UNJUST ENRICHMENT AND AN "ANCIENT" GUERNSEY TORT

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This article considers the findings of both the Royal Court and the Court of Appeal in Guernsey in the recent property related tort case of Hindle v Kitching. *It explores the wider legal ramifications of the courts' findings including how, in certain significant respects, Guernsey tort law and choice of law has failed to keep pace with developments elsewhere. The case is also a useful example of the progress of the law of unjust enrichment in Jersey and Guernsey.*

1 The recent Court of Appeal case of *Hindle v Kitching*[1] dealt with difficult issues relating to Guernsey's tort law. The Court of Appeal found that, in certain significant respects, the law was not consistent with English tort law. The court also held that this case "shows how difficult it is to strike the right balance between the claims of true owners and the claims of innocent purchasers"[2] and confirmed the growing jurisprudence, both in Guernsey and Jersey, recognising the principles of "unjust enrichment".[3]

2 The judgment further tackled complex issues of applicable (or proper) law which again highlight how Guernsey's law has failed to keep pace with English law.

Background facts

3 *Hindle v Kitching* concerned competing claims to a classic car, being a red 1959 Jaguar XK 150 3.4 litre fixed head coupe. The plaintiff, Mr Hindle, bought the car in England in 2003, at auction, in running order. Both the Royal Court, at first instance, and the Court of Appeal found that he thereby became its legal owner. Having insured the car for £20,000, Mr Hindle brought it to Guernsey in 2008 and left it with a mechanic for repair. By 2011, after a "puzzling"[4] delay and inaction by Mr Hindle (whose evidence the Royal Court treated with

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[1] 2020 GLR 1.
[2] 2020 GLR 1, para 6.
[3] 2020 GLR 1, para 62.
[4] Royal Court judgment dated 3 April 2019, para 13.

"some scepticism"[5]) both the mechanic and the car had disappeared. The car (registered throughout by the DVLA in England) had, it transpired, been purchased in Guernsey in 2011 by a well-established English classic car dealer from a "seller who cannot be identified".[6] The dealer referred to the car "undergoing prolonged restoration"[7] due to its very poor, unroadworthy condition.

4 The dealer took the car to England, repainted and sold it, still in a very poor or "rough"[8] state of repair, to a Mr Goldie. Mr Goldie sold the car in 2013 to the defendant, his friend Mr Kitching. Both Mr Goldie and Mr Kitching were, the court found, entirely innocent purchasers. Mr Goldie spent considerable sums improving the car which Mr Kitching in effect "purchased"[9] when he bought it. He then carried out further (less significant) improvements.

5 In 2016, out of the blue, Mr Kitching received a letter from Mr Hindle's Guernsey lawyers stating that he (Hindle) was the legal owner and demanding that the car be forthwith "delivered up", with no concession as to the cost of any improvements. The demand was received in England by Mr Kitching, where he had resided throughout. Since 2011 the car had been in England.

6 In the Royal Court, Mr Hindle commenced a claim for delivery up (which he later clarified as a claim in detinue) or alternatively damages for conversion. Thereafter there followed "hard-fought and protracted"[10] proceedings in the Royal Court.

7 At trial, Mr Hindle conceded that improvements should be paid for by him before taking back the car, but only to the limited extent to which Mr Kitching (who had paid £65,000 for the car) had actually spent money, namely around £3,500.

8 The Royal Court (then Deputy, now Bailiff, McMahon presiding, sitting with Jurats) found that Mr Kitching clearly "cherished"[11] the car during the six years he had possessed it, whereas Mr Hindle regarded it merely as "an asset to be realised"[12] not "a possession giving him any particular pleasure".[13]

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[5] Royal Court judgment dated 3 April 2019, para 13.
[6] Royal Court judgment dated 3 April 2019, para 5.
[7] Royal Court judgment dated 3 April 2019, para 16.
[8] Royal Court judgment dated 3 April 2019, para 105.
[9] Royal Court judgment dated 3 April 2019, para 100.
[10] 2020 GLR 1, para 6.
[11] 2020 GLR 1, para 91.
[12] 2020 GLR 1, para 91.
[13] 2020 GLR 1, para 91.

