COMPARATIVE LAW IN ACTION: THE JERSEY LAW OF CONTRACT

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Timothy VR Hanson
LLB (Hons)
Advocate of the Royal Court of Jersey.

1 Introduction

The Islands of Jersey and Guernsey may fairly be said to deserve more attention from comparative lawyers than they currently receive. Both Islands have what may be described as a mixed legal system, where English and Continental legal traditions are frequently seen to merge. This feature makes them particularly interesting for the study of comparative law.[1] Further, given the current drive towards the development of a European contract law, legal systems that manage to reconcile, successfully, the inherent tensions of a mixed legal system, may even merit imitation in such a grand design. This article examines the current debate in Jersey (being the largest of the Channel Islands) as to the evolution and future direction of its contract law. In grappling with the "identity" of this Island's contract law, this debate reveals the variety of legal influences that have helped shape Jersey's law to its current form. In order better to understand this debate, however, it is first necessary to say a little more as to Jersey's geographical and constitutional position, as well as to sketch out the origins of its law.

The Bailiwick of Jersey lies sixteen miles due west of the Cherbourg peninsula of France and 120 miles south of England. It has a total surface area of some 45 square miles and a population of approximately 87,000.[2] It owes allegiance to the English Crown dating from the 11th century when the Crowns of England and France (including the Duchy of Normandy of which the Channel Islands formed part) were united. Successive English monarchs and governments have granted rights and privileges to the Island, which result in Jersey having a right to govern itself on all internal domestic matters. To this end, the Island has a single chamber legislative body known as the States of Jersey, which passes all domestic legislation subject, in the case of primary legislation, to the approval of Her Majesty in Council. The Island is part of the British Isles, with an overwhelming majority of English speaking inhabitants,[3] but is not a part of the United Kingdom. Jersey is, further, neither a separate member State nor an associate member of the European Union, but nevertheless enjoys the benefit of certain rights conferred by paragraph 227(5)(c) of the Treaty of Rome 1957.[4]

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1 As to mixed legal systems generally, see the overview provided by MacQueen "Scots and English Law: The Case of Contract" 2001 54 *Current Legal Problems* 205-229.

2 Census of 2001. In 1821, the population of Jersey was approximately 29,000.

3 Only 17.3% of residents can speak French either as a main or secondary language. After English, Portuguese is the next main language in Jersey. (Census 2001.) As to the accessibility of Jersey's law in such circumstances, see Hanson "Legal Wonderland" 2002 *Business Brief* 30-3.

4 The Treaty applies, *inter alia*, to Jersey to the extent necessary to ensure the implementation of the arrangements set out in Protocol 3 to the Act of Accession.

2 The origins and development of Jersey law[5]

The Channel Islands were part of the Duchy of Normandy until 1204 when, historically, they are regarded as becoming "separated" from France upon the English Crown's loss of continental Normandy. Both prior to 1204 and for a significant time thereafter, Jersey's law essentially consisted of Norman customary law. This had already formed into a definitive oral body by 1090 and came to be expressed in written form by about 1200 in two separate treatises together known as *Le Très Ancien Coutumier de Normandie.* Subsequent evolution of this customary law took further written form in a version known as *Le Grand Coutumier* or *Summa de Legibus* in about 1250. Subject to certain local customary variations, this appears to have been the version that the Islanders were still relying upon in the 14th century.[6]

In 1585, however, Normandy produced an official revised version of its customary law as a result of a Royal ordinance to this effect. This was known as the *Coutume Reformée* or *Nouvelle Coutume*. Whilst, in many respects, the *Coutume Reformée* did not radically differ from the *Ancienne Coutume*,[7] various parts did stem from *Ordinances*, decisions of the *Cours de Parlement*, or from the *Coutume de Paris* and, therefore, did not reflect Jersey customary law at that time. Nevertheless, despite the *Coutume Reformée* not being of direct authority in Jersey, it came to be "frequently used as books of reference"[8] in the Island owing to the absence of alternative sources of written law. Commentators upon Jersey law such as Poingdestre[9] (1609-1691) and Le Geyt[10] (1635-1716) both refer to the significant influence that the *Coutume Reformée* exerted upon Jersey law and the extent to which the Island came to assimilate, what Le Geyt refers to as "fashionable innovations". The position is well summarised in a report of 1861 that was compiled by Royal Commissioners appointed by the English Crown to investigate the civil laws of Jersey. They stated that "the gradual introduction of much foreign matter" meant that:

> "what is now practically received as the common law of Jersey, may be described as consisting of the ancient Norman law with subsequent accretions, some of which are mere developments of the earlier customs, and other interpolations of French law".

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5 For a more detailed exposition, the reader is referred to Southwell "The Sources of Jersey Law" 1997 *JL Review* 221; Nicolle *The Origin and Development of Jersey Law* (2003) published privately.

6 This appears from the Islanders' Petition to the Crown of 1333 where they claimed to observe the custom of Normandy, which they called *La Summe Mankael*, with certain other customs used in the Islands time out of mind. See Le Patourel *The Medieval Administration of the Channel Islands 1199-1399* 109-110.

7 Thus it is permissible for the *Coutume Reformée* to provide evidence as to the customary law of Jersey: *La Cloche v La Cloche* 1870 VI Moo NS 383.

8 *Report of the Civil Law Commissioners 1861*.

