

THE JERSEY LAW COMMISSION



CONSULTATION PAPER

PRESCRIPTION AND LIMITATION

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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1 Problems in Terminology: Prescription and Limitation.

- 1.1 In the context of the law of prescription, there are differences in the use of terminology and the definitions of the terms that are most often used: prescription itself and limitation. The former is often found, although not exclusively, in the civil law context, while the latter is the generally accepted term in common law jurisdictions. The fundamental distinction to be made between prescription and limitation appears to depend on whether the issue is if the claimant's right to bring an action has been barred or if the right in the object has been altered by a duration in another's possession. Limitation focuses on the action or claim while prescription refers to the impact of the effluxion of time on the underlying right to ownership. Both terms lead to similar objects, the possible extinction of a claim or a right, but prescription appears to be wider because it allows for the possibility of the acquisition of rights.
- 1.2 Prescription is originally a concept first found in Roman Law. It is either "acquisitive" in that an individual is allowed to acquire title to an object or property after a specified period of time or "extinctive" in that it extinguishes the right of the previous owner or possessor. Thus, the effect of acquisitive prescription is to create a new right. In its application to rights *in personam*, extinctive prescription applies by denying the existence of the right once the period of prescription expires, while in reference to rights *in rem* and particularly ownership, either form of prescription may operate.¹ For example, the French Civil Code acknowledge both varieties, stating that 'prescription is a means of acquiring or being liberated by a certain lapse of time under those conditions determined by law.'² Other civil codes unpack this statement by dealing with acquisitive and extinctive prescription separately, an example being the Maltese Civil Code.³ In Jersey, prescription is said by Le Gros⁴ to be

¹B. Nicholas, *An Introduction to Roman Law* (1962, Clarendon, Oxford) at 121.

²Article 2219, *Code civil*.

³Article 2107 - "(1) Prescription is a mode of acquiring a right by continuous, uninterrupted, peaceable, open and unequivocal possession for a time specified by law. (2) Prescription is also a mode of releasing oneself from an action, when the creditor has failed to exercise his right for a time specified by law."

⁴Formerly Viscount of Jersey.

defined in the Ancien Coutumier as being “*une préclusion de réponse, procrée de temps procédé ou escheu*”.⁵ This appears to reflect an element of acquisitive prescription “caused by time proceeding or passed”, but which, as extinctive prescription would have it, “avoids a reply” or “response” to the ownership being asserted.

1.3 Limitation works somewhat differently because its focus is on the action or claim. At the end of the prescribed period, a failure to bring the action allowed by law will prevent the claim-holder from asserting the right, if it has not already been effectively barred through the operation in some common-law jurisdictions of the equitable doctrines of laches, where unreasonable delay in bringing a claim may cause an injustice if relief were granted, and acquiescence, where the infringement of another's rights with no action taken in return infers acquiescence in those actions. Assuming the action is barred does not necessarily mean that the right has been extinguished, although in practice an inability to enforce the claim may amount to the same thing. The result is that the claim is unenforceable or ‘imperfect’ but limitation does not render it void.⁶ In practice, in England and Wales, if the claimant has an alternative means of enforcement, then he may pursue this remedy.⁷ Occasionally, however, limitation statutes may contain elements of extinctive prescription, an example being the position in England and Wales with actions for conversion and title to land.⁸

1.4 The broad distinction drawn by some commentators between limitation and prescription as systems appears to hinge on two fundamental consequences. The first is that an *in rem* right may be asserted against any person except the one against whom a claim has been barred. The example Nicholas gives is of the passing of property from one hand to another. A claim is not available against the former due to a limitation rule applying, but should the item fall into the possession of another, then a claim may yet arise. The second

⁵C. Le Gros, *Traité du Droit Coutumier de l'Île de Jersey* (1943, Les Chroniques de Jersey, Jersey) at 230.

⁶Nicholas, *op. cit.* at 120.

⁷*Allen v Waters* [1935] 1 KB 200 (lien). There is also an alternative dispute-resolution system permissible for Jews before a Beth Din, whose law does not recognise statutes of limitations.

⁸Sections 3(2) and 17, Limitation Act 1980 respectively.

distinction is that acts performed in pursuance of a right remain valid even if they are performed outside a period of limitation. Thus, the payment of a debt after an action has been barred does not entitle the payer to reclaim the moneys.⁹ There may be a further distinction in that limitation periods, because they do not usually have the same effect as extinctive prescription, require to be pleaded as a defence to bar the claim and a common law court will not generally intervene to establish the fact of limitation.¹⁰

1.5 In instances of both prescription and limitation, periods are set out by legislation. In some instances of prescription, this often reflects a customary law position, an example being the *longi temporis praescriptio* of 10 or 20 years, introduced by a *rescripta* of Septimus Severus and Caracalla in 199CE, but based, it is said, on a practice in the province of Egypt of Hellenic origins.¹¹ By way of contrast, it is said that the common law does not recognise a principle of limitation and that, consequently, all periods of limitation have had to be introduced by statute.¹² Nevertheless, in England and Wales, an exception may lie to this authoritative statement in the workings of the common law institutions of the presumption from long user and the lost modern grant, which attempt to replicate the effect of prescription through the judicious use of a fictional grant.¹³ Furthermore, the equitable principle of laches may be the equivalent of just such a principle of limitation.¹⁴

1.6 The position in Jersey is that there is no “*all embracing*”¹⁵ limitation statute that is analogous to the position in many other jurisdictions. As will be set out below more fully in section 4, it appears that many traditional prescription periods are set out in customary law such as the *Charte aux Norman[d]s*

⁹Nicholas, op. cit. at 120.

¹⁰R. Redmond-Cooper, *Limitation of Actions* (1992, Sweet and Maxwell, London) at 2.

¹¹J-P. Levy and A. Castaldo, *Histoire du Droit Civil* (2002, Dalloz, Paris) at paragraph 414.

¹²A. McGee, *Limitation Periods* (2002, Sweet and Maxwell, London) at paragraphs 1.002 and 1.041.

¹³K. Gray and S. Gray, *Elements of Land Law* (2005, OUP, Oxford) at paragraphs 8.189-8.190. This approach was adopted in the Jersey case of *Baudains v Simon* (1971) JJ 1949 concerning the establishment of a *chemin de voisiné*. Interestingly, more than a century previously, Advocate D’Allain repudiated the (English) idea of a lost grant in his evidence to the Civil Law Commissioners of 1861 at paragraph 10,520-10,523. He contended that in Jersey, an actual grant must be proved and would not be presumed.

¹⁴T. Prime and G. Scanlan, *The Law of Limitation* (2001 OUP, Oxford) at 1.

¹⁵Sir Philip Bailhache, Bailiff, referring to an argument raised by the counsel on behalf of the Commission in *Jersey Financial Services Commission v Black* [2002] JLR 294 (Royal Court).

1314,¹⁶ as evidenced by the commentators and treatises on Jersey law as well as judicial pronouncement in the case-law. In more modern times, specific legislation has dealt with prescription in discrete contexts, such as in the area of torts through the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960. In some instances, prescription periods have been abolished, for example in relation to criminal offences.¹⁷ A table of the customary and statutory terms applicable is contained in Annex One.¹⁸

- 1.7 In Jersey, the language of the law uses both the terms “limitation” and “prescription”, and occasionally interchangeably.¹⁹ For example, references to limitation can be seen in Article 7 of the Law Reform (Miscellaneous Provisions) (Jersey) Act 1967 and in various Jersey cases²⁰ as well as in the index to the Jersey Law Reports (which we note are compiled in England).
- 1.8 The use of the term “prescription”, however, has a far more established pedigree in the Island and is, for example, the term utilised by Jersey commentators such as Poingdestre²¹ and Le Geyt²² and is utilised in the index to the “*Table des Décisions*” that formerly summarised local decisions from the late nineteenth century. The following Jersey statutes and procedural rules employ the term “prescription”: Article 34 of the Arbitration (Jersey) Law 1998; Rule 25 of the Petty Debts Court Rules 2004 and Rule 6/4 of the Royal Court Rules 2004.
- 1.9 Anomalously, referring to both terms, there is the example of Article 57 of the Trusts (Jersey) Law 1984.²³ This is perhaps a reflection of the customary sources of borrowing, where either other legal systems have been influential in

¹⁶Promulgated by Louis X (Le Hutin) r.1314-1322.

¹⁷By the Criminal Procedures (Prescription of Offences) (Jersey) Law 1999.

¹⁸See also the comment in the Editorial Miscellany: Prescription Problems (2003) JLR Review 1.

¹⁹ See Gale & Clarke v. Rockhampton & Antler [2007] JCA 117B at para.175

²⁰For example in the headnotes to *Maynard v Public Services Committee* (1995) JLR 65 and *In re Woolley* (1991) JLR Notes-11c (Royal Court).

²¹Lieutenant Bailiff of Jersey 1669-1676.

²²Lieutenant Bailiff of Jersey 1676-1695.

²³This situation is replicated elsewhere, for example in the language of the United Kingdom statute, titled the Prescription and Limitation (Scotland) Act 1973 as well as the Title to Land (Prescription and Limitation) Act (Cap 60:02, Laws of Guyana).

the development of jurisprudence in Jersey²⁴ or terms and definitions have been borrowed because the law elsewhere has been developed or defined ‘more fully’ than in Jersey. In terms of chronology, it was more common so to borrow French terminology up until the middle of the 19th century and English thereafter.²⁵

- 1.10 Nonetheless, as observed by the Privy Council in a case from Guernsey, even within systems derived essentially from Roman and French customary law, “examination of the various laws of prescription in fact shows examples, within these supposedly analogous systems, of purely extinctive prescription, prescription extinguishing the remedy but not the right, prescription defined purely in terms of acquisition, and prescription effective both to confer title and to extinguish adverse claims. It is not uncommon, within a single system, for the law to select different combinations of these elements in relation to different subject matters, and also to progress from one kind of prescription to another...”.²⁶ This observation is comforted by the observation of Birt, Deputy Bailiff admitting that the case law basis of prescription made it difficult to find a “consistent theme or principle” underlying the various prescriptive periods.²⁷
- 1.11 For that reason, because aspects of both limitation and prescription appear to have influenced the development of the law in Jersey, any reform would have to consider the terminology that should be employed (and consistently so) within the reform process. Appropriate issues for consultation would thus be, if the decision were taken to reform the law in Jersey by means of a statute,²⁸ whether the term ‘prescription’ should be retained, in part in order to encourage the consistent use of the term throughout any reforms and, whether, in consequence, a definition would be desirable, inspired perhaps by the Civil Code examples cited above. In this consultation document, the term “prescription” is preferred.

²⁴ *Jersey Financial Services Commission v Black* [2002] JLR 294 at paragraph 23 (Royal Court), per Sir Philip Bailhache, Bailiff.

²⁵ *Foster v A.G.* [1992] JLR 6 at paragraph 21 (Court of Appeal), per Le Quesne, JA.

²⁶ *Vaudin v Hamon* [1979] AC 569 at 582.

²⁷ *In Re: Esteem Settlement* [2002] JLR 141 at paragraph 252 (Royal Court), per Birt, DB.

²⁸ See below in section 7.

2 Why do we need a cut off point in making civil claims?

2.1 The general justification may be stated as follows:

“All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost, and in all well regulated countries the quieting of possession is held an important element of policy”.²⁹

2.2 There are, in fact, a number of arguments that may be made for the existence of a rule of prescription. Many of these have been cited in the context of law reform initiatives in other jurisdictions and may be usefully divided into issues of principle, issues of procedure and, more recently in the literature, issues of economic efficiency.

2.3 Issues of Principle

(a) A rule of prescription serves to discourage true owners from “sleeping on their rights” by failing or neglecting to take appropriate steps to maintain possession. One of the maxims of Roman law is “*vigilantibus non dormientibus, jura subveniunt*”.³⁰ This rule, founded on the principle that law should assist those willing to protect their rights, also grounds the sanction effect of the prescription rule, which is to deny relief to the party seeking to assert ownership beyond a socially acceptable period. The Irish Law Commission has recognised this when dealing with the issue of reform by referring to the effect of a limitation period in “discourag[ing] plaintiffs from unreasonably delaying in instituting proceedings”, which incidentally serves as an incentive for claimants to be “vigilant in the protection and legal vindication of their own rights and interests.”³¹ The issue of the claimant’s conduct is germane to the view taken in equity that prompt action is required to enforce any rights.

