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WHO PAYS THE FERRYMAN? LEGAL AID IN JERSEY UNDER THE SPOTLIGHT

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This article explores the ramifications of a recent appellate decision in relation to the provision of legal aid in Jersey. The article further details the history and unique nature of the legal aid scheme in Jersey, questions its sustainability and argues for fundamental reform in the provision of free and subsidised legal services.

Introduction

1 The Court of Appeal recently made a determination in respect of costs in the co-ownership dispute of *Flynn v Reid*.[2] The case raised important issues for the legal profession and in particular in relation to Jersey's legal aid system. Unusually, aside from the parties, The Law Society of Jersey, the Bâtonnier and the Solicitor General were convened because of the wider significance of the judgment to the legal profession and the public alike.

2 At first instance, the Royal Court indicated that it would usually be inappropriate to order costs where the receiving party was in receipt of legal aid and where the only beneficiary of such an order would be the recipient's lawyer. This decision followed on from an earlier decision of Bailhache, Deputy Bailiff in *Benest v Syvret*[3] and a remark made in a matrimonial case known as *R v G*.[4] (The Law Society had been permitted to make written submissions in respect of a potential appeal in *Benest v Syvret* but leave to appeal was refused.) The Royal Court further suggested that it was appropriate to inquire into the means of the parties and the fee retainer agreed between client and lawyer when awarding costs. Having conducted such an exercise, the Royal Court sought to cap the costs that would otherwise be recoverable.

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[1] This article should be taken to express the views of the authors alone; it is not necessarily an expression of the position of the Law Society of Jersey.
[2] [2012]JCA169; the judgment of the Royal Court is reported at 2012 (1) JLR 370.
[3] [2012]JRC079A.
[4] [2006]JRC12.

3 In both *Benest v Syvret* and *Flynn v Reid*, the Deputy Bailiff sought to import into general civil cases an approach to costs that had pertained to matrimonial cases only, where the approach to costs is very different and influenced by a consideration of the parties' means. The Court of Appeal held that such an approach was wrong and, further, that the *obita dicta* in *R v G* should not be followed. However, in allowing the appeal, Birt, Bailiff (presiding) asserted that the *Legal Aid Guidelines*, which detail the eligibility criteria and obligations of the profession in relation to the provision of legal aid, are, ultimately, within the jurisdiction of the Royal Court, in that it is within the gift of the Royal Court to change the *Guidelines* in the event that it considered them to be unsatisfactory or out of date and the Bâtonnier did not, or refused to, amend them—

> "It remains the case, as the Bâtonnier submitted, that the Bâtonnier exercises her role as a delegate of the Royal Court and ultimately, jurisdiction over the provision of legal aid rests with the Court. Were it ever to be the case that the Legal Aid Guidelines were thought to be unsatisfactory or out of date, then should the Bâtonnier of the day not amend them appropriately, it would be open to the Royal Court (sitting as a full Court after suitable consultation and discussion with the Bâtonnier and the profession rather than by way of individual decision in a particular case) to issue new or amended guidelines which would then bind the profession. That has not been necessary during the last century and I have every confidence that future Bâtonniers and the profession will continue to offer legal aid in a manner which does not require such intervention in the future. Nevertheless that remedy is available should it become necessary".[5]

4 This may give rise to serious ramifications for the legal profession in Jersey. Surprisingly, the issue arose essentially as an aside to the points actually raised on appeal, appearing only in the written contentions of the Bâtonnier, and was not subject to any detailed argument or consideration of authority. Despite objection from the President of The Law Society, the final written judgment of the Court of Appeal maintained this *obiter dictum.* No doubt the Bailiff was motivated by a concern that the court should be able to exert influence over the provision of legal aid in Jersey. Nonetheless, it is accepted and indeed strongly argued that reform of the legal aid system is long overdue, but such reform also needs to reflect changes in market conditions and the legal environment, the increasing financial impact

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[5] *Flynn v Reid* [2012] JCA 169, at para 52.

on the profession, a paucity of Government funding for what is, ultimately, the responsibility of the State, and the fact that lawyers, as well as the public, have both rights and an inherent interest in an effective and fair legal aid system.

Legal aid in Jersey

5 Before considering the arguments in this case, and further exploring the impact of this judgment in respect of the *Legal Aid Guidelines*, it is appropriate to detail the origins of the legal aid system in Jersey and how it differs from the approach taken in England and Wales and, indeed, in the Bailiwick of Guernsey.

6 Jersey's legal aid system is similar in many respects to those which historically were to be found in civil law jurisdictions on the continent of Europe, with "poor man's laws" operating to waive court fees for the poor and providing for the appointment of legal representation for impecunious individuals, with the expectation, in the 18th century, that lawyers would act for such individuals on a *pro bono* basis. Legal aid in Jersey has evolved differently from that which has arisen in England and Wales where, moreover, the legislature has been particularly busy with the introduction of the Legal Aid and Advice Act 1949 and subsequent statutory interventions.

7 The current legal aid system in Jersey is based upon the obligation of advocates to give legal assistance to certain classes of litigants. Although that obligation long pre-dates the Code of Laws for the Island of Jersey approved by Order in Council in 1771, it is set out in that Code in the Advocates' Oath, the relevant section reading as follows—

> "*Vous vous contenterez de gages et salaires raisonnables, et assisterez aux Veuves, Pauvres, Orphelins, et Personnes indefendues.*"
>
> [You will content yourself with reasonable wages and salaries and will assist widows, the poor, orphans, and undefended persons.]

It is relevant to note that, while advocates have been required to take oaths of office since at least the 14th century, it was not until 1771 that oaths included the words about assisting widows, paupers, orphans and undefended persons.

8 It is also relevant to note that the obligation of advocates towards some of those persons was stated in somewhat different terms by Philippe Le Geyt whose writings on Jersey customary law are, of course, an authoritative source. He stated in his *Manuscrits sur la*

Constitution, les Lois, & les Usages de Jersey[6] (written in the 17th century)—

> "*Un avocat doit plaider pour les pauvres et pour les personnes indefendues, et, s'il ne le fait pas, le Juge doit d'Office le contraindre de le faire".*
>
> [An advocate must plead for paupers and undefended persons, and if he does not do so, the judge must of his own motion constrain him to do so.]