9 The Royal Court found that whilst Mr Hindle remained the legal owner of the car, in the interests of what was "fair and equitable"[14] it chose to exercise its discretion to give Mr Kitching the election to keep the car he "cherished" on payment of £20,000 (which it quantified as being Mr Hindle's loss for the market value of the car had it remained unimproved at trial) and £100 "nominal" damages for Mr Kitching's failure to deliver up after the initial request. This reflected the value of the actual loss of enjoyment suffered by Mr Hindle.[15] The Royal Court ordered that the receipt in respect of that amount by Mr Hindle would effect transfer of legal title to the car to Mr Kitching.[16] Mr Kitching was given the alternative that he could choose to return the car on receipt of the sum of £46,989 from Mr Hindle, which the Royal Court quantified as the cost of the improvements.

10 Mr Hindle appealed, maintaining that he should get the improved car back, on payment of only c.£3,500 to Mr Kitching.

Grounds of appeal

11 The Court of Appeal referred to the 19 grounds of appeal as "overlapping".[17] By the time of the appeal, Mr Hindle had conceded that the remedy of delivery up was a discretionary remedy, not an absolute right. The grounds of appeal were in essence directed at the Jurats' findings of fact, or the exercise of discretion.

"*Morton* repainted?"

12 Mr Hindle relied upon an action in detinue (even though he did not expressly plead it) rather than a pure conversion. This is important because the remedies are different. Detinue (described by the Court of Appeal as an "ancient"[18] tort) was abolished in England by the Torts (Interference with Goods) Act 1977 ("T(IWG) Act 77").

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[14] 2020 GLR 1, para 134

[15] Cited by the Court of Appeal (2020 GLR 1, at para 76):

> "while [Mr Hindle] had been deprived of the use of the Jaguar for some time, the Jurats balanced that against the fact that he was prepared to be without it for an extended period of time when it was in the possession of Mr. Freitas."

[16] Cited by the Court of Appeal (2020 GLR 1, at para 77): "[Mr Hindle's] receipt in respect of that amount [£20,000] shall enable [Mr Kitching] to treat the Jaguar as owned by him".

[17] 2020 GLR 1, para 80.

[18] 2020 GLR 1, para 23.

13 Both courts cited a 1975 edition of *Clerk & Lindsell on Torts* to define "detinue" as being—

> "the wrongful detention of the plaintiff's chattel. The action is available against a defendant who . . . withholds the plaintiff's chattel after the plaintiff has demanded its return. The principal object of the action is to recover the chattel or its value. Such an action is as much concerned with matters of . . . property as with matters of tort."[19]

14 The Court of Appeal went on to examine the "important distinctions"[20] between claims in detinue and conversion, including that detinue is "of the nature of an action *in rem*"[21] and conversion is a "purely personal action"[22] citing *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd.*[23] This distinction impacts on the measure of damages. Conversion is a purely personal action and results in judgment for damages only, the measure of damage being the value of the chattel at the date of conversion and any consequential damages that were not too remote. The action in detinue is an action *in rem*, whereby the plaintiff seeks restitution of his chattel.

15 Mr Kitching argued in the Royal Court that Guernsey's customary law had never developed to recognise detinue (the only precedent being an action for delivery up of papers that was described by the judge as "in effect an action in detinue"[24]): *Inalux SA v Old Crown Trust Ltd.*[25] Alternatively, even if detinue had existed in customary law, that would now, in accordance with the principles established in *Morton v Paint*,[26] have been extinguished as a cause of action, leaving only conversion. The Royal Court characterised this argument as in effect "reverse *Morton v Paint*".[27]

16 In confirming that detinue continues to constitute a cause of action in Guernsey, the Court of Appeal cited the seminal case of *Morton v Paint*, in which Southwell JA observed—

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[19] Royal Court judgment dated 3 April 2019, para 49 and 2020 GLR 1, para 32.
[20] 2020 GLR 1, para 34.
[21] 2020 GLR 1, para 34.
[22] 2020 GLR 1, para 34.
[23] [1963] 1 WLR 644, at 648–649.
[24] 2020 GLR 1, para 27.
[25] Sir de Vic Carey, Royal Ct., June 16th, 2000, unreported; noted at (2000) 28 GLJ 28. Cited at 2020 GLR 1, para 27.
[26] (1996) 21 GLJ 61.
[27] Royal Court judgment dated 3 April 2019, para 44.