(b) The concomitant benefit is of course that those against whom claims are intended are protected by the sanction effect of the prescription rule

²⁹ *Trustees of Dundee Harbour v Dougal* (1852) 1 Macq. 321, per Lord St. Leonards LC.

³⁰ The law will assist the vigilant, not the sleeping.

³¹ Law Reform Commission of Ireland, Consultation Document on the Statutes of Limitations (1998) (“Irish Consultation Document”) at paragraph 1.02.

and may rest easy in their ownership or possession. This is one of the reasons why statutes introducing limitation periods or a rule of prescription are often called “statutes of peace”.³² In this context, an oft-cited maxim is “*interest reipublicae ut sit finis litium*”,³³ quoted approvingly in a number of English cases and which ensures that the “quiet of the community” is obtained through providing a rule on limitation as a known limit on litigation beyond which title and rights cannot be called into question.³⁴ Nonetheless, there is an issue here of the appropriateness of the limits that are set by legislation and that any limit should not act in a perverse way to quell claims prematurely.

- (c) In any event, because rules of prescription or limitation operate so as to deny relief or curtail a right to pursue a claim or action, it is necessary to note that they require justification that they are in the public interest. In practice, the issue will not be so much whether the rules are justified but how the rules operate so as to balance competing factors of certainty and procedural fairness in permitting or denying parties the pursuit of claims. However, it is recognised that rules of prescription and limitation serve to balance the competing claims, rights and interests of claimants and defendants and, for that reason, are justified if they lead to greater fairness and equity as between parties.³⁵ Frequently, it is also argued that public interest may be established by reference to some or all of the procedural and economic issues that are discussed below.

2.4 Issues of Procedure

- (a) Procedural arguments tend to look to reasons of procedural and practical efficiency, the impact of evidence and the requirements for factual certainty. The efficiency argument is invoked in the context of prescription in that the existence of such a rule facilitates the transfer of ownership and the investigation of ownership interests, while

³²McGee, *op. cit.* at paragraph 1.034.

³³The State’s interest is that there be an end to litigation.

³⁴*Cholmondeley v Clinton* (1820) 2 Jac & W 1, per Sir Thomas Plummer MR.

³⁵Irish Consultation Document at paragraph 1.09.

serving also to reduce costs incidental to the transaction. The question of evidential needs is dealt with by the fact that a rule of prescription means that “illegal claims after the evidence necessary to defeat them has been lost” cannot be brought. This leads to factual certainty being established by closing off the right to bring claims and thus ensures the maintenance of society’s interest in “security of title”, which includes security of ownership and of possession.

- (b) Procedural efficiency militates for claims to be pursued as soon as practicable. It would be unreasonable for defendants to be faced with the indefinite possibility of a claim made against them. Fairness between the parties (a reflection of a principled attitude as to whether a rule on prescription should exist), would require the defendant not to be prejudiced by stale claims being made at a great remove from the events which give rise to the right or claim. The requirement for factual certainty is served by the existence of a rule of prescription which results in parties being able to rely on the passing of the appropriate limitation period so as to order their affairs and avoid the possibility of a claim being brought. There is a trade-off here between the period for which liability is open and the security obtained once it is closed. In connexion with land claims in particular, a sense of security is considered particularly acute, as observed by the American jurist Oliver Wendell Holmes when he stated that:

“A thing which you have enjoyed and used as your own for a long time ... takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it...”³⁶

- (c) In this context, there is a particular problem related to evidence and the evidentiary burden on parties to claims. Although issues such as the loss of evidence through deterioration or destruction of physical evidence, the unreliability of memory and the death or removal outwith the jurisdiction of potential witnesses affect both claimants and defendants, it is considered that evidentiary loss imposes a greater burden on defendants who may not be conscious of the need to

³⁶O.W. Holmes, ‘The Path of Law’ (1897) 10 Harvard Law Review 457 at 477.

preserve evidence because they are not aware of the possibility of a claim. In this context, it is often the claimant who, knowing of the possibility for an action, will take steps to set down a recollection of events or otherwise obtain and preserve evidence. This view is accepted in Jersey, where Birt, Deputy Bailiff has stated that limitation periods serve an important function by ensuring claims do not become stale and that they are brought “at a time when memories are still comparatively fresh and evidence is likely to be available.”³⁷

- (d) The constant evolution of societal mores and attitudes may also be a particular concern here, as the Irish Law Commission have noted, because it is often harder to measure the conduct of the parties sometime after the events at the heart of the dispute have taken place.³⁸ This may affect the position of potential witnesses and the attitude of the court to the wrong complained of or the nature of the rights at issue. It is evident that even august courts have had difficulties reconciling the views that they have come to consequent on a change in curial and societal opinion with the law they may be obliged to defend.³⁹

2.5 Issues of Economic Efficiency

- (a) There are a number of arguments here in connexion with:
 - (i) why a rule of prescription assists economic efficiency;
 - (ii) the general reasons relating to the use of society’s resources;
and
 - (iii) more specifically, the use of judicial resources.

³⁷ *Gallaher v Dauny* (2001) JLR 302 at 309.

³⁸ Irish Consultation Document at paragraph 1.13.

³⁹ A pertinent example is the palpable reluctance of the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2002] 3 WLR 221 to award the land to the adverse possessors. The failure of the reforms meant to address this issue through the Land Registration Act 2002 to affect matters retrospectively have now been criticised by the European Court of Human Rights in their judgment of 15 November 2005.

- (b) 2.4.2 In this context, a rule of prescription ensures that transfers of property to much “higher-valuing users” can occur.⁴⁰ This is a reflection of the view that it serves society’s interest for procedures to be set allowing a productive user to obtain title from an unproductive user so as to prevent valuable resources from being left idle or remaining uncertain as to status.⁴¹ This is an encouragement of general economic efficiency and for the use of natural resources, particularly where the claim relates to the use of land.
- (c) The security brought about by having a rule on prescription also has an economic impact. The issue of transaction costs attendant on investigations into title and defending or pursuing claims is very cogent and undoubtedly a cost-benefit analysis may be carried out in this connexion.⁴² In a wider context, however, social and economic security may, in the absence of a limitation period, be harmed because of the consequences that follow on from this. In particular, open-ended liability may generate disproportionate transaction costs and the need for those most at risk of liability to reflect this in the unit cost of goods and services, leading to increased overheads and the likelihood that transaction costs will be passed on to consumers. In other instances, the availability of insurance may be affected and, where provided, unlimited or uncertain liability may lead to greater costs in terms of premiums and possible higher thresholds for waivers or deductibles as well as limits on the indemnity provided.⁴³
- (d) A related transaction cost argument specifically focuses on the use of the resources of the judicial system. The availability of the judicial system as a means of providing for resolution and settlement of disputes is an important factor in society. The public interest is

⁴⁰L.A. Fennell, ‘Efficient Trespass: The Case For ‘Bad Faith’ Adverse Possession’, Illinois Law and Economics Working Papers Series (Working Paper No. LE05-021) at 3, copy available at: <www.law.uiuc.edu/academics/iple/papers/LE05-021FennellEfficientTrespass.pdf> (last viewed 13 November 2005).

⁴¹R. Cooter and T. Ulen, Law and Economics (2000, Longman, Reading MA) at 143.

⁴²In Jersey, the investigation of title is costly enough due to the absence of any system that guarantees title as, for example, exists in England.

⁴³Irish Consultation Document at paragraph 1.15.

therefore served by the efficient and timely resolution of claims and not by the reviving of stale claims with all the attendant transaction costs due to evidentiary loss and reduced confidence in factual certainty. The optimal use of judicial resources would require that court time be used for the resolution of relatively recent claims and that burdens are not placed unduly on judges and courts by litigation that, like the fictional *Jarndyce v Jarndyce*,⁴⁴ endure to the detriment of the litigants and the assets that are the subject of the litigation.⁴⁵

2.6 In summary, it may be opportune, having considered the many valid policy reasons for the maintenance and reform of a system of prescription for Jersey, for a statement of those reasons to be contained in any resulting legislation. These could then guide a court in interpreting that legislation.. Examples of such statements, often contained in extensive preambular recitations or in a specific provision at the beginning of a text, abound in Continental, European Union and international law. In the common law, such statements are unusual, but are occasionally found. A pertinent example in England and Wales is section 1 of the Arbitration Act 1996.

2.7 Furthermore, with respect to any future developments in the field of prescription, the creation of a text that deals with prescription should be as exhaustive a treatment of this area as possible. This may include a presumption in the text that there is a prescription period for all matters unless statute says otherwise.

3 Why is a degree of flexibility required?

“[I]n encouraging the timely resolution of disputes, a limitations system must strike a proper balance among the interests of potential claimants, potential defendants and society at large. Potential claimants have an interest in obtaining a remedy for injury from legally wrongful conduct; potential defendants have an interest in being protected from endless claims; and society at large has an interest in providing a range of remedies for injury from wrongful conduct and an orderly and fair process for determining when it is appropriate to award them.”⁴⁶

⁴⁴Serialised in instalments in C. Dickens, *Bleak House* (1852-3, Bradbury and Evans, London).

⁴⁵Irish Consultation Document at paragraph 1.16.

⁴⁶Alberta Law Reform Institute, Report No 55: Limitations (1989) at 16.

- 3.1 The policy reasons behind why periods of prescription or limitation exist seems to be overwhelming. The cumulative arguments, dealing with issues of principle, procedure and economic efficiency, are sufficiently weighty that the principle of a system of prescription may readily be accepted. In dealing with any reforms, however, a balancing exercise will need to be carried out between the particular and competing interests of users of this system (plaintiffs, defendants and contributors), while the overall interests of society in making a system of prescription available must be recognised.
- 3.2 The Irish Law Commission were particularly exercised by the issue of the “social dimension” in the context of the plaintiff’s right to establish and bring a claim, quite apart from the “individual dimension” affecting the positions of plaintiff and defendant alike. The argument is that the plaintiff’s rights are important, not just for the plaintiff, but for society at large. Therefore, particularly when dealing with civil claims, the maintenance of standards depends directly on the possibility of claims being enforced, perhaps by virtue of a deterrent effect on would-be avoiders of legal rules. This is particularly acute where no comprehensive regulatory regime exists to govern behaviour or, where in place, it is insufficiently enforced.⁴⁷
- 3.3 This does have an economic parallel in that arguments of economic efficiency are predicated in many instances on transaction costs being known in advance and thus capable of being factored into calculations of the economic benefits or otherwise of entering into particular contracts or carrying out potentially harmful tort-generating economic activities, where parties are assumed to act from rational self-interest.⁴⁸
- 3.4 In this context, two issues of particular importance arise. The first is how the periods of prescription are to be set, how they are to be defined in relation to when in time they commence and when they are to be brought to an end. The second is whether there are any particular conditions attached to the status of either plaintiffs or defendants that would require discretion in the application

⁴⁷Irish Consultation Document at paragraph 1.18.

⁴⁸Cooter and Ulen, *op. cit.* at 202-205 (contract) and 330 (tort).

of the relevant rules on prescription and commencement of time, particularly with respect to whether the running of prescription may be suspended. The two issues may be related, in that the commencement and running of a prescription period may depend on the identity and quality of the plaintiff, especially where this party suffers from a legally-recognised disability.

