

# Treasurer of the States v Darius James Pearce (t/a Nigel Pearce & Son Jewellers)

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Matthew John Thompson
<b>Judgment Date:</b>	22 October 2013
<b>Neutral Citation:</b>	[2013] JRC 206
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## Text

[2013] JRC 206

ROYAL COURT

(Samedi)

Before:

**Advocate** Matthew John Thompson, **Esq., Master of the Royal Court.**

Between  
Treasurer of the States  
Plaintiff  
and  
Darius James Pearce (t/a Nigel Pearce & Son Jewellers)  
Defendant

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**Advocate G. G. P. White for the Plaintiff.**

Mr Darius James Pearce **appeared in person on his own behalf.**

### **Authorities**

Goods and Services Tax (Jersey) Law 2007.

Petty Debts Court (Miscellaneous Provisions) (Jersey) Law 2000.

*Lapidus -v- Gabb* [\[2013\] JRC 181A](#) .

Rules of the Supreme Court (1999 edition).

*Amy -v- Amy* [\[2011\] JLR 603](#) .

*Tomes -v- Coke-Wallis* 2002/131A .

Supreme Court Practice (1999 Edition).

Income Tax (Jersey)(Law) 1961.

*Bene Limited -v- Hanson & Ors* [\[1995\] JLR 323](#) .

Trusts (Jersey) Law 1984.

Loi (1862) sur les teneures en fidéicommiss et l'incorporation d'associations.

*Rolls -v- Miller* [1884] 27 ch. D71 .

*South West Suburban Water Company -v- Guardians of the Poor of Saint Marylebone* [\[1904\] 2 KB 174](#) .

*Rael-brook Limited -v- Minister of Housing and Local Government* [\[1967\] 2 Q.B. 65](#) .

*Customs and Excise Commissioners -v- Lord Fisher* [\[1981\] 2 All ER 147](#) .

*Customs and Excise Commissioners -v- Morrison's Academy Boarding Association* [\[1978\] STC 1](#) .

*West Devon Borough Council -v- The Commissioners of Customs and Excise* [2001] WL 825212 .

*National Water Council -v- Customs and Excise Commissioners* [1979] STC 0157 .

Jersey Order in Council of 1802 on Public Markets.

Loi (1885) Touchant L'Administration des Marches Publics.

Public Markets (Administration) (Jersey) Regulations 1947.

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HMRC VAT Notice Number 749.

Public Finances (Jersey) Law, 2005.

Debt — application by the Treasurer of the States to strike out the defendant's answer and for summary judgment.

## **THE MASTER:**

### **Reasons for Master's Decision given on 22 October 2013**

- 1 This is an application by the Treasurer of the States to strike out the defendant's answer and for summary judgment.
- 2 The claim arises in connection with the lease of a Unit in the Central Market in St. Helier (the "Market"). The issue I am asked to determine is whether Goods and Services Tax ("GST") is payable on Units leased in the Market.

### **The facts**

- 3 The plaintiff is the Treasurer of the States as the person to whom rent is paid in connection with the lease of Units in the Market. On 7<sup>th</sup> April, 2005, an entity described as Nigel Pearce Jewellers entered into a written agreement for a lease with the Environment and Public Services Committee of the States of Jersey. Under the terms of the lease the Committee let the premises known as Units No. 73–74 and 80 of the Market to "Nigel Pearce Jewellers".
- 4 On 20<sup>th</sup> May, 2009, Nigel Pearce and his son Darius James Pearce the defendant entered into an agreement together with Treasury and Resources Department. The effect of this agreement was to assign the lease from Nigel Pearce to the defendant his son with the consent of the Treasury and Resources Department.
- 5 The lease entered into in 2005 by the Environment and Public Services Committee was said to be for and on behalf of the Public of the Island of Jersey. What is meant by the Public of the Island of Jersey is an issue that was raised by the defendant as part of his submissions before me, which I address later in this judgment.
- 6 It was not disputed that by the time of the assignment in 2009 Treasury and Resources were authorised to enter into the assignment agreement for the States of Jersey by reference to Standing Order 168 of the Standing Orders of the States of Jersey.

