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The Legal 500 Country Comparative Guides

Jersey

LITIGATION

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Viberts

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This country-specific Q&A provides an overview of litigation laws and regulations applicable in Jersey.

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JERSEY LITIGATION



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1. What are the main methods of resolving disputes in your jurisdiction?

The main methods of resolving disputes in Jersey are adversarial Court proceedings or out-of-Court settlements, which may take the form of without prejudice correspondence, evaluative or facilitative mediation or arbitration.

2. What are the main procedural rules governing litigation in your jurisdiction?

Each Court has its own procedural rules.

Where the value of a dispute exceeds £30,000 and therefore falls into the remit of the Royal Court, the Royal Court Rules 2004, as amended, set out the procedure, together with an array of Court Practice Directions which are regularly updated and published online.

Where the value of a dispute does not exceed £30,000, it will fall into the remit of the Petty Debts Court, and the Petty Debts Court Rules 2018 will apply.

Proceedings in the Court of Appeal are governed by the Court of Appeal (Jersey) Law 1961 and the Court of Appeal (Civil) Rules 1964.

3. What is the structure and organisation of local courts dealing with claims in your jurisdiction? What is the final court of appeal

Civil claims fall broadly into two categories: those of a value below £30,000, which sit in the remit of the Petty Debts Court, and those of a value in excess of £30,000, which are within the remit of the Royal Court.

The Royal Court comprises of several "divisions", and as such civil claims will typically be brought in one of the following:

- a. The 'Héritage' Division, which has jurisdiction over certain disputes relating to land;
- b. The Family Division;
- c. The Probate Division, which has jurisdiction in respect of the grant or revocation of probate and administration of movable estates, and all questions relating to a testamentary cause or matter; or
- d. The 'Samedi' Division, which is the general division of the Royal Court, dealing with matters not falling within the jurisdiction of the other three divisions.

Appeals from the Petty Debts Court are heard by the Royal Court, whilst appeals from the Royal Court are heard by the Court of Appeal. Appeals from the Court of Appeal are heard by the Judicial Committee of the Privy Council.

4. How long does it typically take from commencing proceedings to get to trial in your jurisdiction?

This depends upon a number of factors, including the Court's timetable, any ongoing mediation or settlement attempts, and whether the Court has ordered that the matter be dealt with as a '*cause de brèveté*' (expeditiously). However, the Court has clearly stated that deadlines must be met and will impose sanctions for non-compliance, accordingly cases are dealt with at pace in keeping with the Overriding Objective which includes, so far as is practicable, ensuring that cases are dealt with expeditiously and fairly.

It has been stated by the Master of the Royal Court, that whenever possible:

- a. Matters should generally be concluded within 12 months;
- b. Complex cases should be concluded within 24 months; and
- c. Highly complex cases should not be delayed by more than 36 months.

If the matter is appealed that will add to the length of the matter, however appeals in Jersey are dealt with on a relatively short timetable of approximately 6 to 12 months.

5. Are hearings held in public and are documents filed at court available to the public in your jurisdiction? Are there any exceptions?

Generally hearings are held in public save for exceptional matters which are necessarily private, for example proceedings concerning certain injunctions and delegations.

Judgments of the Royal Court are generally available to the public, save for those which are restricted or anonymised.

Judgments can also be requested from the Judicial Greffier of the Royal Court, or the Greffier of the Petty Debts Court.

Subject to confidentiality and/or restricting orders, pleadings are public documents and may be obtained on request.

6. What, if any, are the relevant limitation periods in your jurisdiction?

Civil contractual claims have a prescription period of 10 years from the date of breach.

Civil claims arising out of tort have a prescription period of 3 years from the date upon which the plaintiff became aware of a breach of duty owed, save for aviation-related claims, which typically have a prescription period of 2 years from the date upon which the plaintiff became aware of a breach of duty owing to them.

There are several types of claims which can arise in respect of contested probate matters, which typically prescribe a year and a day from the date of the death of the deceased, or a year and a day from the date of probate being granted, depending upon the type of claim being brought.

