

RIGHTS OF AUDIENCE IN JERSEY AND GUERNSEY AND WHO SHOULD EXERCISE THEM

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Subject to limited exceptions, the right to appear on behalf of a party in any legal process in the courts of Jersey and Guernsey is restricted to Advocates of the respective Bailiwicks' Royal Courts but such right is not absolute and unfettered and is subject to the court's inherent jurisdiction to control its own process. In principle, the same jurisdiction enables non-admitted persons, in appropriate circumstances and subject to the court's sanction, to appear on behalf of a party in any particular process before the court. In recent years, however, businesses have evolved seeking to conduct civil litigation through persons who have little or no legal qualifications and by means of various contractual mechanisms specifically aimed at "creating" rights of audience. Such mechanisms are legal fictions and it is not in the public interest that they should be recognized. There is a place for such lay advocates before our courts, but they should be appropriately regulated, permitted to operate without the need for legal fictions and restricted to roles appropriate to their level of expertise.

1 This article examines in outline the nature and extent of rights of audience before the Jersey and Guernsey courts. It is important to distinguish at the outset between rights of audience, ie the right to appear before and address a court, including the right to call and examine witnesses,¹ and the right to conduct litigation. Subject to certain customary and statutory controls, which will be examined in the course of this article, the modern position is that prima facie all natural persons in the Channel Islands have the right to conduct litigation² in their own name, and that all legal persons have the right to conduct litigation by their duly authorised officers or, if the court

¹Taken from the UK Courts and Legal Services Act 1990, s 119(1). There is no analogous Channel Island legislation which defines "rights of audience".

²But not necessarily to commence it. In Guernsey, Royal Court summonses may be signed by advocates only, unless the Bailiff grants leave to a litigant to commence proceedings in person. The Bailiff's decision on the point is final: see the Royal Court Civil Rules 2007, rr 11(2)(d) and 90.

gives permission, employees and agents. The right to represent others in litigation, however, is closely controlled in both Bailiwicks, and it may occasionally be said jealously guarded by the local professions. That is not to say that the line between rights of action and rights of audience are never blurred or that problems do not arise. A topical example, which may highlight the need for reform in this area, will be explored below.

Rights of audience

2 In Jersey, only appropriately qualified advocates may appear before all courts,³ although limited rights of audience are granted to Jersey solicitors by virtue of two specific statutory exceptions.⁴ Unlike the position in its sister island and the UK, there has never been a comprehensive legislative statement in Guernsey as to which persons do, or more properly perhaps which do not, enjoy rights of audience (that is to say, the right to represent other people) before its courts. The customary authors assume, without identifying the source of the practice, that the courts of their day would be attended and assisted by restricted classes of professionals, variously styled “*compteurs*”, “*advocats*”, “*conseillers*”, “*procureurs*” and “*attournez*”.⁵ At some point, rights of audience became exclusive to professional advocates.⁶ In modern times, with extremely limited exceptions,⁷ the class of legal

³By virtue of art 2(1) of the Advocates and Solicitors (Jersey) Law 1997. See also the *Loi (1961) sur l'Exercice de la Profession de Droit à Jersey*, below.

⁴*Loi (1891) sur la Cour pour recouvrement de menus dettes* and the Licensing (Jersey) Law 1974.

⁵See, for example, Terrien, Livre IX, Chap VI.

⁶L'Eschiquier 1426, cited in Terrien, Livre IX, Chap. VI: “*Est ordonné par la Cour, que desormais aucun ne soit receu à patrociner en Cour laye devant les Baillis, Vicontes, & autres Juges du pays de Normandie, pour postuler, & y faire & exercer office d'Avocat ou conseiller publique, si premièrement il n'est trouvé suffisant, expert & habile, & ait fait serment en assise*”.

⁷For example, there is no rule that HM Procureur or HM Comptroller in Guernsey must be trained as Guernsey advocates. Pursuant to s 7 of the Bar Ordinance 1949, however, if they are not already admitted as Advocates of the Royal Court, the Law Officers have the right upon presenting their Royal Mandates to take the oath of an advocate and to practise as such, subject to the rules attaching to their respective offices, for so long as they remain Law Officers of the Crown. Further, in practice, police officers and special constables regularly conduct criminal matters in the Guernsey Magistrate's Court, as to which see below.

professional automatically entitled to practise before the Guernsey courts⁸ is restricted to Advocates of the Royal Court.