- 7 The charging of GST in Jersey was brought into effect by the Goods and Services Tax (Jersey) Law 2007 (the “GST Law”). The transitional provisions of the GST Law provided that certain long-term contracts entered into before the coming into force of the GST Law came to an end in 2012. These transitional provisions included leases for less than nine years.
- 8 In December 2012 tenants of the Market were informed about the ending of transitional relief on leases and that going forward GST would be collected on rent payable. Invoices issued to the defendant in respect of the rental periods 25<sup>th</sup> December, 2012, to 24<sup>th</sup> March, 2013, and 25<sup>th</sup> March, 2013, to 24<sup>th</sup> June, 2013, included a 5 per cent charge in respect of GST in addition to the rent payable.
- 9 The amount of the GST for each of two periods is £134.10 based on a calculation of one quarter's rent. The defendant paid the rental element of the rent but not the GST element as he disputed the GST was payable on the rent. Accordingly the plaintiff issued proceedings in the Petty Debts Court by a summons dated 19<sup>th</sup> April, 2013.
- 10 By an Act of Court of the Petty Debts Court dated 1<sup>st</sup> May, 2013, the proceedings were transferred to the Royal Court under the provisions of Article 2(1) of the Petty Debts Court (Miscellaneous Provisions) (Jersey) Law 2000.
- 11 Particulars of claim were filed with the Royal Court on 10<sup>th</sup> June, 2013, and an Answer filed on 12<sup>th</sup> June, 2013.

## The Application

- 12 The plaintiff issued its summons before me on 26<sup>th</sup> June, 2013, and sought both to strike out the defendant's answer under Rule 6/13 and summary judgment. The applicable principles on a strike out application and on a summary judgment application are well known and so I do not recite them in full here although I have reminded myself of them.
- 13 However I have specifically reminded myself of a relevant extract in the recent decision in *Lapidus -v- Gabb* [\[2013\] JRC 181A](#). At paragraph 21 of that judgment an extract was cited from paragraph 18/19/6 of the Rules of the Supreme Court (1999 edition) as follows:–

***“Exercise of powers under this rule — It is only in plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley M.R. in *Hubbuck -v- Wilkinson* [\[1899\] 1 Q.B. 86 at 91 \(Mayor etc., of the City of London -v- Horner](#)* (1914) 111 L.T. 512, CA ). See also *Kemsley -v- Foot* [\[1951\] 2 K.B. 34](#); [\[1951\] 1 All E.R. 331, CA](#), affirmed [\[1952\] A.C. 345](#), HL. It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the Plaintiff really**

**has a cause of action** ( [Wenlock -v- Moloney](#) [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, CA). **If there is a point of law which requires serious discussion, an objection should be taken on the pleadings, and the point set down for argument under O. 33, r. 3** ( *Hubbuck -v- Wilkinson* [1899] 1 Q.B. 86 at 91).

**Where an application to strike out pleadings involves a prolonged and serious argument, the Court should, as a rule decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial, and therefore where the Court is satisfied, even after substantial argument both at first instance and on appeal, that the defence does not disclose a reasonable ground of defence, it will order it to be struck out** ( *Williams & Humbert Ltd -v- W. & H. Trade Marks (Jersey) Ltd* [1986] A.C. 368; [1986] 1 All E.R. 129 HL).

**However, by following the procedure under this rule to strike out the statement of claim rather than the procedure for determining a preliminary issue of law under O. 33 r. 3**, the defendant does not adopt such an inherently defective procedure as would require the Court not to proceed to determine the issues raised, and since the effect of the Court deciding these issues against the Plaintiff would be to terminate the action, the Court is entitled to entertain the application and to strike out the offending pleading ( *Smith -v- Croft (No. 2)* [1988] 8 Ch. 114 [1987] 3 All E.R. 909).

**An application to determine a point of law under O.14A and to dismiss the action may be made at the same time as an application to strike out as disclosing no cause of action.**

**A stay or even dismissal of proceedings may “often be required by the very essence of justice to be done” (per Lord Blackburn in *Metropolitan Bank -v- Pooley* (1885) 10 App.Cas. 210 at 221) so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation (cited with approval by Lawton L.J. in *Riches -v- Director of Public Prosecutions* [1973] 1 W.L.R. 1019 at 1027; [1973] 2 All E.R. 935 at 942)."**

- 14 I have referred to the above extract because in this case I have received from both parties by reference to their skeleton arguments and the submissions made a prolonged and serious argument. I can therefore only strike out the defendant's Answer if I am satisfied that the answer filed does not disclose a reasonable ground of defence and to strike it out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial.
- 15 In relation to an application for summary judgment again the applicable principles are well known and were considered most recently in *Amy -v- Amy* [2011] JLR 603. It is clear from that case if a defendant can raise an arguable defence that is an issue for trial then

accordingly I should not enter summary judgment. The onus is on the defendant to raise such a defence.

- 16 In *Tomes -v- Coke-Wallis 2002/131A* the Royal Court cited an extract from the Supreme Court Practice (1999 Edition) ("the White Book") as follows:—

***“Leave to defend must be given unless it is clear that there is no real or substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment”***

In terms of when I may strike out a case and when I may enter summary judgment I consider there is a significant overlap between the approaches I have to take and it is only if those criteria are met can judgment be entered for the plaintiff.