The prescription period for some property claims is 40 years. There is no time limit on recovery of trust property where the trustee has possession or control of the same.

Prescription periods can be extended where for example the plaintiff is a minor and has yet to reach the age of majority, where fraud has occurred or where a person

lacks capacity. Such impediments are called *empêchement*.

7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?

Pursuant to a Practice Direction prior to issuing proceedings it is a requirement to:

- a. issue detailed pre-action correspondence giving at least 14 days for a response; and
- b. to seek to engage in attempts at settlement (particularly mediation and/or ADR where necessary). If an effort has not been made to mediate prior to proceedings being issued, it is likely that proceedings will be stayed in an effort to ensure that this occurs.

Failure to follow the requirements can lead to adverse costs orders.

8. How are proceedings commenced in your jurisdiction? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

Proceedings in the Royal Court are typically commenced by Order of Justice, Representation or Summons. An Order of Justice is usually addressed to the opposing party and used in more complex matters, where it is clear who the opposing party will be, and where there is a clear available remedy. A Representation is usually addressed to the Court and often made on an *ex parte* basis, seeking the Court's intervention or order in respect of a situation. A Summons is usually used in the context of more straightforward matters, often concerning estates or debt actions.

Service is carried out by either ordinary service (by post or hand delivery) or personal service via the Viscount's Department (being the executive division of the Court).

Where ordinary or personal service is not possible an application for substituted service can be made, serving on a family member or via email. Similarly, an application can be made for service by a process agent where the defendant is out of the jurisdiction.

9. How does the court determine whether it has jurisdiction over a claim in your

jurisdiction?

There are varying factors which determine whether a Jersey court has jurisdiction over a claim in Jersey. These include:

- a. Applicable law (i.e. whether any particular Jersey case or statute applies, and in the case of contracts or trusts, the governing law of the particular contract or trust in question);
- b. In the case of a particular incident giving rise to a cause of action, where the incident took place;
- c. *Forum non conveniens* (the most appropriate and convenient location for each of the parties);
- d. Domicile (in the case of an individual) or jurisdiction of incorporation (in the case of a company);
- e. Where the Defendant conducts most of its business; and
- f. Where the Defendant has most of its assets.

A balance of each of these factors determines whether the Court finds that it has jurisdiction to hear a certain matter.

10. How does the court determine which law governs the claims in your jurisdiction?

The Court will apply the factors and reasoning outlined above and may reach an alternative finding, i.e. that the claim is not governed by Jersey law. The Court can hear evidence of foreign law and will seek to avoid allowing the parties to 'forum shop'.

11. In what circumstances, if any, can claims be disposed of without a full trial in your jurisdiction?

Often matters concerning e.g. personal injury, property disputes, construction, contentious probate, contract disputes and contentious trust matters will settle out of Court. The parties will enter into an agreement and seek an order for discontinuation from the Court.

Claims for smaller debts owing are often disposed of without a full trial, and the Petty Debts Court will require early mediation before it will deal with a case.

Where a party does not attend a hearing, the Court may order judgment in default. However such judgment is susceptible to being set aside by a later application by a Defendant who can prove service was ineffective.

Parties may seek to a strike out a section or the whole of a pleading. If the whole of an Answer is struck out (and there is no counterclaim), the matter is disposed of thereafter. Strike out can be ordered for e.g. abuse of process, no reasonable cause of action, a frivolous action, lengthy delay.

In some tortious cases a split trial will be ordered, with the Court hearing issues of liability in the first instance, with a trial on quantum scheduled for a later date. If the Plaintiff fails to establish liability, the quantum trial will fall away.