3 It is clear from the customary texts that, from early times, the courts of Normandy imposed demanding, though perhaps ill-defined, conditions on those who could be admitted before them. Candidates were required to be “*suffisant, expert et habile*”,⁹ according to Terrien, and to take an oath before being entitled to practise. Those who purported to act in defiance of these restrictions were liable to be fined, as were the judges who permitted them to be heard.¹⁰ The articles of the oath of the Norman advocate were laid down, remuneration was regulated and there was a rudimentary code of conduct which comprised various imperatives and prohibitions. In return, the advocate was permitted to address the courts. In fact, according to Terrien, “*la Justice le doit ouyr*”.¹¹ Insofar as this might be taken to suggest an absolute and unfettered right of audience, however, it is suggested that this statement goes too far.¹²

4 There is a statutory framework in both Bailiwicks which sets out the qualification process for legal professionals with a view to ensuring minimum standards of competence for those who wish to practise before the Jersey and Guernsey courts. The modern qualification requirements for Jersey lawyers are set out in the Advocates and Solicitors (Jersey) Law 1997 and associated regulations.¹³ In Guernsey, entry to the profession of advocate continues to be regulated by the various relevant Bar Ordinances, although the procedures by which an advocate can be suspended or removed from practice will henceforth be governed primarily by the Guernsey Bar (Bailiwick of Guernsey) Law, 2007.¹⁴

⁸Including the Court of Alderney and the Court of the Seneschal of Sark.

⁹Note 6, *supra*.

¹⁰See, for example, the continuation of the 1426 order of the Norman Exchequer mentioned above.

¹¹“The court must hear him.”

¹²To give one (historical) example of a common exception to the rule that advocates were entitled to plead their causes, several *coutumes* take note that excommunicants were not to be heard even in lay courts.

¹³See in particular art 2 of this Law, “Entitlement to practise as an advocate or solicitor”.

¹⁴Without prejudice, however, to the Royal Court’s general powers of regulation in respect of its officers and procedures, which are preserved by s 35.

5 In Jersey, it is instructive to compare modern day requirements with the more simplistic regime that prevailed until shortly before 1861, when advocates (6 in all¹⁵) were appointed at the Bailiff's sole discretion, with no other entry requirements. Later, at the time of the Report of the Civil Commissioners, an unlimited number was permitted, provided that candidates attained certain minimum qualifications of being called to the English bar and/or having graduated from specified universities.¹⁶

6 Although the contrary is sometimes assumed to be the case,¹⁷ there is in fact no legislation in the Bailiwick of Guernsey which expressly establishes a monopoly on rights of audience for the benefit of duly admitted legal professionals.¹⁸ However, art 7 of the *Ordonnance relative au Barreau et au Corps des Ecrivains* 1932 makes it an offence for an individual to claim to be or to call himself an Advocate admitted by the Royal Court of Guernsey. This provision will soon be replaced by s 15 of the Guernsey Bar (Bailiwick of Guernsey) Law

¹⁵In Guernsey, the number of advocates was similarly limited, for many years, to six. In pre-revolutionary France, by contrast, according to de Ferrière's dictionary in 1779, "*Le nombre des Avocats est indéfini. Il n'est pas même permis à un Juge de le fixer dans son Siègre, & tous ceux qui ont les qualités requises, sont en droit de s'y présenter & d'y être admis*". An 1867 Ordinance created the *corps des écrivains*, a profession which was abolished (with savings for those then in practice as such) by the Bar Ordinance, 1932.

¹⁶see p xxxiii "The Bar".

¹⁷See eg the ruling of Guernsey's Magistrate Gillett on a preliminary point in the 1996 trial of Frenchman Jean Pierre Giroult, who wished to be defended by a member of the Paris Bar on charges of breaching British Fishery Limits: "The legislation which regulates the right of audience of lawyers before the Courts of Guernsey is the Bar Ordinances 1932 to 1996. These Ordinances confine the right of audience to Advocates of the Royal Court of Guernsey". It is respectfully suggested that, if indeed they do so confine the right, they do not do so expressly.

¹⁸Note however the provisions of s 19 of the Legal Aid (Bailiwick of Guernsey) Law 2003, which appears to assume such a monopoly in that it provides for the States, by Ordinance approved by the Royal Court, to permit an "authorised lawyer", being a person other than an advocate, to represent legally assisted persons before the Bailiwick courts. To date, this power has never been exercised. Proposals to use this power to create a Public Defender scheme employing lawyers who were not Guernsey-admitted advocates were rejected by the States in September 2007, although the situation remains under review by the Policy Council.

2007 which creates the offence, falsely or recklessly, to claim to be, or use any title which tends to imply or mislead the public into believing, that an individual is authorised or qualified to practise as an Advocate. There are additional penalties for those offering legal advice or drawing contracts without first informing the recipient that they are neither an advocate or consultant to, or employee of, an advocate but no statutory monopoly over rights or audience as such. Notwithstanding, a rule to such effect has no doubt arisen as a result of long established custom.¹⁹ The legislative position is, however, somewhat different in Jersey. The *Loi (1961) sur l'Exercice de la Profession de Droit à Jersey* does exist to the effect that only the Attorney General, Solicitor General, advocates and Jersey solicitors as “*personnes diplômées*” may commence legal proceedings on behalf of another²⁰ (art 2) or hold themselves out as being able to advise upon Jersey’s laws and customs (art 3). It is instructive to set out art 3 because its ambit is not terribly clear:

“Toute personne non diplômée qui volontairement se fait passer pour une personne possédant des qualités qui la rend apte à intenter un procès ou à donner des conseils au sujet des lois et coutumes de cette Ile ou qui fait usage d’un nom, titre, mention de titre ou qualités ou désignation emportant qu’elle possède de telles qualités sera coupable d’une contravention à la présente Loi.”