9 Lieutenant Bailiff of Jersey between 1669-1676. His currently unpublished work *Remarques et Animadversions sur la Coutume Reformée* discusses the extent to which the *Coutume Reformée* had become part of Jersey law. Lieutenant Bailiff of Jersey between 1676-1695. See, eg, the preface to his *Constitution, Lois et Usages*.

10 Lieutenant Bailiff of Jersey between 1676-1695. See, eg, the preface to his *Constitution, Lois et Usages*.

As far as contract law was concerned, the customary law of Jersey frequently made no provision and the general practice was to turn to civil or Roman law for guidance.[11] In more modern times, this has led the Jersey Courts to pay high regard to the writings of Robert Joseph Pothier (1699-1772), the celebrated French jurist, and in particular to his *Traité des Obligations* and *Traité du Contrat de Vente*. The fact that Pothier also wrote upon, and frequently refers to the neighbouring customary law system of Orléans, increases the weight placed upon his works within the Channel Islands. In contract matters, Pothier has, for example, been described as the "preferred"[12] authority and "a surer guide"[13] to the discovery of Jersey's contract law. Nevertheless, where there is no previous decision of a Jersey Court upon a given contractual point, the Royal Court of Jersey explained in the case of *Father Amy*,[14] that it is not obliged to follow Pothier. The phrase "a surer guide" only means that the Court has "an inclination or predisposition to follow [such a] source" and is still free to choose to adopt into Jersey law a more appropriate legal rule should "policy" require it to do so.[15] As is examined in further detail below, such flexibility has been both a strength and a weakness in the development of Jersey's contract law.

3 Development towards the *Code Civil*

On 21 March 1804, the *Code Civil des Français* was promulgated by Bonaparte*, Premier Consul*, and eventually re-named in 1807 as the *Code Napoléon*. Pothier's influence upon the content of the French *Code Civil* is acknowledged to have been so great that he has been described as "the father of the Code".[16] Whilst careful scrutiny of the *Code* will reveal much that is consistent with Pothier's works, or at least a development of his writings, it may be somewhat surprising to note the reluctance of the Jersey Courts to follow the *Code* when dealing with contractual disputes that have come before it. The case of *Selby v Romeril*,[17] however, represents one of the few modern authorities where the Royal Court did decide to develop Pothier's writings when considering the essential constituents of a contract. Declaring that Jersey's law "cannot be regarded as set in the aspic of the 18th century,"[18] the Royal Court adopted the constituents of a valid contract as set out in article 1108 of the *Code Civil.*

Any great enthusiasm for this approach, however, appears to have been quickly dampened by the Jersey Court of Appeal's note of caution sounded in *Public Services Committee v Maynard*:[19]

> "care has to be taken in referring to French legal texts in connection with the law of Jersey. After the Channel Islands were severed from the rest of

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11 Poingdestre, eg, refers to "[le] Droict Romain, qui est celuy que tout le monde suyt en matière de contracts…" [Roman Law, which is that which the whole world follows in matters relating to contract…].

12 *Wood v Wholesale Electrics (Jersey) Ltd.* 1976 JJ 415.

13 *HM Viscount v Treanor* 1969 JJ 1243 1245.

14 2000 JLR 80.

15 *In the Estate of Father Amy* 2000 JLR 80 93. Affirmed on appeal 2000 JLR 237.

16 Robinson, Fergus and Gordon *An Introduction to European Legal History* (1985) 434.

17 1996 JLR 210.

18 218.

19 1996 JLR 343 350-351.

> the Norman territories in what is now France, Norman customary law continued to develop in Jersey, Guernsey and Normandy in parallel, but not with identical developments. In Normandy, development was naturally affected by doctrines prevailing in other parts of France. The Napoleonic Codes embodied much of the pre-existing laws of the French provinces, but with some material changes. After the Napoleonic Codes came into existence, French law developed independently of developments in Jersey and Guernsey, under the direction or influence of French statutes, French jurisprudential writers and the case law of the French courts. Accordingly, no great weight can be placed on French law as it exists today in ascertaining what is Jersey law, except perhaps on a comparative basis as showing how the same problems have been treated in another legal system."

Soon after this judgment, the Royal Court decided in *Mendonca v Le Boutillier*[20] that the principle enshrined in article 2279 of the French *Code Civil* (*en fait de meubles, possession vaut titre*: in the case of movables, possession gives title) was not part of Jersey law and, in fact, never had been. This decision appeared to justify all that the Court of Appeal had said as to the limited reliance that could be placed upon the *Code Civil*.

Whilst greater exploration of the *Code Civil* is something that should be encouraged in the Channel Islands, it is notable that the[21] limited excursions into this area have already posed some difficulties. In *Selby v Romeril*, for instance, the Court had to deal with the position where one of the essential constituents in a contract was absent. Whilst the Court found (properly) that the contract was, therefore, "null", the Court appeared to go on and approve the distinction which exists in French law between defects in a contract that would render the contract an absolute nullity (*nullité absolue*) with those that would render it a relative nullity (*nullité relative*). According to such theory, for example, the lack of one of the essential elements enshrined in article 1108 of the *Code Civil* would lead to the contract being an absolute nullity whereas a *vice du consentement*, namely, mistake (*erreur*), duress (*violence*) or fraud (*dol*) would render the contract a relative nullity. In either event, however, the contract would be *void ab initio*. Otherwise, French law treats each of the types of nullity differently, *inter alia*, by applying separate prescriptive periods to any resulting *action en nullité.* A number of subsidiary rules are of further relevance in this context, notably by protecting the interests of third parties, such as *en fait de meubles, possession vaut titre* (in the case of movables, possession gives title) which, as we have seen, is not part of Jersey law.