12. What, if any, are the main types of interim remedies available in your jurisdiction?

A number of interim remedies are available, to include:

- a. Interim payments, whereby plaintiffs can make applications to the Court for advance payments from their damages in certain circumstances. In order for an interim payment to be ordered, the Court must be satisfied that the Plaintiff is likely to succeed at trial, and that the level of interim payment will not exceed the total damages which the Court will ultimately award.
- b. Payment into Court, whereby, in order to reduce the risk of having to pay all of the Plaintiff's legal fees in the event that the Defendant is unsuccessful at trial, the Defendant in an action may make payment to the Court clerk of the sum that the Defendant believes is owed in damages (being a lesser sum than the amount of damages the Plaintiff is claiming). Accordingly, if the trial Court orders that the Defendant must pay damages to the Plaintiff and the amount of those damages is equal to or less than the amount previously paid by the Defendant to the Court clerk, then the Court is unlikely to order that the Defendant pay the Plaintiff's legal fees from the date of that payment to the Court clerk. The Defendant may be ordered to pay the Plaintiff's legal fees prior to the date of the payment in. Such a payment into Court puts the onus on the Plaintiff to decide whether to continue with the Court process after the payment into Court is made as it places an inevitable risk on the Plaintiff of receiving reduced costs, which depending on when the payment is made, may be significant.
- c. Injunctions can be obtained to require a party

or third party to refrain from acting or compelling them to act. If the party does not follow the order they may be in contempt of Court. Such injunctions include *marevas* (freezing order), *anton pillar* orders (entering and taking documents from a party's premises), a *caveat* (restricting the alienation of immovable / real property and a *clameur de haro* (to stop a visible wrong on one's land). The test to obtain such injunctions are set at a high bar.

13. After a claim has been commenced, what written documents must (or can) the parties submit in your jurisdiction? What is the usual timetable?

In the Royal Court, where the Plaintiff has commenced an action by Order of Justice or Representation, the Plaintiff will have pleaded their case in that document.

Where a Plaintiff has commenced an action by Summons (e.g. to recover a debt which is a certain sum), the action may be stayed and placed on the 'Pending List' until the Plaintiff files their Particulars of Claim, which must be filed within 21 days.

Thereafter, the Defendant (by way of response to either the Order of Justice, Representation or Particulars of Claim) files a pleading known as an 'Answer'. The Answer may be paired with applications for a strike out (of all of the Plaintiff's Claim), or with a counterclaim. The Answer may also convene any relevant third parties to the proceedings. The Answer must be filed within 21 days of the matter being placed on the Pending List (if the action was commenced by Order of Justice), or within 21 days of receipt of the Particulars of Claim, as appropriate.

The Plaintiff may then file a Reply within 21 days of receipt of Answer, but may only do so if:

1. The Defendant's Answer contains a counterclaim; and/or
2. The Defendant's Answer raises a new, positive case regarding which the Plaintiff has further, positive material to plead.

Unless the Defendant's Answer contains a counterclaim, no later pleading later may be filed without the leave of the Court.

If the Defendant's Answer contains a counterclaim, or in other circumstances if leave of the Court has been sought and granted, the Defendant may file a pleading in response to the Plaintiff's Reply, known as a

'Rejoinder', within 21 days of receiving the Reply.

Any party who fails to file a pleading in time risks having judgment in default entered against them.

In the Petty Debts Court, the times stated above are extended to 28 days.

14. What, if any, are the rules for disclosure of documents in your jurisdiction? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

Parties to the litigation have to disclose and exchange all documentation relevant to the litigation (even if it undermines or harms their own case).

Deliberately destroying or concealing relevant documents is likely to be a contempt of court and may constitute the offence of attempting to pervert the course of justice.

Any innocent failure to disclose documentation should be volunteered and may have adverse consequences in costs and delay.

As a general rule, documents and information obtained from disclosure must only be used for the purpose of the litigation in which they were disclosed and cannot be used or disseminated for any collateral or ulterior purpose without specific leave of the court.

The discovery obligation is a continuing one. Relevant documents must be disclosed whenever they come into the party's possession, custody or power, up to and during the trial.

Should further documents be created or found following the exchange between parties of lists of 'discovery documentation', a supplementary list and supporting affidavit must be produced.

Discovery usually takes place after the filing of pleadings.