> "It would not be appropriate to leave Guernsey law in the state reached by English law nearly 40 years ago, which was justly criticised as something of a blot on English jurisprudence and requiring urgent reform. For the Guernsey Courts to cling to obsolete English common law cases which ceased to be authoritative in England and Wales 40 years ago would not be in the interests of those who live in Guernsey or their visitors."[28]

17 However, the Court of Appeal went on to find that "certain fundamental parts of Guernsey law are incapable of alteration by judicial decision".[29] The court classed detinue as such a "fundamental part of Guernsey law".[30] This is perhaps rather surprising given the lack of authority for a claim in detinue in Guernsey, other than the passing reference stated above. As such a "fundamental" right, the court went on to confirm that it cannot "be abolished through the development of the customary law",[31] as the customary law cannot be "abrogated without legislative intervention".[32]

18 In reaching this conclusion the Court of Appeal took account of the Trading Standards (Enabling Provisions) (Guernsey) Law 2009,[33] which gives the States power to abolish detinue, mirroring the 1977 English statute, which had two consequences. First, it added weight to the conclusion that detinue "continues"[34] as part of Guernsey's customary law. Secondly, it would require legislative enactment to abolish it. It was a situation where "the legislature has started to take steps to follow the statutory changes made in England but has not yet completed that task".[35]

19 The Court of Appeal went on to uphold the Royal Court's finding that at the date of the abolition of detinue in England in 1977 such a claim could have been brought in Guernsey as "in tort cases the Guernsey Courts follow the decisions of the English courts on the common law".[36] *Morton v Paint* in fact suggests that the situation is more nuanced than this and subsequent cases show that Guernsey

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[28] 2020 GLR 1, para 25.
[29] 2020 GLR 1, para 26.
[30] 2020 GLR 1, para 26.
[31] 2020 GLR 1, para 27.
[32] 2020 GLR 1, para 29.
[33] 2020 GLR 1, para 30.
[34] 2020 GLR 1, para 45(i).
[35] 2020 GLR 1, para 31 and Royal Court judgment dated 3 April 2019, para 48.
[36] 2020 GLR 1, para 26.

Courts do not always follow the English Courts on the common law, but this was the relevant finding for the purposes of this case.

20 The Court of Appeal also stated the importance of the difference between the "relief"[37] prayed for and the "remedies" available in a claim of detinue; the "remedy"[38] of delivery up was discretionary.

Applicable law

21 Again, in relation to its conflict of laws rules, Guernsey lags somewhat behind English law, there being no Guernsey statutory equivalent to the Private International Law (Miscellaneous Provisions) Act 1995 ("PIL (MP) Act 95") nor the European Parliament and Council Regulation (EC) 864/2007 (sometimes referred to as "the Rome II Regulation")[39] which dictates the applicable law. Therefore, when deciding which law to apply, the Royal Court looked to the common law principles, of which the leading authority remains the 1971 case *Chaplin v Boys*.[40]

22 The Royal Court noted that Lord Wilberforce in *Chaplin v Boys* had declined to adopt the *lex delicti* (*ie* the law of the place where the tort was committed).

23 Under Guernsey's common law, the "double actionability" test therefore still applies. This states that if an act done abroad is tortious and actionable, and if it is also an act which if done in Guernsey would be a tort and not justifiable, it will be actionable in Guernsey. The "double actionability" rule was abolished in England in 1971 by the PIL (MP) Act 95. The Royal Court stated that the wrongful act did not have to involve the same cause of action in Guernsey, just some cause of action. The fact that detinue was abolished in England was not a bar to claiming in detinue in Guernsey.

24 Under the Limitation Act 1980, time starts running against the claim at the date of the original conversion, even if there are successive conversions. This was held by the Royal Court not to be part of Guernsey law, a position upheld by the Court of Appeal. This approach reveals a serious prescription issue as each new conversion in Guernsey law will, it seems, start time running afresh.