9 As will be argued further below, the role of the Royal Court today has changed. In respect of legal aid, the role of the court would be limited, for example, to disciplinary proceedings for those referred to the court for failing to adhere to the Code of Conduct of The Law Society of Jersey and which requires compliance with *Legal Aid Guidelines* approved by the profession. Such a principle has its roots in the earlier efforts of the legal profession and notably the unanimous resolution of 20 August 1904, that the legal aid obligation would be discharged by advocates of less than 15 years' standing on a *tour de Rôle* [according to one's turn] basis and which has since been applied subject only to further amendment and amplification by the profession.

10 Advocates (and now solicitors of the Royal Court) of less than 15 years' standing are therefore, in general, obliged as a matter of law to act upon the directions of the Bâtonnier to represent a person under the legal aid scheme as now further detailed in the *Legal Aid Guidelines*. The authority of the Bâtonnier in this respect was emphasized *In re an Advocate*[7] when an advocate declined to act for legal aid clients believing that the system to be purely voluntary, only to find himself subject to a finding of serious professional misconduct by the Superior Number of the Royal Court and being informed that it was, in fact, a legal obligation. Since the passing of The Law Society (Jersey) Law 2005, the profession's responsibility for drafting and updating the *Legal Aid Guidelines* has been reinforced by virtue of the recognition of the Code of Conduct in The Law Society of Jersey Bye-Laws 2007 and in particular the requirement that members comply with that Code as set out in bye-law 38.

11 While discharge of the obligation, in line with the provisions of the *Legal Aid Guidelines*, is effectively a matter of law, this article argues that this does not confer upon the court ownership of the *Guidelines*

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[6] Published by States of Jersey, 1846.
[7] 1998 JLR *N*–14.

themselves; this notwithstanding the *obiter* comments in *Flynn v Reid*.[8]

12 The oath set out in the Code of 1771 makes no reference to the remuneration of the advocates assisting widows, paupers and the undefended. However, Le Geyt as above cited states—

> "*On plaide toujours gratis pour ceux qui sout veritablement pauvres. C'est le riche qui dedommage quand son tour vient*".
>
> [One always pleads gratis for those who are truly poor. It is the rich client who compensates for this when his turn comes.]

According to Le Geyt, the advocate appears to have a judgment to make as to whether the person he is assigned to represent is "truly poor". There is nothing, for example, to suggest that a defendant with financial means who has to invoke the assistance of the court (nowadays through the Bâtonnier) in finding an advocate (because otherwise he will be unrepresented) is not liable to make a payment to the advocate. Indeed, the *Legal Aid Guidelines* reflect that the advocate could charge such a client his normal rates.

13 The liability of the legally-aided client to remunerate the advocate has been made express in legal aid certificates for the past 30 years or so in that the client is required to sign an acknowledgement at the time of instructing the advocate that the advocate is entitled to charge for his services, to an extent which is reasonable bearing in mind the client's means. Where it is clear that there will be a substantial amount of time incurred in dealing with the case and that the client has financial resources, the advocate may further require payments on account as the case progresses.

14 It has been the practice in the last 20 years or so to require the prospective legal aid client to complete a statement of means at the time he applies for legal aid. The statement serves a double purpose in that it will show to the Bâtonnier (or the Acting Bâtonnier whose role is more fully described below) whether the applicant is indeed "*pauvre*" and therefore entitled to legal aid.

15 Secondly, as that statement is sent to the allocated advocate, it will give him some guidance as to the extent of the client's means. In practice many of the applicants do have means, but their means are insufficient to enable them to pay the full private client rates of the lawyers. This circumstance is taken as entitling them to legal aid, but also as entitling the advocate to raise some charge. The *Legal Aid Guidelines* indicate the level of contribution to his or her fees that the

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[8] [2012]JCA169.

advocate may charge. Fees may also be recouped from monies awarded to a successful litigant. In the event of a disagreement, an assisted person may apply to the Bâtonnier for a fee adjudication.

16 Legal aid rates are generally based on a maximum contribution of the Factor A rate set by the court without a Factor B uplift or profit element. The Factor A rate is a scale of what is deemed, by the court, to be the "break-even point" for lawyers. The advocate is unable to recover the difference between the contribution made by the client and what the client would be charged on a private basis, except where an order for costs is made and recovered against another party and where some of such deficit may be recouped. Save in such a circumstance, even when the legally-aided person pays a contribution, the advocate (or his firm) is providing a subsidy.

17 While the administration of the legal aid system is the responsibility of the Bâtonnier, as head of the Bar, in practice this responsibility is delegated to the Acting Bâtonnier who allocates legal aid on a day-to-day basis.[9] The Acting Bâtonnier receives the applications for legal aid and, where it is deemed appropriate, interviews the applicant about his means. If the Acting Bâtonnier determines that the applicant is entitled to legal aid, a certificate is issued to the next advocate or solicitor on the *tour de rôle*. While the obligation is personal to the advocate or solicitor, in practice he may delegate (or pay for) others to carry out the work for him. A ruling by a previous Bâtonnier in 2005 was to the effect that Jersey lawyers (unlike their colleagues in England and Wales) were not able to complain of professional embarrassment when allocated a legal aid matter outside their normal expertise and were expected to be competent in "legal aid matters" or engage others who could provide such expertise. Such an expectation may strike many as startling and unrealistic particularly for those who are sole practitioners or who are in small firms with limited resources. It may further not engender complete confidence from legally-aided clients—a subject discussed below.

18 The issue of the certificate completes the Acting Bâtonnier's duty, and the client then deals directly with the advocate in respect of any financial contribution. Either the client or the advocate may refer back to the Acting Bâtonnier if either seeks to have the certificate discharged for any reason or some difficulty occurs in respect of the instruction. An appeal lies to the Bâtonnier against any decision of the Acting Bâtonnier.

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[9] The States of Jersey provide some funding for the day-to-day administration of the scheme.

19 Financial support from the State is available in a limited number of cases. Under the provisions of the Costs in Criminal Cases (Jersey) Law 1961, the costs of a defendant for whom a lawyer has been appointed under the legal aid scheme are generally paid from public funds where the defendant is acquitted, but it is fair to say that there remains a grey area in the assessment process which is limited to those costs that the Greffier considers "reasonably sufficient".[10] The costs of an acquitted legally-aided defendant are not limited to the contribution (if any) that the defendant would be expected to pay to his or her lawyer under the legal aid scheme. Payment is also made from public funds for a legally-aided defendant in connection with an appeal from the Magistrate's Court to the Royal Court and an appeal from the Royal Court to the Court of Appeal irrespective of the outcome of the appeal. However, such costs are limited to $^{5}/_{6}$ of Factor A.