Disclosure of the existence of relevant documents is given by way of a list (the 'exchange of lists') which identifies the documents which will be made available to the other party for inspection and copying. Each party to the litigation is required to swear an affidavit verifying the accuracy of their list of documents.

After the exchange of these affidavits, parties may inspect the original documents referred to in the other party's discovery list and take any photocopies they

require. In appropriate cases, the court may place restrictions on who can inspect the documents; for example, lawyers and independent experts only.

The meaning of “documents” in the context of discovery is broadly construed and includes (but is not limited to) correspondence, formal documents, emails, handwritten notes, telephone notes, diaries, meeting notes, plans, drawings and any other forms of record.

The disclosure duty extends to any device on which information is recorded, whether in a tangible or intangible form, which may be made tangible or intelligible. This broad scope therefore encompasses photographs, microfilms, films, videos and computer databases containing information which can be retrieved in legible format, tape recordings and their transcripts. Data deleted before litigation proceedings are contemplated, that can be retrieved from back-up tapes, is discoverable.

Jersey recognizes the exception of privilege in the context of Discovery. Whilst privileged documents do not need to be physically disclosed, their existence must be referred to in the list of discovery documents. There are varying types of privilege recognised in Jersey, including professional privilege and common interest privilege, among others.

In certain circumstances, confidential documents may be covered by legal professional privilege or, in exceptional circumstances, public interest immunity.

As a general rule, the fact that a document is regarded as confidential is not usually a good enough reason in itself for the party not to fulfil his duty to disclose a document that is relevant to the issues in dispute. A party’s confidentiality alone will not result in a document being regarded as privileged. The Court has a general discretion to allow a confidential document to be withheld. In making this decision the court will conduct a balancing exercise, weighing up the interests of the party seeking disclosure to assist his case against the competing interest of the innocent third party’s right to confidentiality

15. How is witness evidence dealt with in your jurisdiction (and in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

Witness statements are disclosed after discovery has taken place.

Written and oral witness evidence is dealt with in much the same way as it is in the UK.

Ordinarily witness evidence must be heard orally and in open court. In practice evidence in chief is generally set out within written witness statement which are provided in advance of trial and which will be put to proof at trial.

Whilst there are many rules on examination of witnesses, generally speaking examination-in-chief will be put to the witness as a series of ‘open questions’, followed by cross-examination being put to the witness by the other side attempting to challenge his or her evidence, as a series of ‘closed’ or ‘leading’ questions designed to put the opposing case to each witness.

Any re-examination should only raise issues previously raised in examination. As is the case in the UK, there are rules against badgering or leading witnesses, and protocols for dealing with hostile witnesses.

In terms of depositions, where a potential witness may not be available to give evidence at trial, a party may apply to the Court for an order for an officer of the Court to take in writing, on oath, the evidence of any witness who is in Jersey at the time of the application. A party may also apply for a commission or for letters of request to examine a person who is a party or witness in any suit and who is not in Jersey at the time of the application.

Subject to the overriding discretion of the Court to direct otherwise, such evidence taken by deposition, commission or letter of request is only admissible at a hearing if the deponent is dead, outside Jersey or unable from sickness or other infirmity to attend Court.

16. Is expert evidence permitted in your jurisdiction? If so, how is it dealt with (and in particular, are experts appointed by the court or the parties, and what duties do they owe)?

Typically experts are appointed by the parties. Ordinarily each party would have their own expert(s), but there are occasions when parties jointly appoint one or more experts (for example, in instances where a property valuation is required and the parties are agreed on the expert to be used).

The Court will not usually allow expert evidence from more than two different disciplines to be called in any particular case. An exception is made for personal injury and medical negligence cases. Parties are typically limited to one expert per discipline, and where there are multiple plaintiffs or defendants they should aim to use

the same expert.

The Court may order simultaneous or sequential disclosure of expert reports, although in personal injury claims, the Plaintiff's expert evidence will be disclosed first.