- 3.5 Taking the first issue, of time, into consideration, it is clear from the earlier discussion that the arguments for certainty and security arising from the availability of a prescriptive period are unanswerable. Preventing claims that are stale, or which cause evidential uncertainty and thus occupy disproportionate resources in establishing the truth or otherwise of a claim, is in society's interest. Incidentally, it also provides a sanction for a failure to pursue claims, which is also in society's interest.
- 3.6 Nevertheless, the calculation of when a period of prescription begins (and thus notionally when it ends) may be problematic. In general, there are two approaches: one depends upon whether a cause of action has accrued and the other upon whether sufficient knowledge exists on the part of the plaintiff, assessed objectively on a reasonableness test, that a claim may be brought.
- 3.7 The first cause of action approach is consistent with the idea of prescription as a period that reflects the running of time against claims and which bolsters rights acquired as a result of the effluxion of time. The second approach is consistent with the view that injustice may result where an arbitrarily defined period of prescription comes to an end before the plaintiff has the requisite knowledge of the possibility of a claim.
- 3.8 As the Irish Law Commission also discuss, the "sensitivity or otherwise of limitation periods to the circumstances of the plaintiff" is a "vexed question".⁴⁹ This includes where the knowledge of the plaintiff is a necessary ingredient in establishing the commencement of a prescriptive period as well as where the plaintiff is subject to a legal disability (which may or may not have an impact on the knowledge required to establish a claim.) In this context, the Court of Appeal of Jersey has held that prescription will not run

⁴⁹Irish Consultation Document at paragraph 1.19.

against the plaintiff where he can show at trial that he has been prevented from pursuing his legal right by an *empêchement d'agir*, or practical impossibility. This is an application of the principle, known to Jersey law, that “*contra non valentem agere nulla currit praescriptio*”.⁵⁰

- 3.9 Furthermore, the strictness of a prescriptive period has to balance the possible injustice to the plaintiff, given his particular circumstances, with the overall interest of society in seeing a finality to litigation. There is a strong argument here that, despite the plaintiff’s individual circumstances, a rule against indefinite exposure to the possibility of litigation might be necessary.⁵¹ This is reflected in many jurisdictions, particularly in Europe in the context of consumer protection legislation, where long-stop provisions set out an, often generous, but ultimate period beyond which claims are no longer possible.
- 3.10 In summary, any reform proposals must consider how the appropriate balance might be struck between the competing rights of the parties to litigation. In this, consideration may need to be given to defining how prescriptive periods may be calculated, what tests to apply and, depending on the test used, whether the concept of long-stop provisions should be introduced into Jersey law.
- 3.11 In this context, a further issue will be whether discretion should be a feature of the reforms, thus permitting courts to determine how prescription is to be calculated and, particularly, what factors govern plaintiffs and/or defendants in deciding the commencement, suspension or termination of prescription periods.
- 3.12 A further issue, canvassed by a number of Law Commission reports from the United Kingdom and the Commonwealth, relates to the extent to which it may be permissible for parties to agree to vary limitation or prescriptive periods in terms of length as well as set different starting points for such periods.⁵² The consensus seems to be that the nature of the limitation defence, which must be specifically pleaded to bar claims, invites the view that parties should

⁵⁰ *Public Services Committee v Maynard* [1996] JLR 343.

⁵¹ Irish Consultation Document at paragraph 1.20.

⁵² See discussion in Prime and Scanlan, *op. cit.* at 34-36.

therefore be free to set their own arrangements for what is in essence a procedural matter. Furthermore, the general acceptability of waivers of limitation seems to invite a similar concession in terms of parties being able to form a binding agreement to extend the benefits of any limitation period.⁵³

3.13 Such agreements should, however, be open to challenge upon legitimate grounds, for example, in the event that an agreement was not obtained freely or contractual terms waiving or extending periods infringed consumer protection legislation or rules on unfair terms in contracts. Whilst the consensus of the work by various Law Commissions is that the principle of freedom to contract should extend to periods of limitation, nevertheless, public policy issues may still intervene in a number of respects. An agreed extension in time may, for example, not be desirable where it would have the effect of overriding any longstop provisions that may be introduced by legislation, especially where the rationale for these provisions is predicated on reasons of evidential certainty and the state interest in there being a finality to litigation.

4 What are the sources of the Jersey law of Prescription?

4.1 The Jersey law of prescription is essentially to be discovered from three sources which, in order of importance, are as follows:

(a) Jersey customary law and particularly as evidenced by writers on Jersey law such as Poingdestre,⁵⁴ Le Geyt⁵⁵ and Le Gros,⁵⁶ although the Court will also be prepared to consider Norman commentators on

⁵³Ibid., at 35, citing the work of the Alberta Law Reform Institute in their Report No 4 of 1986 (Limitations) at paragraph 8.3. Note that whilst prescription periods can be extended in Jersey by agreement, an admission of liability will not of itself stop prescription under Jersey law: *Gallagher v Dauny* (2001) JLR 302.

⁵⁴Lieutenant Bailiff of Jersey 1669-1676. Some caution should be exercised as to his *Remarques et Animadversions sur la Coutume Reformée de Normandie* which was concerned primarily with the Coutume Reformée and the extent to which it was applied in Jersey: the Court in *Esteem* (at 141) found it to have been incorrectly cited by Counsel as to the existence of a 30 year prescriptive period.

⁵⁵Lieutenant Bailiff of Jersey 1676-1695. His work entitled *Privilèges, Loix et Coutumes* was applied on the issue of prescription in *Albright v Harrison (née Wailes)* (1952) JJ 31 and also in *Esteem* (2002) JLR at 141.

⁵⁶Viscount of Jersey who in 1943 produced a *Traité du Droit Coutumier*. He was, for example, cited by the Privy Council on prescription in *Snell v Beadle* (2001) JLR 118 at paragraph 38, page 134.

the subject⁵⁷ and other writers of distinction such as Pothier,⁵⁸ in so far as they can elucidate the proper Jersey legal position;

- (b) Decisions of the Jersey Courts; and
- (c) Statute, for example, the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 which provides a 3 year period for actions “founded on tort.”

4.2 In ascertaining the relevant prescriptive period for a particular action which is not expressly dealt with in any of these sources, the Royal Court will attempt to categorise such a cause of action so as to identify the prescriptive period that should, as a matter of principle (and policy), be applied.⁵⁹

4.3 Classification

- (a) As a general proposition, the Jersey Courts will group together various actions in accordance with the classifications that can be gleaned from customary law and, also, from other relevant French legal sources in so far as they can clarify or expand customary law. There are notable exceptions to such a “French” or “civilian” classification, for instance in respect of the law of tort, which is discussed below. However, in *Esteem*,⁶⁰ the Court had regard to the French division of actions as stated by Guyot in 1776 as:
 - (i) personal actions (*les actions personnelles*), whereby a personal obligation arises towards another by reason of contract, quasi-contract, delict or quasi-delict;
 - (ii) real actions (*les actions réelles*), whereby a person seeks to regain possession of a thing that is withheld by another;

⁵⁷See generally *Snell v Beadle* (2001) JLR 118.

⁵⁸Born 1699. Died 1772. He was, for example, cited with apparent approval in *Esteem* (2002) JLR at 141 as to the classification of actions for the purpose of determining appropriate prescription periods.

⁵⁹See for example *Esteem* (2002) JLR at 141. Furthermore, in *Robertson v Lazard Trustee Co Ltd* (1994) JLR 103 at 108, Bailhache, Bailiff sought to discover the prescriptive period by “characterizing the nature of the action.” In that case the Plaintiff had sought to annul various *inter vivos* gifts of movables

⁶⁰(2002) JLR at 140.

- (iii) mixed actions (*les actions mixtes*), involving both elements of the above.
- (b) The Court in *Esteem* further went on to expand upon the above position by reference to other writers such as Pothier who subdivided a personal action into an *action personnelle mobilière* and an *action personnelle immobilière*. In the former case, the “*objet*” or aim of the action is a sum of money or other movable, whilst in the latter case, it is an immovable.
- (c) The distinction in classification between an *action personnelle mobilière* and an *action personnelle immobilière* is part of Jersey law and is something that is touched upon by Le Geyt when dealing with prescription:
- “Toutes Cédules & Obligations faites entre Habitans & Resseans de l’Isle qui ni sont demandées judiciairement ou renouvelées dans dix ans continuels en fait de meuble, comme aussi toutes obligations mobilières de Rolles de Cour & condamnations de cette nature, ensemble tous Comptes de procurations, administrations & généralement toutes autres actions purement pour meuble entre Habitans & Resseans, sont aussi prescrites par le mesme tems & de la mesme maniere. Toutesfois une obligation pour l’interest de laquelle une rente assignée se reçoit de tems en tems n’est pas sujette à cette prescription.”*⁶¹
- (d) This passage from Le Geyt led the Royal Court in *Albright v Harrison (née Wailes)* (1952) JJ 31 to hold that the prescriptive period of 10 years applied to an action for *damages* arising out of a delay in granting possession of a property that had been purchased by contract passed before the Royal Court. The action was held to be an *action personnelle mobilière* being an *action purement pour meuble*. Consistent with this decision is *Drummond Hay v Godfray* (1905) 223 Ex 494, where the ten year period was applied to an action for the return of certain movables.
- (e) By way of contrast, *Albright* suggested that an *action personnelle immobilière* was prescribed by the period of a year and a day. The

⁶¹Le Geyt, op. cit. at 64 (Title X, Article 9).

Court referred to *Giot v Giot* (1876) where an action had been brought requiring a party to honour its promise to pass a contract for the sale of land (or presumably, in default, pay damages⁶²) and this action was dismissed as being outside such a period.

- (f) It is, however, immediately observable that an action to pass a conveyance or pay damages has as its aim the conveyance of an immovable or, in the alternative, a movable in the form of damages. To this extent the action appears to be mixed and it is not readily apparent why a period of a year and a day should, as a matter of policy, apply to both forms of relief.
- (g) In *Bichard v Bichard* (1875) 47H. 436 an action was brought to rectify a contract of *partage* (that had been passed before the Royal Court twelve years previously) for mistake: it was contended that one of the parties had not received their just share of land under such contract owing to “*une erreur dans la mesure des terres qui lui ont été allotties*”. The Plaintiff asserted that such a claim could not be barred other than by a prescriptive period of 40 years, or alternatively, 25 years. Nevertheless, the Court dismissed the action as being prescribed and stated that it should have been brought before the expiration of a period of a year and a day from “*l’ouverture du droit d’action*”. It would seem that the subject matter of the contract, in this case land, meant that such a period applied rather than a 10 year-period.⁶³
- (h) It is important to note that *Albright*, *Giot* and *Bichard* all involved claims arising from a contract.⁶⁴ Accordingly, it is incorrect to advance the principle that contractual claims necessarily bear a ten year prescriptive period. Instead, these authorities appear to ascribe prescriptive periods according to the subject matter or aim of the action

⁶²See *Le Breton v Norman, Connétable et aus.* (1887) 212 Ex. 269 where an action in this form was brought. The maxim *nulle promesse à héritage ne vaut* prevents specific performance. Hence this formulation of relief.

⁶³This would appear to have been a harsh decision given the apparent ignorance of the Plaintiff of the error but it should be noted that the existence of an *empêchement d’agir* was not argued, to which see paragraph 5.11 below.

⁶⁴ The same situation occurs in *Vardon v Holland* (1964) JJ 375 where infringement of a right of way that was conferred by contract was still prescribed after a year and a day. Surely the infringement also constituted a breach of contract?

in question. Further, even from this broad principle, custom appears to have evolved such exceptions and refinements that Le Geyt lists a ragbag of relationships which, whilst most will be underpinned by contract, enjoy prescriptive periods of a year and a day, three years and ten years:

*“Action pour services & corvées...promesse verbale...loyers & gages de gens de métier, Maçons, Charpentiers, Couvresseurs, Labouresseurs & autres Mercenaires est prescrite après an & jour passés...Il en faut excepter la livraison de Marchand à Marchand, qui ne se prescrite que par dix ans, au lieu que la merchandise vendue en detail n’a que l’an & jour. Il en faut excepter aussi les salaires des Domestiques & les gages des procureurs ad lites, qui durent trois ans seulement, s’il n’y a point d’interpellation ni de compte réglé”.*⁶⁵

- (i) It is doubtful that such prescriptive periods would be applied to such relationships today and it is likely that custom has developed since the time that Le Geyt was writing. Nevertheless, until the point is argued and decided, the position is unclear.⁶⁶

- (j) It is, however, difficult to deduce coherent principle from these and earlier cases and this can be sensed in *Albright* itself where the Court was driven to suggest that an action “*savouring* of the realty” will be prescribed by a year and a day. Unfortunately, in respect of the older decisions, the rationale behind the categorisation of actions in Jersey will not be wholly apparent because until 1950 the Royal Court did not give detailed reasons for its decisions.⁶⁷ Instead, for decisions prior to 1950 (and even for some until 1961) we are largely confined to the Acte of Court in any given case to discern the reason(s) for a given decision.⁶⁸ In part, this has contributed to the difficulty in discerning coherent principle for determining the prescriptive period that should be applied to a given cause of action. Perhaps, at best, the cases discussed above merely suggest that actions relating to land are prescribed after a year and a day and actions in respect of movables are

⁶⁵Le Geyt, op. cit. at 64 (Article 11).

⁶⁶See *Connétable of St Helier v Gray & AG* [2004] JRC 177.