20 There is also a so-called "Legal Aid Vote" fund administered by the Judicial Greffe and distinct from the legal aid system. Neither the Bâtonnier nor the Acting Bâtonnier has any control over the fund, although they may make representations to the Judicial Greffe about matters to do with allocations from the fund if they deem it appropriate to do so. The funds can be utilised by the Deputy Judicial Greffier either to pay for disbursements which are required to be paid in a case, *e.g.* expert witness fees, or contribute to the services of an advocate to a client who is awarded legal aid by the Acting Bâtonnier.

21 Although the administration of the fund is discretionary, there are no published guidelines about the exercise of such discretion. Recourse to the fund is arguably intended in cases where the extent of the demands on the advocate's time and the paucity of the client's ability to make a contribution will cause the advocate or his employers to incur a disproportionate and unfair financial burden in carrying out the instructions of the client. However, in practice, funds (other than disbursements referenced above) and costs paid under statutory provisions (*e.g.* under the Costs in Criminal Cases (Jersey) Law 1961 referenced above) are only paid out in certain classes of proceedings, notably in respect of long running criminal matters, cases involving children and those in relation to public interest matters. In the case of *Re B*[11] (and despite the point not being directly in issue) the Deputy Bailiff held that lawyers acting for children should be paid $^{5}/_{6}$ of Factor A rates (in common with criminal appeals) pending the implementation of a revised system.

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[10] See RC 05/12 Taxation of Costs—Costs in Criminal Proceedings.
[11] 2010 JLR 387.

22 The basis for consideration for any *ex gratia* payment appears to be in respect of proceedings which are likely to last longer than three weeks, with payment on agreed cases only made after 60 hours of *pro bono* work has been absorbed by the advocate concerned and thereafter on a fixed rate basis or at $^{5}/_{6}$ of Factor A. Other formulations have, however, been applied. One purpose of the Legal Aid Vote is thus financially to support the lawyers and parties in lengthy legal aid cases. Aside from ensuring access to justice, the aim is also to avoid a breach of art 4(2) of the European Court of Human Rights Convention (forced labour) such that disproportionate obligations on the individual lawyer are removed. Unfortunately, the Judicial Greffe does not apply a consistent approach in the allocation of public funds to advocates in these "onerous" cases and, consequently, financial support can vary considerably,[12] not least to ensure compliance with annual budgets.

23 The issue here is that financial support through the Legal Aid Vote is only provided in particular circumstances, yet numerous legally-aided cases exceed the 60 hour threshold without the potential for financial assistance. There appears to be no transparency within the Legal Aid Vote, with the fund operated in an arbitrary manner, albeit with the best of intentions.

24 In respect of funds paid out for disbursements, the client receiving such monies usually enters into an undertaking to repay the fund should their case be successful and recovery of the disbursements is made *via* any third party. For a fleeting moment, the Deputy Judicial Greffier also sought to impose interest terms on such payments without consultation with The Law Society or interest groups, but this practice appears to have been short lived. This repayment requirement appears to be consistent with the approach taken in the appellate court's findings in *Flynn v Reid* which, *inter alia*, held that in making an award for costs, the court is only concerned with the interests of the parties and not with those of their legal representatives.

25 So how does legal aid provision differ in England and Wales and, locally, in the Bailiwick of Guernsey?

26 In England and Wales, the idea of providing publicly funded legal services to ensure equality before the law for all has existed since the Middle Ages. Indeed, it was the Magna Carta of 1215 that stated "we will not deny or defer to any man either justice or right". However, it was not until the Legal Aid and Advice Act, 1949 that the provision of "Legal advice for those of slender means and resources so that no one

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[12] As to a possible challenge on this basis, see *R (Hussain) v Secy of State for Home Department* [2012] EWHC 1952 (Admin).

will be financially unable to prosecute a just and reasonable claim or defend a reasonable right" was formalised, with the development of a legal aid system that led to England and Wales becoming the global leader in the provision of publicly funded legal services.

27 Arguably, the provision of publicly funded legal advice and representation to those who cannot afford to pay is crucial to democracy, thus ensuring that a level playing field is created for all citizens. If individuals are denied, through affordability, access to justice, then the key principles of the rule of law—equality before the law and due process—would be violated.

28 Such access to justice has, though, come at a considerable cost to the taxpayer. Costs have risen from £12m in 1970 to £2.1bn in 2009, although a peak of £2.3bn was reached in 2003 before the introduction of fixed fees. No lawyers in England and Wales are forced to participate in the legal aid scheme, while individuals are provided with choice of representation (albeit amongst participating lawyers), thus obviating the risk of censure under the European Court of Human Rights Convention, art 6.

29 However, the escalating costs of the scheme have now resulted in a major reform of the scheme, with financial eligibility and the areas of law for which legal aid is available being scaled back. The stated intention is to reduce costs by up to £300m per annum in the basic operation of the scheme, with additional savings of £150m through reduced payments to practitioners.

30 Of course it remains to be seen whether these reforms will place the United Kingdom at risk of referral to the European Court of Human Rights, notwithstanding that the basic tenets of the scheme would appear to discharge the jurisdictional obligations to provide access to justice in primary areas of law.

31 It has been noted that England and Wales is regarded as providing the most extensive entitlement to legal aid of any jurisdiction in the world, although after the reforms implemented in April 2013, this attribution may no longer be accurate. However, assessment of the respective schemes in England and Wales and Jersey shows that the entitlement to legal aid in Jersey is far more extensive than that which applies in England and Wales, even before the recent changes were implemented. Given that it is the legal profession that largely funds the provision of legal aid, it is perhaps not surprising that lawyers in Jersey have, for many years, been seeking reform of the system and an acceptance by the States of Jersey that their jurisdictional obligation to fund legal representation for those who cannot afford it needs to be fulfilled.

32 While one might have expected the position in Guernsey in relation to the provision of legal aid to have parallels with that in operation in Jersey, their scheme is more in line with that applicable in England and Wales. As noted later, the basis of legal aid in Guernsey was shaped by a complaint by a Mr Ian Faulkener to the European Court of Human Rights in 1995 which resulted in the development of a statutory legal aid scheme. This commenced in September 2001 for criminal matters with its scope extended in January 2002 to cover civil matters. The Legal Aid (Bailiwick of Guernsey) Law 2003, was approved on 1 August 2001 and came into force on 28 September 2005.

