

JERSEY / JUDGMENT

# JFSC v Black [2002] JRC 77 (11 April 2002)

[2002] JRC 77

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## judgment

the bailiff:

## Background

1. In these proceedings, the Jersey Financial Services Commission ("the Commission") applies to the Court for an order under Article 20(7) of the Collective Investment Funds (Jersey) Law as amended ("the CIF Law"). Article 20(7), as amended, provides - "(7) If on the application of the Commission the court is satisfied -
  - (a) that profits have accrued to a person as a result of his failure to comply with any provision of this Law, or of any Regulation or Order made, or permit granted, or with any direction given, under this Law; or
  - (b) that one or more investors have suffered loss or been otherwise adversely affected as a result of that failure; the court may make an order requiring the person concerned to pay into court for distribution as the court may direct such sum as appears to the court to be just having regard to the profits appearing to the court to have accrued and to the extent of the loss or other adverse affect."
2. There are four respondents to the application. In outline the proceedings concern a number of schemes and arrangements which are collectively described in the representation as "the Delta Scheme". It is alleged that the Delta Scheme was a collective investment fund. It is further alleged that the first and second respondents were or held themselves out as being "functionaries" of the alleged collective investment fund and that the 3<sup>rd</sup> and 4<sup>th</sup> respondents consented to or connived in and/or aided and abetted the alleged failures to comply with the CIF Law by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The Commission has described the Delta Scheme as being the instrument of a major fraud perpetrated by an American citizen and others as a result of which investors have lost significant sums of money. It is alleged that all the respondents have been guilty of misconduct of one kind or another and are liable, pursuant to Article 20(7) of the CIF Law, to pay into Court such sum as appears to be just. All these allegations made by the Commission are contested. The preliminary issue 3. It is unnecessary, for the purposes of this judgment, to describe the background in any more detail. It is common ground that the cause of action in the present proceedings accrued at the latest on or before 27<sup>th</sup> September 1993. The

alleged contraventions of the CIF Law, and any alleged accrual of profit or alleged loss by investors as a result of the alleged contraventions, occurred at the latest by that date. These proceedings were not commenced until 30 th June, 2000. 4. The preliminary issue raises an important point of law. What (if any) is the prescription period applying to proceedings under Article 20(7) of the CIF Law? Rival contentions 5. For practical purposes the arguments advanced by the different respondents in relation to the preliminary issue are indistinguishable. I shall therefore refer to the respondents collectively, notwithstanding the fact that they are separately represented. The respondents' case is that - (1) the applicable prescription period is 3 years, pursuant to Article 2(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 ("the 1960 Law"); (2) if, contrary to the primary submission, the 1960 Law does not apply, the applicable prescription period is a year and a day; or (3) customary law would now prescribe a three year period by analogy with the 1960 Law. 6. The Commission's case is that - (1) no prescription period applies to proceedings under Article 20(7) of the CIF Law; or (2) the applicable prescription period is 30 years under customary law. It is convenient to consider first the prescription periods contended for by the Commission. 30 years' prescription 7. Mr. Kelleher advanced his argument in relation to the Commission's alternative case only tentatively. The high-water mark of the submission is to be found in Poingdestre's Remarques et Animadversions sur la Coûtume Réformée on Article 522 of the Coûtume Réformée. Article 522 provides - " Toutes actions personnelles et mobilières sont prescrites par trente ans ". Poingdestre comments on this article as follows - " Sous les actions personnelles sont comprises toutes celles qui viennent de contrat encore qu'elles soient pour héritage , comme celles qui sont intentées pour vendition de terre , maison ou rente dont l'acheteur n'auroit point eu de saisine , auquel cas l'acheteur ou preneur ne pourroit en vertu de son contrat quoique porté par écrit et passé en forme authentique demander l'effet dudit contrat après trente ans. Mais si l'acheteur ou preneur avait eu possession de l'héritage vendu ou baillé en vertu dudit contrat avec lecture dudit contrat à ouïe de paroisse alors s'il en était dépossédé il auroit son remède par Br. De nouvelle dessaisine dans l'an et jour ou par voie propriétaire dans quarante ans pour recouvrer ladite possession. Secondement les actions qui viennent ex quasi contractu et ex maleficio vel quasi maleficio sont personnelles . C'est à dire celles qui descendent de quelque fait qui équipole à contrat comme celles qui viennent de Prêt, de Dépôt , de Gage, de choses adirées , d'Estrangement , d'administration des biens d'autrui , tutelles et semblables . Item celles qui procèdent de délit ou excez ou autres méfaits qui tiennent nature de délit , de dommage fait &c. Pour les actions mobilières elles comprennent celles qui sont pour rentes , fermes , redevances et pour toute sorte de meubles . Or quand il est dit en cet article que telles actions se prescrivent par trente ans , il ne faut pas entendre cela comme s'il [n] y en avait quelques unes d'entre elles qui se prescrivent par moins de tems . Comme celles qui se prescrivent par an et jour, celles qui se prescrivent par trois ans , celles qui se prescrivent par cinq ans , celles qui se prescrivent par dix ans mais il le faut entendre que nulles desdites actions ne passe trente ans excepté l'action pour reporter un gage laquelle n'étant que personnelle dure jusques à 40 ans , voire (selon la Glose sur la chapitre des fief de Gage) par delà de quarante ans ". 8. This unpublished commentary on the