⁶⁷See the Preface to the Jersey Judgements 1950.

⁶⁸This has been part of the explanation as to why *stare decisis* is not part of Jersey law : *Qatar v Al Thani* 1999 JLR at 125-126. This French style is referred to as a *jugement motivé* and has led some to doubt the usefulness of citing cases prior to 1950.

prescribed after ten years: this may not be viewed as a terribly helpful or sophisticated distinction. Nevertheless, the shorter period in respect of immovables may well be the result of particular public policy considerations and the importance attached to land ownership in a small Island.

4.4 The problem posed by current classification

- (a) Whether one adopts the classification provided by Guyot or Pothier, or the limited principle that emerges from older case law, a number of problems arise. As we shall consider in more detail below, tort actions have a prescriptive period of three years notwithstanding the fact that the particular tort alleged may relate to land or to a movable, or an injunction is sought or damages. In tort actions, therefore, the prescriptive period depends upon the cause of action itself⁶⁹ rather than the subject matter or the aim of the action.
- (b) Difficulties can further arise when one is faced with an obscure⁷⁰ cause of action or one that has evolved⁷¹ in more modern times. In essence, the dramatic development of Jersey law in the past fifty years has meant that new causes of action do not always fit the conventional mould. Accordingly, classification of either an obscure cause of action or one that has recently evolved, may require determination by the Court and lead to significant legal costs being incurred in the process.
- (c) *Jersey Financial Services Commission v Black & Ors*
 - (i) For example, in *Jersey Financial Services Commission v Black et Ors*, the Court had to grapple with whether or not a prescriptive period applied to an application under Article 20(7) of the Collective Investment Funds (Jersey) Law 1988, and, if

⁶⁹A distinction used to be made as to a *tort personnelle* and a *tort matériel*. According to *Speed v Nixon* 1977 JJ 1 at 2-3 this distinction led to differences in prescription periods and the procedure to be adopted. However, the distinction is not relevant to modern Jersey law.

⁷⁰E.g. The Pauline action considered in *Esteem*.

⁷¹E.g. One introduced by statute such as an application under Article 20(7) of the Collective Investment Funds (Jersey) Law 1988, as considered in *Jersey Financial Services Commission v Black* (2002) JLR 294 (Royal Court) and (2002) JLR 443 (Court of Appeal).

so, which period. In basic terms, Article 20(7) vested a discretionary power in the hands of the Court to force particular persons to make a payment into court for subsequent distribution. The Law was silent as to whether or not a prescriptive period applied to such an application and, unsurprisingly, customary law similarly did not provide a ready answer.

- (ii) At first instance, the Bailiff held that the application was “founded on tort” and that pursuant to Article 2(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 a prescriptive period of 3 years applied. On appeal, the Jersey Financial Services Commission argued that there was no prescriptive period that applied to such public law proceedings or, if there was, the action was an *action personnelle mobilière* in that it had, as its aim, the payment of money and therefore was prescribed by the period of 10 years. The Respondents maintained their argument that had succeeded in the Royal Court below that the application was “founded on tort” and thereby had a prescriptive period of 3 years or, in the alternative, was prescribed by the period of a year and a day. This latter period, it was contended, would arise by virtue of the “infraction” of the 1988 statute that (it was said) formed the basis of the application.⁷²
- (iii) The Court of Appeal, however, allowed the appeal and held that an application under Article 20(7) was not “founded on tort” and that there was, in fact, no period of prescription that applied to such an action.⁷³ Nevertheless, the multitude of

⁷²Reliance was placed upon *La Loi (1843) sur la Prescription des Poursuites*: ‘Toute infraction à une Loi...pourra être poursuivie et punie....pourvu que les poursuites aient été instituées....dans l’an et jour de l’infraction.’

⁷³Contempt proceedings are probably also not subject to any prescriptive period if English law is to be followed in this respect (*Taylor v Ribby Hall Leisure Ltd* [1998] 1 WLR 400). Similarly, time does not appear to run against the Crown: “*prescription n’a lieu contre le domaine du roi*”. (Terrien, Livre 4, ch 2; although Poingdestre has more to say upon this point: *Lois et Coutumes* p.95.)

(credible) arguments that were placed before the Court of either a one, three or ten year-period applying, together with the divergence in opinion between the Court of Appeal and the Royal Court, justify concern⁷⁴ that the law of prescription in Jersey requires reform so as to provide greater certainty.

4.5 Customary law and tort

(a) Whilst the problem faced in *Jersey Financial Services Commission v Black et Ors* arose over a novel statutory provision, the case foundered in the Royal Court upon the issue as to the meaning of “tort” as a matter of modern Jersey law. Unfortunately, the concept of tort is likely to lead to further problems when dealing with the classification of actions for the purpose of prescription and this is explained in greater detail below.

(b) Since at least the 1970s, Jersey has followed English law in the approach to the law of tort to the extent that “*the English concept of tort [now] governs legal thinking*” in the Island.⁷⁵ As a matter of civilian law, however, delict or *délit* would represent the functional equivalent of tort:

“We have, so far, been referring rather indiscriminately to the notions of delict and tort. “Delict” (derived from “*delinquere*” – hence the word “delinquent”) is the civilian term generally used to designate a civil (as opposed to criminal) wrong. Its common-law counterpart is “tort”, which in turn, has its etymological root in the Latin term “*tortus*”, meaning “crooked” or “twisted”. Delict and tort are functional equivalents, since both of them refer to certain wrongful acts which the law is prepared to redress, either with a decree for restitution in kind or with an award of damages. But the approach adopted towards defining the scope and essence of such wrongful acts is entirely dissimilar.”⁷⁶

(c) However, in Jersey since at least 1843, *délit* has meant a criminal offence rather than a civil wrong.⁷⁷

⁷⁴See Editorial Miscellany: Prescription Problems (2003) JL Review 1.

⁷⁵S. Nicolle QC, *The Origin and Development of Jersey Law* (2003, privately published, Jersey) (3rd ed.) at paragraph 15.24.

⁷⁶R. Zimmerman, *Law of Obligations* (2000, OUP, Oxford) at 907.

⁷⁷*Jersey Financial Services Commission v Black* (2002) JLR 294 at 306.

(d) Such a reception of English principle in the form of tort causes difficulty in that it provides a concurrent remedy with other, more established causes of action that have a different juridical basis. This issue can perhaps best be illustrated by the decisions of the Royal Court and Court of Appeal in *Gale and Clarke v Rockhampton and Antler*⁷⁸, a case in which the Bailiff, at first instance, was moved to say that "it is clear that the law of prescription cries out for reform". The decisions turned on the interface between *voisinage* and tort and demonstrates the difficulties created by new, evolving forms of action in the Island.

(e) *Voisinage* has been described by Matthews and Nicolle⁷⁹ as follows:

“*Voisinage* imposes on the owners of adjoining properties certain reciprocal rights and duties, which do not constitute servitudes, nor indeed do they require any titre to establish their existence. The nature of *voisinage* was examined by the Court in *Searley –v- Dawson* (1971) 1 JJ 1687, where the principle of *voisinage* as set out by Pothier, *Oeuvres*, 1844 ed., Tome 5, *Traité du Contrat de Société*, page 240 (page 322 of the 1821 ed), was approved as forming part of Jersey law. It is characteristic of Jersey law, as (in this respect at least) a civil law system, that it should treat an aspect of law which in England would be regarded as part of the law of nuisance (i.e., as a tort) as a part of the law relating to land. As Pothier put it (page 245 of the 1844 ed cited in *Searley –v- Dawson*, page 328 of the 1821 ed),

“*Le voisinage oblige les voisins à user de son héritage, de manière, qu’il ne nuise pas à son voisin*”.

“(“*voisinage*” requires that neighbours should each use their own property in such a way that they do not injure their neighbour”).

(This statement was applied recently, in *Mitchell –v- Dido Investments Ltd* 1987-88 JLR 293 at 312).”

(f) In the *Rockhampton* case the Plaintiffs owned a number of properties on La Grande Route de St.Aubin. The First Defendant was the owner of a block of flats, known as *Rockhampton Apartments*, which were developed by the Second Defendant. It was alleged that during those

⁷⁸ [2006]JRC 189A (Royal Court); [2007]JCA 117B (Court of Appeal)

⁷⁹ P. Matthews and S. Nicolle QC, *The Jersey Law of Property* (1991, Key Haven Publications Plc, London) (2nd ed.) at paragraph 1.50.

development works the actions of the Defendants caused cracking and subsidence to the Plaintiffs' neighbouring properties, resulting in substantial damage to the Plaintiffs' property. The claim was brought both in negligence and voisinage but it was accepted that the cause of action in negligence was prescribed, the proceedings having been served more than three years after the cause of action accrued. The point before the court, tried as a preliminary issue, was the applicable prescription period for a claim brought in voisinage. Both at first instance and on appeal the argument went beyond that narrow point and extended to the question as to whether a quasi contractual doctrine of voisinage was part of Jersey law, a question which the Bailiff (and subsequently the Court of Appeal) answered in the affirmative, going on to hold that the applicable prescription period was ten years, as an action peronelle mobiliere., The matter was complicated by the fact that the Royal Court in *Searley v Dawson* had accepted Pothier's classification of *voisinage* as a quasi-contract between neighbours whereas the Court in *Mitchell v Dido Investments Ltd* accepted that,⁸⁰ in respect of the tort of nuisance, the law of Jersey follows the law of England.

In the course of delivering judgment in the Court of Appeal McNeill JA said :

"Looking at the matter broadly, this does not seem to me to be an inappropriate period. It must be highly likely that when an infringement or anticipated infringement occurs, a claim – and if necessary, action – will be brought immediately. However, given the nature of the problem which this action presents – interference with support – there could easily be instances where structural damage, or the severity of structural damage, is not evident for a number of years. This is quite different from noise nuisance, noxious fumes or unacceptable levels of dust. Having considered the decision of the Royal Court in Charles Church (Spitfires) Limited and Anr v Aviation

⁸⁰At 304.

Jersey Limited and Anr (1993) JLR 93, I note that individual circumstances relating to the nature of a defect may determine the time at which it has caused personal injury or damage to property so as to result in the accrual of a right of action and commencement of the prescriptive period. This may leave an uncertainty which is better avoided and for these further reasons I consider the Bailiff's view that a ten year period is applicable to be appropriate"

- (g) Whilst *voisinage* and the tort of nuisance may be virtually indistinguishable in relation to the particular interest to which they both seek to protect, the difference in their classification will lead to differing prescriptive periods being applied. Consider, for instance, a claim for damages against one's neighbour and based upon the principle of *voisinage*, which is a matter of quasi-contract. A 10 year prescriptive period will apply to such an action in accordance with the authority of *Rockhampton*. However, the tort of nuisance will be prescribed by three years in accordance with the 1960 Law. To add yet further confusion, there is also the authority of *Vardon v Holland*⁸¹ to the effect that where a party's rights in the possession or enjoyment of an immovable are infringed, the resulting action is an "*action possessoire*" and prescribed after a year and a day.⁸² Such differing prescriptive periods might be concluded to be anomalous and without any evident justification. As Birt, Deputy Bailiff observed in a different context in *Northwind Yachts Ltd* [2005] JRC 050, such a differential is not "very logical or convenient as there will then be endless argument [as to which category an action falls within]".

4.6 Contract and Tort

- (a) The availability of concurrent remedies that arise from different causes of action is particularly visible in respect of contract and tort. In both contexts, an identical obligation or duty may arise on the part of one

⁸¹ (1964) JJ 375.

⁸² In *Vardon v Holland* such period commenced from the date of the Plaintiff's demand to the Defendant.

person towards another. For instance, where a lawyer contracts to provide legal services to his/her client there will be an implied term of the contract that the lawyer will provide such service with reasonable skill and care and a similar duty will arise as a matter of tort.

- (b) In Jersey, however, the prescriptive periods for contract and tort are very different. As a general proposition, and subject to the caveat expressed in 4.2.8 above, the former may be said to enjoy a 10 year-period and the latter 3 years. Such a prescriptive imbalance for what can often be concurrent remedies, would seem to require some justification. In England, for example, the Limitation Act 1980 provides an identical period of 6 years (or 3 years for actions in respect of personal injuries). Guernsey has similarly adopted such periods.⁸³For the reasons that are given above, the differential (and particularly one of 7 years) in Jersey is, therefore, most unwelcome.