33 Having been born out of an ECHR referral, the scheme, perhaps not surprisingly, mirrors the expectations of the Convention. The costs of the scheme are met by the States of Guernsey, although the application of scale fees for representation effectively means that the legal profession heavily subsidise the provision of legal assistance. They do not, however, have to meet the full costs themselves, as is the case for lawyers in Jersey when no contribution is available from a legally-aided client or when they are unable to recoup the costs from other parties. The costs of the scheme in Guernsey exceeded £2.2m in 2009, which may provide a reasonable indicator of the extent to which the legal profession in Jersey are subsidising what is, of course, a State obligation.

34 While Jersey's history and heritage are unique and highly prized, it is perhaps not unfair to suggest that members of the legal profession would like to see a more modern (and arguably fairer) approach to legal representation for those with limited means, rather than to maintain reliance on a promise that dates back many hundreds of years that has no place in the Jersey of the 21st century.

Flynn v Reid—Impact of original decision

35 The original hearing[13] related to an unmarried couple who had separated. The family home, which was immovable property, had been in the male partner's sole name, and there was a written agreement as to how the proceeds would be divided on sale. The female sought a 50% share in the proceeds of the sale of the property (which was greater than stipulated in the agreement) on the grounds of breach of contract, proprietary estoppel, constructive trust and unjust enrichment. Although unsuccessful on the first three grounds, the plaintiff succeeded on the basis of unjust enrichment and was awarded some £92,000 representing 40% of the sale proceeds.

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[13] [2012]JRC100.

36 Both parties were legally aided with limited funds. They had lived together as if they were man and wife. In determining costs, the Royal court took into account, *inter alia*, the fact that the parties were legally aided and categorised the case as quasi-matrimonial. The court made a costs order than was both split and capped: the defendant was ordered to pay 60% of the plaintiff's costs, such costs being capped at £16,000, and that the plaintiff was ordered to pay 40% of the defendant's costs, such costs being capped at £8,000. The plaintiff appealed, arguing that she should have been awarded her full costs on the standard basis, because she had received more than the defendant had offered in a without prejudice *Calderbank* offer.

37 Leave to appeal was given by the court against the order of costs on the basis that the third ground of appeal (the first two being the respective orders for proportional payment of each party's costs), namely that the court erred in taking into account the fact that both parties were legally aided, and raised issues relating to access to justice, warranted ventilation by an appellate court. It was, however, accepted by the court that this opened the appeal to the question of costs on an appellate basis at large, notwithstanding the Deputy Bailiff's assertion that the grounds for appeal were limited to consideration of the legal aid aspect.

38 The Deputy Bailiff saw the operation of the legal aid system as leading lawyers into a conflict between their personal interests and those of their client.[14] In granting leave to appeal, the Deputy Bailiff said—

> "I am dismayed by the operation of the legal aid scheme if it means what seems to me to be implied by what the plaintiff says, namely that full fees, that is to say the Factor A fees and uplift can be recovered from the opposing party, even on Legal Aid, even though the lawyer could only recover Factor A fees from his or her own client. I am similarly dismayed if the operation of the Legal Aid scheme means, which seems to be implied, that a Legal Aid client can be represented for nothing if she loses, but charged Factor A rates if she wins, perhaps taking all the proceeds of her victory. But these are matters which can be enquired into by the Court of Appeal, and adjudicated upon if that is necessary.

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[14] This echoes the Bailiff's decision in *In re Valetta Trust* 2012 JLR 1 against the use of conditional fee arrangements in Jersey, which, it is submitted, is how legal aid works in Jersey albeit without any enhancement above market rates upon "winning".

> It may sound harsh, and it is certainly crudely put, that many members of the public would say that lawyers might have to decide whether their job as professionals is to serve the clients they represent or whether it is as businessmen to exploit them. The Court will have to consider how best to accommodate the delivery of justice between these extremes, and that is not pointing a finger of accusation at any member present in this Court, how to accommodate the delivery of justice within these extremes with fairness to all. That is going to be a very, very difficult task, but I do consider that this issue raises access to justice considerations which is a matter of public importance and public interest and that it is right that leave to appeal be given on this limited ground.
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> It may well be that once the Court of Appeal is seized of the matter because leave to appeal has been given, the argument will be at large, but I express the hope that the exercise of discretion should stand in respect of the other matters, because that seemed to me to meet the justice of the case. The Legal Aid issue is, as I say, quite different, raising points of principle which ought to be ventilated in the Court of Appeal. So leave to appeal is given on that limited ground."

39 This, perhaps somewhat surprising and arguably harsh, criticism of both the legal aid scheme and, indeed, the profession at large raised "access to justice considerations which is (sic) a matter of public importance and public interest", resulting in The Law Society of Jersey, the Bâtonnier and the Solicitor General being invited by the Court of Appeal to file submissions. Interestingly, at the leave to appeal stage, the Deputy Bailiff ordered that both parties to the Royal Court proceedings (who were legally aided) should have their costs paid out of public funds for the purpose of such appeal, albeit capped at £15,000 each. The judgment in this respect was to be handed down at a later stage (albeit not received at the time of writing) and should make interesting reading as to the jurisdictional power to make an award out of public funds in this civil law context.

40 As articulated earlier, legal aid represents a considerable burden for lawyers and even poses one of the main inhibitions to a Jersey lawyer setting up in sole practice. The implication of the Deputy Bailiff's assertions that the legal aid system leads to the interests of clients being subservient to those of the lawyers themselves is misplaced and unfounded. That reform of the legal aid system is required is not, however, in dispute. Indeed, The Law Society of Jersey has, for a number of years, sought to engage the States of Jersey in addressing the shortcomings of the system, not least of which are the matters of funding, the disproportionate burden on lawyers and

enhancing proper access to justice for the people of Jersey, including the choice of a suitably experienced and specialist lawyer when necessary.

41 Of course, had the appellate court dismissed the legal aid elements of the appeal, then piecemeal reform would inevitably have followed; this would have served to exacerbate further the financial impact on a profession that already absorbs the costs of legal representation for qualifying individuals, notwithstanding that ultimate responsibility, under Human Rights legislation, rests with the States of Jersey.