Coûtume Reformée must however be read in the light of Poingdestre's writings on prescription in *Lois et Coûtures de l'Ile de Jersey* (1928 edition). In that work Poingdestre writes extensively on prescription. He divides the subject into three headings of which the last is relevant for these purposes. He writes - "Au troisième chef il n'y a autre chose requise pour prescrire, que le temps marqué par les Loys, avec Titre & bonne foy, laquelle est toujours nécessaire en ce Chef icy, quoy qu'elle ne le soit pas au précédent. Or ce chef icy regarde ou bien les Immeubles, lesquels le Droit considère davantage pour leur durée; & partant la Prescription en est limitée à plus long temps, (à savoir Ans par le Droit Civil & François, & 40 Ans nre Isle; en quoy nous avons suivi l'ancienne Coutume de Normandie, plutôt que la moderne) ou bien les meubles, lesquels estant pour la plus part de peu de durée, il faut de nécessité qu'ils se prescrivent par moins de temps". 9. Poingdestre writes later of prescription quadragénaire, prescription de dix ans, and of lesser periods, but not of prescription de trente ans. It is clear that, so far as Poingdestre was concerned, prescription trentenaire did not form part of the law of Jersey. 10. Nothing is to be found in *Le Gros, Droit Coutumier de Jersey*

(1943) nor in the records of decisions of the Court published in the *Tables des Décisions de la Cour Royale*, which suggests that prescription trentenaire in relation to moveable property applies in this jurisdiction. In my judgment the alternative argument of the Commission, that the right of action under Article 20(7) of the CIF Law is enforced by an action personnelle mobilière for which the prescription period is thirty years at customary law, is without foundation and I reject it. No prescription 11. I turn next to the primary argument of the Commission which is that the right of action under Article 20(7) of the CIF Law is not subject to prescription at all. Counsel submitted that the law of prescription in Jersey was not a seamless web where all causes of action (other than actions against the Crown or in some circumstances against the Church) were subject to prescription of one form or another. He contended that the right of action conferred on the Commission by Article 20(7) was sui generis and that no prescription period had been provided by the statute. There was no all-embracing limitation statute in Jersey analogous to the Limitation Act 1980 in England. It followed that the States must have intended that an action by the Commission could be brought at any time. Counsel submitted that in such circumstances it was not appropriate to have regard to policy considerations. 12. If, contrary to this submission, policy considerations did apply, counsel contended that there were powerful reasons why the right of action under Article 20(7) should not be subject to prescription. The Commission was pursuing an action for the benefit of the public and not in its own interest. Investor protection and redress for investors who had suffered loss were important aspects of this representation. If the action were held to be prescribed, many investors would be left without compensation. It was almost inevitable in claims of this kind that the underlying circumstances would be complex and difficult to unravel. The necessary evidence might be in several different jurisdictions. To assemble a case justifying an application under Article 20(7) might take many years. Counsel conceded that an action by a private investor under Article 21 would be prescribed after 3 years. He drew