Experts are required to be entirely independent and cannot advocate for either one party or the other. Rules governing the provision of expert evidence and standards required of an expert are set out in a Royal Court Practice Direction. Directions in relation to experts should provide for experts to consult with one another with a view to narrowing down the issues in dispute.

Where parties wish to seek a further expert opinion, this must be funded by the party seeking such evidence, and permission must be sought to rely upon the second report. Disclosure of the first report is also usually ordered in such circumstances, and the court must be satisfied that a party is not simply engaging in expert shopping, but rather that the party's confidence in its expert has been lost.

Experts do not have to be sourced from within the jurisdiction of Jersey.

17. Can final and interim decisions be appealed in your jurisdiction? If so, to which court(s) and within what timescale?

Final decisions made by the Petty Debts Court may be appealed to the Royal Court. Leave must be sought within 7 days.

Interlocutory judgments made by the Master of the Royal Court may be appealed to the Royal Court within 10 days of the relevant order.

Final decisions made by a single judge or a single judge and Jurats may be appealed to the Court of Appeal within 1 month of the decision. Leave is required if the decision in question is confined to the matter of costs.

Final decisions made by the Court of Appeal may be appealed to the Judicial Committee of the Privy Council with their leave.

In exceptional circumstances a party denied an appeal via one of the above routes may seek an order for *doléance*. In such case there must be a proper complaint against the judge or a grave injustice may result from the relevant decision.

18. What are the rules governing enforcement of foreign judgments in your jurisdiction?

The enforcement of foreign judgments in Jersey is governed by the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 and the Judgments (Reciprocal Enforcement) Rules 1961. The law and subsequent Act cover judgments from the higher courts of England and Wales, Scotland, Northern Ireland, Isle of Man and Guernsey.

For jurisdictions other than those listed within the statute and rules listed above, it is necessary to commence fresh proceedings in Jersey, referring to the foreign proceedings within the new pleadings and submissions where necessary and appropriate.

19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side in your jurisdiction?

In Jersey there is an important distinction between recovering costs in Petty Debts Court proceedings and Royal Court proceedings.

In Petty Debts Court proceedings, the general position is that the successful party is only entitled to recover relatively limited fixed costs. The amount of fixed costs recoverable depends on whether the claim was contested, the overall value of the claim, and the stage it reached in proceedings.

In the Royal Court, in relation to costs, the Court can order:

- a. Costs in favour of the successful party. This may be on a reasonable basis or an indemnity basis. Legal fees will then be ordered to be repaid by the unsuccessful party and the fees may be referred to a Court officer to be adjudicated. The final percentage of costs recovered from the unsuccessful party, as a rule of thumb is 66% for reasonable costs. Indemnity costs are higher and may be in excess of 90%.
- b. An adverse costs order, i.e. an order that the successful party pay the other side's costs. There are several instances in which this may occur, but examples include where the successful party is awarded damages less than a sum paid into Court, or if the Court considers that a party has not conducted all or

- part of the litigation appropriately.
- c. That each party bear their own costs.

20. What, if any, are the collective redress (e.g. class action) mechanisms in your jurisdiction?

There are various ways to create a class action in Jersey.

- i. there is a mechanism in the Royal Court Rules for representation of a class of ascertainable persons where it appears in all the circumstances expedient to do so. Quantum and the difficulty of the issue at hand will be considered in allowing such an action. Unascertainable persons can also be represented using the same Rule;
- ii. matters can be commenced separately and then consolidated; and
- iii. Plaintiffs may be joined to an existing action with consent.

Of course multiple Plaintiffs may start an action together.

21. What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings in your jurisdiction?

The Royal Court Rules at Rule 6/36 provides for the addition of a person who ought to have been joined to proceedings at the outset, or who may have an interest in the proceedings, or whom, in the opinion of the Court, it would be just and convenient to join to determine the matter.

It is not however possible to join an additional Plaintiff to the proceedings without that person's consent in writing (or in such other manner as the Court may direct).