Arguments on appeal—costs element

42 The appellant argued that her standard costs should be met in full, in line with the *Elgindata* basis, having effectively won her case, notwithstanding that three of the four grounds upon which she claimed relief were denied.

43 *Calderbank* offers had been made, yet the Deputy Bailiff had, in his *ex tempore* costs judgment said that this was "of little relevance". Correspondence showed that the appellant's approach had been reasonable in seeking an out of court settlement, yet this was not taken into consideration in the final costs order. Almost three years in time (and legal costs) had passed during which the respondent refused to offer to pay the appellant a sum greater than the sum she eventually achieved. It was argued that justice suggested that, *prima facie*, the respondent must bear the responsibility for costs from the date of the appellant's offer which had been exceeded.

44 The partial success of the appellant's action should not, it was argued, result in having to make a contribution to the respondent's costs, even if she should have a deduction from her own costs.

45 The description by the Deputy Bailiff of the proceedings as "quasi-matrimonial" was argued to be wrong, on the basis that this was a property dispute and nothing else. In matrimonial proceedings, the court is concerned with need, and a full investigation of the means of the parties is undertaken, while in property matters, the court is concerned with rights, regardless of means.

Court of Appeal judgment on costs

46 The Court of Appeal held that the Deputy Bailiff, in his desire to do justice to all parties, had made significant errors of principle. The appellant had made concerted efforts to settle matters out of court. The court noted that if *Calderbank* offers are treated has having "little relevance" this will act as a great disincentive to parties to make such offers and try to settle matters sensibly, the importance of offers of

settlement as a means of avoiding costs liability being stressed in *Goodwin v Bennetts UK Ltd*.[15]

47 That the appellant should effectively be penalised in having a deduction from her own costs as a consequence of only achieving partial success was not supported. It was held that this case was "easily distinguishable" from a case such as *Pell Frischmann*, where the Commissioner said[16]—

> *"the order that the successful party pay the unsuccessful party a proportion of its costs was because of the disproportion between the nature and extent of the plaintiff's main claim and the nature and extent of the judgment obtained at the end of the trial".*

The Deputy Bailiff expressly acquitted the parties of any misconduct in the litigation itself and there was no equivalent disproportion. As set out in *Elgindata* (in the passage cited at para 3 of *Watkins*), a successful party should only be ordered to pay the costs of an unsuccessful party where the successful party has raised issues or made allegations improperly or unreasonably.

48 The description of the proceedings as "quasi-matrimonial" was equally not supported. While the principle that a court addresses costs in matrimonial proceedings in a manner different from other civil proceedings is well established, this case could not be categorised as such, even though the parties had lived together as man and wife. It was further noted that "the wider question as to whether married or unmarried parties should be treated in the same way by the law is a matter for consideration by the legislature, and not for a single decision in a single case on an ancillary matter".

49 Thus the decision of the Court of Appeal was to award the appellant 100% of her costs, subject to taxation.

Arguments on appeal—legal aid

50 In considering the appeal on the legal aid point, and specifically the entitlement of the Deputy Bailiff to cap costs based by reference to the fact that both parties were in receipt of legal aid, and determining the appropriateness of the award of costs to one party on the basis that such an award would benefit only that party's legal representative, the Court of Appeal heard submissions from the Bâtonnier and the President of The Law Society of Jersey on the nature and salient features of the legal aid scheme and its operation.

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[15] [2008] EWCA Civ 1658, at paras 13, 14 and 15.
[16] Para 18.

51 The President of The Law Society argued that, as a matter of English Law, s 1(7) of the Legal Aid and Advice Act 1949 and subsequently s 31(1) of the Legal Aid Act 1988 both included a provision that, in considering the principle of awarding costs, the court must exercise its discretion without regard to the fact that the successful party was legally aided. Such a provision, it was argued, had continued into s 22(1)(b) of the Access to Justice Act 1999. The rationale and policy aim of such provision is touched on in a number of judgments including *Starkey v Railway Executive*[17]—

> "The plaintiff was an assisted person. She had not been called on to provide anything towards the costs of the litigation, from which I take it she was virtually a person without means. She succeeded in her action and obtained damages. In the ordinary way a litigant who succeeds in those circumstances would recover her costs, and an application was made for her costs. Stable, J, did not grant them. If the position is left in that way, the costs of the successful plaintiff will fall to be borne by the Legal Aid fund set up by s. 9 of the Legal Aid and Advice Act, 1949—in other words, by the taxpayer. Why should the wrong-doer profit by the fact that the plaintiff is an assisted person? If a successful plaintiff is to be deprived of costs because he or she is an assisted person, the wrong-doer gets a benefit from the Act at the expense of the State. I do not believe that that is in accordance with the intention of Parliament. Stable, J, would seem to have thought that a fully assisted person should recover no costs from a defendant. I see no ground for that. If the judge is to be read as saying that assisted persons under the Legal Aid and Advice Act, 1949, are not to have any costs if they succeed, then I think it is not a proper exercise of the discretion granted to the judge either under R.S.C., Ord. 65, r. 1, or under s. 31 (1) (h) of the Supreme Court of Judicature (Consolidation) Act, 1925. The judge ought to have granted the plaintiff costs in the usual way."

52 In a subsequent English case of *Blatcher v Heaysman*,[18] both parties were legally aided and the Court of Appeal determined that it was wrong for the plaintiffs to be deprived as a matter of principle of their costs on the basis that any costs would just "make some contribution for the Legal Aid fund".[19] The approach of Stable, J at first instance in *Blatcher*—for which he had by then attained some notoriety—has echoes of the approach adopted (wrongly it was

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[17] [1951] 2 All ER 902 903G.
[18] [1960] 2 All ER 721.
[19] *Ibid*, at 722H.

submitted) by the Deputy Bailiff in *Syvret v Benest*, "the only benefit [of costs] is to the receiving party's Advocate . . ."[20]

53 Finally, the President of The Law Society noted that the responsibility that lies upon the States of Jersey to ensure that there is access to justice is largely discharged by the Jersey legal profession and its implementation of a legal aid scheme. Nonetheless, the policy aims articulated in such cases as *Starkey* and *Blatcher* apply equally in Jersey and irrespective of the profession discharging the main part of the legal aid burden rather than a specific statutory body established to do so.