an analogy with compensation orders to justify the distinction for which he contended between actions under Article 20(7) and Article 21. A civil claim arising out of an assault would be time-barred after 3 years whereas the power of the Court to make a compensation order under the Criminal Justice (Compensation Orders) (Jersey) Law could be exercised at any time. This does not seem to me, however, to be a true analogy. The power of the Court to make compensation orders under the 1994 Law is entirely discretionary and is part of the Court's criminal jurisdiction to punish an offender for an offence. The victim is entitled to make representations but no right of action is vested in the victim. 13. The other side of the public policy coin is that an imprescriptible right of action vested in the Commission to pursue wrongdoers under the CIF Law would run completely counter to all the efforts of this Court to make civil justice more speedy, cost-effective and fair. As Birt, DB, stated in *Gallaher v. Dauny*

(2001) JLR 302 at 309 - "Limitation periods serve an important function. They ensure that claims are not allowed to go stale and that proceedings are brought at a time when memories are still comparatively fresh and evidence is likely still to be available". 14. Observations by Lord Denning MR in *Biss*

v. Lambeth Health Authority

[1978] 1 WLR 302 at 389 in the context of the dismissal of actions for want of prosecution seems to me equally relevant here - "The one solution that I see is that the prejudice to a defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial. Like the prejudice to Damocles when the sword was suspended over his head at the banquet. It was suspended by a single hair and the banquet was a tantalizing torment to him. So in the case of the President of India, which we heard the other day. The business house was prejudiced because it could not carry on business affairs with any confidence - or enter into forward commitments - while the action for damages was still in being against it. Likewise the hospital here. There comes a time when it is entitled to have some peace of mind and to regard the incident as closed. It should not have to keep in touch with the nurses, saying: "We may need you to give evidence", or to say to the finance department: "We ought to keep some funds in reserve in case this claim is persisted in", or to say to the keepers of records: "Keep these files in a safe place and don't destroy them as we may need them". It seems to me that in these cases this kind of prejudice is a very real prejudice to a defendant when the plaintiff is guilty of inordinate and inexcusable delay since the issue of the writ: and that it can properly be regarded as more than minimal". 15. The proposition that the Commission has been empowered by the legislature to carry out its investigations at a leisurely or even dilatory pace and then, at a moment of its choosing, five, ten or more years later, to bring proceedings against hapless defendants under Article 20(7) of the CIF Law is inherently unattractive and not consonant with notions of justice in the twenty-first century. Counsel submitted that the remedy in

such circumstances would be that the Court might in the exercise of its discretion decline to make an order. While I suppose that in theory the Court might act in that way, it seems unlikely that the Court would punish the dilatoriness of the Commission by failing to order wrongdoers to whom profits had accrued to pay into Court the appropriate sum of money for distribution to investors adversely affected by that wrongdoing. If it were necessary to resort to policy considerations I should hold that the balance tipped in favour of laying down a prescription period. But the strength of the Commission's primary argument lies rather in the contention that, as a matter of law, there is no prescription period. I turn now to consider whether, notwithstanding the absence of any provision for prescription in Article 20 of the CIF Law, the matter is covered by the general law. The respondents' contentions 16. The respondents' primary argument is that the right of action conferred by Article 20(7) is a right of action in tort and is therefore embraced by Article 2(1) of the 1960 Law and accordingly prescribed. Article 2(1) provides - "The period within which actions founded on tort may be brought is hereby extended to three years from the date on which the cause of action accrued". Article 1 contains the following definitions - "In this Law - "action" means any proceedings in a court of law; "tort" means a "tort personnel" or a "tort matériel"; Plainly the application under Article 20(7) of the CIF Law amounts to "proceedings in a court of law". The question is whether the proceedings are "founded on tort". 17. Mr. Binnington summarized the case for the respondents in the following way - (i) "tort" in the 1960 Law has the meaning which that term bears in Jersey law, having regard to (a) the customary law and (b) the history, structure and content of the Jersey law of prescription; (ii) by 1960 the Jersey law of prescription recognised the year and a day period as applying to all civil proceedings for "tort"; (iii) "tort" in this context means a classification of civil actions where liability arises from a wrong as distinct from contract and property; (iv) the scope of "actions founded on tort" in the 1960 Law encompasses all civil actions (outside contract and property) where liability depends upon a wrong ("tort") committed by the person against whom relief is sought; (v) the present proceedings are within Art 2 of the 1960 Law, as they are civil proceedings under which liability depends on a wrongful act." 18. Before considering the submissions advanced on behalf of the Commission, it is right to advert to the confusion of analysis which has, in my view, resulted from linguistics. Prior to 1940, despite the predominance of English in the social and commercial life of the community, most of the business of this Court was conducted in French and most statutes were enacted by the States in that language. It was only after the Liberation in 1945 that the linguistic balance tipped dramatically. Most legislation came to be enacted in English and gradually the French language has been all but ousted from the Courts. The draftsman of the 1960 Law used the now familiar drafting technique of employing French words in an English context in the expectation, no doubt, that lawyers and the courts would readily understand what was meant. He would have had in mind the words of C. T. Le Quesne QC, Lieutenant Bailiff in *Guernsey States Insurance Authority v. Ernest Farley and Son Ltd* .