4.7 Public Policy

- (a) Even where Jersey law is clear as to the prescriptive period that should be applied, it seems safe to assume that the policy objectives that may have supported such periods in the 17th and 18th centuries - the days of Poingdestre and Le Geyt - are not necessarily the same as those that apply today. For instance, having applied a ten year prescriptive period to the Pauline action in *Esteem*, the Deputy Bailiff remarked:
- “..a period of somewhat less than 10 years would strike a better balance between the need to protect creditors and the need to allow transactions to be relied upon. However, that is a matter for the legislature.”⁸⁴
- (b) Similarly, in *Snell v Beadle* (2001) JLR 118 the doctrine of *déception d’outré moitié de juste prix* and its accompanying longer prescriptive period of 30 years received adverse comment from the majority in the Privy Council. Lord Hope of Craighead remarked:
- “It is not generally recognized to be just, according to the notions of our time, that such a contract should be at risk of being re-opened for

⁸³See the Law Reform (Tort) (Guernsey) Law 1979.

⁸⁴At 144.

30 years simply because it occurred later to one of the parties that he or she would have been able, by asking more, to obtain more than twice the price that was agreed to.”

- (c) Interestingly, a similar criticism of such a long prescriptive period was expressed by Le Gros, some sixty years before :

*“Le terme de trente ans accordé au vendeur por demander la rescision du contrat semble être trop long...La validité du titre ne devrait point être laissée en suspens pendant trente ans.”*⁸⁵

4.8 Summary

- (a) It can be seen from the above that not only are there difficulties presented by the current approach to classification of an action for the purposes of ascertaining the relevant prescriptive period, but the periods that are currently applied merit reconsideration in terms of length and overall unity.

5 What are the relevant prescriptive periods that apply to actions in Jersey?

5.1 A table summarising the main prescriptive periods is set out at Annex One. However, the more problematic areas and issues of significance are dealt with in greater detail below.

5.2 Contract

- (a) In an action for breach of contract, the prescriptive period in Jersey is commonly stated to be 10 years.⁸⁶As the explanation in paragraph 4.2.8 above makes clear, however, such a general proposition is, in fact, not justified. What appears to have occurred is that more recent Jersey authority has shifted towards an English method⁸⁷ of

⁸⁵Le Gros, op. cit. at 353.

⁸⁶*Racz v Perrier* (1979) JJ 151 at 152: “It is further agreed that if a cause of action founded on contract arises more than ten years before the commencement of proceedings it is barred by prescription...”. See also *Maynard v Public Services Committee* (1995) JLR 65 at 78; on appeal, sub nom *Public Services Committee v Maynard* (1996) JLR 343; *Boyd v Pickersgill & Le Cornu* (1999) JLR 284 at 287 “The prescriptive period in contract is 10 years”; *Kinsella v Lido Bay Hotel (Jersey) Ltd.* (2001) JLR 247 at 253, in which the longer (contractual) prescriptive period was noted.

⁸⁷Section 5 of the Limitation Act 1980, for example, applies a period of 6 years for simple contract actions.

classification and one (like the period applied to tort actions) which is based upon the cause of action itself and not the aim or subject of the action. According to cases such as *Albright*, *Giott* or *Bichard*, the latter appears to be the correct criterion. Accordingly, a contract claim might be prescribed by ten years if it is an *action personnelle mobilière* or, alternatively, by the period of a year and a day if it is an *action personnelle immobilière*.

- (b) It is also not entirely clear as to the date from which any prescriptive period commences. In *Boyd v Pickersgill & Le Cornu* (1999) JLR 284 the Court of Appeal assumed that the period automatically commenced on the date of the breach of contract being the date upon which the cause of action is said to arise. Sumption, J.A.⁸⁸ suggested his personal contentment at a cause of action arising in contract as at the date of breach, which was a view shared by Commissioner Le Cras in the first instance decision in *Maynard v Public Services Committee* (1995) JLR 65. However, it is clear from the majority decision in *Boyd* that it remains open to a future Court to conclude that the cause of action in contract cannot accrue whilst the Plaintiff did not know and could not reasonably have known of the existence of facts that would otherwise give rise to such a cause of action (the “reasonable discoverability test”).
- (c) However, given the existence of the doctrine of *empêchement d’agir* which is considered below, it may be felt that the introduction of a “reasonable discoverability test” is unnecessary.

5.3 General Period for Personal Actions and All Actions Concerning Movables

- (a) We have seen from earlier classification that a personal action includes the *action personnelle mobilière* which bears a prescriptive period of 10 years. In *Esteem*, the Royal Court attempted to lend greater clarity to this category of action and stated the position in broad terms:

⁸⁸At 296.

“We think that the time has come to hold that the 10-year period referred to by Le Geyt is a general period which should be taken to apply to all personal actions and all actions concerning movables, save to the extent that they have already been held to be subject to a different period, e.g. Tort, actions concerning estates etc, or that some other period is, by analogy, clearly more applicable. The 30-year period should be confined to actions for *déception d’outré moitié* and other actions, if any, where that period is already established by judicial decision or by statute.”

- (b) The Royal Court’s formulation, which refers to “personal actions” or “actions concerning movables”, was apposite given the customary law classification referred to in section 4.2 above. However, the Court’s generic reference to a ten year period applying to all “personal actions” fails to note the different approach that has been taken to an *action personnelle mobilière* and an *action personnelle immobilière* as noted in *Albright*. Both are (as Pothier further describes) “personal actions” but appear to enjoy different prescriptive periods under Jersey law.
- (c) More recently, and in keeping with the decision in *Esteem*, the Royal Court in *Northwind Yachts Ltd* [2005] JRC 050 stated its preliminary view that a breach of fiduciary duty by a director was prescribed after ten years.
- (d) A period of ten years also applies to an action brought upon a judgment: see Article 7 of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1967 where time is specified to run from the date upon which the judgment becomes enforceable but the meaning of this provision is not entirely clear. However, some possible assistance may be gained from *Dyson v Helliwell* (1885) 210 Ex 391 where time was said to run not from the date of the order but from the date that it was entered into the Rolls of the Royal Court.

5.4 Tort

- (a) In an action “founded on tort”, the prescriptive period in Jersey is 3 years.⁸⁹ However, as with contract, it remains uncertain as to when

⁸⁹Article 2 of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960.

such period starts. In tort, damage is normally⁹⁰ a prerequisite to such an action but the Court of Appeal in *Public Services Committee v Maynard* (1996) JLR 343 suggested the possibility that a cause of action in the tort of negligence might accrue not at the point that damage is sustained but upon the “reasonable discoverability test”.

- (b) However, as we have noted above, it may be felt that the introduction of a “reasonable discoverability test” in tort is unnecessary.

5.5 Contribution Proceedings

- (a) Contribution proceedings⁹¹ between joint tortfeasors is possible under Article 5 of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 which applies the three-year tort period under Article 2. The case of *Bell v Heating & Ventilating Engineering Company Ltd & Ors* (1985-86) JLR 241 makes clear that the prescriptive period only starts once the tortfeasor claiming contribution has been held liable to the Plaintiff.

5.6 Estates

- (a) The prescriptive period to annul a will of movables or a will of immovables is a year and a day. In the latter case, the period starts from the date of the Acte of Court ordering registration of the will of immovables.⁹² In the former case, the commencement date is not entirely clear, but the better view is that the period starts from the date that probate is granted; this being a *sine qua non* to the right to recover or receive the movable estate⁹³. There is, however, authority to the effect that the period starts from death: see *Robertson v Lazard Trustee Co Ltd* (1994) JLR 103 at 112, apparently rejecting the Plaintiff’s

⁹⁰Some torts do not require proof of actual damage e.g. libel.

⁹¹The 1960 Law deals with contribution and contributory negligence and both areas are worthy of reform in their own right.

⁹²Article 15 of the *La Loi sur les testaments d'immeubles* (1851).

⁹³Article 19(1) of the Probate (Jersey) Law 1998. The Report of the Civil Commissioners 1861 at xx refers to the previous need to prove the will but in the Ecclesiastical Court and within a year and a day of the testator’s death.

argument that time ran from the grant of probate.⁹⁴ The period of a year and a day similarly applies to an action to reduce a will of movables so as to allow a child the right to his or her *légitime*. The date from which time runs in this instance has been stated to be the date of death.⁹⁵

- (b) Assuming that the appropriate trigger for the commencement of time can be identified, there is some authority as to how the period of a year and a day is to be calculated. In *Le Sueur v Piraulx* (1888) 48H. 402 the Royal Court stated that the prescriptive period relevant to the particular action in that case, commenced on 10 May, 1887 being the date of death of a particular person. The prescriptive period of a year and a day then expired at midnight on the day of 10 to 11 May, 1888. Interestingly, such a computation of time that includes the day of the triggering event itself, may be viewed as being at odds with the way in which time is computed in other areas of our law. For example, under Royal Court Rule 1/3(2) when an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date. Clearly, consistency would be desirable when calculating time. Further, it is to be noted that when computing prescriptive periods in England, the day on which the cause of action accrued is excluded: *Marren v Dawson Bentley & Co. Ltd* [1961] 2 QB 135.

5.7 Trusts

- (a) Article 57 of the Trusts (Jersey) Law 1984 sets out the circumstances in which a “*period of limitation or prescription*” cannot apply to an action against a trustee. In broad terms, these include matters of fraud and recovery of trust property. Otherwise, a beneficiary or enforcer must bring an action “founded on breach of trust” within three years from delivery of final accounts or from knowledge of a breach of trust

⁹⁴Argument recorded at 107.

⁹⁵*Robertson v Lazard Trustee Co Ltd* at 111, applying *Le Geyt*.

whichever period shall first begin to run.⁹⁶ Where the beneficiary is a minor, such period does not run until majority, and it would appear that such provision extends time for an action by both beneficiary and enforcer, although the position is not clear.

- (b) Because there are certain difficulties that arise from this article, it is necessary to set out its precise wording:

“Limitation of actions or prescription

(1) No period of limitation or prescription shall apply to an action brought against a trustee –

(a) in respect of any fraud to which the trustee was a party or to which the trustee was privy; or

(b) to recover from the trustee trust property –

(i) in the trustee’s possession,

(ii) under the trustee’s control, or

(iii) previously received by the trustee and converted to the trustee’s use.

(2) Save as provided in paragraph (1), the period within which an action founded on breach of trust may be brought against a trustee by a beneficiary or an enforcer is –

(a) 3 years from the delivery of the final accounts of the trust to the beneficiary or the enforcer; or

(b) 3 years from the date on which the beneficiary or the enforcer first has knowledge of the occurrence of a breach of trust,

whichever period shall first begin to run.

(3) Where the beneficiary is a minor the period referred to in paragraph (2) shall not begin to run before the day on which the beneficiary ceases to be a minor.

(3)(a) Save as provided in paragraph (1), the period within which an action founded on breach of trust may be brought against a former trustee by a current trustee is 3 years from the date on which the former trustee ceased to be a trustee of the trust.

⁹⁶See further *West v Lazard Brothers & Co (Jersey) Ltd*, 18 October 1993 (unreported).

(4) *This Article does not apply to a foreign trust whose proper law is the law of a jurisdiction to which the Convention on the law applicable to trusts and on their recognition, signed at The Hague on 20th October 1984, for the time being extends*".

- (c) Whilst the customary law principle of *empêchement d'agir* (see below) would have a potential application in an action for breach of trust that is outside Article 57(2) (i.e. not brought by an enforcer or beneficiary) it is unclear whether or not this principle will also apply to an action that does fall within the (apparently exhaustive) terms of the article. Presumably, as the Law is not to be construed as a codification, the principle of *empêchement d'agir* should still have an application. Indeed, one can imagine circumstances where a beneficiary becomes aware of a breach of trust but, for instance, by reason of some impediment (let us assume is held hostage by terrorists the following day) is unable to prosecute its claim. In such circumstances, it would be reasonable for time not to run against the beneficiary and despite the apparently clear wording of Article 57(2) that time runs from the date of knowledge. The view that *empêchement d'agir* can operate in such circumstances is supported by Dawes in relation to comparable provisions found in the Trusts (Guernsey) Law 1989.⁹⁷

5.8 Déception D'Outre Moitié De Juste Prix

- (a) *Snell v Beadle* confirms that the prescriptive period for this action is 30 years. However, the public policy reasons for such a long period must seriously be questioned.

