

## Jersey & Guernsey Law Review – October 2012

### SHORTER ARTICLES

#### Orders in Council and the extension of Acts of Parliament to the Channel Islands

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*The extension of Acts of the United Kingdom Parliament to the Channel Islands by way of an Order in Council is a familiar to all Insular lawyers. However, the enabling powers for making the Order present both uncertainty and significant constitutional questions; neither of which has been properly considered previously.*

1 The extension of Acts of the United Kingdom Parliament to the Channel Islands is usually achieved<sup>1</sup> by Her Majesty making an Order in Council. It is generally presumed<sup>2</sup> that such Orders are made under what are called permissive extent clauses, that is a provision in an Act of Parliament which permits it to be extended to Crown Dependencies, including the Channel Islands.<sup>3</sup> This discussion is intended to consider the nature of those clauses and whether they are delegated legislation made under powers granted by Parliament or made under the Royal<sup>4</sup> Prerogative,<sup>5</sup> and the implications that follow from those two scenarios.

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<sup>1</sup> An unusual anomaly is the Summer Time Act 1972, s 5 which provides that the law in the Channel Islands was as provided in the Act unless different provision is made: such provision being made by the Summer Time (Jersey) Law 1972; Summer Time (Guernsey) Ordinance 2001; Summer Time (Alderney) Ordinance 2001; Summer Time (Sark) Ordinance 2002.

<sup>2</sup> As in the recent article by McLellan *Permissive extent clauses and the amendment difficulty* (2012) 16 J&G L Rev 68.

<sup>3</sup> They may also allow for the extension of laws to British Overseas Territories.

<sup>4</sup> In right of the Duke of Normandy, rather than as the Queen of the United Kingdom.

<sup>5</sup> In terms of Orders of Council, a written answer was given in 2003 (HC Deb, 13 March 2003, WA 397) which stated that 526 Orders in Council were

### Permissive extent clauses

2 A simple example of a permissive extent clause<sup>6</sup> is found in s 29(4) of the Landmines Act 1998<sup>7</sup>—

“(4) Her Majesty may by Order in Council make provision for this Act to extend, with such exceptions, adaptations or modifications as may be provided for by means of the Order, to any of the Channel Islands, the Isle of Man or any colony.”

3 An Order in Council was made extending the Act to Jersey in the form of the Landmines Act 1998 (Jersey) Order 2001.<sup>8</sup> Such an Order in Council will be called an “extent Order”. Is such an Order, however, delegated legislation or is it a so-called prerogative order?<sup>9</sup>

### Obvious answer?

4 It might appear that the nature of an extent Order is self-evident, as the 2001 Order<sup>10</sup> states in its preamble that it is made under powers conferred by an Act of Parliament—

“Her Majesty, in exercise of the powers conferred on Her by sections 3(4) and 29(4) of the Landmines Act 1998, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows . . .”

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made; 372 of these were made under an Act or measure and 154 were made under the Prerogative.

<sup>6</sup> They are generally called “clauses” despite that upon enactment “clauses” become “sections” of Acts.

<sup>7</sup> Unusually the Landmines Act 1998 has both an extent and application clause in relation to the Channel Islands (the latter at s 3(4)).

<sup>8</sup> SI 2001/3930. A similar Order was made in respect of Guernsey, the Landmines Act 1998 (Guernsey) Order 2000 (SI 2000/2769), but for the purposes of this discussion only the 2001 Order will be considered.

<sup>9</sup> See *Craies on Legislation* (ed Greenberg) (9th ed, Sweet and Maxwell 2008), [3.2.2].

<sup>10</sup> This form of wording has usually be used for the last few decades, but an example of an approach including the Royal Prerogative is seen in the Carriage By Air (Jersey) Order 1967 (SI 1967/803).

“Her Majesty, in pursuance of the powers conferred upon Her by section 9 of the Carriage by Air Act 1961 and by section 5(1) of the Carriage by Air (Supplementary Provisions) Act 1962 *and of all other powers enabling Her in that behalf*, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows . . .”

5 The preamble is now significant;<sup>11</sup> it requires the powers under which the instrument is made and any statutory pre-conditions (such as consultation or publication of notices) to be recited.<sup>12</sup> The preamble to the 2001 Order specifically states that the Order is made under powers conferred by the 1998 Act; in other words, but for the 1998 Act no Order could be made as Her Majesty would have no power to do so otherwise (such as under the prerogative).