(1953) JJ 47 when he stated - "The word "tort" is used here in the sense in which it is commonly used by English lawyers when they speak of the Law of Torts as opposed to the Law of Contracts. On grounds of convenience this may be permitted, provided that it is done without losing sight of the fact that this is a Jersey Court administering Jersey Law, whether it be the internal domestic Law of Jersey or the principles of Private International Law as they are applied by Jersey Courts". Thus when tort was defined as a tort personnel or a tort matériel there is little doubt that the draftsman was referring to tort in a Jersey sense rather than to the concept familiar to English lawyers. 19. Counsel for the Commission contended however that tort was now to be construed in an English sense. In support of this contention he referred to Nicolle - the Origin and Development of Jersey Law - an Outline Guide where the learned author states at paragraph 15.23 - "Reliance upon English authority on any significant scale came late to the law of tort. As late as 1953 the Royal Court could say - [and the passage from Guernsey States Insurance Authority v Ernest Farley & Son Ltd . referred to above is then cited]. At paragraph. 15.24 she continues - "Though English influence may have come late to the law of tort, when it came it came in an overpowering wave. Guernsey States Insurance Authority v Farley was probably almost the last, if not the last, occasion for over forty years upon which a court was to advert, explicitly or implicitly, to the difference between a tort and a tort (Fr.). By the time the distinction was recognised again [in Arya Holdings Ltd v Minorities Finance Ltd (10 th July, 1995) Jersey Unreported] it was only to acknowledge that over the years Jersey law had moved ever closer to the English concept of tort, and that from the 1970s onward, the English concept of tort governs Jersey legal thinking". 20. That passage was of course written before Arya Holdings went before the Court of Appeal to which decision I refer in more detail below. Counsel for the Commission drew comfort, however, from the adoption by the Court of Appeal in Arya Holdings of a definition of tortious liability in English Law. At (1997) JLR page 181 Southwell JA stated - "We were referred to the definition of tortious liability in English law formulated by Sir Percy Winfield in The Law of Tort, at 32 (1931) and quoted in Clerk & Lindsell on Torts. th ed., para 1-01, at 1 (1995): " tortious liability arises from the breach of a duty primarily fixed by the law: such duty is towards persons generally and its breach is redressible [sic] by an action for unliquidated damage." This definition was cited with some measure of approval as applying to torts in Jersey law by Ereaut Bailiff, in Watson v. Priddy (1977 J. J. at 152-154). This definition is, however, even as applied to English law, not without difficulties. There are duties "fixed by the law" which give rise to liability outside the law of torts, the meaning of the adverb "primarily" is wholly unclear and there are tortious duties owed to particular persons and not to "persons generally". But this definition is of some use in deciding whether a right of action under Jersey law gives rise to tortious liability other than some other form of liability". The Court of Appeal subsequently employed the Winfield definition in helping it to determine that a D'Allain -type action was founded upon tort. 21. Counsel for the Commission then contended, on the basis that English law had been used to assist in determining what was a tort in Jersey, that the following test was to be applied - (i) was a duty owed as a matter of law? (ii) to whom was the duty owed? (iii) was the breach of such

a duty to be redressed by an action for damages? (iv) if the right of action was established, did the Court have a discretion whether or not to enforce it? 22. Counsel submitted that the right of action conferred by Article 20(7) of the CIF Law failed this test in that no duty was owed to the Commission, nor was the Commission itself entitled to damages, nor could it be said that the Court had no discretion as to the order which might be made against the respondents. These are perfectly proper submissions (although I must not be taken as endorsing them) but they are based, in my judgment, upon a flawed premise