[Any unqualified person who voluntarily passes himself off as a person having the skills to render him competent to issue proceedings or to give advice on the subject of the laws and customs of this Island, or uses a name, title, reference to title, or skills or designation importing that he possesses such skills is guilty of an offence under this law.]

It would appear that it is not the giving of advice of Jersey law per se that is prohibited, but merely the false impression being conveyed that such a person is suitably qualified. Nevertheless, the precise demarcation is uncomfortably hazy and particularly for Jersey law firms who regularly employ foreign lawyers who do give Jersey legal advice direct to clients.²¹ For 20 completeness, it should also be noted that in Jersey art 17 of the *Loi (1891) Sur La Cour Pour le*

¹⁹See for example *Constable of St Helier v Gray*, 2004 JLR 360.

²⁰Litigants themselves of course may do so and are unaffected. Cf. the position in Guernsey (note 2, above).

²¹Such advice is unlikely to have an appropriate disclaimer and presumably should clearly be signed off as being given on behalf of the law firm (“per pro” or *per procurationem*).

Recouvrement de Menues Dettes expressly prohibits non-appropriately qualified persons from pleading a case of another before the Petty Debts Court.

7 Some important circumstances in which individuals other than advocates can appear in court are as follows—

- (a) in the Jersey Magistrate's Court, centeniers continue to prosecute the less serious criminal cases (although a recent Scrutiny report²² has queried this anachronism). Further, the Law Officers are able to field non-Jersey qualified lawyers. All are answerable to the Attorney General and/or other professional bodies;
- (b) in Guernsey, members of the police force regularly prosecute Magistrate's Court cases under authority delegated by the Law Officers,²³ although the Law Officers are apparently not entitled to deploy non-Guernsey-qualified lawyers. In recent times, the practice has developed of swearing in lawyers employed by St James' Chambers, but not admitted as Advocates of the Royal Court, as Special Constables with a view to their then appearing to prosecute in the Magistrate's Court under conventional delegated authority to the Guernsey Police. So far, this practice has been adopted with respect to two lawyers admitted in England, both of whom subsequently qualified as Guernsey Advocates;
- (c) in Jersey, foreign counsel may conduct examinations before the Viscount but (subject to exceptions mentioned herein) not otherwise appear: *Dick v Dick*,²⁴
- (d) in Guernsey, foreign counsel have been permitted to appear before a Commissioner of the Royal Court on a Commission Rogatoire, ostensibly under the provisions of the Evidence (Proceedings in Other Jurisdictions) Act 1975, as extended to the

²²*The Role of the Centenier in the Magistrate's Court*, S.R. 18/2007.

²³This is not strictly an entitlement attaching to the office of police constable but as a practice it has been followed, undisputed, for many years. It finds its origins in the powers of the parish Constables as prosecutors before parochial policing was abolished by the *Loi ayant rapport à la Police Salariée pour l'Île Entière*, 1920 and the institution of the Magistrate's Court to replace the Royal Court sitting *en Police Correctionnelle* by the *Loi ayant rapport à l'Institution d'un Magistrat en Police Correctionnelle et pour le Recouvrement de Menues Dettes*, 1925. Relevantly, the Magistrate's Court thereby constituted could proceed to dispose of criminal matters in the absence of the Law Officers.

²⁴1993 JLR N-1.

Bailiwick.²⁵ However, foreign counsel have been refused permission to address the Magistrate's Court in criminal matters²⁶ on the grounds that there was no power in the court to permit this;²⁷

- (e) in Jersey family cases where there are agreed standard directions, a Jersey qualified lawyer is not required to attend the hearing.²⁸ However, under the Jersey Law Society's Code of Conduct, as under the Guernsey Rules of Professional Conduct, members are required to ensure that their employees comply with the Code and are answerable for their defaults;
- (f) in Jersey planning appeals²⁹ certain categories of persons are permitted to appear who are not advocates (and in some cases are not legally qualified at all);
- (g) in Guernsey's Conveyancing Court,³⁰ it has long been the practice for conveyancing clerks to present a conveyance, bond or other document³¹ recording a transaction in Guernsey *immeubles*, although such an example is perhaps not the exercise of a right of audience in strict terms. In Jersey, the Friday afternoon list of conveyances passed "*devant Justice*" similarly does not require any qualifications on the part of those appointed to appear on behalf of a client (and to take the customary oath not to act contrary to the terms of the conveyance) for instance under a power of attorney;

²⁵*The States of South Africa v Dutton*, Royal Court, 24 March 1992. In allowing the request for South African counsel to appear to examine witnesses, subject to the provisos that they would not seek remuneration under any provision of Guernsey law and that a Guernsey Advocate would be instructed and retain control of the case, Deputy Bailiff Dorey indicated that, apart from the 1975 Act, he would consider the request to be contrary to common law.