5.9 Prescription de Quarante ans (or Possession Quadragénaire)

- (a) The Code of 1771 states the legal position as follows:

“A LA COUR DU SAMEDI

Les personnes qui ont possédé un immeuble paisiblement, et sans interruption, quarante ans, ou au-delà, ne pourront être inquiétés, ni molestés à l'égard de la propriété dans la chose possédée, la possession quadragénaire donnant un droit parfait, et incontrovertible, selon

⁹⁷G. Dawes, *Laws of Guernsey* (2003, Hart, Oxford) at 405.

l'ancienne Coûtume de l'Isle, excepté en matière de servitude, laquelle ne peut s'acquérir par la prescription, fût-elle Centenaire: mais dont on peut se libérer, ou acquérir la liberté par la prescription, c'est-à-dire, lorsque la servitude n'a point été exercée par quarante ans continuels".

(b) In essence, 40 years' peaceable and uninterrupted possession of an immovable will extinguish the title of the previous owner, and will give a perfect title to the occupier. In respect of servitudes, however, this principle will not allow a servitude to be acquired, although a servitude can be extinguished by its non-exercise for 40 years. By way of contrast, it is of interest to note that in France, Article 690 of the *Code Civil* allows a servitude to be acquired after thirty years.

(c) Despite the apparently clear wording of this provision in the Code, there remains some doubt as to the relevance of good faith in *possession quadragénaire*. Writers on Jersey Law prior to the Code, thought that good faith had a role to play. Poingdestre thought that it was an essential ingredient:

"Et généralement tous les jurisconsultes tiennent pour une règle indubitable que la bonne foi est un ingrédient nécessaire pour faire que la prescription ait lieu, c'est-à-dire, qu'il faut que celui qui veut prescrire quelque chose la possède comme sienne et ait juste et raisonnable cause de croire qu'elle lui appartient, comme s'il l'avait acquise de quelqu'autre ou qu'elle lui ait été donnée à titre de succession".

(d) Le Geyt, however, was of the opinion that 40 years possession gives a good title unless "*mauvaise foi*" is shown:

"Possession quadragénaire et paisible, en toute matière d'héritage, vaut de titre se l'on ne montre qu'elle est de mauvaise foy".⁹⁸

(e) Advocate A.J. D'Allain said in evidence in the 1861 Commissioners' Report:

"... I wish to show that prescription can never give title to an usurper, though even that usurper may have been in a quiet peaceful possession for above 40 years, upon the maxim "*Contre usurpateur la revendication est éternelle*". That is, our law considers that with regard to realty prescription can only give title when the person actually prescribing had good reason to believe that the property he held was really his own and it follows that an usurper and his heirs holding

⁹⁸Le Geyt, op. cit. at 63 (Article 1).

under a vicious title, with knowledge of the fact of usurpation, could never obtain a title by his prescription, however long ...”⁹⁹

- (f) Le Gros considers the various arguments and casts doubt upon the role of good faith in *possession quadragénaire*:

“En effet, ce serait porter atteinte à la stabilité des transactions héréditaires de dire que la bonne foi est une condition tacitement comprise dans les termes du Code. Ce serait apposer une condition trop dure à la prescription acquisitive. On pourrait dire à l’encontre de ce raisonnement que la bonne foi est présumée exister tant qu’on ne justifie pas le contraire. Mais Basnage n’est pas de cet avis. Selon lui, ce long espace de temps “purge tous les défauts réels”.

- (g) Given that the Code makes no requirement for good faith, but merely as le Gros states, refers to “*la possession paisible et sans interruption, et rien de plus*”,¹⁰⁰ it seems unlikely that good faith has any role to play in *possession quadragénaire*, at least since 1771.

- (h) On this point, the position in Guernsey is different. There the claimant is required by statute to act in good faith and it was further argued in *Vaudin v Hamon* [1974] AC 569 that this had always been a requirement of Guernsey customary law. In France, the position is dealt with by varying prescription periods according to how innocently the prospective acquirer conducted him or herself. Thirty years is required for a squatter with no pretence of title but 10 years for someone who entered into possession with what was perceived as a “*juste titre*”.

- (i) *Possession quadragénaire* has a well established pedigree in Jersey. Nevertheless, such a long period that further fails to distinguish between the different circumstances of possession justifies reconsideration in the 21st century.

5.10 Criminal Law

- (a) By virtue of the Criminal Procedure (Prescription of Offences) (Jersey) Law 1999, the time within which proceedings may be instituted in

⁹⁹At 10526.
¹⁰⁰At 232.

respect of an offence is now (subject to any other enactment) without limit. The previous position was unclear.¹⁰¹.

5.11 Periods in which Prescription does not run

- (a) Empêchement d'agir
- (b) This principle (which has a long established basis in customary law) provides that prescription will not run against a person who is subject to an impediment which prevents him from bringing a claim or otherwise acting in the prosecution or defence of his rights. Literally it means "impediment to action". In essence, there are two¹⁰² types of impediment: (i) an *empêchement de fait* and (ii) an *empêchement de droit*.
- (c) An *empêchement de droit* involves a legal disability. For example, where a party is a minor, time will not run unless the minor has a tuteur.¹⁰³ A minor for whom a tuteur has been appointed will however have a right of action against the tuteur in cases of negligence.¹⁰⁴ Similarly, where a person lacks mental capacity in circumstances where a curator has not been appointed, time will not run.
- (d) An *empêchement de fait*, however, refers to the practical impossibility of commencing or continuing legal proceedings. Where a person is ignorant of the facts giving rise to the cause of action and such ignorance is objectively reasonable, such ignorance will amount to an *empêchement de fait*.¹⁰⁵ Other examples of potential impossibility include concealment as the result of another's fraud or bad faith, or

¹⁰¹S. Pallot, 'The Limits (If Any) of "Prescription Criminelle" ' (1998) JL Review 159.

¹⁰²*Public Services Committee v Maynard* (1996) JLR 343 at 351

¹⁰³*Letto v Stone* (1890) 48H 473: "prescription ne court pas contre un mineur dépourvu de tuteur"

¹⁰⁴Le Geyt, op. cit. at 65 (Article 13). At customary law, the prescriptive period for such an action was a year and a day but presumably this will now fall within the three year (statutory) tort period.

¹⁰⁵Per Beloff JA in *Boyd v Pickersgill & Le Cornu* (1999) JLR 284 at 291; Southwell and Sumption JA at 295, although Sumption JA made clear that once there was knowledge of the facts giving rise to the cause of action, ignorance that a cause of action arose in such circumstances was not enough.

times of war.¹⁰⁶ Fraud *per se* should not, it is submitted, stop time from running unless it also results in an *empêchement de fait*. However, *Perot v le Breton* (1891) 11 C.R. 29 is often cited for the contrary view that a party cannot plead prescription against a claim of fraud.

- (e) A number of recent authorities (both in Jersey and Guernsey) have considered the application of the principle of *empêchement d'agir* such that it can be seen to enjoy a modern day vitality.¹⁰⁷ Further, the inherent flexibility for a Court in determining whether or not a litigant suffered from a practical impossibility in pursuing his/her claims may be seen as a positive element to the application of this principle that still maintains well defined limits.
- (f) Finally, it is important to note that time will cease to run upon service of proceedings, or where leave to serve out of the jurisdiction has been obtained, on the making of such an order.¹⁰⁸ In the Royal Court, service of proceedings is frequently required to be made through the Viscount and time will only cease to run in the event that service is effected as is required by the Royal Court Rules: *Gale v Rockhampton Apartments Ltd* [2005] JRC 105.¹⁰⁹ As the Royal Court noted in this case, such service represents the issuing of proceedings, and the English regime is different: the sealing of the process by the Court *prior* to service represents its issue for prescription purposes.
- (g) Where the issuing and service of proceedings depends upon the agency (and availability) of the Viscount's staff, it may be more appropriate for any prescriptive period to cease upon the Viscount's receipt of the proceedings that are required to be served.

¹⁰⁶ *Public Services Committee v Maynard* (1996) JLR 343 at 352; *Robertson v Lazard Trustee Co Ltd* 1994 JLR 103 at 112. Note that in *Carson v Romeril* (1946) 242 Ex. 295 the Royal Court refused to accept that the Plaintiff could not have brought his action in time because of the war: the Court observed that the Royal Court was still open for business as usual and the Plaintiff was in the Island.

¹⁰⁷ See, for example, the Guernsey case of *Holdright Insurance Company Limited v Willis Corroon Management (Guernsey) Ltd* (25 August 2000).

¹⁰⁸ RCR 6/4; PDR 25.

¹⁰⁹ Query whether the proceedings (by way of Order of Justice) could have been saved had they been incorrectly served by post as a summons under RCR 6/2. RCR 10/6 may then have rescued the proceedings from being rendered "void".

6 Private and Public International Law Developments

6.1 Private International Law

- (a) Issues of a private international law nature are inevitable in an era of globalised commerce and movements of assets and claims. The rise of international commerce and the ease of setting up in more than one jurisdiction now mean that many individuals and companies have little difficulty in gearing their economic expansion to a global scale. Interaction between economic entities located in different countries, as a by-product of globalisation and the increasing dependence on new and powerful technologies that effectively “shrink” the world, has caused the delocalisation of business and the search for new markets to take business opportunities throughout the world. It is almost redundant to suggest that the transaction by an individual or business that crosses an international boundary will raise issues of conflict of laws and resolution of this conflict by reference to the rules of private international law. It may also be superfluous to note that successful transactions often raise no such questions for resolution. It is only in cases of dispute that an attempt must be made to ascertain the proper law to apply and what the consequences are on the claim and the manner in which it may be raised, resolved, satisfied or denied.
- (b) Inevitably, the factor that most affects whether claims may be brought is the relevant period of prescription or limitation applying to the claim, which will in many instances differ from jurisdiction to jurisdiction. Furthermore, there is a question as to how the existence of a foreign limitation period, which in itself may reflect how that jurisdiction chooses to deal with balancing the rights and claims of plaintiffs and defendants, will have an impact on proceedings in Jersey. In this context, the balance between certainty and the right to pursue a claim was dealt with in *Cooper*,¹¹⁰ where it was stated that where the

¹¹⁰*Cooper v Cooper (née Resch)* (1985-86) JLR Notes-6a (Royal Court) (21 October 1985).

prescriptive period in Jersey was longer than one in the United Kingdom and that Jersey was not, because of attachment factors present in the case, a *forum non conveniens*, it would be permissible to allow the plaintiff to pursue the case in Jersey.

- (c) Nonetheless, the potential application of a foreign limitation or prescription period may be problematic, in that it is generally regarded as a rule of procedure governing when claims may be brought and yet will have a substantive impact on whether the claim may be exercised. Because of this, the reasoning previously employed, in England and Wales, the courts treated limitation periods as procedural in nature and thus to be governed by the *lex fori* (law of the forum), often the foreign law. This meant that English courts could apply their own limitation periods to the exclusion of foreign limitation periods, occasionally permitting claims to proceed though barred elsewhere, but also potentially barring claims though still alive in other places. The ambiguity of this position was avoided by the introduction of the Foreign Limitation Periods Act 1984, which is said to have been inspired by the Rome Convention paradigm on limitation (see below),¹¹¹ and which introduced succinctly the rule that foreign periods of prescription or limitation were now to be treated as substantive matters, irrespective of whether the same period would be regarded by the law of the jurisdiction it emanates from as procedural.¹¹²
- (d) It may be opportune, as part of overall consideration of reforms in the area of prescription, to enact a rule similar to that contained in the United Kingdom legislation.

6.2 Public International Law

- (a) The United Kingdom's present position with respect to what treaties or international agreements may extend to Jersey is contained in a

¹¹¹PM. North and JJ. Fawcett, *Cheshire and North's Private International Law* (1999, Butterworths, London) at 599.

¹¹²Section 1(1)(a) of the Foreign Limitation Periods Act 1984. For a detailed discussion of this Act, see McGee, *op. cit.* in Chapter 25 (*in extenso*).

statement on the Department of Constitutional Affairs' website.¹¹³ According to this, the international understanding that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”, a practice reflected in Article 29 of the Vienna Convention 1969,¹¹⁴ is also reflected in the United Kingdom's long-standing practice when ratifying a treaty “to do so on behalf of the United Kingdom of Great Britain and Northern Ireland and such (if any) of its overseas territories as wish the treaty to apply to them”.¹¹⁵ If the instrument of ratification does not permit the inclusion of Crown Dependencies or overseas territories, the scope of the ratification can be extended later to include these.