- that is, that the English law of torts is applicable in this jurisdiction. 23. It is true that Jersey, in common with many other jurisdictions, has been subject to the influences of other systems of law in the development of its jurisprudence. The classic description of this process is to be found in the judgment of Le Quesne JA in *Foster v. A. G.*

(1992) JLR 6 CofA when the main issue was whether fraud was an offence under the law of Jersey. The learned judge of appeal described the numerous references to " fraude ", " vol ", " escroquerie " and similar terms in the cases recorded in the *Poursuites Criminelles* and referred to a particular case where the allegation of " fraude " had clearly been drafted by someone familiar with the terms of the English Larceny Act 1861. He continued - "Such a process was essential to the development of the law in a small jurisdiction like Jersey. It is the link between law as a theoretical study and law as a practical tool. When an offence is known by so comprehensive a term as " fraude ", some definition of it is needed in the interests both of the state and of its citizens. The state and its representatives and the citizens both need to know whether conduct alleged or proved against a defendant is indeed criminal conduct. Sometimes the definition is provided by statute. In Jersey this has occurred rarely by local statute and never on the subject of " fraude ". Sometimes it is provided by judicial precedents. This is possible only if cases arise frequently and if not only the decisions but also the reasons for the decisions are adequately recorded. In Jersey in earlier times neither condition was satisfied. In this situation, the Jersey lawyers turned for help to a different source. They borrowed terms and their definitions from the law of neighbouring countries in which the law of fraud had been developed and types of fraud had been defined more fully than in Jersey. We have seen that terms were borrowed from France in the first half of the 19 th century. In the second half of the century the use of English categories and English terms (in translation) began." 24. A similar process is discernible in relation to what we now call the law of torts. The genesis and development of this branch of Jersey law is worthy of closer study and analysis by a legal historian but for present purposes the following synopsis will suffice. Mr. Binnington began with Chapter 51 of the *Grand Coutumier* of which the most accessible version is to be found in *L'Ancienne Coutume de Normandie*

- (1881) edited by W. L. de Gruchy . Under the heading "De Tort Faict " one finds - "Tort faict est oultrage qui est fait à aulcun , de quoy tous les contends naissent ainsi comme les ruyseaulx naissent de la fontaine . Tout contends est engendré de tort qui a esté faict à la personne d'aulcun , ou à sa possession". Some light is shed on the word " oultrage " by

examining the Latin text of the Grand Coutumier , also printed in the de Gruchy edition. The heading is "De injuria " and the opening words of the chapter are " Injuria est actio laeso jure indebite alicui irrogata ... ". In the Introduction to Roman Law by Professor Nicholas (1962 edition) the following passage is to be found at page 215 under the heading " Iniuria " - "Classical scope of the delict . In its widest sense the word iniuria denotes simply unlawfulness or the absence of a right. As the name of a particular delict , however, it bears in the classical law a more specific, but still compendious, meaning. If it is to be translated by a single English word, 'insult' or 'outrage' may serve, but neither suggests the full width of the Roman idea, which embraced any contumelious disregard of another's rights or personality. It thus included not merely physical assaults and oral or written insults and abuse, but any affront to another's dignity or reputation and any disregard of another's public or private rights, provided always that the act was done wilfully and with contumelious intent. It was iniuria , for example, to prevent another, without lawful justification, from moving freely in a public place, or from fishing in the sea or other public water. It was likewise iniuria to interfere with his use of his property or to enter unauthorized into his house or on to his land. Again, it was iniuria to affront a woman's modesty". 25. The Roman law of delicts had no general principle; it was a law of specific wrongs. In that respect it was more akin to the modern English law with its system of specific torts. The wrong of iniuria , and the related *damnum iniuria datum* , of which the essence was loss ( *damnum* ) caused by culpable conduct ( *iniuria datum* ), do, however, stand out for their generality. On the basis of those wrongs civilian systems built a general theory of civil wrongs. Thus Article 1382 of the French Code Civil provides, under the heading "Des délits et des quasi- délits " - "Tout fait quelconque de l'homme , qui cause à autrui un dommage , oblige celui par la faute duquel il est arrivé , à le réparer ". 26. It is to be noted that a délit has a different meaning in Jersey. A délit is a criminal offence and not a civil wrong. That was well established by the time of the enactment of the Loi (1843) sur la prescription des poursuites which provided - " Toute infraction à une Loi passée par les Etats pourra être poursuivie et punie même après l'expiration de la Loi, pourvu que les poursuites aient été instituées , ainsi qu'il se pratique pour tous délits et torts, dans l'an et jour de l'infraction ". 27. It seems clear, however, that Jersey law has not followed the civilian path in developing the law of torts. It has retained a system of specific wrongs for which a cause of action arises, even if some of the wrongs are fairly general in character. Examples of this generality are to be found particularly where the law of torts (if I may so call it) abuts upon the law of property. Thus, in *Shaw, widow Key, v. Regan*