²⁶*Law Officers of the Crown v Giroult*, above.

²⁷At least, this seems to be the position in relation to the Magistrate's Court. There is anecdotal evidence to the effect that, in circumstances of exceptional urgency, non-locally qualified lawyers employed by Guernsey firms have been permitted to address the Royal Court in relation to injunctions.

²⁸Practice Direction FD 07/01.

²⁹RCR 15/3b.

³⁰The Royal Court, constituted for this purpose as a *Cour Ordinaire*, currently sits in this capacity every Tuesday and Thursday at 9.30am.

³¹Such documents must, however, have been signed by an Advocate.

- (h) in Guernsey, officers of a States department may represent the States in the Magistrate's Court, provided they are authorised to do so by the Chief Officer of the department concerned. Similarly, once appointed, the Children's Convenor will be entitled to represent his Office in Magistrate's Court proceedings;³²
- (i) in both Jersey and Guernsey, the courts have exercised a general discretion to permit the use of McKenzie Friends³³ although not for the purpose of addressing the Court directly;³⁴
- (j) considerations of capacity aside, individual defendants are always entitled to defend themselves in person, at all levels, against criminal charges;
- (k) police and customs officers have various rights to apply to the courts for search orders, production orders, and the like, and in relation to bail;
- (l) representatives of debt collection agencies are generally permitted to pursue civil claims which, in substance if not in form, belong to their clients. This raises issues of principle which will be explored below.

8 Modern day mechanisms for ensuring effective "quality control" of Channel Island lawyers are sophisticated and bolstered by codes of conduct. The Code of Conduct issued by the Law Society of Jersey³⁵ is required to be approved by the Royal Court, whereupon it becomes

³²See Magistrate's Court (Guernsey) Law 2008, s 42.

³³Recent guidance from the President of the English Family Division has restated the position that the role of a McKenzie Friend is to assist a lay litigant discreetly; not to act on his behalf, to address the court or to examine witnesses. The Court can permit such further assistance in its discretion, however.

³⁴During the Samedi Court hearing on 12 January, 2007, the Deputy Bailiff of Jersey refused to hear a non-Jersey qualified individual purporting to act on behalf of a Plaintiff who had not attended Court. The Deputy Bailiff requested that an advocate (who happened to be present in Court) formally request that the action be tabled late which, if refused, would otherwise have led to the action being prescribed. At the same sitting, a certain debt collecting agency carried on its customary business of presenting claims assigned to it but also through a non-Jersey qualified individual.

³⁵Pursuant to the Law Society (Jersey) Law 2005.

a bye-law.³⁶ The Royal Court therefore continues to be intimately engaged in the proper regulation of Jersey lawyers, despite the reforms effected by the Law Society (Jersey) Law 2005. Importantly, the Royal Court's inherent jurisdiction over practitioners remains unaffected.³⁷ Indeed, its jurisdiction extends even to fixing (when necessary) the fees that may be charged by Jersey lawyers: see in particular the recital to the now repealed *Loi (1939) sur les Honoraires des Avocats et des Ecrivains*. Further, it will be noted that the Deputy Bailiff remains the President of the Board of Examiners in respect of aspirant Jersey lawyers and thus continues to exert some of the former influence enjoyed by the Royal Court over entry into the Jersey legal profession.³⁸

9 The Royal Court of Guernsey retains its monopoly in respect of the power to call suitably qualified candidates to the Guernsey Bar, and those who are admitted are bound by the Rules of Professional Conduct. These Rules were drafted under powers conferred by the Royal Court (Bar Administration) Order 1993, and required approval of HM Procureur and sanction of the Bailiff. Under the provisions of the new Guernsey Bar (Bailiwick of Guernsey) Law, 2007, these formal requirements will continue, albeit disciplinary procedures will be revamped with the aim of promoting greater transparency and accountability.

10 However, even where advocates or Jersey solicitors enjoy rights of audience by reason of their qualifications, these rights are not absolute. They may be restrained by the court from acting in any given case, as the court's inherent jurisdiction over its process is in no way curtailed by recent legislation.³⁹ The English Court of Appeal in *Geveran Trading Co Ltd v Skjevesland*⁴⁰ made clear, at para 41 of its judgment, that lawyers may be prevented from acting in circumstances beyond conflict of interests or the improper use of confidential information⁴¹ and, in particular, they may be restrained from acting in

³⁶See arts 16(5) and 17(2) of the Law and also art 38 of the Law Society of Jersey Bye-Laws 2007 – Breach of the Code of Conduct.