The danger with *Selby v Romeril* is that the distinction between a nullity that is "absolute" or "relative" is something that appears not to have been considered in any other Jersey reported case. Indeed, all other recent Jersey authority[22] defines nullity in terms of contracts that are <u>either</u> void *ab initio* or merely voidable. Given, further, the apparent

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20 1997 JLR 142.

21 1996 JLR 210 219-220.

22 *Vibert v Vibert* 1890 48 H 462 (contract void *ab initio* where party deprived of mental faculties); *Valpy, Curator of Warren v Channing* 1946 50 H 290 (contract declared *nul ab initio et non avenu* upon comparable grounds); *Le Jeune v Le Jeune* 1900 49 H 182 (*Table des Decisions* refers to *la nullité ab initio*); *Simon v Page* 1905 49 H 279 (contract to sell future interest in parents' estate was *cassable et annullable*); *Jackson v Jackson* 1965 JJ 463 (time cannot cure a contract that is *nul*); *Deacon v Bower* 1978 JJ 39 49-50 (contract passed during a *remise des biens* is voidable only: "It is clear …that the Royal Court has distinguished between a case where a contract is void *ab initio* and one which is merely voidable"); *Ferbrache v Bisson* 1981 JJ 103 (contract passed under duress was void *ab initio:* query,

absence in Jersey law of differing prescriptive periods for an absolute or relative nullity, and the further lack of other relevant rules, Jersey would appear to be ill equipped to adopt such concepts even if it chose to further develop the *dicta* in *Selby v Romeril.*[23]

More recently, in *Steelux Holdings Ltd v Edmonstone,*[24] a similarly constituted Royal Court sought to reinforce the position that had earlier been reached in *Selby v Romeril.* In this case, the Royal Court was asked to adjudicate upon the validity of a promissory note that the defendant alleged had been procured in 1991 by a fraudulent misrepresentation on the part of the plaintiff. Both counsel agreed that the case should be analysed from the viewpoint of "misrepresentation" as considered in the English textbook of *Chitty on Contracts*. Such an approach was certainly supported by existing Jersey authority[25] with cases such as *McIlroy v Hustler*[26] stating that the basic ingredients for a misrepresentation were the same as under English common law. In fact, in *McIlroy v Hustler*,[27] the Royal Court had declared that:

> "the principles enunciated by Domat and Pothier have much in common with the law of England relating to misrepresentation and mistake. In arriving at our judgment in this action, therefore, we have regard both to the civil law and to the law of England".

In *Steelux Holdings Ltd v Edmonstone*, however, the Royal Court took an entirely different approach, both from this earlier authority and from counsel's submissions:

> "While English law and Jersey law may often arrive at the same conclusion in relation to the effect of a false or fraudulent misrepresentation upon a contract, the process of reasoning, and the route by which the journey is taken, are sometimes different. We find it necessary therefore to set out what we conceive to be the law in this area."

The Royal Court went on to consider the case upon the basis that in the event that there had been a fraudulent misrepresentation, this would have constituted a "*vice du consentement*" or defect in the consent of the defendant to the obligations that she assumed under the promissory note. As referred to in *Selby v Romeril,* this would have constituted a "*moyen de nullité*" or cause of nullity of the agreement which, the Royal Court held, would have been "void *ab initio.*"

Given the absence of "misrepresentation" as a discrete cause of action in French Law,[28] this very much represented a French analysis. Ultimately, however, the Court did not accept the defendant's evidence as to the occurrence of the misrepresentation. Nevertheless, the case is of interest, not least because the Court appears to have eschewed the reference to the French concepts of nullité *absolue* and *nullité relative* that had earlier been adopted in

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however, whether contract ought to have been declared to be voidable only). See also Le Geyt *Constitutions, Lois et Usage* Tome 1 118 *et seq* where a similar distinction is made.

23 At present, the classification of *nullité absolue* and *nullité relative* has only received further acknowledgment by its inclusion in the syllabus to the current Jersey legal examinations.

24 2005 JRC 062.

25 For fraudulent misrepresentation, see *Marenko v CIS Emerging Growth Ltd* 2002 JLR 348.

26 1969 JJ 1181.

27 1969 JJ 1181 1185.

28 See Nicholas *The French Law of Contract* 2 ed (1992) 114.

Selby v Romeril. However, the practical consequence remained the same: had the defendant's case been made out, the contract would have been void *ab initio*.[29]

Steelux Holdings Ltd v Edmonstone did not, however, deal expressly with the issue as to what limitation period would apply to a *moyen de nullité* and no such issue was raised upon the pleadings. In this particular case, it would have been arguable that as the cause of action was based upon *dol* or fraud, the action was "founded on tort" and therefore a period of three years would have applied, as in other tort actions in this jurisdiction.[30] Alternatively, the ten year limitation period that is applicable to contracts would have been relevant.[31] However, in either event, the particular limitation period would have been extended whilst the complainant was (despite all due diligence) unaware of the fraud.[32]

Similarly, no consideration was given in this case to the extent to which a *moyen de nullité* can be barred by the occurrence of certain events within the applicable limitation period, such as lapse of time or affirmation of the contract. Such matters certainly would have been relevant when considering rescission of a contract upon the basis of misrepresentation.[33] Presumably, with the Court in *Steelux* having concluded that a contract is void *ab initio* for a *vice du consentement*, it would seem to follow that only the expiry of the relevant limitation period -- whichever period this might be -- would bar such an action. In contrast, concepts such as lapse of time, affirmation, or creation of third-party rights would be relevant in contracts that are "voidable" only (as opposed to "void") and which are valid until rescinded.

