MISCELLANY

Brexit—a reality

1 On the evening of 23 June 2016, few retired to bed contemplating the political and financial turmoil that the dawn would bring. The polls and the financial markets confidently predicted a “Remain” vote and sterling rose accordingly. By the morning, when the result was clear, sterling and the markets had crashed. Within hours the Prime Minister of the United Kingdom, who had stated that he would remain in office whatever the result of the referendum, had tendered his resignation. The decision to invoke art 50, TEU immediately and to withdraw from the European Union without delay had been cancelled. For some days the UK government seemed paralysed by shock. The newly appointed Prime Minister has stated that “Brexit means Brexit”, but no date has yet been determined for the process of withdrawal to begin. The statement in the last issue of this Review that “a vote by the UK to leave the EU . . . would bring uncertainty” can be viewed as something of an understatement.¹

2 Where does this leave the Channel Islands legally and constitutionally? As this issue goes to press, the answers to those questions are that nothing has changed. For the time being, Protocol 3 remains in force, and the constitutional relationship with the UK is unchanged. Because officials in both Bailiwicks, unlike their counterparts in the United Kingdom, were under no mandate from their governments not to consider the possibility of a “Leave” vote in the referendum, more forward planning has taken place in the Channel Islands than was possible in the UK. In Jersey a provisional stance was taken by the government that something as close as possible to the status quo would be the political aspiration, and informal consultation with institutions and business took place on that basis. The Government of Jersey published a document setting out that aspiration in more detail in the week following the referendum.² A similar report was presented to the States of Deliberation in Guernsey.³ While

³ “Managing the implications for Guernsey because of the UK’s changing relationship with the EU”—P.2016/19 debated on 29 June 2016.
recognising that Protocol 3 will eventually fall away, the reports indicate that the Islands seek to preserve the substance of their current relationships with the EU and the UK, and that their best interests would be served by continuing the status quo so far as possible.

3 However, constitutional change is on the horizon whether the Channel Islands like it or not. The United Kingdom Government has established a new department for exiting the European Union. A meeting has been requested with the Secretary of State for that department, but the Prime Minister, Theresa May, MP, has already stated in a letter placed in the public domain that—

“as we prepare for a new negotiation with the EU we will engage your Governments. It is right that the Crown Dependencies are kept informed and offered the opportunity to contribute where it is relevant and appropriate to do so.”

Time will tell what “offered the opportunity to contribute” means, but the Prime Minister’s letter represents a considerable and welcome improvement on the practice followed when the UK was negotiating to enter the European Economic Community in 1970–72. Then there was an unambiguous statement from an FCO official that the UK would decide what was best for the Channel Islands, and the Islands’ interests were furthermore something of an afterthought.

4 Two issues of particular interest to the Channel Islands flow from the dying Protocol 3. The first arises from art 1 of the Protocol which provides that the Islands are part of the customs territory of the Union. Industrial and agricultural goods can be freely moved to and from the Union without tariff barriers. This is of particular importance to the fishing industries of both Bailiwicks. Fish are exported in some quantities from Jersey and Guernsey to France and thence to other parts of Europe. In the absence of Protocol 3, that freedom would disappear. Some politicians in the UK reportedly argue that the UK should simply pull out of the EU Customs Union so as to confer freedom to negotiate other trade deals without being bound by the

---

4 It will be staffed by officials from the Cabinet Office’s Europe Unit, the FCO’s Europe Directorate, the UK’s Permanent Representation to the EU, and officials from other government departments as may be required. The Secretary of state is the Rt Hon David Davis, MP.


same external tariffs as the EU.\textsuperscript{7} This might or might not be in the interests of the Channel Islands.

5. The second important issue concerns the freedom of movement of people, and migration. Articles 2 and 4, and their interrelationship, are the relevant articles of the Protocol. Article 2 provides that Channel Islanders “shall not benefit from the Community provisions relating to the free movement of persons and services.” “Channel Islander” is however tightly defined and excludes any citizen of the United Kingdom with a parent or grandparent born, adopted, naturalised or registered in the UK. As most residents of the Channel Islands have such a relative, it is true that few are regarded as “Channel Islanders” under the Protocol.\textsuperscript{8} UK citizens resident in the Islands who are not regarded as Channel Islanders do enjoy freedom of movement in the EU. EU citizens do not, in principle, enjoy freedom of movement in the Channel Islands. However, art 4 of the Protocol provides “The authorities of [the Channel Islands] shall apply the same treatment to all natural and legal persons of the Community”. This non-discrimination provision means that immigration controls can be applied to EU citizens only if they are applied to all, including British citizens. Both Jersey and Guernsey apply such controls on immigration indirectly to all EU citizens through legislation restricting access to housing and work.\textsuperscript{9}

6. It is generally accepted that one of the main reasons leading voters in the UK to elect to leave the EU was the freedom of EU citizens to come to the UK to live and work without any limitation. If that freedom is curtailed, it is an open question what effect that might have on migration in the Channel Islands. Jersey and Guernsey are part of the Common Travel Area (“CTA”) and the provisions of the UK’s Immigration Acts have been extended to the Islands. Whether the CTA can survive Brexit is of course another open question. The UK and Irish governments have both expressed a wish to avoid the creation of any border controls between the Republic and Northern Ireland. It is not easy to see how that aspiration can be met. The Channel Islands have expressed their desire to retain the ability to move freely between the British Islands and, ideally, Ireland.