³⁷See art 32 of the 2005 Law.

³⁸Note that the position may change in the event of an Institute of Law being set up in Jersey and which is planned to operate from the autumn of 2009.

³⁹Art 32 of the 2005 Law in Jersey and s 35 of the 2007 Law in Guernsey refer.

⁴⁰[2003] 1 WLR 912

⁴¹See, in Guernsey, *Perrot et al v Beetle Holdings Ltd et al*, Court of Appeal, 10 April 2003 and *Ferbrache et al (Ozannes) v Dinning*, Court of Appeal, 16 December, 2004.

cases where the court is concerned that its procedure might be abused. Such circumstances would, however, be exceptional. The English Court of Appeal emphasized that “justice need not only be done but should be seen to be done”. Such principles have since been endorsed and applied by the Jersey Royal Court in *Takilla Ltd v (i) Olsen Backhurst & Dorey and (ii) Jenners*,⁴² and there is no reason to think that the Royal Court would take a different line in Guernsey.

11 The need for “quality control” may be a powerful argument in favour of restricting rights of audience to trained professionals, and we have seen, in Jersey at least, legislative intervention designed to ensure that only restricted individuals are able to hold themselves out as providing certain legal services,⁴³ but this does not necessarily provide a good reason for a blanket prohibition against the appearance in court of even the most experienced of lawyers from outside the Channel Islands, or indeed for preventing qualified lawyers in one Bailiwick from practising in the other.⁴⁴ The perceived anglicization of Jersey and Guernsey law in recent years, which has arisen both because of the increasing pace of substantive and procedural legislation based largely on Anglo-Saxon models and also because by far the majority of current practitioners received their initial training in England rather than France, perhaps means that the peculiarity of Channel Island law is now a less powerful objection to extending rights of audience to select non-local practitioners. In any event, for over forty years our respective Bailiwicks’ Courts of Appeal have been constituted largely of eminent English and Scottish counsel and indeed lawyers from the UK frequently sit as judges in the Royal Court (referred to as “Commissioners” in Jersey and as “Lieutenant Bailiffs” in Guernsey.)

12 The danger, however, would be that any significant influx of non-local lawyers, might decimate the local bars and with it, put at risk the continuation of much of our cherished laws and customs. In addition, the legal aid burden in Jersey (which is assumed by each Jersey qualified lawyer upon taking an oath when admitted) would have to be

⁴²2004 JLR 219 at para 21 and 22.

⁴³See *Loi (1961) sur l’Exercice de la Profession de Droit à Jersey*, above.

⁴⁴In an address to the Guernsey Bar, the Bailiff of Jersey suggested (although subject to the caveat that it was “certainly” too radical), that reciprocal rights of audience before Guernsey and Jersey courts might be conferred for advocates of the other jurisdiction. As he noted, Channel Island lawyers have all studied the customary law of Normandy, they all share a bifocal training in common law and civil law, and legal firms have established themselves in their sister Bailiwicks.

extended to such foreign lawyers, or else the current legal aid system, as it exists in Jersey, would rapidly collapse. It will be readily appreciated, therefore, that a wider consideration of reform in this area is beyond the scope of this modest article.

Litigants in person

13 As is the case with the appearance of locally qualified lawyers, the rights of action of a litigant in person are similarly not absolute and unqualified. In fact, in Jersey, we see from the Report of the Civil Commissioners in 1861⁴⁵ that the position has actually been far more restrictive in the past, and that parties were not allowed to plead their own causes other than through an advocate by virtue of the Code of 1771. The justification for such a rule was stated to be the need to ensure high (or at least minimum) standards in the conduct of proceedings before the court and for other parties not to be disadvantaged by improper conduct of a litigant in person.⁴⁶ Such prohibition no longer applies and parties can now appear in the courts without the need for a lawyer. As will be seen below, this does not mean that parties have an absolute right to conduct proceedings.

14 In the modern climate, courts must have particular regard to every litigant's art 6 right to access the court system and to have a fair hearing, in accordance with the European Convention on Human Rights (the relevant parts of which are now part of Jersey and Guernsey domestic law.) It should follow from the Convention framework that it will now be exceptional for a litigant in person to be prevented from pleading his own case in court. Even so, it remains the case that there is no absolute entitlement on the part of any litigant in person to be heard, just as no qualified lawyer has an absolute right to conduct any given case. In Guernsey, because of the signing requirements for summonses, litigants may effectively be prevented from commencing litigation if they are unable to convince an advocate, or failing that the Bailiff, that their case has any merit. More generally, litigants may be prevented from commencing litigation

⁴⁵At paras 72–73.