### **The status of the Defendant**

- 17 The defendant in his Answer at paragraphs 2 and 3 raised an issue in respect to the identity of the person who acted as lessee. At paragraph 2 of his Answer he stated:—

*“Initially the contract was with “Nigel Pearce Jewellers” when in fact the correct person was “Nigel Pearce, Jeweller” and the identity of the person who is currently the Lessee is Darius James Pearce. “Nigel Pearce Jewellers” was never a person to the best of my knowledge. “Nigel Pearce & Son, Jewellers” is a trading name of Jersey Online Traders who is not a party to the contract.”*

- 18 The original agreement of lease as set out above was between the Environment and Public Services Committee and Nigel Pearce Jewellers and was dated 7<sup>th</sup> April, 2005. It was signed by Nigel Pearce in his own name. In my judgment Nigel Pearce Jewellers can only be a trade name of Nigel Pearce. Accordingly the original lease was between the Environment and Public Services Committee on behalf of the Public of the Island and Nigel Pearce personally trading as Nigel Pearce Jewellers.
- 19 In relation to the assignment, this was between Nigel Pearce trading as Nigel Pearce & Son Jewellers and Darius James Pearce trading as Nigel Pearce & Son Jewellers and the Treasury and Resources Department.
- 20 The assignment of the lease was between Nigel Pearce and Darius James Pearce. The fact that both referred to trade names does not alter that Nigel Pearce assigned the lease to Darius James Pearce.
- 21 Mr Mark Grant Assistant Director of Jersey Property Holdings (“JPH”) has confirmed on affidavit that rent on the property leased has been received from the defendant for every rental period from 2009 other than in respect of the GST the subject matter of these

proceedings. JPH ultimately administer all property not administered by States Trading operations which falls under the remit of the Minister for Economic Development including the Market.

- 22 In my judgment the terms of the assignment are clear and the defendant did take an assignment of a lease of premises at the Central Market and has paid rent since the date of that assignment consistent with the terms of the lease. I do not therefore consider that paragraph 2 of the defendant's Answer raises any issue that precludes me from considering the plaintiff's application.
- 23 The defendant also raises the point that the memorandum of assignment of lease entered into in 2009 is not an assignment but a novation as it is a tri-partite agreement. While the defendant is technically correct in relation to this issue, the fact that the memorandum of an assignment was a tri-partite agreement does not affect his obligations as lessee and again is not an answer to the question I have to consider.

### **The scope of the GST Law**

- 24 Article 6(1) of the GST Law provides:–

***“GST shall be charged –***

***(a) on the supply of goods or services in Jersey, if the supply is a taxable supply made by a taxable person in the course or furtherance of any business carried on by the person”***

- 25 Article 2(1) provides that:–

***“For the purposes of this Law “business” includes any trade, profession or vocation.”***

- 26 I was also referred to Article 2(4) by the defendant which provides:–

***“If, in the course of or furtherance of a business, a person accepts any office, then the services supplied by the person for the performance of the functions of that office shall be taken for the purposes of this Law to be supplied in the course of or furtherance of the business.”***

- 27 Article 19 of the GST Law as amended by the Goods and Services Tax (Jersey) Regulations 2007 provides:–

***“This Law shall not apply to the supply of goods or services by the States being a supply that is not in the course of or furtherance of a business.”***



- 28 The principal argument raised by the defendant is that the leasing of Units within the Central Market is not in the course of or furtherance of a business. In relation to the plaintiff's application I have to consider whether this assertion gives rise to an arguable defence.
- 29 Article 21 of the GST Law deals with the meaning of supply. Article 21(1) & (2) provides as follows:–

***(1) Subject to this Article, for the purposes of this Law –***

***(a) “supply” includes all forms of supply, but not anything done otherwise than for a consideration;***

***(b) any supply that is not a supply of goods is a supply of services.***

***(2) Subject to this Article, for the purposes of this Law –***

***(a) a supply of goods includes anything that is specified in Schedule 2 as a supply of goods;***

***(b) a supply of services includes anything that is specified in Schedule 2 as a supply of services.”***

- 30 Paragraph 7 of Schedule 2 provides as follows:–

***“(1) The grant, assignment, transfer or surrender of a major interest in land is a supply of goods.***

***(2) In this paragraph, “major interest in land” means an interest that confers an exclusive right on the owner of the interest to enjoyment of the land (whether or not that right is conditional, deferred or present), but does not include a lease of land for a term of 9 years or less.”***