Court of Appeal judgment on legal aid

54 The Court of Appeal held that in making an award for costs, the Court is only concerned with the interests of the parties and *not with those of their legal representatives.* The fact that, because of the operation of the legal aid scheme, a particular award of costs to one party may benefit only that party's advocate (but without disadvantaging that party) is not a reason for refusing to make an order which is otherwise justified.

55 *Obiter dicta* suggesting otherwise (*R v G*[21] and *Benest v Syvret*[22]) should be disregarded; costs awards should be based on two major considerations: (a) the merits of the case (as adjudicated upon by the court); and (b) the conduct of the parties in the litigation. However, a court may decline to make a costs order if such an order would be undesirable to the public interest.

56 Save in exceptional circumstances, the means of the parties (outside matrimonial cases) are not relevant to the making of a costs order; the potential exposure to costs, if unsuccessful, is itself a salutary discipline against maintaining, from either perspective, an untenable position and there is no reasonable basis for treating a legally-aided party differently from a privately paying client;

57 For a court (other than in a matrimonial case) to cap costs on the basis of a party's means could result in a protracted inquiry into the means of the parties which is not practical and would create uncertainty; in appropriate circumstances, a costs order could be made with a proviso that it is not enforced without leave of the court,

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20 [2011]JRC233 at para. 44. For a more recent examination in 2006 on the importance of *inter partes* costs orders in England where parties are publicly funded, see "Litigating in the public interest," *Liberty*, paras 37–38 and 103.
21 [2006]JRC12, at para 17.
22 [2012]JRC079A, at para 3.

although only one such order appears to have been made by a Jersey court.

58 In respect of the Deputy Bailiff's comments about his "dismay" at the operation of the Jersey legal aid scheme and his perception that lawyers may allow commercial considerations to impair their professional responsibilities, Beloff, JA stated that in his view the profession in Jersey deserved praise for the way they provide their services under the legal aid scheme. He also indicated that whether or not Jersey should move to a system whereby legal aid is provided from public funds rather than by the legal profession is not a matter for the Court of Appeal, but that he could not understand how Jersey lawyers can be said to exploit their clients. The amount of any fees is limited by the *Legal Aid Guidelines* and is always subject to taxation.

59 As indicated earlier, the Bailiff, as President, with whom the other two members of the Court of Appeal agreed without further elucidation, went on to emphasise that the court looks to the profession and to the Bâtonnier to ensure that the legal aid guidelines are applied in an appropriate manner to achieve the objective encapsulated in the Advocates' Oath and, in default, would be free to intervene after consultation.

Ramifications arising from judgment

60 Fortunately, the Court of Appeal saw fit to uphold the appeal such that, from a costs award perspective, focus remains on the interests of the parties and not those of their legal representatives.

61 However, the suggestion by Birt, Bailiff that it is within the gift of the Royal Court to change the legal aid guidelines is strongly contested. That is not to say that the views of the Royal Court would not be given considerable weight, but it would surely be inappropriate for the judiciary to influence or control the entitlement of individuals to free legal representation, unless such representation was paid for from public funds rather than placing further *pro bono* demands on the legal profession. However, it appears that as recently as March 2013 the Royal Court has expressed concern at the current eligibility for legal aid in family cases.[23]

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[23] See *C v D* [2013]JRC056, at para 50, *per* Birt, Bailiff—
"Finally, we should add that, at an earlier hearing, the Deputy Bailiff had made it clear that he hoped very much that the husband would be granted legal aid. It would seem that for some time the husband's partner refused to disclose details of her assets in accordance with the requirements of the Legal Aid Scheme but that, following the Court's assurance that any such

62 It is argued that had the Court of Appeal invited further discussion in *Flynn v Reid* on the point, it would have been clear that the Royal Court enjoys no such power over legal aid outside judicial review, human rights challenge or disciplinary proceedings. As has been discussed earlier, The Law Society of Jersey Law 2005 and associated bye-laws has placed the current Code of Conduct and *Legal Aid Guidelines* on a statutory footing that is outwith the direct control of the Royal Court in any particular case that might cause it to wish to exercise control, but this (it is argued) was the position prior to such Law in any event. In *In re Manning*,[24] the role of the *Bâtonnier* was again emphasised and it was ruled that—

> "The granting or refusal of Legal Aid is exclusively in the discretion of the *Bâtonnier* and a single judge of the Court of Appeal [as occurred in that case] has no jurisdiction under art. 18(1) of the Court of Appeal (Jersey) Law, 1961 to consider an application for Legal Aid by a party who has lodged an appeal to the Court of Appeal".

63 However, more powerful authority against the proposition stated by the Court of Appeal can be found in *In re Ogden*.[25] There it was found that while in the Advocates' Oath of Office (in the Code of 1771) an advocate swears to defer to the court's opinion in submissions ("conclusions"), this gives the court no authority to order him to represent a client against his will. In this case, the representor applied for an order that his former advocate continue to represent him, contrary to the advocate's wish and intention. The representor's former advocate discharged himself from representing him in *dégrèvement* proceedings when his firm merged with another and a

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information would not be made available to the wife, the husband's partner did provide the relevant information. However, legal aid was then refused on the basis that her capital asset precluded the granting of legal aid. We have to say that that decision suggests an urgent need for a review of the Legal Aid Guidelines. The house belongs entirely to the husband's partner and he has no claim upon it. It is clear that, save for the matrimonial home, he has no capital assets and in any event the matrimonial home is desperately needed to provide a home for the children, whether in the form of its retention or the use of its sale proceeds. It is also clear that at present the husband's income position is far from satisfactory. In all the circumstances, it seems extraordinary that legal aid should be denied to the husband. We think that this and certain other cases which have come to the attention of the Court suggest that a review of the *Legal Aid Guidelines* is overdue".

[24] 1985–86 JLR *N*–16a.

[25] 1992 JLR 106.

conflict of interest arose. The court ordered that a new advocate be appointed as counsel for the representor, which appointment was made by the Acting Bâtonnier. The representor, however, wished to retain the services of his former advocate and sought an order for his continued representation. He submitted, *inter alia*, that since the court had the power to appoint and to dismiss advocates, who were officers of the court and not beholden to any other body, it could likewise order counsel to represent a particular client against his will. In declining to make the order sought it was held that—

(1) The representor's submissions were misconceived. The Advocates' Oath of Office in the Code of 1771 stipulated that in his "conclusions", an advocate should defer to the opinion of the court but it was no authority for ordering him to represent a particular client against his will. On the contrary, if no replacement for the representor's former advocate had been appointed, the *dégrèvement* proceedings could have been suspended.