⁴⁶The so-called “Warburton’s Treatise” of 1682, mentions (with approval) the existence of a similar rule in Guernsey. (Note that it is generally accepted that the author of such treatise was most probably Christopher, First Viscount Hatton, Governor of Guernsey 1670–1706. See for example Clark, “Mr Warburton’s Treatise on the History, Laws and Customs of Guernsey” (1984) XXI *Transactions of La Société Guernesaise*, 547–51.)

without leave where they have been declared to be vexatious.⁴⁷ They may be removed and even imprisoned for showing contempt in the face of the court.⁴⁸ In more trivial circumstances, it is not unknown for the Bailiff of Jersey to put back a conveyance from being passed *devant Justice* where a party to a conveyance has not worn a jacket and tie and thereby displayed a lack of respect to the court, and the same has recently been true where an individual appears (unsuitably dressed) for appointment to some public office. However such instances have been rare and have not been the subject of oral argument or controversy. Nevertheless, they represent examples of the court's inherent power over its process.⁴⁹

15 Clearly, if there is to be any interference with the ability of a litigant in person to plead his case in court, exceptional circumstances should exist so as to outweigh that litigant's art 6 rights. Even where such circumstances are present, possible compromise methods of balancing a litigant's rights against those of the parties to an action, or the wider public interest, might include the court declining to hear the litigant in person, while directing an adjournment for legal representation to be obtained. Alternatively, the court might actually appoint a lawyer to act and assist the litigant (and therefore the court in its task.) Such appointment might be under the current legal aid system in Jersey (the litigant being within the class of "*Personnes indéfendues*" referred to in an advocate's oath) and/or as an *amicus curiae*.

Different types of litigants in person—the problem of legal services being provided under agency or assignment agreements

16 When is a litigant in person not a litigant in person? Litigants in person are probably easier to spot than they are to define. No definition appears in the procedural rules in either Bailiwick. In England the concept has certainly led to difficulties and particularly in relation to costs, where the issue is relevant because a litigant in person recovers less than he would if a lawyer had been retained. In

⁴⁷See the Civil Proceedings Vexatious Litigants (Jersey) Law 2001 and The Restriction of Vexatious Legal Proceedings (Guernsey) Law 1985.

⁴⁸A surprisingly frequent occurrence, at least in the Magistrate's Courts. However the Royal Courts are no strangers to contempt: see for example the numerous occasions when the Guernsey courts were compelled to rein in the enthusiastic and often original advocacy of Maurice John Kirk in the 1980s.

⁴⁹See *Alhamrani v Alhamrani*, 2008 JLR N [16], where a defendant's pleadings were struck for abuse although reversed on appeal as to proportionality and the exercise of discretion by the Royal Court.

Jersey a similar rule applies.⁵⁰ In *Jonathan Alexander Ltd v Proctor*,⁵¹ a company which authorised a director to appear did not recover costs and was held not to be a litigant in person. In contrast, in *Leeds United Association Football Club Ltd v The Phone-In Trading Post Ltd*,⁵² the Royal Court of Jersey has recently reached the opposite conclusion⁵³ and distinguished the English position. The Deputy Bailiff stated—

“I consider that the more natural interpretation of the expression ‘litigant in person’ when used in the Royal Court Rules is that it includes any litigant who is not represented by an advocate and who is therefore acting for himself or itself. I see no reason why that expression cannot include a company which is acting in the only way that it can in law, namely by its director.”

17 Nevertheless it should be important to identify cases where an individual is a litigant in person properly so called, and others where some other factor intervenes, the effect of which is that, in reality, the person before the court is providing legal services to another, often for reward. For example, according to the terms and conditions of a particular Jersey debt collecting agency “a right of audience to appear upon our clients’ behalf” is expressly referred to as sometimes being created through the artificial use of a mandate (in the case of companies) or alternatively by assignment of the debt underlying the cause of action or by a power of attorney. Similarly, a Guernsey debt collection agency states in its terms and conditions that—

“we have to establish a right of audience to appear upon our clients’ behalf. The Court’s rules in this regard are presently very restrictive and we can only achieve this by assignment to [us] of the debt to be collected.”

18 In Jersey, a draft Practice Direction concerning rights of audience is, at the time of writing, under consultation. Amongst other things, it aims to limit legal representation before the court by use of a power of attorney (however, as presently drafted, credit control agencies are still to be permitted to take assignments of debts in order to pursue

⁵⁰See RCR 12.

⁵¹(1996) *The Times*, 3 January, CA.

⁵²[2008] JRC 141.

⁵³This being consistent with the litigation which led to the 1972 Guernsey Court of Appeal decision in *Hougue Fouque Property Company Ltd v National Westminster Bank Finance (CI) Ltd*. In that case, a director of the Appellant company appeared on behalf of the company, but the appearance point was not the principal point on appeal and the relevant arguments were not reported.

recovery actions). No similar initiative has yet been taken up in Guernsey. As the jurisdiction of Guernsey's Petty Debts Court increases to £10,000,⁵⁴ so as to match the corresponding jurisdiction in Jersey, there may be a more pressing need to review the circumstances in which non-qualified individuals should be permitted to present civil cases in court, and whether there should be at least some level of regulation for such persons.