6 In *Vibixa Ltd v Komori UK Ltd*<sup>13</sup> the English Court of Appeal held that a Statutory Instrument was only *intra vires* where the powers under which it was made were expressed in the preamble.<sup>14</sup> Accordingly, where an Order in Council does not recite prerogative powers, it cannot have been made under the prerogative. So, turning to the example of the 2001 Order, the preamble only recites powers in the 1998 Act and not prerogative powers: it cannot therefore be relying on such powers.

7 It may be that as a matter of Jersey and Guernsey law, although not English law, the powers do not need to be recited in the preamble. Indeed, there have been some strong and influential criticisms of the *Vibixa* decision<sup>15</sup> and so there might be good reason to depart from the English position.<sup>16</sup> Nevertheless, it is probable that the Privy Council itself believes that, in relation to extent Orders, it would have to exercise its powers in accordance with *Vibixa*, rather than legislating on some other unidentified basis. Before considering the possibility of

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<sup>11</sup> Until recently it was believed that the preamble had no legal effect: see *Craies on Legislation* (ed Greenberg) (8th ed, Sweet and Maxwell 2004), [3.3.5].

<sup>12</sup> *Craies on Legislation* (ed Greenberg) (9th ed, Sweet and Maxwell 2008), [3.5.5].

<sup>13</sup> [2006] EWCA Civ 536; [2006] 1 WLR 2472 (which purportedly followed *Buck v Att Gen* [1965] Ch 745).

<sup>14</sup> In the decision there was much made of what are called general enabling words, for example “and all of his other enabling powers”. Such words are no longer good practice in statutory instrument drafting: see *Statutory Instrument Practice* (4th ed, OPSI November 2006).

<sup>15</sup> Bennion “*Statutory powers: a dubious decision*” (2006) 170 JP 767; Bennion’s book on statutory interpretation (*Bennion on Statutory Interpretation* (5th ed, Lexis 2008)) has been referred to favourably by the Royal Court of Jersey: *Le Monnier v Att Gen* 1989 JLR 170 and *Re Ostroumoff* 1999 JLR 238.

<sup>16</sup> As it has done so in relation to previous decisions of English courts which it has done in relation to heavily criticised decisions: see *Att Gen v Thwaites* 1978 JJ 179.

extent Orders being made under the prerogative notwithstanding these issues, it is important to consider the implications of an extent Order being delegated legislation.

### **Delegated legislation**

8 There are fundamental constitutional issues which would arise if an extent Order is made under an Act of Parliament, but before examining these, certain practical issues arise.<sup>17</sup> These include the application of the legislation on statutory interpretation and the effect on an extent Order when its permissive extent clause is repealed.

#### *The application of the Interpretation Acts*

9 Starting with the position in United Kingdom law, the Interpretation Act 1978 does not apply to prerogative orders,<sup>18</sup> but it does apply to Orders in Council which are made under an Act of Parliament.<sup>19</sup> It does not necessarily follow, however, that the 1978 Act applies to such Orders as a matter of Jersey and Guernsey law. It is apparent that the Insular interpretation statutes do not apply to extent Orders (or any other Order in Council). The Interpretation (Jersey) Law 1954 creates rules which apply to “enactments”. The definition of an enactment is set out in art 1(1) as “any Law passed by the States and confirmed by Her Majesty in Council” and any delegated legislation “passed or made in Jersey under the authority of any Order in Council or under any such Law”. Accordingly, the meaning of “enactment” in the 1954 Law *does not* include Acts of Parliament or, more importantly, Orders in Council. The position in Guernsey is not as clear; the Interpretation (Guernsey) Law 1948 applies the various provisions to “enactments”, but it does not define what “enactment” means and so it is possible, although unlikely, that it could include an Order in Council.

10 Furthermore, if the Interpretation Act 1978 does not apply to an extent Order then that Act’s continuity of law provisions would not apply<sup>20</sup> and, as indicated immediately above, nor would those in the

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<sup>17</sup> Some Acts of Parliament are drafted as if the Order in Council is delegated legislation: see the Wireless Telegraph Act 2006, s 118(3) and (4) (the latter provision prohibiting the extension of certain provisions under the former provision—*ie* limiting the delegation).