4 The Influence of English law

The influence of English law in Jersey can already be detected from the discussion above. Such influence became particularly marked from the 19th century but not across all areas of Jersey law. In criminal law, English law has perhaps played its greatest role. As long ago as 1847, the Report of the Criminal Law Commissioners noted the frequent citation and use of English authorities in criminal cases at that time and, in 1936, the Privy Council was led to remark upon the development of Jersey criminal law towards "English models".[34] Similarly, the Jersey courts have adopted general principles of English law in tort to the extent that the majority in *Picot v Crills*[35] held that unless a separate Jersey rule had already been established, the decisions of the English Courts were binding.[36] In contrast, other areas of Jersey law, such as that relating to land[37] (*propriété foncière*) or succession,[38] have

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29 In contrast, note that by s 19 of the Indian Contract Act 1872 (which is dealt with in the main text *infra*), a contract is merely voidable for fraudulent misrepresentation.

30 Art 2 of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960.

31 See *In Re Esteem* 2002 JLR 53 142 as to the more general application of this period. Further, note its possible application to a breach of fiduciary duty: *In the Matter of Northwind Yachts Ltd* 2005 JRC 050.

32 Time would not have run against the complainant in such circumstances: *Eves v Le Main* 1999 JLR 44 53.

33 See, eg, *Channel Hotels & Properties ltd v Rice* 1977 JJ 111 115 where it was suggested that lapse of time could prevent rescission of a contract arising out of an innocent misrepresentation.

34 *Renouf v Att Gen* 1936 AC 445. See also *Foster v Att Gen* 1992 JLR 22.

35 1995 JLR 33.

36 It is submitted that this decision went too far and that the better view is that English authority ought merely to be accorded due weight and respect: see the minority judgment of Blom-Cooper JA 62-63.

37 See, eg,*Colesberg Hotel (1972) Ltd. v Alton Hotel Ltd* 2003 JLR 176.

38 *Godfray v Godfray* 1865 III Moo NS 338 343.

largely remained immune to the influence of English law. This is probably due to the fact that these aspects were already well entrenched in customary law and are so different to conventional English principle.

In matters of contract law, the approach of the Jersey courts has been somewhat inconsistent. English law has sometimes been applied but often without any proper analysis as to why this should have been the case.[39] On other occasions, the court has been quick to admonish counsel that Pothier was the more appropriate authority in this jurisdiction. The battle between these approaches is starkly illustrated by the recent debate as to how a contract in Jersey may be resolved or rescinded by reason of the other party's breach. In *Hotel De France (Jersey) Ltd v The Chartered Institute of Bankers*,[40] the Royal Court approached the matter according to French principle. It held that, absent the consent of the parties, the sanction of the Court was required so as to resolve a contract. This decision, however, sparked a debate amongst local practitioners as to whether or not this was correct and whether, in fact, extra-judicial termination of a contract[41] in Jersey was permissible in accordance with the English doctrine of repudiatory breach. Doubt was expressed upon the "French approach" in a further case,[42] but the issue was not finally dealt with until *Hamon v Webster*,[43] where the Royal Court decided to follow the English doctrine of repudiatory breach.[44]

5 Possible causes of legal inconsistency

The inconsistency in approach to Jersey law, and particularly in the field of contract law, was the subject of a Conference in London on 2 July 2004 that was organised by the Jersey Law Review.[45] During the course of the Conference, it was observed that over a period of several decades, from at least the 1970s, advocates had fallen into one of two camps: those who were prepared to "mine the rich lodes" of Norman and French law[46] and those who were content to agree that Jersey law was the same as English law upon the contractual point in question.[47] One particular judge (Commissioner Page QC) indicated that advocates who had appeared before him, had all too frequently adopted this latter approach.

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39 This approach is illustrated, eg, in *Denny v Hodge* 1971 1915 1924 (quantum of damages for breach of contract held to be the same as in English law but no examination made as to Pothier's various rules upon this subject as, eg, are set out at par 213-216 to his *Traité du Contrat de Vente*). See also *United Dominions Corp (C.I) Ltd v Pinglaux* 1969 JJ 1123 1137 (implied terms in respect of a hire-purchase agreement).

40 2002 JLR Note 5.

41 See the article of Le Cocq "Resolving Contracts: The Hotel de France Case" 2000 *JL Review* 151 and the reply of Kelleher "*Résolution* and the Jersey Law of Contract" 2000 *JL Review* 266.

42 *Rossborough (Insurance Brokers) Ltd v Boon* 2001 JLR 416.

43 2002 JLR Note 30.

44 Interestingly, since the 1994 and 2002 amendments to the Sale of Goods Act 1979, the ability to rescind a contract for breach has been restricted: see ss 15A 48E.

45 The event was part of a celebration of the separation of the Channel Islands from Normandy and their allegiance to the English Crown over the past 800 years. All of the speeches will be bound together and published.