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[37] 2020 GLR 1, para 87.
[38] Royal Court judgment dated 3 April 2019, para 94; 2020 GLR 1, para 86.
[39] Royal Court judgment dated 3 April 2019, para 53; 2020 GLR 1.
[40] [1971] AC 356, cited at Royal Court judgment dated 3 April 2019, paras 53, 54 and 60 and 2020 GLR 1, paras 36, 37 and 39.

25 Mr Kitching had argued in the Royal Court that this case was "exceptional" and therefore all material aspects of it should be treated as substantive and not procedural (pure procedural law always being subject to Guernsey law) and that English law should apply. The Royal Court rejected this argument and held that "this is not the exceptional type of case".[41]

26 The Court of Appeal, upholding the decision of the Royal Court, also found that the applicable law for the claim was Guernsey law, despite the fact Mr Kitching at all times resided in England, received the demand for delivery up of his English purchased, registered and sited car at home, and that English law claims exclusive jurisdiction over torts committed in England.[42]

Unjust enrichment

27 Having found that Mr Hindle was still the legal owner of the car, the Royal Court went on to consider the appropriate remedies available under customary law. As seen, Mr Kitching was given an election to keep the car, which he took. This decision was made on the basis that delivery up was a discretionary remedy and that as the car was "of no special value or interest"[43] to Mr Hindle, the discretion to deliver up "ought not to be exercised".[44] Mr Hindle's claim for an absolute right to delivery up failed.

28 The question therefore was how much was due to Mr Hindle to compensate him for his loss.

29 The Royal Court held that "the primary heads of relief were not materially different, whether at common law or under statute",[45] comparing the remedies under the *General and Finance Facilities* case[46] (in the absence of any Guernsey authority) and s 3(2) of the English T(IWG) Act 77 which sets out the "form of judgment where goods are detained" (also cf fn 23).

30 In essence the remedy consisted of three options—

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[41] Royal Court judgment dated 3 April 2019, para 62; 2020 GLR 1, para 41.
[42] Clerk & Lindsell on Torts (22nd edn) at para 7–25. This states that "At common law a tort committed in England and Wales is governed exclusively by English law". See *Szalatnay-Stacho v Fink* [1947] KB 1.
[43] 2020 GLR 1, para 53.
[44] 2020 GLR 1, para 53.
[45] 2020 GLR 1, para 43.
[46] See footnote 23

(a) an order for delivery of the goods and payment of consequential damages; or

(b) an order for deliver up but an alternative of paying damages by reference to the value of the goods and consequential damages; or

(c) damages.

31 The aim of the damages would be to achieve the "general principle of putting [Mr Hindle] into the position in which he would have been had the wrong not been committed against him".[47] This would involve "a value judgment concerning the extent of the loss for which the defendant ought fairly or justly to be held liable",[48] the aim being not unjustly to enrich the plaintiff at the innocent defendant's expense.

32 The law of unjust enrichment is an area of law which is undeveloped by comparison with England and Jersey. In contrast to the position in England where four steps are required to succeed in a claim for unjust enrichment,[49] the Jersey courts have settled on a model founded on natural justice and general principles of *équité*. Those principles are helpfully set out in the authoritative 2012 Jersey case of *Flynn v Reid*.[50] In Guernsey, in the *Investec v Glenalla* litigation,[51] the Court of Appeal based the Guernsey law of unjust enrichment on the English model but the court's judgment was heavily caveated and the court expressed a hope that its decision would be challenged in the future. However, to date, the Guernsey courts have not engaged in the kind of comparative analysis that the Guernsey Court of Appeal had hoped for and the development of the law of unjust enrichment in Guernsey, and attempts to identify its underlying principles, are the subject of ongoing debate, notably, in two articles published in this *Review* in 2019 where the respective authors engaged in a careful analysis of the state of the law.[52]

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[47] 2020 GLR 1, para 54.

[48] 2020 GLR 1, para 54.