<sup>18</sup> See *Halsbury’s Laws of England, Statutes*, vol 44, at 1232. Accordingly, Prerogative Orders may expressly apply the Act to them: see Jersey Crown Property (Revocation) Order 1993, (Jersey Order in Council 2/1993), art 2.

<sup>19</sup> Interpretation Act 1978, s 21(1).

<sup>20</sup> Interpretation Act 1978, s 16.

1954<sup>21</sup> or 1948<sup>22</sup> Laws. The significance of this is often forgotten as the common law position was modified by statute over 150 years ago.<sup>23</sup> In the absence of the continuity of law provisions, under the common law, once an Act of Parliament (or Order in Council) is repealed or revoked it is deemed never to have existed.<sup>24</sup> The effects of this can be drastic. It means that any legal proceedings commenced on the basis of a right under a statute—which is subsequently repealed before judgment is given—are automatically terminated as the court no longer has jurisdiction.<sup>25</sup> The position under the common law may not be reflected in customary law, but this seems unlikely. If customary law protected vested rights under repealed enactments there would be no need for a continuity of law provision in either the 1954 or 1948 Law.

*Repeal of permissive extent clauses and the lapsing of Orders in Council*

11 When the enabling power in primary legislation is repealed, any legislation made under that power lapses. This is because delegated legislation only has force of law because primary legislation says that this is the case; and once that legislation is repealed there is nothing to give the delegated legislation any force of law.<sup>26</sup> Thus, once a permissive extent provision is repealed by a subsequent Act of Parliament,<sup>27</sup> an extent Order would lapse and the Act of Parliament would no longer extend to the Channel Islands (or anywhere else) unless it is specifically saved.<sup>28</sup> This means in effect that Channel Islands law is protected only to the extent that Parliament (or more

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<sup>21</sup> Interpretation (Jersey) Law 1954, art 17(2).

<sup>22</sup> Interpretation (Guernsey) Law 1948, art 19(2).

<sup>23</sup> Interpretation of Acts, 1850, s 5.

<sup>24</sup> *Surtees v Ellision* (1829) 9 B & C 750, 752; 109 ER 278, 279 (approved in *The Mexican & South American Company Case* (1859) 4 De G & J 544, 557; 45 ER 211, 216; similarly, expressed in *Kay v Goodwin* (1830) Bing 576, 582–583; 130 ER 1403 and approved by the Privy Council in *Lemm v Mitchell* [1912] AC 400, 406.

<sup>25</sup> *Miller's Case* (1764) 1 Black W 451; 96 ER 259; *R v Mawgan Inhabitants* (1838) 8 Ad & El 496 (112 ER 927) and *R v Denton Inhabitants* (1852) 18 QBR 761 (118 ER 287); also see *DPP v Lamb* [1941] 2 KB 89, 101–102.

<sup>26</sup> See *Watson v Winch* [1916] 1 KB 688, 690–691; *Bennion on Statutory Interpretation* (5th ed, Lexis 2008), 275 (s 70).

<sup>27</sup> It might also be possible for the repeal to be by a statutory instrument made under a Henry VIII power to amend primary legislation.

<sup>28</sup> For example, the Wireless Telegraph Act 2006, Schedule 7, para 24.

precisely Parliamentary Counsel) subsequently provides for its protection by including a savings clause.<sup>29</sup>

12 The problem of delegated legislation lapsing only exists where the extent clause itself is repealed. Other repeals, and indeed, amendments to, an extended Act of Parliament are a different issue.<sup>30</sup> Vested rights under the lapsed extent Order would be protected by the continuity of law provisions (assuming the Interpretation Act 1978 applied<sup>31</sup>) but this is hardly sufficient when the legislation governing a particular area of law in the Channel Islands could disappear—without consultation—simply on the commencement of UK repealing legislation.

### **Prerogative powers**

13 Alternatively, a permissive extent clause might be declaratory, so the Privy Council has the inherent power to extend an Act of Parliament to the Channel Islands under the Royal Prerogative. It would be immaterial, therefore, whether an Act of Parliament has a permissive extent clause or not because any Act of Parliament could be extended to the Channel Islands where Her Majesty in Council so Orders.<sup>32</sup>

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<sup>29</sup> A similar point is made in relation to amendments by McLellan *Permissive extent clauses and the amendment difficulty* (2012) 16 J&G L Rev 68, para 11.