19 In the English case of *Gregory v Turner*,⁵⁵ it was held that a party may not by power of attorney confer on another the right to appear in court as his lay advocate. However, by virtue of certain statutory provisions (which are not applicable in any of the Channel Islands) the court in that case did enjoy an exceptional discretion.

20 Paragraph 71 of the judgment in *Gregory* refers to one author's view that—

“A question which does not seem to have been conclusively settled is whether a litigant can appoint an attorney to represent him in court, exercising the donor's right to appear in person. To allow this would be to drive a coach and horses through the traditional monopoly of the legal profession to appear on behalf of litigants. It seems unlikely that a court would accept this.”

21 At para 75 the court accepted this view and held—

“In relation to rights of audience, in our view such a construction would, as Mr Aldridge says, drive a coach and horses through the purpose of the statute, which is to impose effective controls on rights of audience and conduct of litigation in accordance with the ‘general principle’.⁵⁶ The exception for the individual party is, as the paragraph makes clear, a recognition of the established position before the 1990 Act, which allowed an individual to appear in his own case in any court, regardless of his qualifications. There is nothing to suggest that, before the 1990 Act, that right could be exercised by an agent, other than one properly qualified for the purpose. In our view, this was and is a personal right, which cannot be delegated. Were it otherwise, there would be no purpose in the careful restrictions imposed in the public interest on those who can appear as advocates in proceedings.”

⁵⁴When the Magistrate's Court (Guernsey) Law 2008 is brought into force.

⁵⁵[2003] EWCA Civ 183.

⁵⁶It is the criteria which, in England and Wales, inform the discretion to grant rights of audience pursuant to the Courts and Legal Services Act 1990.

22 More recently, Mumby J. has considered the issue in *Re N.*⁵⁷ At para 41 of his judgment, he drew attention to the need for caution in respect of permitting rights of audience to those who are not qualified lawyers but who seek to provide advocacy services—

“... at one end of the spectrum there will be the ‘professional’ McKenzie friend who acts as an advocate, the person, as Lord Woolf CJ put it,⁵⁸ ‘setting themselves up as an unqualified advocate’ or, as Clarke LJ put it,⁵⁹ ‘holding himself out as providing advocacy services, whether for reward or not’. There, as a general principle, the court will make an order [permitting such representation] only in exceptional circumstances.”

23 The same public policy considerations which led the English Court of Appeal in *Gregory* to reach its decision on powers of attorney, and the stance and reasoning of Mumby J. should, it is suggested, apply with equal force in the Channel Islands, and also apply to other artifices whereby the same outcome is achieved. These will include mandates purporting to appoint a corporate representative, who just happens to work for a debt collection agency, and sham assignments of causes of action. Arrangements that have as their intention the bypassing of conventional rules as to rights of audience should not be countenanced by the courts. In this respect, there is an obvious and clear distinction to be made between a person who is exercising his own rights to plead a case and those that have (by design) been clothed with such rights so as to appear in court and bypass conventional restrictions on this privilege. The former is exercising a right (albeit even then not absolute, as we have seen) while the latter is *prima facie* an abuse and, it is suggested, contrary to the public interest.

24 By way of example, the usual terms of business of such debt collection agencies are expressly designed to provide a means of circumventing the restrictions that ordinarily apply to the provision of legal services to the public (and those which have been partially reproduced above are used merely to illustrate the point rather than to mark out any particular companies for special treatment). Such companies are known to describe themselves in their terms of business as providing “a paralegal service” and contemplate that they will appear in court, in reality always “on behalf of [their] client”. In order to achieve this, there has to be a pretence of an outright assignment of the right of action. In reality, for the arrangement to work at all, any

⁵⁷[2008] EWHC 2042 (Fam).

⁵⁸In *Clarkson v Gilbert* [2000] 2 FLR 839.

⁵⁹*Ibid.*

assignment must carry with it a promise that the debt collection agency will account for all of the fruits of the cause of action (i.e. monies recovered) subject only to a charge for its services. The assignment is in reality a fiction because in substance nothing but the right to appear in court is being assigned. The assignment should not therefore be upheld: see *Re Knights (Jersey) Ltd*⁶⁰ and *Re Lawrence Ltd*,⁶¹ and note the maxim *donner et retenir ne vaut (rien)* which, it is suggested, also undermines such purported assignments.

25 The public interest is not best served by unregulated and untrained persons conducting proceedings by way of business before any court. Such individuals do not have to comply with the requirements of a code of conduct (including requirements as to dealings with client monies, interest thereon, accounting practices, minimum insurance, ethical duties, the need to warn the client of what costs may be recovered etc).