[49] *Bank of Cyprus v Menelaou* [2015] UKSC 66. (i) The defendant must be enriched, (ii) the enrichment must be at the claimant's expense, (iii) the enrichment at the claimant's expense must be unjust, and (iv) there must be no applicable bar or defence.

[50] 2012 (1) JLR 370. The principles may be found in Pothier's discussions on *quasi* delict following the Roman law principle "*nemo ex alterius detrimento fieri debet locupletari*"—"no man ought to be made rich out of another's injury".

[51] *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* 2015 GLR 300.

[52] First, in "The law of unjust enrichment in the Channel Islands: recognising the civil law strand", (2019) 23 *Jersey & Guernsey Law Review* 7, Duncan

33 The Court of Appeal in *Hindle v Kitching* noted that "extensive reference was made to the opinion of Lord Nicholls in *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 a case in conversion".[53] In assessing what was "justly" due to Mr Hindle, great weight was given to the analysis in Goff & Jones, *The Law of Restitution* (7th ed) and the analysis of Lord Denning MR's 1973 judgment in *Greenwood v Bennett*,[54] and stated as follows—

> "In 1972, when *Greenwood v Bennett* was decided, the principle of unjust enrichment had not yet received authoritative judicial recognition . . . it is evident that the basis of the improver's claim was mistake and that the owner had gained an incontrovertible benefit which was readily realisable, which had not been realised, and which was gained at the improver's expense."[55]

The ceiling was that—

> "the improver should never recover more than he spent . . . *At the end of the day, the court must balance the claims of the innocent improver against those of the innocent owner. In our view, the equities of the improver's claim are more appealing.*" [Emphasis added][56]

34 Mr Kitching submitted that Guernsey law recognises the existence of relief for unjust enrichment (just as it is recognised in Jersey)[57] and that, as a result, the analysis in Goff & Jones should be followed in Guernsey.[58] On this aspect of the case, the Deputy Bailiff, at first instance, having referred to a number of authorities setting out the position in England, reminded the Jurats that they were not bound to

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Fairgrieve and Kathryn Purkis explored the sources of the law of unjust enrichment in the Channel Islands. The authors: (i) suggested an explanation as to why the equity based test for unjust enrichment in Jersey differs from the test in England and Wales and (ii) considered why the Jersey test could faithfully be applied in the Guernsey courts. Secondly, in his article entitled "The development of unjust enrichment in the Channel Islands", (2019) 23 *Jersey & Guernsey Law Review* 136, Paul Buckle, in response to the Guernsey Court of Appeal's criticisms in the *Investec v Glenella* litigation concluded that the Court of Appeal had left Guernsey law in an "unsatisfactory state".

[53] 2020 GLR 1, para 54.

[54] [1973] 1 QB 195, cited at 2020 GLR 1, para 61.

[55] Goff & Jones, *The Law of Restitution* (7th edn), at para 6–011.

[56] 2020 GLR 1, para 61.

[57] *Flynn v Reid* 2012 (1) JLR 370.

[58] 2020 GLR 1, para 62.

follow them and that their task was to reach a just outcome with the aim of putting Mr Hindle into the position in which he would have been had the wrong not been committed against him.[59]

35 In Jersey in the *Esteem* case Mr Birt (then Deputy Bailiff) said[60]—

> "Unless and until he was deprived of that title by order of the court setting aside the alienation, the recipient was entitled to the fruits of the thing which he owned. The position was analogous to that considered in *Mendonca* v. *Le Boutillier* . . . where the court held in reliance *inter alia* upon the principles expounded by Pothier, *Traité du Contrat de Vente*, para. 326, at 363 (1830 ed.), that a transferee, who acted in good faith in accepting movable property from a transferor who did not have good title did acquire the right to receive any income or benefits from that movable property arising in the meantime, without having to account for them to the owner."

