between 1 March and 1 June 2020 in order to provide directors with some breathing room given the extraordinary economic impact of the economic lockdown. The policy objective was of course to enable as many businesses to stay afloat and employing people at a time when they might be starved of revenue.

On 13 May 2020, the Jersey Law Society published its own [guidance on wrongful trading](#) under Jersey Law. The document did not, unlike its English counterpart, change any rules, nor was it a precursor to any changes. Rather it was an attempt to flag up the differences between Jersey and English law on wrongful trading. The main difference for these purposes is that, whereas under English law the statutory defence that a director might have to wrongful trading requires him to have taken "every" step to minimise potential loss to creditors, in Jersey, he is only required to take "reasonable" steps.

The Law Society is keen to stress that it is not legal advice but does express the hope that flagging up this difference will give Jersey directors some "comfort".

The wrongful trading provisions in Guernsey are also slightly different to those in the UK (and Jersey), and provide a defence to a director where they can show they took "every step ... [they] ought reasonably to have taken." There are no known plans to provide any temporary suspension of the law in Guernsey.

7 Other COVID-19 Resources

Internationally, we have been contributing to a number of updates on Covid-19 developments

1. [Stephen Alexander](#) and [Abel Lyall](#) recently authored an article for INSOL Europe and LexisNexis, a [COVID-19 Tracker for insolvency Reforms](#), focusing on reforms to the insolvency law of the Channel Island prompted by COVID-19.
2. As the INSOL Europe Country Coordinator, Stephen Alexander has also contributed to the [Ireland, Channel Islands and UK 'COVID Coffee Breaks' webinar series](#) launched by INSOL Europe share personal experiences of the COVID-19 crisis in their countries and give highlights of reforms and challenges of national insolvency framework to address the current crisis.

More locally, you may find the following useful:

1. [Chamber of commerce coronavirus hub](#)
2. [CIFO update](#)
3. [GIBA COVID-19 business support](#)

8 Regulatory Matters

On 12 May, the GFSC published FATF guidance on "[Covid-19 related Money Laundering and Terrorist Financing Risks](#)". The Report contains no big surprises – whilst the pandemic has resulted in a downturn in legitimate economic activity, the reverse is true for the criminal world. The opportunities to misuse online and virtual financial services and products and exploit hastily drafted government support schemes have grown exponentially. The particular risk posed to the offshore world is around ensuring that the innovative methods adopted to overcome the difficulties of verifying customer due diligence and the validity of certain transactions do not undermine the high standards we have applied in normal times.

The Report identifies certain steps that member countries can take to ensure domestic co-ordination and improving communication but, in the end, the buck stops with the organisations and individuals involved in financial services and the risk frameworks they apply. In that sense there is nothing new in the Report but it is a useful pulling together of the various problems encountered in the FATF community.

9 CICRA to Demerge

In the midst of the pandemic, the Government of Jersey announced that the Channel Islands Competition and Regulatory Authorities (CICRA) would de-merge from 1 July 2020 to "better address the different competition issues faced in Jersey and Guernsey". Created in 2010, little is known if this is the result of political machinations but Guernsey's response was that Jersey's announcement was timely as it wanted its new Guernsey Competition Regulatory Authority to focus on the telecommunications and energy sectors as well Guernsey's competitive position post-Brexit.

A transition plan is being implemented to ensure that competition regulation in either island is not affected by the change and, in Guernsey, it is expected to be business as usual for the GCRA with minimal impact on businesses. The intended effective date of the separation is no later than the end of June 2020. Given the ongoing Covid-19 crisis this seems ambitious but only time will tell.

10 Employer and Employee matters

From 1 June 2020, further business activities are now able to operate subject to strict guidelines. Details can be found [here](#). An online portal has been introduced to apply for payroll support and there has also been an extension of the small business grants so that they now include businesses with up to 20 employees. Details can be found [here](#).

11 New Ways of Working

We all know that these are challenging times for leaders of all organisations. Those finding it particularly challenging or overwhelming may be interested in the [IOD's Soundboard programme](#).

One of the leadership qualities coming to the fore even before the pandemic but particularly now is compassion. The following might be of interest - some tips might even be useful for domestic life!

This article is part of a series of 5 articles from McKinsey on [leadership during the crisis](#). Links to the others can be found on page 1.

That McKinsey are writing on compassion in leadership suggests there is a hard-nosed business reason behind its rise. Jeff Wharton, the CEO of LinkedIn reinforces this in a speech he gave at the recent graduation ceremony at Wharton [here](#) and for further reading this [Harvard Business Review Article](#) focuses on self-compassion.

12 And Finally.....

You may recognise his voice as the BBC's international rugby commentator, but Andrew Cotter had real problems hosting his company meeting on Zoom - view the youtube clip [here](#).

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