<sup>30</sup> See McLellan *Permissive extent clauses and the amendment difficulty* (2012) J&G L Rev 68; although one of the issues mentioned by McLellan is questionable. He suggests that the failure to include a permissive extent clause in amending Acts of Parliament can only be overcome by a subsequent Act of Parliament (para 13). It could also be overcome by remaking the Order in Council and making further “modifications” to reflect those amendments made to the primary Act by the amending Act which the Insular authorities wish to apply to Jersey or Guernsey as the case may be. This approach has been used quite widely in relation to intellectual property and the Isle of Man. For example, the whole scale change to the Registered Designs Act 1949 made by the Registered Designs Regulations 2001 (SI 2001/3949) in the UK was given effect by an Order in Council which made numerous modifications: see Registered Designs (Isle of Man) Order 2001 (SI 2001/3678).

<sup>31</sup> It may also be that Interpretation Act 1978, s 17(2)(b) has implications which provide that where an enabling power is re-enacted the subordinate legislation can continue in force.

<sup>32</sup> A law could be passed by the States which extends and applies an Act of Parliament to Jersey (or Guernsey) and this law would get Royal Assent from

14 At the outset, it is clear that the Monarch<sup>33</sup> through the Privy Council had the power to legislate for the Channel Islands.<sup>34</sup> Foundational laws of both Jersey (the Code of 1771) and Guernsey (*L'Approbation des Lois*) were made by the Privy Council legislating by Order in Council under the Royal Prerogative and that power was still used to make legislation during the nineteenth century.<sup>35</sup> Accordingly, subject to modern constitutional and democratic restraints<sup>36</sup> the Privy Council can still<sup>37</sup> make laws for the Channel Islands under that Prerogative.<sup>38</sup> The question is therefore whether extent Orders might be made under the Prerogative.

15 The effect of an extent Order being made under the prerogative means that it would not lapse on the repeal of the Act of Parliament it was extending. The Order would be primary legislation and so would not depend on the Act for its validity. This means, even without transitional provisions, that an old Act of Parliament could continue to apply in Jersey for many years after it had been repealed in the United Kingdom. However, the Interpretation Act 1978 and the 1954 and

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the Privy Council (this essentially happened with the *Loi (1913) au sujet des droits d'auteur*, making the Copyright Act 1911 apply to Jersey).

<sup>33</sup> In right of the Duke of Normandy: see *Civil Law Commissioners Report* (1861), at v.

<sup>34</sup> Bois, *A Constitutional History of Jersey* (1970), s 11.

<sup>35</sup> It was the usual way of making laws until the nineteenth century although it was still used at that time albeit occasionally; *Civil Law Commissioners Report* (1861), at v.

<sup>36</sup> In Jersey, these are prescribed by the States of Jersey Law 2005, art 31; also see arguments put forward in *In re the Terrorist Asset-freezing (Temporary Provisions) Act 2010* 2011 JLR 117.

<sup>37</sup> In the common law the prerogative cannot fall into abeyance. Although the “powers were . . . somewhat indefinite . . . [and where they ] have not been expressly abolished, . . . the . . . question must often occur whether they are or are not in existence. Remember this, that we have no such doctrine as that a prerogative may cease to exist because it is not used”: Maitland, *The Constitutional History of England* (Cambridge 1919), at 418; this still represents the modern English law: *Halsbury's Laws of England, Constitutional Law and Human Rights*, vol 8(2), 368. The prerogative cannot be extended however: *BBC v Johns (Insp of Taxes)* [1965] Ch 32. In a related field, see *R v Civil Service Bd, ex p Bruce* [1988] 3 All ER 686. There is nothing yet suggesting a different rule applies to the original Duke of Normandy's Prerogative.

<sup>38</sup> For example, the Jersey Crown Property (Revocation) Order 1993 (Jersey Order in Council 2/1993).

1948 laws do not apply to prerogative orders.<sup>39</sup> Accordingly, when the Order was revoked, unless the new Order saved the effect of the old Order, there would be no continuity of law provisions and vested rights might disappear. In addition, the definitions used in the Interpretation Act 1978 would not necessarily be applied to the extended Act<sup>40</sup> (neither would those in the 1954 or 1948 laws) and so some confusion might arise over the meaning of words like “person”, “month” and gender references and plurals and so forth. They would have one fixed meaning in the United Kingdom and an uncertain meaning in the Channel Islands.