46 A phrase coined by Commissioner Hamon in *La Motte Garages Ltd v Morgan* 1989 JLR 312 316. See also *Donnelly v Randalls Vautier Ltd* 1991 JLR 49 57.

47 Panel Discussion , Session 2 of the Conference.

As a consequence, it was accepted that English contract law had been adopted upon an *ad hoc* basis and that Jersey law had become increasingly confused in this area.[48]

It is, in fact, a fair criticism of Jersey counsel to say that he or she has sometimes found it easier to refer the Court to English texts such as *Chitty on Contracts* or *Halsbury's Laws* rather than to conduct the more time consuming and expensive[49] research of writers such as Pothier or Domat. In part, this disinclination is the result of Jersey lawyers now receiving their University and postgraduate education in England rather than in France,[50] which is in marked contrast to the position that existed prior to the 20th century.[51] It is also true that since about the end of the Second World War, French has become a foreign language in the Channel Islands, thereby making a perusal of the old French texts that bit more onerous when compared to the ready availability of current English texts.[52]

Whilst counsel must shoulder some responsibility for the legal confusion generated by incorrect or inconsistent use of legal principle, it is the judges that make the ultimate decision as to the legal principle to be applied in any given case. As the case of *In the Estate of Father Amy* shows, the Jersey Courts have deliberately adopted a policy of "cherry-picking" legal principle from differing sources. Given the frequent delay or absence of appropriate statutory intervention in the Islands, such judicial ingenuity has often been extremely important in developing Jersey law.[53] Nevertheless, such ingenuity has inevitably caused a degree of uncertainty as to what legal rule the Court might go on to apply in any particular case.

The drift towards English legal principle has further resulted from the particular make up of many of the judges who sit in Jersey. At Royal Court level (which is comparable to the High Court in England) the full time judges are the Bailiff and Deputy Bailiff who will have practised as Jersey lawyers for many years prior to their appointment. Part-time judges known as Commissioners will also sit as required, but these will include a number of English Queen's Counsel who have been selected for such role.[54] However, of more importance is the Jersey Court of Appeal, which since its creation in 1961,[55] has sat locally and at regular intervals throughout the year. The availability of this convenient tier of appeal (when compared to the expense and delay of an appeal direct to the Privy Council in London) has led to greater use being made of the appellate process. Since the judges of the Jersey Court of Appeal have, in practice, been drawn predominantly from the ranks of senior English

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48 See also Kelleher "The Sources of Jersey Contract Law" 1999 *JL Review* 1-21.

49 Note that despite the absence of rules equivalent to the English Civil Procedural Rules, the Court of Appeal has declared that an "overriding objective" should still be applied in the conduct of litigation in the Islands so as to ensure that legal costs are proportionate to the issues and value at stake. See Hanson "No Legal System is an Island, Entire of Itself 2004 *JL Review* 209.

50 Since the Solicitors and Advocates (Jersey) Law 1997, the requirement for aspiring Jersey lawyers to complete a diploma course of study at Caen University in Normandy, has further been removed.

51 The 1861 Civil Commissioners noted the fact that Jersey law enjoyed a French complexion that was partially attributable to the fact that its lawyers tended to receive their education in France.

52 See Hanson "The Language of the Law: The Importance of French" 2005 *JL Review* forthcoming.

53 See Hanson "Justice in Our Time: the Problem of Legislative Inaction" 2002 *JL Review* 74-76.

54 As at June 2005, Jersey has two Commissioners who were previously Jersey lawyers: Mr FC Hamon OBE and Mr PR Le Cras. The three remaining Commissioners consist of a retired English High Court Judge: Sir Richard Tucker and two English Queen's Counsel: Mr HWB Page QC and Mr BGD Blair QC.

55 Art 2 of the Court of Appeal (Jersey) Law 1961 sets out the limited category of persons who may be appointed to the Jersey Court of Appeal. In summary, appointment is restricted to Commonwealth judges, Jersey advocates of at least ten years standing and barristers of at least ten years standing drawn from England, Wales, Scotland, Northern Ireland or the Isle of Man.

lawyers,[56] it is suggested that this has inevitably made the Court process more amenable to the reception of English law. Indeed, the more recent application in the Channel Islands of principles emanating from the English Civil Procedural Rules, can be directly attributed to English lawyers sitting as judges of the Jersey Court of Appeal.[57]

6 The debate: "The Jersey law of contract: which way?"

As part of the Jersey Law Review Conference, three particular advocates put forward differing arguments as to the future direction of Jersey and Guernsey contract law.[58] In respect of Jersey, the first speaker recommended codification favouring an English approach,[59] whilst the second speaker urged codification based upon Jersey's existing roots in Norman and French law.[60] The last speaker was a Guernsey advocate who suggested that Guernsey continue with its existing approach, being to follow Pothier and the *Code Civil*.[61] In reacting to such a recommendation, the second and third speakers' appeal to follow Pothier implied that Pothier and English contract law must therefore be radically different. In some areas, there are, of course, important differences. For example, contracts in the Channel Islands, as in France, do not require "consideration" but "*cause*". Whilst these often amount to the same thing in the majority of contractual situations, the distinction between such concepts can sometimes lead to differing results.[62] However, across a broad range of other areas, it is interesting to note the extent of the similarities that do exist between Pothier and English contract law.