- (1962) JJ 189 , the plaintiff claimed damages *inter alia* for injury to her health caused by building works on adjacent land. Although the head note to the case begins with the word "Nuisance", it is noticeable that the judgment of the Court contains not one reference to that concept. Instead the existence (or non-existence as it turned out) of a tort is analysed on principle. *Le Masurier , Bailiff*, stated at page 192 - "Counsel for both parties cited to us a number of authorities and cases, and, although each one appeared to turn on the facts relevant to itself, the following principles did emerge.

- (1) The occupier of land is entitled to the quiet and unimpeded enjoyment of that land.
- (2) The owner of land is entitled to do as he pleases with that land. It is obvious that in many cases, as has happened here, these two principles can give rise to a direct conflict of interest and, accordingly, both are subject to some limitation. The limitation to which the first is subject is that the quiet and freedom from impediment must be related to the needs of the average person in the particular neighbourhood and furthermore that those needs must be average needs and subordinated at times to the particular needs of others. The limitation to which the second principle is subject is that the occupier of land can do with that land only that which is lawful, a great limitation at the present day, and, within that which is lawful, that which will not give rise to emanations which might unreasonably interfere with his neighbours." 28. Indeed the records of the Court are replete with references to conduct alleged to constitute "un tort". In *Watson v Priddy*
- (1977) JJ 145, cited by counsel on a different point, there are references to earlier cases where the plaintiffs founded their actions in part on what would now be described as the tort of seduction. In *Le Roux v Agnes*
- (1891) 214 EX 517 the plaintiff claimed "tant pour le tort subi par ladite remontrante ....". In *Hands v Sweeney*
- (1956) 250 Ex 173, 252, the plaintiff similarly claimed damages for "le tort subi .... par suite de la conduite reprehensible .... etc". 29. It is the case, however, that in the modern period (mid-nineteenth century onwards), Jersey lawyers, and the Courts, have increasingly turned to English law both for labels to attach to particular torts and for assistance in defining the ambit of those torts. In *Curry v Horman*
- (1889) 213 Ex 511 it was decided that "balayures amoncelées près d'une maison d'habitation constituent une nuisance". Many cases involving injury to reputation are recorded in the *Tables des Decisions* towards the end of the nineteenth century under the rubric "Diffamation". These references were made, however, against a background of knowledge of existing causes of action arising under the customary law. Jersey lawyers, and the courts, employed English terminology and, to an extent, legal principle to supplement but not to subvert the customary law. 30. What has happened in the last 35 years in the context of certain areas of the law of torts is of a different character. Dicta from three cases will suffice to illustrate the point. 31. In *Louis v E. Troy Ltd* .
- (1970) JJ 1371 , where the plaintiff slipped on oil and suffered injury in the course of his employment, the Court stated at page 1377 - "All the parties agreed that the principles of law applicable to this case are to be found in textbooks on the English common law of negligence and employer's liability, and in English judicial decisions". In *Filliastre v Harbours and Airport Committee*