16 Another possibility, is that a permissive extent clause is of a *sui generis* nature<sup>41</sup> and so neither the rules for delegated legislation nor prerogative orders apply to extent Orders. But if this is the case then the rules which apply are unknown: it would be a creature new to the law. This uncertainty is not more desirable. The issue of whether an extent Order is delegated legislation or is made under the prerogative or some third way is not one of mere practicalities however, but extends to constitutional principle.

### **Constitutional issues**

17 There are constitutional difficulties with extent Orders. If they are made under a delegated power it once more brings to the fore the question of whether Westminster can legislate for the Channel Islands. As the name suggests, a delegated power, requires the power to be “delegated” and if the Order in Council is made under an Act of Parliament then it is Parliament delegating to the Privy Council the power to legislate in the Channel Islands. To delegate the power it must have the full power to legislate itself.

18 Whether an Act of Parliament, without local approval, can apply to the Channel Islands is widely disputed within the Islands, with the latest round being in *In re the Terrorist Asset-freezing (Temporary Provisions) Act 2010*.<sup>42</sup> The extensive debates about whether Parlia-

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<sup>39</sup> The Jersey Crown Property (Revocation) Order 1993 (Jersey Order in Council 2/1993) provides that the Interpretation Act 1978, ss 1–4, applies to the Order, but not the other provisions of that Act.

<sup>40</sup> It is arguable that the Interpretation Act 1978 is incorporated by reference into the extended Act by reason of s 22(1).

<sup>41</sup> As is the European Communities Act 1972, s 2(2): see *Oakley v Animal* [2005] EWCA Civ 1191; [2006] Ch 337.

<sup>42</sup> 2011 JLR 117.



ment can directly legislate for Jersey will not be explored here.<sup>43</sup> But the implications of permissive extent clauses creating a delegated power to legislate in respect of the Channel Islands are clear within such a debate. It is making the Privy Council, in its role in legislating for Jersey and Guernsey, dependent on permission from Westminster and accordingly Westminster is supreme over the Islands.

19 The other possibility, that extent Orders are made under the prerogative, also presents constitutional issues. The Monarch, through Her Privy Council, has the power to so make extent Orders under the prerogative, subject to any statutory restrictions.<sup>44</sup> This does not mean that it is constitutionally desirable to have primary legislation made by the Privy Council without involvement of the States. If the Privy Council can extend an Act of Parliament to the Channel Islands then all it is really doing is originating legislation which applies to one or all of the Channel Islands. In principle at least, this would mean that there is no reason why the Privy Council could not legislate freely in respect of any matter (as there is no requirement for there to be an Act of Parliament).<sup>45</sup>

### **Concluding thoughts**

20 The extension of Acts of Parliament to the Channel Islands by way of extent Orders is problematic from a constitutional perspective and it also presents practical problems. These problems will only be

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<sup>43</sup> See generally, Jowell *The UK's powers over Jersey's domestic affairs in A Celebration of Autonomy* (Jersey Law Review 2005); Young *The scope of Guernsey's autonomy in law and practice* (2001) 5 JL Rev 123; Haldane *Jersey Prison Board Case—Notes of a proposed argument* (2001) 5 JL Rev 254; Jowell *The scope of Guernsey's autonomy: a brief rejoinder* (2001) 5 JL Rev 271.

<sup>44</sup> States of Jersey Law 2005, art 31.

<sup>45</sup> Subject to domestic rules, such as art 31.

overcome where there is legal certainty over their nature. One such way to create certainty would be for the States of Jersey and the States of Deliberation in Guernsey to adopt laws which empower the Privy Council to extend any Act of Parliament to the respective Bailiwick.<sup>46</sup> Such a law could allow for the law to be adopted, with or without modifications, and be subject to the appropriate votes by the Island authorities. It could also provide continuity of law provisions and the other savings necessary to protect vested rights.<sup>47</sup> The political ramifications of such a proposal may be greater than the legal uncertainty that presently exists, particularly as the number of Acts of Parliament extended to the Channel Islands is decreasing. Yet such a move would be one further demonstration of the increasing confidence and maturity of the States.

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<sup>46</sup> On occasion, extending provisions from the United Kingdom is desirable to create a single “British Isles” jurisdiction, rather than just the United Kingdom. This would require the same law to be applied throughout. Accordingly, it might be necessary in some cases for an Act of Parliament to have permissive extent clauses to “join up” with the Orders made under relevant States laws.

<sup>47</sup> It could also retrospectively deem all existing extent Orders to be made under the law.