In the area of sale of goods, for instance, Pothier and the Civil Law generally were heavily drawn upon by Sir Mackenzie Chalmers who drafted the UK's Sale of Goods Act 1893 (the 1893 Act). In Chalmers' 1894 book entitled *The Sale of Goods Act, 1893*, he makes the following acknowledgements:

> "I have…made frequent reference to Pothier's *Traité du Contrat de Vente*. Although published more than a century ago it is probably still the best reasoned treatise on the Law of Sale that has seen the light…The references to the Civil Law need little comment. It is the foundation of Scottish law, and it is an inexhaustible store of legal principles. There is hardly a judgement of importance on the Law of Sale in which reference is not made to the Civil Law. 'The Roman Law' says Tindal C.J., 'forms no rule binding

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56 As at June 2005, the Jersey Court of Appeal consists of a panel of three or more judges selected from the following: the Bailiffs of Jersey & Guernsey; a QC from Scotland (PS Hodge); a QC from Northern Ireland (PD Smith); seven QC's from England (RC Southwell, E Gloster, MJ Beloff, J Nutting, JPC Sumption, DAJ Vaughan and KS Rokison) and a retired English Court of Appeal judge (The Rt Hon Sir Charles Mantell PC).

57 Hanson "No Legal System is an Island, Entire of Itself" 2004 *JL Review* 209.

58 Lord Hoffman PC chaired the panel of speakers upon this particular topic, entitled "*The Law of Contract: Which Way?*"

59 Advocate Alan Binnington.

60 Advocate John Kelleher.

61 Advocate Alison Ozanne of the Guernsey Bar. Note also Robilliard "The Guernsey Law of Contract – An Explanation" 1998 *JL Review* 35.

62 Eg, in principle, a gratuitous contract should be recognised and enforced in Jersey (as it would be in France) despite the absence of consideration as required under English law. See Buckland and McNair *Roman Law and Common Law, A Comparison in Outline* 2 ed (1952) 233-236. There is, however, no clear authority upon the point in Jersey: *Osment v Constable of St.Helier* 1974 JJ 1 and 1975 JJ 205.

> in itself on the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law – the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe.'[63] My task of reference in this edition has been much facilitated by Dr. Moyle's excellent monograph on the *Contract of Sale in the Civil Law*."[64]

Notwithstanding the subsequent repeal of the 1893 Act, significant parts were replicated in the Sale of Goods Act, 1979 and, therefore, continue to have force in the UK today. More generally, Pothier's influence upon English law was repeatedly acknowledged in England by the House of Lords. In the 1822 case of *Cox v Troy,*[65] Pothier was described as an authority "as high as can be had, next to a decision of [an English] court of justice". In a further House of Lords decision in 1883, Pothier's importance was again emphasised, but this time by Lord Blackburn:

> "We constantly in the English Courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases where they happen to be in point; and so in a Scotch case you would cite English decisions, and cite Pothier, or any foreign jurist, provided they bore upon the point."[66]

As can be seen from the above references, Pothier was an authority in England for some considerable period. Whilst it is clear that from about the end of the 19th century, Pothier's influence upon emerging case law steadily diminished, it is noteworthy that his works continued to retain some influence and were cited,[67] albeit with far less regularity, during the course of the 20th century. More recently, the House of Lords in *Shogun Finance Ltd v Hudson* 2004.[68] had cause to re-examine Pothier's works as to the effect of mistake in the formation of a contract.

7 The Contribution of the Jersey Law Commission

The timing of the Jersey Law Review Conference was particularly appropriate because it took place only a few months after the publication of the Jersey Law Commission's Final Report that recommended the codification of Jersey's contract law according to an English model.[69] In its Topic Report number 10,[70] the Jersey Law Commission recommended that

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63 *Acton v Blundell* 1843 12 M & W 324.

64 Introduction (vi) to (vii).

65 1822 5B & Ald 481.

66 *Mc'Lean v Clydesdale Bank* 1883 9 App Cas 105.

67 Pothier was, eg, applied by Fry J in *Smith v Wheatcroft* 1878 9 Ch D 223 230; by Horridge J in *Phillips v Brooks* 1919 2 KB 243; by Viscount Haldane in *Lake v Simmons* 1927 AC 487 501; and by Tucker J in *Sowler v Potter* 1940 1 KB 271. Pothier was referred to by Lord Goff in *Kleinwort Benson Ltd.v Lincoln City Council* 1999 2 AC 349 368-369. *Cf Lewis v Averay* 1972 1 QB 198 206 where Pothier's statement upon mistaken identity was urged by Lord Denning MR to be "dead and buried together".

68 1 AC 919.

69 The Commission's *Consultation Paper* was published in October 2002 and its *Final Report* in February 2004.

Jersey adopt a statutory framework for the Jersey law of contract that was modelled upon the Indian Contract Act, 1872 and which, itself, was based upon the English common law prevailing at that time. However, the intention of the Law Commission was that those aspects of existing Jersey Law which were peculiar to Jersey as opposed to England, and which were found worthy of retention, should also be incorporated where necessary. In arriving at this recommendation, the Jersey Law Commission discounted the adoption of the Quebec Civil Code or the Uniform Commercial Code of the United States of America. The Quebec Civil Code was ruled out upon the basis that future Jersey Courts might be tempted to look to Quebec case law and possibly also to French law for help in interpreting the provisions of such a new statute and this would be largely inaccessible to the Jersey population. It would seem, however, that the adoption of the Indian Contract Act, 1872 might lead to a comparable situation where decisions upon such statute are similarly scrutinised for guidance, although such case law might be slightly more accessible and, at least, be in the English language.