\textsuperscript{7} Financial Times, 27 July 2016.
\textsuperscript{8} Those that are so regarded have a rider in their passports declaring that “The holder is not entitled to benefit from EU provisions relating to employment or establishment.”
\textsuperscript{9} Control on Housing and Work (Jersey) Law 2012; Housing (Control of Occupation) (Guernsey) Law 1994.
7 One possible solution to the problem might be for the UK government to agree to an entrustment empowering the Channel Islands to make their own arrangements with the EU as third countries. Even if such an entrustment were given, it takes two to tango; the EU member states would have to agree to negotiate and conclude an agreement with the Islands. The outcome is not easy to foretell.

Farewell tutelle

8 There were once three procedures at Jersey customary law whereby committees were established by the Royal Court to protect the interests of those who were unable or incapable of doing so themselves. They were the administratelle, which administered the property of a person who had been absent from the Island for more than a year and a day, and whose whereabouts were unknown; the curatelle, which administered the property (and originally protected the person) of an individual who had lost his reason or had abandoned himself to drink and was dissipating his assets; and the tutelle, which administered the property of a minor. The process was invoked in the same way for each procedure. An interested party would make an application to the court, and seven from the relatives, neighbours and friends of the proposed interdict or child would be summoned to court.1 These électeurs, after the administration of an oath, would be called upon in turn to choose one of their number to act as administrateur, curateur, or tuteur, as the case might be, and that individual would then be sworn to office by the court. The function of the électeurs was to give advice and counsel. They would ensure that accounts were kept, and the interests of the interdict or child were properly safeguarded by the administrateur, curateur or tuteur.2

9 The “administratelle” was abolished in 1963,3 the “curatelle” in 19694, and the “tutelle” most recently by the Children’s Property and

1 If for any reason a sufficient number of relatives, neighbours and friends could not be found, the Viscount would be appointed to office, although in recent years it became the practice for lawyers’ offices to provide électeurs from amongst their employees. A “friend” was interpreted with a certain amount of elasticity.

2 See, generally, the chapters in Le Gros, Droit Coutumier de Jersey (Les Chroniques de Jersey Ltd, 1943; reprinted in 2007 by Jersey and Guernsey Law Review Ltd) entitled “De l’absent et de l’administrateur de ses biens” at 84 et seq, “Du mineur” at 175 et seq, and “De la Curatelle et de la Procuration Générale” at 186 et seq.

3 The Royal Court Rules 1963.
The duties are now fulfilled by the administrator, curator and tuteur respectively, and the functions of the electors have been subsumed in more stringent accountability to officials of the Royal Court.

One should not lament the march of progress, but one may note the social changes which have taken place over the last 70 years as a result of the huge increase in the population and a consequential loss of connectivity between the people and their customary law, which has served them so well for 800 years. Eventually, the duties of electors were not well understood, and people proved less willing to give time to look after the interests of their neighbours. Nonetheless, it is the case that the customary law has shown its capacity for adaptation to the needs of contemporary society. The 2016 Law sets out more clearly than before the duties of a tuteur, and the requirement for an appointment. A tuteur must be appointed to administer the assets of a minor if they include immovable property or movable property to a value of £25,000 or more. Movable property which is held on trust may be disregarded for this purpose. The tuteur remains personally accountable to the Royal Court; a body corporate may not be appointed to office. Importantly, it is made clear that the statutory tuteur is the same creature as the tuteur of customary law and retains the responsibilities and obligations laid down in the Code of 1771 and by custom. The Jersey Law Commission can also rejoice that at least one of its reports is no longer gathering dust.

---

4 Mental Health (Jersey) Law 1969.
5 The Law was registered on 22 July 2016 and came into force on 22 August. Transitional arrangements were made on 26 July 2016 by the Chief Minister in the Children’s Property and Tuteurs (Transitional Provisions) (Jersey) Order 2016 principally to deal with tutelles constituted before the coming into force of the 2016 Law.
6 The Chief Minister may, by Order, amend the figure of £25,000 (art 2(4)).
7 Article 2(2).
8 Article 2(8).