(2) The Bâtonnier alone could designate advocates to litigants in legal aid cases. The court's power was limited to admission of advocates and it became seised of disciplinary powers over them only through representations by the Bâtonnier, except in cases of contempt of court. Since counsel had been appointed by the Acting Bâtonnier, the representor could choose whether to instruct him or to appear in person. The court, however, had no further role to play and the application was dismissed accordingly.

If, contrary to the arguments above, the Royal Court sought to impose its own set of legal aid obligations, the ramifications could be wide-ranging and of deep concern to the profession.

64 Any attempt to widen the scope of the *Legal Aid Guidelines*, which appears to be the implication, at a time when the legal aid burden on the profession continues to be significant, would need to be resisted. It also comes at a time when, in comparable jurisdictions, such as England and Wales, eligibility criteria for legal aid is being tightened. Of course, it should not be forgotten that, unlike other such jurisdictions, the costs of legal aid are essentially borne by the legal profession, and not the State, with whom, arguably, the liability should rest as a "public body."

65 To cede control over something so fundamental as the *Legal Aid Guidelines*, at a time when the profession is seeking to address the clear imbalances—and some would say injustice—of the current system, is fundamentally wrong. So what is next for legal aid and what is the profession doing to restore the equilibrium?

What next for legal aid? The case for reform

66 It is well established, and indeed a fundamental element of the European Convention on Human Rights that it is the duty of Government to provide a system that not only gives access to the courts for those with no or limited means, but for those charged with a criminal offence

> "to be able to defend themselves in person or through legal assistance of their own choosing or, if they do not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".[26]

67 In Jersey, the efficient, continued provision of free legal aid by the legal profession has prevented persistent breaches, by the States of Jersey, of the ECHR Convention, art 6. However, future complaints about a perceived lacuna in the Island's legal aid system, such as the absence of choice of legal representation (under art 6.3) or, indeed, potential action by a lawyer as a consequence of an obligation to provide unlimited legal representation without remuneration, which may be seen as both disproportionate and representative of "forced labour" (under art 4), may place the States of Jersey at risk of reference to the ECHR.

68 The States of Guernsey have, of course, already felt the heat of referral to the ECHR resulting from a complaint in 1995 against the United Kingdom (which is responsible for the compliance of the Bailiwicks of Jersey and Guernsey with the ECHR Convention), as a consequence of legal aid not being available to an eligible individual to institute civil proceedings in Guernsey, in contravention of art 6.1 of the ECHR Convention. In that instance, Guernsey avoided a judgment against the United Kingdom by a settlement through the introduction of a statutory legal aid scheme, which included provision for legally-aided civil proceedings. The Guernsey approach is twofold: in criminal cases, the lawyer is paid by the scheme authority and that authority is solely responsible for addressing the client's liability and for recovering any contribution at the end of proceedings, while in civil cases, the lawyer is responsible for recovering the contribution and the scheme authority pays the lawyer the appropriate percentage of the fee which is further reducible by taxation.

69 Despite numerous attempts by The Law Society of Jersey to engage with the States of Jersey to reform the legal aid system, little or no progress has been made, with the Government seemingly content to "allow" the legal profession to discharge its State responsibilities and

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[26] ECHR, art 6.3.

obviate reference to the European Court of Human Rights, notwithstanding that the human rights of the Island's lawyers are arguably compromised by the vagaries and extensive obligations of the scheme as it currently stands.

70 The legal aid system was extended from applying only to advocates for complex Royal Court hearings for clients whose life and liberty were at risk and had no means to pay, to include solicitors, routine matters in the Magistrate's and Petty Debts Court, civil matters and also include those who could contribute to their fees in part and those for whom no lawyer would act for various reasons.

71 As such, it is submitted that the scope of the *Legal Aid Guidelines* is far wider than the intention of the "current" oath, which dates back to 1771. Surely, despite acceptance by the profession of an obligation to provide free and subsidised legal representation to those of limited means, it was never intended to apply to all areas of law, and largely on an unrestricted and thus, uncapped, basis, at the expense of lawyers alone?

72 Interestingly, there were only six members of the Bar when it "unanimously" agreed, in 1904, that advocates of less than 15 years' standing would meet the legal representation needs of the poor; there are no records available to detail the extent to which that obligation was invoked but even though the population stood at nearly 53,000 (1901 Census: 52,576), litigation was far less prevalent and thus the burden, even on such a small number of lawyers, was much less than it is today. Placing this into context, of the 310 practising advocates and solicitors of the Royal Court, 275 are of less than 15 years' standing and thus, unless exempt or suspended from the *tour de rôle*, expected to undertake legal aid work. This may be seen as not unreasonable until it is appreciated that in excess of 100 legal aid certificates are issued every month, any one of which may result in a practitioner having to represent a client, for many hundreds of hours, without the prospect of any remuneration. The load, while spread amongst a growing number of practitioners, remains considerable, at a significant cost to the profession.

73 The proposition, as stated by Le Geyt, that "rich" clients subsidise those who are poor, is laudable and supported in principle. But we are in a different world, with different pressures and a very different legal environment from that which pertained in Le Geyt's time. To some extent, the application of scale fees that lawyers could charge for conveyancing gave lawyers the business opportunity to provide services on a *pro bono* basis for those who could not afford private fees, in the same manner as doctors, accountants, veterinarians and other professionals did in times gone by. But scale fees have gone, the market for legal services is highly competitive and margins have been

squeezed. The legacy of the past is no longer affordable, nor should it be expected that one section of the business community should be penalised in this manner.

74 It is a moot point, the extent to which the oath taken upon entry into practice in Jersey meaningfully gives rise to legal obligations by itself, but even if it does so, the oath's ambit is limited, unclear and would have to be read subject to principles of the ECHR. Of course, the court (along with the profession and the public) will also be concerned with issues of access to justice, not least because it is a "public body" caught by the Human Rights (Jersey) Law 2000. However, the jurisdiction of the court to impose obligations on practising lawyers could only (at best) properly cover those matters that could reasonably be considered to be within the scope of the oath. It must therefore be highly questionable whether the court could have jurisdiction over aspects of the legal aid scheme which are wider than those which could reasonably flow from the words of the oath.