Given the influence upon English contract law of both Pothier and the Civil Law generally, it is suggested that the adoption of an English model for the future codification of Jersey's contract law would not involve too radical a departure from the existing Jersey position. Indeed, even whilst the Jersey Law Commission has recommended the adoption of an English model, it is noteworthy that it has further suggested the retention of "*cause*" as opposed to the introduction of the English concept of "consideration". Moreover, in certain important areas (for example, in the quantum and recoverability of damages for breach of contract), English law has already established itself [71] as part of Jersey's heterogeneous contract law.

What may strike the reader as surprising, however, is the choice of this particular statute as a model to copy. Whilst the Indian Contract Act, 1872 is annexed to the report, there is no commentary or other detailed consideration as to the specific provisions of this Act and that one might have hoped to have seen as justification for its adoption. Indeed, the text to the Final Report of the Jersey Law Commission is extremely short and runs to a mere three and a half pages. However, even a quick perusal of this Act makes it clear that it is not some panacea. Whilst the statute might provide a convenient starting point for a new statutory framework, its provisions necessarily reflect an out-dated position. For instance, the Indian Contract Act either makes no provision or, at least, no detailed provision in the following areas:

- sale of goods and the terms to be implied;
- provision against the use of unfair contract terms;
- implied terms in contracts for the provision of services;
- credit agreements; or
- particular provisions for the sale and transfer of immovable property.

Indeed, whilst the Royal Court declared in *Selby v Romeril* that Jersey's contract law was not set in the aspic of the 18th century, there is a danger that too great a reliance upon the

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70 See www.lawcomm.gov.je

71 A fact recognised in *In the Estate of Father Amy* 2000 JLR 80 and in *McDonald v Parish of St Helier* 2005 JRC 074. See also *Denny v Hodge* 1971 JJ 1915.

Indian Contract Act might not lead to the advance that one would hope to achieve by such a major reform of the law. It is most unfortunate, for example, that the Law Commission did not consider the adoption of the *Principles of European Contract Law* (PECL) which were completed in 2003 and prior to the Jersey Law Commission's Final Report. This was prepared in three parts[72] by the Commission of European Contract Law under the chairmanship of Professor Ole Lando and with the view of providing general rules of contract to be applied throughout the European Union. Accordingly, whilst the PECL will similarly not address all of the matters identified above as being absent from the Indian Contract Act, it at least represents a broad, contemporary work on the subject. For instance, the PECL make provision for liability in the case of negotiations that are conducted contrary to good faith[73] whereas even under current English law, recovery is not readily available in such circumstances.[74] Furthermore, unfair terms[75] are similarly dealt with, as are periods of prescription, their commencement, extension and effects:[76] all being areas of Jersey law that are in need of reform. In general, the PECL can readily be seen as such an important work that the apparent omission of the Jersey Law Commission to consider its relevance should result in a reconsideration of the model chosen for the new codifying law.

The adoption of the PECL is also justifiable upon more general grounds. In the Law Commission's consultation process concern was expressed that an increased adoption of English contract law would lead to "a further erosion of Jersey's relative independence from England". The adoption of the PECL would have met such concern, whilst at the same time providing a contractual framework that would have made Jersey the focal point of European interest in this respect. Indeed, there would have been a ready supply of European academics and practitioners to drive on such reform. Moreover, with the real possibility of the PECL eventually being integrated in what may eventually become a European Civil Code, there might even be trading and other advantages in Jersey being at the vanguard of such a movement.

8 Fears as to identity

Whatever criticisms may be made of the recommendation of the Law Commission, it is clear that the Jersey law of contract is in need of reform and clarification. The recent Law Commission's proposal, however, comes at a sensitive time, being in the midst of Jersey's 800 years' celebrations since its break with Normandy, where notions of "identity" find regular expression. It is inevitable, therefore, that the recommendation that Jersey law ought to be developed towards an English model will be disconcerting to a number of Islanders. During the Conference, the second and third speakers certainly appealed to notions of "identity" in arguing for the maintenance of laws that were different to other jurisdictions and that preserve our Norman French roots.[77] It is, however, immediately noticeable that despite

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72 Work commenced on this project in 1982. Parts I & II were published in 1999 and Part III in 2003.

73 Art 2.301.

74 See, eg, *Walford v Miles* 1992 2 AC 128. Contrast the French position where the pre-contractual period is regulated through the medium of delict: Giliker "A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French, and Canadian Law" 2003 52 *ICLQ* 969-994.

75 Art 4.110.

76 Arts 14.201 to 14.601.

77 Reference was, for instance, made by the second speaker to a quotation from Victor Hugo (1802–1885): "Jerseymen…are certainly not English without wanting to be, but they are French without knowing it." It is poignant to note, however, that a century later, the Jersey author GR Balleine described Jersey as

Jersey having followed England for many years in the law of tort, and longer still in relation to criminal law, Jersey has not suddenly lost its sense of "identity" and no public outcry has ensued.