26 As regards the matter of insurance in particular, such services are generally offered through the medium of a private limited liability company, which one might imagine to have only nominal assets, whereas the value of a claim which such an entity might be 'employed' to deal with may be up to £10,000 in the Petty Debts Court⁶² and unlimited in the Royal Court. Where the conduct of such litigation is defective, or negligent, the loss of a right of action of this value is highly significant indeed. From the defendant's point of view, of course, there may also be difficulties in enforcing any order for costs against the debt collection agency who has brought the claim in its own name.

27 Further, debt collection agents/agencies are not officers of the court or otherwise amenable to the court's jurisdiction as are Jersey or Guernsey lawyers, and receive no mandatory training for the purpose of conducting proceedings. If nothing else, this could have a significant impact on the length and cost of running a case. Debt collection agencies in the Channel Islands appear to be wholly unregulated and unaccountable to any particular disciplinary body, so far as the legal services they provide are concerned.

28 There has been some minor controversy already in Guernsey when, in August 2006, a debt collection agency received press

⁶⁰1962 JJ 207.

⁶¹1963 JJ 341.

⁶²In Jersey, and soon in Guernsey; see note 54 above.

attention⁶³ after commencing and then discontinuing petty debts proceedings against its former clients, the victims of a thrift club fraud. The collection agency had been attempting to recover fees incurred in pursuing and then abandoning a claim against the fraudster, who proved to be impecunious. Whatever the rights and wrongs of the situation (and we are in no position to comment about that), it seems reasonably clear that there was at least a difference in understanding between the agency and its clients in relation to fees. Such misunderstandings can occur in the lawyer-client relationship too, of course: the difference is that in the case of professional lawyers there is a professional body to impose and enforce certain minimum standards of client care and a mechanism for resolving disputes, which mechanism goes beyond the pure contractual content of the retainer.

29 The situation in the Channel Islands compares poorly with the position in England, where legislation⁶⁴ sets out specific criteria for granting rights of audience, which are referred to as “the general principle”. In England, appropriate expertise and regulation (and in particular an effective code of conduct) are seen as key considerations. A recent article by HHJ Mitchell⁶⁵ summarises the present state of English case law. It refers⁶⁶ to an extract from a judgment of Neuberger J,⁶⁷ as follows—

“It is desirable that members of the public know they are briefing a representative who has been properly trained and who is accredited by an appropriate professional body. To permit any person unknown to the Court, with no legal training and no professional accreditation to represent a litigant might be unfair to the litigant, to other parties and to the Court.”

A suggested solution for debt collecting agencies

30 It may be regrettable that this position has evolved, apparently without any careful reflection on the issues of principle involved, but this does not mean that remedial measures are not now possible. Equally, it is important to observe that debt collection agencies do serve a public interest and, in particular, provide a means of recovering monies efficiently when the use of lawyers might prove too expensive. Clearly, such agencies should be permitted to exist, but to

⁶³*Guernsey Evening Press*, 24 August 2006, “Debt agency drops case against Hangman’s seven”.

⁶⁴See s 17 of the Courts and Legal Services Act 1990.

⁶⁵“*Representing the Unrepresented Litigant*” [2007] Fam Law 43.

⁶⁶At p 46.

⁶⁷In *Izzo v Phillip Ross & Co (a firm)* [2002] BPIR 310.

the extent that they provide legal services and, in particular, seek to appear in court they should (i) be properly regulated by a designated body,⁶⁸ on consumer protection grounds; (ii) operate without fictions of assignment, powers of attorney, mandates and the like; and (iii) operate in narrow and specified circumstances appropriate to their level of legal expertise.

31 Legislation is undoubtedly desirable in order to fully achieve these aims, establish the necessary regulatory framework, remove the need for legal fictions, and to define the limits of the rights of audience which it may be appropriate to confer on non-advocates. In the interim, however, the current position might be improved by the use of Practice Directions issued by the Islands' respective courts, and seeking to utilise the courts' inherent jurisdiction over their own process.

32 Careful thought should therefore be given to regularising the situation in this way, and not only for the protection of the consumer. If local businesses continue to be permitted to circumvent well-established rules in relation to rights of audience, even if this practice has thus far been confined to the realms of small claims and even though it may be convenient, it is difficult to see any reason in principle why larger enterprises should not be entitled to avail themselves of the same devices in more substantial litigation. Certainly such enterprises would have to take significant financial risks, but it is not inconceivable that somebody will see the opportunity to take a profit as they are likely to be unencumbered by professional restrictions on fee arrangements. The fact that litigation costs may not be recoverable in respect of work done by non-advocates will not necessarily be a sufficient deterrent: after all, litigation costs are not generally recoverable at all in the United States. Rather than turn a blind eye to important issues of principle, it is suggested that it is better to preserve (whilst regularising and then regulating) a limited role for debt collection agencies and perhaps also other lay advocates before our courts.

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⁶⁸For instance, brought within existing regulatory regimes for local lawyers.