Consolidation of separate matters is possible pursuant to the Royal Court Rules at Rule 6/11 where:

- a. There is a common question of law;
- b. The rights or relief arise from the same transaction(s); or
- c. There is another desirable reason to consolidate.

Such consolidated proceedings can be later de-consolidated.

22. Are third parties allowed to fund litigation in your jurisdiction? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

Since a 2012 case, third party funding arrangements have been permitted to allow improved access to justice for those who could not otherwise commence and sustain a claim. Litigation funding remains relatively rare but there is a market for the same which is serviced by Jersey and UK litigation funders. Such funders run the risk of a potential adverse costs order:

Non-party costs orders were recently reviewed in a 2021 case following earlier case law which put in place the following principles:

- i. Costs orders against non-parties will be exceptional. The exceptional considerations will be fact-specific and the ultimate consideration will be that of justice as between the litigant seeking the order and the person against whom the order is sought.
- ii. Generally, the discretion will not be exercised against 'pure funders', namely persons with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course.
- iii. Ordinarily, a non-party will not be made liable for costs if those costs would in any event have been incurred even without such non-party's involvement in the proceedings.
- iv. Difficult cases will arise when non-parties fund litigation designed to advance the funder's own financial interest.
- v. Where a non-party promotes and funds proceedings by an insolvent company solely or substantially for its own financial benefit, that non-party should be liable for the costs if the claim, defence or appeal fails.
- vi. The position of an individual director who participates in or funds litigation will require careful consideration.
- vii. When deciding whether to exercise its discretion to award costs against a director personally, the court should determine what lay behind his or her involvement.
- viii. Where a director promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails, but if the director can realistically be regarded as acting rather in

the interests of the company (and more specifically its shareholders and creditors) than in his own interests, it is likely that a costs order will not be made against him personally.

- ix. The guiding considerations are reason and justice.
- x. Ordinarily, a non-party funder, with no personal interest in the litigation and who does not stand to benefit from it will not be liable for the costs incurred by an unsuccessful party without a full hearing of the merits upon which it is contended that potential liability arises.

23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction?

Initially there were some significant delays in the Court processes, although these have largely been addressed. There were some difficulties engaging experts during the pandemic. The Court processes have adapted and, since the pandemic, there is more acceptance of the use of video links and remote evidence. Since the pandemic the Court has made more use of electronic facilities and document management systems. Filing is now conducted electronically. Lastly, more applications are presented via written submissions as opposed to oral submissions, and these matters include some representations and applications for service out of the jurisdiction.

24. What is the main advantage and the main disadvantage of litigating international commercial disputes in your jurisdiction?

There are several strong advantages to conducting international commercial disputes in Jersey. The Court is very well-resourced and versed in international litigation. The Court system is responsive with comparatively short

delays before hearing dates can be secured.

There is a strong judiciary with a wide and deep knowledge of many aspects of Law in Jersey and further afield.

Many of the law firms have an international presence and/or are well used to working with international clients from far and wide. There is a competitive legal profession in the Island with many lawyers who have worked in a variety of jurisdictions.

The statutes and case law is well reported and accessible. The local company and trusts law have been drafted and amended to some degree with the concerns of Jersey's international clientele in mind.

25. What is the most likely growth area for commercial disputes in your jurisdiction for the next 5 years?

There are a number of growth areas in the Island for the next 5 years including local and international insolvency, regulatory issues, construction law, competition law and the use and abuse of information.

26. What, if any, will be the impact of technology on commercial litigation in your jurisdiction in the next 5 years?

The Court and profession-led move away from paper bundles to digital bundles has been revolutionary cutting down the time and expense of creating, collating, indexing and leafing through great volumes of correspondence. This move will likely become ever more pervasive over the next 5 years.

A further sea change is in the world of discovery where it has become commonplace to use data rooms not only for storage and provision of emails, documents and more, but also for their review. It is expected that this method of carrying out the discovery exercise will be almost exclusively used within in the next few years, or even required by Rules of Court.

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