In reality, such issues will not be relevant to the ordinary Channel Islander for at least two reasons: first, the issues are simply too esoteric to be readily appreciated; secondly, the average consumer already believes that Jersey contract law is, more or less, the same as English law. The reasons for this perception may be gathered from a Report on Consumer Protection in Jersey that was published in 2002:

Why the UK is relevant

- Most goods and services sold in the Island are either imported from the UK or are sold by UK based organisations. Often, traders are complying with UK laws, regulations and codes of practice when they sell in Jersey even though they are under no obligation to do so.
- Jersey people buy many goods directly from the UK either when they visit Britain, by telephone, by mail order or by Internet. They therefore benefit from, and have some knowledge of, the UK framework for consumer protection.
- Jersey has many visitors from the UK and also many people visit the Island for business reasons during which time they may be consumers. A significant proportion of consumer expenditure in Jersey is by non-residents, mainly from the UK. While they have no right to expect UK legislation to apply they are nevertheless familiar with it.

To the extent that the public perceives Jersey's contract law to be English in nature, there can, therefore, be little force in the argument that the Law Commission's recommendation to follow English contract law will lead to a loss in Jersey's "identity".

9 Conclusion

In essence, therefore, Jersey's contract law represents an interesting fusion of French law, before the *Code Civil*, with English law. In many ways, Jersey's contract law shares the characteristics of English law of the 19th century, with the relevance of Pothier, the absence of significant statutory intervention,[78] and the prevalent notion of freedom of contract.[79] It is, however, striking how quickly English principle has taken root in Jersey's contract law over the past 30 to 40 years. Its growth owes much to the increasing trade and cultural ties with England and, in particular, to the steady settlement of UK anglophiles in the Islands after the Second World War.

The eclectic mix of English and French law in Jersey has inevitably led to tensions and a degree of uncertainty. As we have seen, this point is well exemplified in the debate as to the relevant principles to be applied for the resolution of a contract. In the context of reform of Jersey's contract law, the ultimate survival of the English principle of repudiatory breach is

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"intensely un-English, yet even more intensely anti-French". Quoted by R Le Masurier in *Le Droit de L'Ile de Jersey* (1956) 333.

78 Hanson "Justice in our Time: the Problem of Legislative Inaction" 2002 *JL Review* 74-76.

79 The maxim "la convention fait la loi des parties" is frequently cited by the Jersey courts. See, eg, *Wallis v Taylor* 1965 JJ 455 457; *Basden Hotel Ltd v Dormy Hotel Ltd* 1968 JJ 919.

prophetic. In an article that appeared in the *Stellenbosch Law Review* in 1998, Jacques du Plessis[80] noted the argument that:

> "mixed systems have the potential of being legal 'battlefields' where rules from different systems have to fight for their survival so that only the fittest or best rules survive..."

In Jersey, it is true that there exists such an ongoing struggle and that in certain areas, English law has already won valuable ground. Indeed, statutory codification looks ready to reinforce and accelerate such gains. However, this is not necessarily because such English legal rules are particularly better than any other rules, say for example, than those contained in the French *Code Civil* or, indeed, in the PECL. It is simply that there are a number of features (as outlined above) that now make English law both a "natural" and easy resource to supplement and develop the Jersey legal process.

The problem, of course, is that the introduction of such extraneous material may prove to have a devastating effect upon the indigenous legal species. Further, with the absence of a University in the Channel Islands and the pressures already upon public finances that make funding a programme of research and reform elsewhere unlikely, it is difficult to see what can be done to halt this process of anglicisation. Many sentimental Island practitioners will lament at such a conclusion, whilst others may see it as a necessary phase in the continuing evolution of Jersey law. Whatever view one adopts, however, the next decade should prove to be of real significance in determining the future direction and development of Jersey Law.

OPSOMMING

Gemengde regstelsels het 'n onderwerp van groot belangstelling geword veral as gevolg van die vordering wat die Commission of European Contract Law gemaak het met die daarstel van 'n stel *Principles of European Contract Law* (PECL) wat dalk nog eendag deur al die verskillende regstelsels van die Europese Unie aanvaar mag word. Sover dit die Britse Eilande betref is daar baie geskryf oor ervaringe met Skotland se gemengde regstelsel terwyl ander voorbeelde heeltemal misgekyk is. In hierdie artikel word die regstelsel van die " 'Bailiwick' of Jersey" van naderby bekyk. "Bailiwick" is die argaïese term vir die gebiede onder die jurisdiksie van 'n "bailie" of "bailiff" (balju) wat die mees suidelike gedeelte van die Britse Eilande uitmaak. Jersey, net soos Guernsey, 'n sustereiland, het 'n ryk *civil law*-tradisie omdat dit eens deel was van die Hertogdom van Normandië. In die een en twintigste eeu het albei eilande egter by 'n kruispad gekom waar dit wil lyk asof anglisering die inheemse reg gaan oorweldig. In hierdie artikel word ondersoek ingestel na die konflik in Jersey tussen regsreëls wat uit verskillende tradisies voortkom en na die oorlewingstryd wat dit meebring. Besondere klem word geplaas op die ontwikkeling van Jersey se kontraktereg wat lyk asof dit, pleks van trou te bly aan die Franse wortels daarvan, die Engelse reg toenemend navolg. Die skrywer doen aan die hand dat Jersey, pleks van te tob oor die verdringing van Frans georiënteerde kontraktereg deur Engelse reg, aktief deel moet word van die beraadslagings oor die aanname van 'n PECL en so 'n plek aan die voorpunt van 'n breër Europese beweging moet inneem.

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80 "The Promises and Pitfalls of Mixed Legal Systems: the South African and Scottish Experiences" 1998 *StellLR* 343.