36 However the remedy chosen by the Royal Court dealt with the cost of the improvements and that is the "ceiling",[61] not the increase in market value. The Court of Appeal roundly rejected Mr Hindle's suggestion that this very narrow approach to construing the value of "improvements" as it was "wholly unjust".[62] "The effect that such an order would have is obvious: it would have enriched [Mr Hindle] at [Mr Kitching's] expense",[63] this outcome would have been "oppressive and unjust".[64] This is especially so in the light of the Royal Court finding that Mr Kitching acquired "a form of title to the improvements when he purchased the car".[65]

37 The Royal Court was, the Court of Appeal said, therefore quite correct to "avoid such an unfair outcome".[66] It was "accurate and fair to say that [Mr Kitching] purchased the improvements"[67] from Mr Goldie. The Court of Appeal rejected the proposition advanced by Mr Hindle that Mr Kitching would suffer no prejudice for his unrecovered losses because he could sue Mr Goldie, who in turn could sue the dealer. This "would be a backward step procedurally, especially as justice could be done between the parties in the manner determined by

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[59] 2020 GLR 1, para 63.
[60] 2002 JLR 243, at para 17.
[61] Royal Court judgment dated 3 April 2019, para 83.
[62] 2020 GLR 1, para 113.
[63] 2020 GLR 1, para 113.
[64] 2020 GLR 1, para 134.
[65] 2020 GLR 1, para 69.
[66] 2020 GLR 1, para 113.
[67] 2020 GLR 1, para 113.

the Royal Court"[68] and it was both "unrealistic and disproportionate".[69]

38 The Court of Appeal got no satisfactory answer from Mr Hindle as to why the windfall he felt he should receive would be in any sense "fair" or "just". Instead, the Court upheld the Deputy Bailiff's approach of inviting the Jurats to consider the approach set out in s 6 of the T(IWG) Act 77 "Allowance for improvement of the Goods" as "illustrative of what might be regarded as fair".[70]

39 The Court of Appeal found that it was indeed "correct to proceed on the basis of the long-established principle of Guernsey law that the law must be developed in a way which is in the interests of those who live in and visit Guernsey".[71]

40 With regard to remedies therefore, the customary law can and does therefore continue to develop in line with the classic *Morton v Paint* approach.

Outcome of the appeal

41 The Court of Appeal dismissed all 19 grounds which were "without substance".[72] There was no reason to disturb the Jurats' findings of fact as they were "based on the evidence adduced by the parties".[73] Further if—

> "the Royal Court was correct to balance the views and interests of both [Mr Hindle], as owner, and [Mr Kitching], as innocent purchaser, in making the orders that it did as an exercise of its discretion."[74]

Wider impact?

42 The Court of Appeal has clarified the approach to the development of the customary law. Rights which the court regards as "fundamental"[75] parts of Guernsey customary law will not be "abrogated"[76] without legislative intervention. Accordingly, the

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[68] 2020 GLR 1, para 70.
[69] 2020 GLR 1, para 110.
[70] 2020 GLR 1, para 105.
[71] 2020 GLR 1, para 107.
[72] 2020 GLR 1, para 98.
[73] 2020 GLR 1, para 136.
[74] 2020 GLR 1, para 92
[75] 2020 GLR 1, para 26.
[76] 2020 GLR 1, para 29.

customary law will not develop to extinguish such claims, including an "ancient"[77] tort like detinue abolished over 40 years ago in England. Contrast that, however, with the court's approach to the development of remedies which the law will provide to such a claim. Here, the court will look to modern English case law and statute as "illustrative"[78] of what is fair, rather than rely on outdated English common law (the approach so decried in *Morton v Paint*).

43 Careful thought should therefore be given to the continuing impact on other areas of Guernsey's tort law where legislative change has not kept pace with English law. For instance, s 8 of the T(IWG)Act 77 abolished the defence open to a defendant in a claim for wrongful interference with property, to allege that a third party has a better right to the property in dispute than that claimed by the plaintiff (the *jus tertii*) which (on the reasoning of this case) will continue to exist as a defence in Guernsey. In the law of prescription, successive conversions could lead to an unhappy lack of clarity as to when a claim is extinguished.

Epilogue

44 Mr Kitching elected to keep his "cherished"[79] car, and on paying the £20,100 became its legal owner. He continues to enjoy driving it (weather permitting) in Yorkshire and Scotland.

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[77] 2020 GLR 1, para 23.
[78] 2020 GLR 1, para 105.
[79] 2020 GLR 1, para 91.