- (b) The United Kingdom's practice has apparently been acquiesced in by other states and, for the purposes of Article 29, is treated as establishing the “different intention” permitted by that article for variation of the extent of ratification. In relation to the European Union, there is a facility to make Orders under Section 1(3) of the European Communities Act 1972 specifying any community treaties that may apply either wholly or in part to the Channel Islands under Protocol 3 of the Treaty of Accession.¹¹⁶ The scope of this facility is, however, extremely limited and is applicable only in the context of customs matters, quantitative restrictions, freedom of trade and anti-discrimination matters.
- (c) Despite the exclusion of general European Union law, there are a number of European Union texts dealing with private international law matters, which may worth considering in the context of any reform to the private international law position, particularly where the issue of any foreign limitation period is concerned.

¹¹³See DCA Statement on <www.dca.gov.uk/constitution/crown/govguide.htm> (last viewed 15 November 2005).

¹¹⁴This Treaty may be viewed at: <www.un.org/law/ilc/texts/treatfra.htm> (last viewed 15 November 2005).

¹¹⁵Paragraph 34 of the DCA Statement.

¹¹⁶*Ibid.*, at paragraph 35.

- (i) Convention on the Law applicable to Contractual Obligations of 19 June 1980 (80/934/EEC) (“Rome Convention”)¹¹⁷
- (A) The Rome Convention is potentially relevant in that, by determining the appropriate choice of law for contracts, it indirectly stipulates the application of the relevant law to limitation periods for claims. Article 10(1)(d) of the convention states that the law found to be applicable to the contract will govern the issue of prescription or limitation. Nevertheless, Article 27(2)(b) of this convention states that it is not to apply to any European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible, unless the United Kingdom makes a declaration to the contrary in respect of any such territory. Thus far, there is no evidence of any call for extension of the convention to Jersey, although section 8(2)(b) of the Contracts (Applicable Law) Act 1990 permits the extension of the Act to Jersey by means of an Order in Council.
- (B) A recommendation may be made here that, in the context of a reform of prescription periods, the benefit of extending this convention to Jersey may be slight, in that it deals incidentally with the issue of the limitation periods that may apply to cases involving issues of private international law. Nevertheless, this is not to say that, in the context of a wider reassessment of contract law in Jersey, this convention may not receive due consideration for extension, given the consensus of commentators of the utility of this text.¹¹⁸

¹¹⁷Given force in the United Kingdom by the Contracts (Applicable Law) Act 1990.

¹¹⁸North and Fawcett, *op. cit.* in Chapter 18 (*in extenso*).

(ii) Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 and 1988 (“Brussels Convention” and “Lugano Convention” respectively)¹¹⁹

(A) The Brussels and Lugano Conventions are potentially relevant in that, by determining the appropriate choice of court for a wide number of issues, including contracts, torts, other civil claims, insurance and consumer matters as well as matters affecting land, trusts, companies and intellectual property, it indirectly stipulates the application of the relevant law to limitation periods for claims. Nevertheless, Article 60(2) of the Brussels Convention states that it is not to apply to any European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible, unless the United Kingdom makes a declaration to the contrary in respect of any such territory.

(B) The Brussels Convention remains, despite the enactment of Council Regulation (EC) 44/2001, of potential application to relations between other European Union member states and Denmark, where it was excluded by the application of the terms of that country’s accession protocol to the Treaty of Maastricht. However, it is understood that Denmark has signed an agreement with the European Union extending the terms of the Regulation. The Lugano Convention remains potentially of application to relations between European Union member states and Norway, Iceland, Switzerland and Liechtenstein. It is also open to states outside Europe to accede to the

¹¹⁹Given force in the United Kingdom by the Civil Jurisdiction and Judgments Act 1982.

Lugano Convention and Australia was reported to be considering this option.¹²⁰

(C) Given the limitations now attendant on the use of the Brussels Convention, as a result of moves within the European Union towards enacting private international law instruments as Regulations under Title IV of the EC Treaty,¹²¹ there is perhaps now no call for Jersey to request the extension of this convention, although the power is contained in section 52(2)(b) of the Civil Jurisdiction and Judgments Act 1982 to permit the extension of any provisions of the Act to Jersey by means of an Order in Council. In any event, the issue would be moot as to whether the extension of the Brussels Convention would enable Jersey to have the benefit of what hitherto would have been the position of the United Kingdom vis-à-vis the other member states of the European Union. However, the same provision, which would authorise an extension of the Lugano Convention, may be of some use given the existence of other states to which it could apply.

(d) A number of diverse international instruments deal with individualised limitation periods applicable to their subject matter. Some of these are potentially of application to Jersey and in fact have received attention by Jersey authorities in connexion with their proposed application to the island.

(i) Conventions on Stolen or Illegally Exported Cultural Objects

¹²⁰See Australian Law Reform Commission Report 80 on Legal Risk in International Transactions in Chapter 9, available at: <www.austlii.edu.au/au/other/alrc/publications/reports/80/ALRC80Ch9.html> (last viewed 17 November 2005).

¹²¹This move may be regrettable as a number of later instruments, including the European Insolvency Regulation (1346/2000), include choice of law rules, in this instance Article 4 potentially governing limitation periods in the context of insolvency procedures and claims.

- (A) Two conventions deal with limitation periods in respect of claims of this type, the first being the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, whose Article 13(c) requires states to “admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners” without any limitation of time.
- (B) The second UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 stipulates in Article 3(3) that “any claim for restitution [of a stolen object] shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft” subject to the possibility in Article 3(5) for “any contracting state [to] declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law.” The convention further states in Article 5(5) that “any request for return [of an illegally exported cultural object] shall be brought within a period of three years from the time when the requesting state knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a [temporary export] permit.”
- (C) Report 22/1999 to the States of Jersey, dated 8 June 1999, deals with the second of these conventions. The recommended action was, as the Jersey authorities were of the view that it would be in Jersey’s best interests to be included in the United Kingdom’s ratification of this

convention, that Jersey awaited the United Kingdom's decision on the form of legislation it proposes to introduce, before making a final decision on the form of the domestic legislation in order to implement the convention. A subsequent Report 54/2004, dated 21 December 2004, dealt with the matter of the first convention, but was less sanguine, although noting the United Kingdom's intention to ratify the convention, preferring instead to postpone any request for extension of ratification to Jersey on grounds of insufficient resources, particularly those required to comply with the convention's requirements for a cultural inventory.

- (ii) Carriage and Transport Conventions
 - (A) The United Kingdom Carriage by Air Act 1961, which transposes the Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 ("Warsaw Convention") was extended to Jersey by the Carriage by Air (Jersey) Order 1967.¹²² The time limit for bringing an action, under Article 29 of this convention, is two years from the date of actual or intended arrival at the destination or from the date on which carriage stopped.
 - (B) Report 20/2000, dated 23 May 2000, to the States of Jersey deals with the International Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention"), which is intended to supersede the Warsaw Convention (above) and the modifications to Article 22 relating to the liability of the carrier for persons when involved in the carriage of persons. The Jersey authorities have asked that the United Kingdom's ratification be extended to Jersey

¹²²Jersey Order in Council 8/1967.

subject to enactment of the necessary legislation to give effect to it. Report 35/2002, dated 24 September 2002, confirmed that the Jersey authorities had been asked to confirm the adequacy of Jersey legislation for the proposed extension of the convention and that the Law Officers, having had sight of the United Kingdom's draft statutory instruments, had provided drafting instructions for an Order in Council. The subsequent Report 54/2004, dated 21 December 2004, confirms that drafting has occurred and the instrument was awaiting Privy Council approval. It should be noted that, under Article 35 of this convention, the time limit for bringing an action will remain two years calculated under the same terms as in the Warsaw Convention (above).

- (iii) A summary of this section might conclude that, in reforming the general prescription periods, attention should be paid to the possibility that limitation periods applied by international law may intervene to vary the period applicable to particular claims. Therefore, care should be taken not to unduly complicate matters by simplifying, as far as possible, the variation in limitation periods that may apply in particular areas of law.

7 How is reform best implemented?

- 7.1 At present, the lack of a comprehensive system for prescription in Jersey is a disadvantage. It leaves lacunae, which are only partially resolved by the case law evolving to take into account new forms of action and new types of claims, as well as by occasional legislative initiatives dealing with discrete issues. This creates a great deal of uncertainty and militates against the promotion of efficiency, speed and fairness within the legal system.

- 7.2 Reform may best be implemented by statute.¹²³ This would present a coherent statutory scheme in the law in Jersey, which would be a clear advantage. This may be wholly justified by reference to the policy, procedural and economic reasons outlined above in section 2.
- 7.3 Currently, there are two broad schemes that may be conveniently emulated or considered in any proposed reforms. The first would be to take a civilian code and tailor it to the specifications of the law in Jersey. Arguably, this would be consonant with the roots of Jersey law and would respect the customary source and origins of many of the prescription periods that are also reflected in codifications in Western Europe. In this context, the French law of prescription bears many close resemblances and could be adapted specifically for use in Jersey.
- 7.4 Alternatively, the English model of a Limitation Act may be considered. Many of the models used at present in the Commonwealth, including in Australia and Singapore, share common origins, being derived from the United Kingdom Limitation Act 1939 or predecessor texts. The position in the United Kingdom itself derives from the later enactment of the Limitation Act 1980, which itself has been amended in the United Kingdom a number of times since. It is however, in the words of some commentators, in need of major reform.¹²⁴
- 7.5 The position in Guernsey, which bears a close analogy to that in Jersey, by reason of common origins of customary laws, albeit diverging in some material respects over the centuries, appears to take a mid-point by being inspired by the approach in the Limitation Acts as respects some areas of law.¹²⁵ Nevertheless, here too, there is a lack of an overall statute dealing comprehensively with all aspects of prescription.
- 7.6 In summary, the diversity of legislative examples may require closer consideration and may depend on a policy decision being taken by those

¹²³See Editorial Miscellany: Prescription Problems [2003] JL Review 1.

¹²⁴Prime and Scanlan, *op. cit.* at 40-41, referring warmly to Law Commission proposals issued in 1998.

¹²⁵E.g. Torts through the Law Reform (Tort) (Guernsey) Law 1979.

responsible in Jersey for law reform consonant with the overall thrust of views solicited as part of the reform process. Annex Two provides a comparison between the law in Jersey and that of a number of other civil and common law jurisdictions, which may be a useful reference for a number of policy decisions, particularly in respect of arguments for the reduction of certain prescription periods.

8 Summary of Recommendations

- 8.1 On the issue of terminology and the choice between limitation or prescription, prescription is preferred as being truer to the roots of the law in Jersey.
- 8.2 Reforms should take place by a consolidating statute, gathering together and reforming existing periods of prescription contained in general and customary law as well as statute. A French or English model may be considered apt for tailoring to the needs of Jersey.
- 8.3 There should be a definition of prescription within any text adopted and the impact of prescription on rights and claims should be mentioned. If felt necessary, the rationale for the system of prescription may be noted in a preambular text or initial statement of purposes within the law.
- 8.4 The reforms should add clarity to any new law and remove doubt in the current law and specifically in the respects that have been considered in this consultation document. Furthermore, with respect to any future developments in the field, there should be a presumption that there is a prescription period for all matters unless statute says otherwise.
- 8.5 Consideration must be given to periods generally and to the public policy interests they serve. In particular where there are different periods, differences have to be justified especially where concurrent remedies lead to the application of different periods of prescription depending on classification of the action.
- 8.6 A case may be made for a uniform period of prescription, subject to limited exceptions. This is especially cogent given the potential proliferation of

exceptions to general periods introduced by particular statutes and by the impact of private and public international law measures.