- (1970) JJ 1511 the Court stated, at page 1515 - "The parties agreed that the test to be applied on a plea of contributory negligence ... is to be found in text books on the English common law of negligence and in British judicial decisions". In *Dale v Dunell's Ltd* .
- (1976) JJ 291 the Court stated at p 296 - "The plaintiffs have brought their action in negligence, and in the alternative, in nuisance. [Counsel for the plaintiffs] has invited us to find that the law of Jersey, in these respects, follows the law of England, and, therefore, we can have regard to the English authorities in these circumstances. [Counsel for the defendant] has not disagreed with that argument and we have felt able to accept it". 32. Miss Nicolle in "The Origin and Development of Jersey Law " described this as the " overpowering wave " of English influence which came upon the law of tort. In many of these cases the application of exclusively English principles no doubt led to the same result as would have emerged had counsel troubled to research the local cases. But does this mean, as submitted by counsel for the Commission, that the English law of tort now governs Jersey legal thinking? The proposition that a combination of indolence by counsel and acquiescence by the Court is sufficient to bring about fundamental change to the substance of the Jersey law of torts is not one that I would readily accept. Fortunately, there is higher authority upon which I am able to rely. In *Arya Holdings Ltd. v Minorities Finance Ltd* . , to which I have already referred, Southwell JA, giving the judgment of the Court of Appeal stated - "The Jersey law of torts derives primarily from the Jersey common law which has its origins in the Norman law of the *ancienne coutume* . In relation to the tort of negligence, Jersey follows the law of England ( *T. A. Picot (C. I.) Ltd. v. Crills*) except as regards any point on which a different rule has been established in Jersey. In relation to other torts or other aspects of the law of tort, although careful attention is paid to decisions on English common law, the courts of Jersey have to found themselves on the common law of Jersey. Thus there may be causes of action in tort which are available in England but not in Jersey, and vice versa. A D'Allain claim is a cause of action available in Jersey in accordance with Jersey common law, as a feature of the Jersey law relating to *declarations en désastre* , but is naturally not also available in England. Accordingly, reference to the English law of torts is of limited assistance in seeking to answer the question whether a D'Allain claim is a claim founded on tort under Jersey law". 33. It is in the context of this statement of principle that the employment by the Court of Appeal of the Winfield definition of tortious liability in *Arya Holdings* must be viewed. I do not understand the learned judge of appeal to be stating that the definition is necessarily of universal application. On the contrary, he cautioned that it was " not without difficulties " although it was of " some use " in deciding whether a right of action under Jersey law gave rise to tortious liability. 34. It is certainly true that it is difficult to shoe-horn the right of action under Article 20(7) of the CIF Law into the Winfield definition. The principal difficulty arises from the requirement that the breach of duty should be redressable by an action for unliquidated damages. Mr. Binnington argued that tort in Jersey was a wrong-based concept with less emphasis on the remedy. He referred to Pothier:

## Introduction

Générale aux Coûtures , Chap iv, para 116 - "On appelle délits et quasi- délits les faits illicites qui ont causé quelque tort à quelqu'un , d'où naît l'obligation de le réparer ".. In my judgment this submission is correct. In determining whether a right of action is " founded on tort " it is necessary to ascertain whether the cause of action is based upon wrong-doing of some kind. The precise remedy available to the victim or to the body representing the victim is not of significance. The important factor is that the cause of action gives rise to a remedy of some kind - it is not essential that the remedy should be what English law would describe as "damages". In support of this submission counsel referred to *Hamon v Mourant*