75 The limited discussions that have taken place with Government have focused on an already agreed desire to secure access for justice for those in need, but they do not wish to pay for the privilege. Yet the Government do not expect doctors, accountants or other professionals to work on a *pro bono* basis.

76 A further issue, which is no less important, and indeed is central to the tenet of access to justice, is the failure to allow litigants a choice of specialists (as applies in England and Wales and in Guernsey for eligible cases), rather than forcing a lawyer upon an entitled litigant. Changing to a system which provides choice will result in better representation and save time and costs for the litigant, lawyer and court alike. While under the *tour de rôle*, the rota system which underpins the allocation of lawyers, competent representation will generally be provided, there is a significant risk of lawyers having to deal with legal aid cases for which they have no experience. This is analogous to an orthopaedic surgeon being required to undertake heart surgery on a patient; the surgeon is medically qualified but is not experienced in another specialist field. The consequences of such action are likely to be life-changing. Legal representation by an individual with little or no experience in a specific field can have an equally life-changing impact on a litigant, not through any fault of the practitioner himself, but as a consequence of a system that is, clearly, in need of reform. Technically, there may be insufficient evidence of a litigant having been denied competent representation to satisfy the various legal tests, but it is argued that this is setting the bar too low and that we strive for better representation than that. In addition, it ignores the public perception and dissatisfaction that may arise in certain cases. The Law Society is seeing an increased number of

complaints from individuals who feel let down by the lack of choice and the limitations of non-specialist representation. Any such individuals could seek to take the matter on to appeal and even to the ECHR, were they to exhaust their domestic remedies.[27]

77 In a limited number of cases, where firms have developed their own legal aid team to manage their firm's legal aid "obligations", some degree of specialism can be provided but generally amongst the profession this is not feasible. This pooled resource within a firm works well and is indicative of the benefits of moving possibly towards a Public Defenders' Office model for certain categories of cases, as operated in a number of jurisdictions including Canada, Australia and the USA, which might be one possible reform option, provided further, of course, that experienced Jersey qualified lawyers are recruited in the areas concerned.

78 There is, though, no suggestion that the profession is seeking to dispense with the obligation to provide legal aid *per se*, but to streamline and modernise the legal aid system to make the obligation—and burden—more proportionate and fairer to all parties, with the benefits equally seen by lawyers and the public alike.

79 The key area of concern for the profession is the requirement on lawyers to undertake legal aid cases without remuneration where the amount of work required is excessive. The issue in such cases is that the transfer of the State obligation to the individual lawyer is not proportionate and thus the State may eventually find a challenge on ECHR, art 4(2) grounds.[28]

80 The intention of the Legal Aid Vote, as administered by the Judicial Greffe, is financially to support lengthy cases, and thus avoid a breach of art 4(2) such that disproportionate obligations on the individual lawyer are removed. Unfortunately, the Judicial Greffe does not apply any consistent approach.

81 Generally, where it is agreed to fund the case, funding is agreed beforehand in either a fixed amount or $^{5}/_{6}$ of the "Factor A" rate and will commence after the lawyer has undertaken 60 hours of work. A

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[27] For a failed challenge at domestic level to have English counsel advise and be paid for from the Legal Aid Vote, see *Warren v Att Gen* 2009 JLR 268.

[28] see *Van der Musselle v Belgium* (1983) 6 EHRR 163 at §29. The combination of the obligation on the state to provide legal assistance and the *Van Musselle* judgment suggests that the state will breach its obligations under ECHR, art 4(2) by failing to make payment to any lawyer who is required to undertake a legal aid case without remuneration where the amount of work required is excessive.

limit of 60 hours' work would appear to be far nearer the type of upper limit which would prevent a case imposing a disproportionate obligation on an individual lawyer.

82 The issue here is that financial support through the Legal Aid Vote is limited.

83 The indiscriminate nature of the *tour de rôle* in terms of legal aid cases allocated means that an advocate could be required to deal with a case that involves a guilty plea in the Magistrate's Court taking less than 5 hours to complete, yet could equally be allocated a family matter than takes 200 hours or more to conclude. In the latter case, there is currently no scope for assistance from the Legal Aid Vote, yet there is a disproportionate impact on the allocated lawyer.

84 Capping the professional obligation of lawyers to 60 hours appears to be a reasonable proposal and arguably a suitable compromise on which the profession could move forward. Indeed, it would be within the profession's power unilaterally to limit compulsory provision of legal aid in this respect. What is certain is that the current system is not sustainable and arguably not compatible with the ECHR for The Law Society of Jersey (on behalf of the States of Jersey) to impose a limitless obligation on individual lawyers.

85 The Law Society accordingly seek a solution for funding from the Legal Aid Vote in a consistent and fair manner across all legal aid cases, not just cases which are deemed as significant from a profile or public perspective. Further, the importance of the public having access to specialists in practice areas cannot be underestimated.

Conclusion

86 Lawyers in Jersey have, for over 240 years, discharged an obligation to provide free or subsidised legal representation to those of limited means. Yet, notwithstanding fundamental changes in the operating environment and the world at large, that obligation not only remains in place, but has effectively been extended well beyond the scope of the 1771 oath.

87 The legal profession does not seek praise for its altruistic approach to legal aid nor does it seek to dispense with the obligation *per se*, but seeks a sustainable solution that befits the 21st century environment, with its attendant pressures, within which we operate.

88 We contend that ownership of the legal aid scheme and the rules (the *Guidelines*) rests solely with the profession and that it remains within its gift to effect necessary change. However, it wishes to do so in a spirit of co-operation and fairness, working with the States of Jersey and the judiciary to craft a scheme that is fit for purpose, that

offers freedom of choice, maintains a burden on lawyers that is both fair and proportionate and above all, provides effective access to justice to those in need.

89 The legal aid "ferryman" often traverses uncharted territory carrying a heavy payload, yet receives little thanks and provides a free ride. It is not sustainable for it to take on more non-paying passengers, a heavier load or to provide a choice of vessel. Providing access to justice comes at a cost, but it is a cost that should not, in the spirit of fairness be borne by those who are, after all, seeking to uphold the highest standards of a thing called "justice". Indeed, lawyers should be chosen by legally-aided clients on the basis that they are specialists in the practice area in question not because they are next on some lucky dip rota. The issues for the practitioner and the legally-aided client are in fact the two sides of the same coin who both aspire for a better system.

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