- 8.7 Nevertheless, if there is no desire for uniformity, the length of each prescriptive period should be considered. Overall reductions may be sustainable, for example from 10 years to 6 years as per the reforms in Guernsey and the United Kingdom. Similarly, the longer periods of 30 or 40 years may be reduced to 20 years or according to particular circumstances that merit different treatment. However, in this context particularly, adequate protection for interests and safeguards may be deemed desirable, for example through a requirement for good faith so as to justify a shorter prescriptive period than is currently provided by *possession quadragénaire*.
- 8.8 An overall revision of customary law may be undertaken with the above in mind. Nevertheless it remains legitimate to continue aspects that have a modern vitality, for example the principle of *empêchement d'agir* which would allow an extension in prescriptive periods, *inter alios*, in cases of disability, fraud and concealment. However, consideration would need to be given as to how this principle operates in such respects and to what extent reform or clarification is required.
- 8.9 In a similar light, consideration may also be given to a determination of when prescriptive periods should begin and how the periods are to be computed. Different tests, notably the accrual of the cause of action or the date of discoverability are used in general law. Prescription better matches the first test, while the second is geared towards the limitation of actions.
- 8.10 Were the continuance of the principle of *empêchement d'agir* to be rejected, an argument may legitimately be made for allowing the date of discoverability to govern the ability of the plaintiff to bring a claim as representing a fairer test or burden on the plaintiff, who has to show that he knows or ought reasonably to have known that a cause of action exists. This could be accompanied, as in many jurisdictions, by a long-stop provision running from the date of accrual of the cause of action, which reflects the interest of potential defendants for an upper time limit on their liability.

- 8.11 In such circumstances, it may also be necessary to allow for courts to be given some additional discretion. While a long-stop prescription period might not require courts to be given much latitude, the courts may still need some discretion in exceptional cases.
- 8.12 An argument may be made that, within the bounds set by the requirements for certainty, efficiency, and good faith, parties to arrangements should continue to be permitted to vary the periods of prescription applicable to their situation.
- 8.13 Finally, the reforms must take the opportunity to deal with both domestic periods of prescription and the treatment at private international law of foreign limitation or prescription periods. Consideration may also be given, perhaps separately, to whether it would be opportune for Jersey to request the extension to the Island of the United Kingdom Contracts (Applicable Law) Act 1990.

The Commissioners wish to express their thanks to the Topic Practitioners who assisted in researching and drafting this paper, namely Advocate Timothy V.R. Hanson and Paul Johann Omar, Barrister, Advocate and Solicitor of the High Court of Malaysia.

Annex One: Main Prescriptive Periods in Jersey

Period	Application	Comments
40 Years (quadrageraire)	Rentes if not claimed (Holloway v. Le Sueur 1833)	Can be interrupted e.g. by contract or acte: Payn v Prouings (1863) 8 CR 383; De Gruchy v Le Neveu (1901) 77 Ex 153.
	Servitude extinguished if not exercised (Code 1771)	
	Acquisition of title to land by virtue of possession quadragénaire (Code 1771) & owner's loss of action pétitoire pour exhibiter titre (Vardon v Holland 1964 JJ 375.)	
30 Years	Deception d'outré moitié (Snell v Beadle 2001 JLR 118)	
	Guarantees: Article 44, Loi (1880) sur la Propriété Foncière.)	From date stipulated or arose
10 Years	Contract (but see 4.2.8 above) & specifically <i>actions personnelles mobilières</i> : Albright v. Harrison (née Wailes) 1952 JJ 31. Re Esteem Settlement (2002)JLR 53	The ten year period does not apply to an <i>action personnelle immobilière</i> whether or not the action originates from a breach of contract.
	Droit de suite in respect of a <i>hypothèque judiciaire</i> or <i>légale</i> : Article 29, Loi (1880) sur la Propriété Foncière.	Exception – dower & <i>hypothèque conventionnelle</i> .
	Restitution de meubles (Drummond – Hay v. Godfray (1905) 223 Ex 494	
	Voisinage (Gale and Clarke v. Rockhampton and Antler [2007]JCA117B)	
	Judgments of Royal Court and Petty Debts Court: Article 7, Law Reform (Miscellaneous Provisions) (Jersey) Law 1967.	From date judgment becomes enforceable.
3 Years	Torts Article 2(1), Law Reform (Miscellaneous Provisions) (Jersey) Law 1967, Article 5, Fatal Accidents (Jersey) Law 1962	From date action accrued or from date of death

	Breach of Trust Action by beneficiary or enforcer founded on breach of trust: Article 57, Trusts (Jersey) Law 1984	From delivery of final accounts or from date of knowledge. Note <i>lacunae</i> and provision for extension in time.
Year and 1 Day	An action personnelle immobilière including an action to enforce an agreement to sell land (Giot v Giot 1876); & rectification of a contract of partage (Rive v. Bichard 1875)	
	Action against former tuteur by former infant unless is “founded on tort” in which case 3 years	From date of majority (Le Geyt)
	Action en suite par hypothèque	From close of décret or dégrèvement: Article 104, Loi (1880) sur la Propriété Foncière.
	Action to annul will of realty (Article 15, Loi (1851) sur les testaments. d’immeubles)	From date of registration
	Action to annul will of personalty (Bertram v. Bree 1894)	From death or arguably now from date of grant of probate
	Actions possessoires (<i>nouvelles dessaine</i>) (Vardon v. Holland 1964 JJ 375)	From date of demand
	Action en rapport a la masse	From date of death: <i>Robertson v Lazard Trustee Ltd</i> (1994) JLR 103 at 111
	Recordement d’un bénéfice d’inventaire (Hilgrove v. Lempiere 1745)	
6 Months	Proceedings in tort maintainable against deceased’s estate (Customary Law Amendment (Jersey) Law 1948)	Unless pending death or taken not less than six months after personal representatives. took out representation
40 Days	Landlord’s right to follow movables for rent into the hands of third party (Le Gresley v. Bourne 1886)	May not be exercised against a <i>bona fide</i> purchaser after forty days
Date of death News of death	Application by heir for bénéfice d’inventaire	From date of death if de cuius died in the Island, otherwise from date of receiving news

Annex Two: Prescription Periods/Limitation Acts Contrasted

	Contract	Tort	Land	Latent Damage	Consumer Protection	Special Periods
Guernsey	6Y: Art. 1, Loi relative aux prescriptions 1889	6Y: Art. 1, Loi relative aux prescriptions 1889 and s4(1), Law Reform (Tort) (Guernsey) Law 1979 (general torts); 3Y: s5, LR(T)(G)L 1979 (personal injury based on negligence, nuisance or breach of duty); 3Y: s6, LR(T)(G)L 1979 (claims under Fatal Accidents Law 1900); 2Y: s10, LR(T)(G)L 1979 (contribution proceedings)	20Y: Art.1, Loi relative à la prescription immobilière 1909			no limit: s71(1), Trusts (Guernsey) Law 1989 (trust claims: fraudulent breach of trust or conversion); 3Y: s71(2), T(G)L 1989 (trust claims: breach of trust)
France	30Y: Art. 2262, C. civ. (actions réelles et personnelles); 10Y: Art. L. 110-4-I, C. com. (actions entre commerçants et entre commerçants et non-commerçants); 5: Art. 2277, C. civ. (claims for wages, rents, pensions, family support and interest on loans)	10Y: Art. 2270-1, C. civ. (from harm occurring or being aggravated); 20Y: Art. 2270-1, C. civ. (where harm caused by torture, barbarous acts, violence or sexual abuse against a minor)	10Y: Art. 2265, C. civ. (immoveables where true owner in same <i>ressort</i>); 20Y: Art. 2265, C. civ. (immoveables where true owner elsewhere); 10Y: Art. 2270, C. civ. (constructions)		3Y: Art. 1386-17, C. civ.: calculated from date of awareness or when reasonable awareness ought to have intervened; 10Y: Art. 1386-16, C. civ (longstop provision)	1Y: Art. L. 110-4-II, C. com. (sailors' victuals, ships' equipment, <i>ouvrages</i>); 5Y: Art. L. 110-4-III, C. com (sailors' wages) 1 month: Art. 2271, C. civ. (teachers' wages); 6 months: Art. 2271, C. civ. (hotel rooms and supplies); 1Y: Art. 2272, C. civ. (<i>huissiers'</i> acts, students' and

						<p>apprentices' pensions); 2Y: Art. 2272, C. civ. (doctors' and surgeons' services and medicines, merchant's sales); 2Y or 5Y: Art. 2273, C. civ. (lawyers' fees for finished or unfinished cases); 10Y: Art. 2277-1, C. civ. (claims against lawyers)</p>
England and Wales	<p>6Y: s5, Limitation Act 1980 (simple contract); 6Y: s8, LA 1980 (contract on a specialty)</p>	<p>6Y: s2, LA 1980 (torts general); 1Y: s4A, LA 1980 (defamation); 3Y: s11(2), LA 1980 (personal injury)</p>	<p>12Y: s15(1), LA 1980 (recovery: unregistered land); 10Y+2Y: s96 and Sch. 6, paras. 9(1)-(3), Land Registration Act 2002 (recovery: registered land); 12Y: s16, LA 1980 (mortgage redemption); 6Y: s19, LA 1980 (rent); 12Y: s20(1), LA 1980 (mortgage principal); 6Y: s20(5), LA 1980 (mortgage interest)</p>	<p>6Y: s14A(4)(a), LA 1980: from accrual of cause of action; 3Y: s14A(5), LA 1980: alternative period of claim begins at: 'the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required and a right to bring an action'; 15: s14B, LA 1980 (longstop provision)</p>	<p>3Y: s11A(4), LA 1980: damage to person and property; 10Y: s11A(3), LA 1980 (longstop provision)</p>	<p>6Y: s9(1), LA 1980 (claims under a statute for sums due); 6Y: s21(3), LA 1980 (trust claims: property recovery or breach of trust); no limit: s21(1), LA 1980 (trust claims: fraudulent breach of trust or conversion)</p>
Ireland	6Y: 11(1)(a),	6Y: s11(2),SLA	12Y: s13, SLA		3Y: s7,	6Y: s43,

	Statute of Limitations Act 1957 (but not equitable relief)	1957 (but not equitable relief) 3Y: s3, Statute of Limitations (Amendment) Act 1991: slander; personal injury caused by negligence, nuisance or breach of duty	1957 (land claims); 12Y: s34, SLA 1957 (actions for redemption); 12Y: s36, SLA 1957 (mortgage principal); 6Y: s37, SLA 1957 (mortgage interest)		Liability for Defective Products Act 1991: calculated from date of awareness or when reasonable awareness ought to have intervened 10Y: section 7(2)(a), LDPA 1991 (longstop provision)	SLA 1957 (trust claims: property recovery or breach of trust); no limit: s44, SLA 1957 (trust claims: fraudulent breach of trust or conversion)
Australia: ACT	6Y: s11, Limitation Act 1985 (general claims); 12Y: s13, LA 1985 (claim on a deed)	6Y: s11, LA 1985 (general claims); 3Y: s16A, LA 1985 (workers' compensation); 3Y: s16B, LA 1985 (personal injury); 1Y: s21B, LA 1985 (defamation)	12Y: s13, LA 1985 (claim on a deed); 12Y: s24, LA 1985 (mortgage principal); 6Y: s25, LA 1985 (mortgage interest)			12Y: s14 LA 1985 (claim on a judgment); 12Y: s27, LA 1985 (fraud or conversion of trust property)
Australia: NSW	6Y: s14, Limitation Act 1969 (general claims) 6Y: s14A, LA 1969 (frustrated contracts); 12Y: s16, LA 1969 (action on a deed);	6Y: s14, LA 1969 (general claims); 1Y: s14B, LA 1969 (defamation); 3Y: s18A, LA 1969 (personal injury); 12Y: s62A, LA 1969 (longstop provision)	12Y: s27, LA 1969 (claim to land); 12Y: s41, LA 1969 (mortgage redemption); 12Y: s42, LA 1969 (mortgage principal); 6Y: s43, LA 1969 (mortgage interest)			12Y: s17, LA 1969 (action on a judgment); 6Y: s48, LA 1969 (trust claims: property recovery or breach of trust); 12Y: s47, LA 1969 (trust claims: fraudulent breach of trust or conversion)
Singapore	6Y: s6(1), Limitation Act (Cap. 163) (contracts)	6Y: s6(1), LA (general torts); 6Y: s24A(3), LA (negligence, nuisance, breach of duty); 3Y: s24A(2),	12Y: s9(1), LA (claim to land); 12Y: s21(1), LA (mortgage principal); 6Y: s21(6), LA (mortgage interest)			12Y: s6(3), LA (claim on a judgment); 6Y: s7, LA (conversion); 6Y: s22(2), LA (trust claims: property

		LA (personal injury); 15: s24B, LA (longstop provision for claims under s24A)				recovery or breach of trust); no limit: s22(1), LA (trust claims: fraudulent breach of trust or conversion)
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