(1852) 173 Ex 425. The Court held - " Attendu que la présente action est instituée dans la vue d'obtenir du défendeur un dédommagement pour un tort que l'actrice prétend avoir éprouvé par sa faute ou négligence .... La Cour a jugé que le défendeur n'est maintenant actionnable et l'a déchargé de l'action ". " Dédommagement " may be translated as "compensation". The wrong in that case was an alleged failure to comply with a statutory obligation. This approach seems to me also consistent with Chapter 51 of the Grand Coutumier to which I have referred above. 35. What then is the basis of the right of action vested in the Commission by Article 20(7) of the CIF Law? The basis is - (1) that there must have been a failure by a person "to comply with any provision of [the CIF Law], or of any Regulation or Order made, or permit granted, or with any direction given, under [the CIF Law]" and (2) that profits have accrued to that person as a result of the failure, or one or more investors have suffered loss or been otherwise adversely affected as a result of the failure. The failure to comply with a statutory obligation with the result either that profits accrue to that person or that losses are suffered by investors must surely be an example of wrongdoing. It is true that such a failure may also constitute a criminal offence, but that does not mean that the underlying conduct cannot also amount to an actionable civil wrong or tort. Is it significant that the Commission is not the party suffering loss? It seems to me that no significance attaches to that fact. The statute empowers the Commission to bring what is in effect a representative action. Individual investors may not have the ability or resources to bring an action under Article 21 of the CIF Law. Article 20(7) empowers the Commission to protect the interests of all investors by interceding on their behalf. Counsel for the Commission submitted that the right of action arose even if no loss had been suffered by investors. It was possible therefore that the Commission might bring an action for purely punitive reasons to require a person to disgorge illicit profits. This is of course correct, but this possible employment of Article 20(7) does not in my judgment negate the wrongdoing which is the basis of the action. By definition illicit profits are derived from prejudice caused to others even if it is not possible to identify those others. Finally, counsel for the Commission objected that the discretion conferred on the Court as to the making of an order was inconsistent with a right of action founded on tort. This argument seems to me again to place undue emphasis on the remedy provided by the statute. It is true that the legislature has employed the permissive "may" rather than the imperative "shall". But the same phraseology is used in Article 3 of the Drug Trafficking Offences

(Jersey) Law 1988 where the Court, having determined that a person has benefited from drug trafficking, "may" make a confiscation order. Notwithstanding the permissive "may" it seems to me improbable in the extreme that the Court would decline to order a drug trafficker to surrender his proceeds of drug trafficking. It seems to me equally improbable that the Court, having satisfied itself that a person has failed to comply with his obligations under the CIF Law and as a result caused loss to investors, would decline to order that person to pay the appropriate sum into Court for distribution. In my view the courteous use of the permissive form does not deprive the Commission of its legal right to a remedy on the assumption that the statutory preconditions to its cause of action are made out. 36. Before arriving at my conclusion, I should briefly revisit the policy issues that were urged upon me by all counsel. As I indicated at paragraph 15 above, if it were necessary to resort to such considerations, I should hold that public policy required the imposition of a limitation period. I accept the force of the arguments advanced by counsel for the Commission as to the complexity of many investigations into alleged wrong-doing of this kind and as to the time needed to bring such investigations to a conclusion. It seems to me, however, that the customary law affords a protection for the interests of the Commission and of investors in the doctrine of " *empêchement d'agir* ". By this doctrine, as laid down by the Court of Appeal in *Public Services Committee. v Maynard*

(1996) JLR 343 at 351 - "Prescription does not run and is suspended while the plaintiff or potential plaintiff is prevented by a practical impossibility from exercising his rights to commence or to continue legal proceedings". The doctrine is expressly preserved in relation to actions founded on tort by Article 2(2) of the 1960 Law. 37. I conclude that the right of action created by Article 20(7) of the CIF Law is founded on tort and that it is subject to a prescription period of three years pursuant to Article 2(1) of the 1960 Law. I accordingly hold that the action brought by the Commission against the respondents in this case was already prescribed at the time when the Order of Justice was served, and I answer the question posed in the preliminary issue in the affirmative. It only remains for me to express my gratitude to Mr. Binnington and Mr. Kelleher for their assiduous researches and for the clarity of their submissions. Authorities. *Collective Investment Funds (Jersey) Law 1988 as amended : Article 20(7). Law Reform (Miscellaneous Provisions) (Jersey) Law 1960: Article 2(1). Poingdestre: Remarques et Animadversions sur la Coutume Réformée : Article 522. Poingdestre: Lois et Coutumes de l'Ile de Jersey (1928 edition): de la Prescription. Le Gros : Droit Coutumier de Jersey (1943). Criminal Justice (Compensation Orders) (Jersey) Law 1994. Gallaher v. Dauny*

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