- 31 The combined effect of Article 21(1) & (2) and paragraph 7 of Schedule 2 means where parties enter into a lease for more than 9 years this is a supply of goods whereas a lease for 9 years or less is a supply of services. It is not clear why such a distinction exists albeit it does not matter for the purposes of the application before me.
- 32 The defendant's argument is set out in his Answer at paragraph 4 where he raises the issue that “the plaintiff makes no representation to demonstrate that “the Public of the Island of Jersey” is a taxable person nor that they are a registered person under the GST Law.” Both in his submissions and in paragraph 1 of his Answer the defendant asserted that the Public of the Island of Jersey as lessor was settlor and beneficiary of a Public Market Trust. In particular he contended at paragraph 6 of his Answer “it was never intended that GST



should be chargeable on the normal business of government, that being operation of the Public Trust”.

33 In the defendant's Skeleton Argument at paragraph 6 he put the issue as follows:–

*“Should the matter go to trial I would rely on the following three defences to the particulars of claim, the Public Markets are not a business and not subject to the GST Law, if the Public Markets are a business then they are for the benefit of the community as a whole and thus not subject to the GST Law and the Lessor is the Public of the Island of Jersey and such is not registered or a taxable person under the GST Law.”*

### **The status of the Public of the Island of Jersey**

34 I firstly propose to deal with the argument as to whether or not the Public of the Island of Jersey should be a registered or taxable person under the GST Law. This argument was expanded upon further by the defendant in his oral submissions to me.

35 The defendant firstly referred me to the proposition in relation to the establishment of JPH. Page 2 of the proposition in the introductory section stated:–

*“most of the property occupied by States Departments and other public administrations is owned by “Le Public” which is the legal entity. In turn the States of Jersey acts as a delegate of the public and is entrusted with stewardship of this public property.”*

36 The defendant contended that the reference to the word “*entrusted*” meant that property held in the name of the Public was held on a trust for the people of the Island. He then referred me to paragraph 5 of Schedule 5 to the GST Law which provides as follows:–

***“(1) for the purposes of this law, the supply of any service or goods by a charity shall be exempt.***

***(2) for the purposes of this paragraph “charity” means a corporation, association, or trust, the income from the property of which is exempt from income tax by virtue of Article 115(a), (aa) or (ab) of the Income Tax (Jersey) Law 1961.”***

37 Article 115 of the Income Tax (Jersey)(Law) 1961 as amended provides that:–

***“Exemption from income tax shall be granted in respect of –***

***(a) any income derived from any of the following –***

***(i) the property of a corporation, association or trust established in Jersey***

**for any of the following –**

.....

**(D) a purpose beneficial to the whole community.”**

- 38 The defendant argued that the holding of land including the Market by the Public was a purpose beneficial to the whole community and was therefore a charity and as such was exempt by reference to paragraph 5 of schedule 5.
- 39 To consider this submission I need to consider the legal basis for property being held in the name of the Public of the Island of Jersey. In the case of *Bene Limited -v- Hanson & Ors* [1995] JLR 323, Judicial Greffier Le Marquand stated at page 324 line 40 as follows:–
- “The second issue which arises is as to the nature of the Public of the Island of Jersey.** I am able to take judicial notice of the fact that when the States of Jersey transacts in relation to real property (including a contract lease as in this case), it customarily transacts in the name of the Public of the Island of Jersey and not in the name of the States of Jersey. Subsequently, the States of Jersey determine which Committee will administer the relevant piece of real property.”
- 40 While the Committee system has now been replaced by Ministerial government the approach of the States of Jersey to holding immovable property has otherwise not changed. In relation to the Market the States of Jersey has determined that its administration on a practical level falls under the remit of JPH.
- 41 At page 325 line 6 in *Bene* Judicial Greffier Le Marquand continued:–

**“What, then, is the Public of the Island of Jersey?** It is clearly a corporate body of a kind which holds real property on behalf of the general public but under the Administration of the elected representatives of the general public, namely the States of Jersey. However, its origins are shrouded in mystery although I suspect that what happened historically was that as a distinction began to be drawn between the Crown on the one hand and property held on behalf of the general public of the Island on the other, it was decided at some stage that rather than property being actually held by the States of Jersey, it should be held by this corporate entity to be known as the Public of the Island of Jersey.

**“The third issue is as to the relationship between the Public of the Island of Jersey and individual States Committees.** The Public of the Island of Jersey clearly has no mind or will independent of that of the States of Jersey and for that reason could be in many ways be viewed as the nominee of the States of Jersey. I find it very difficult to distinguish between these two bodies for the purposes of determining possession, custody or power. Anything which

belongs to the public must be within the control of the States and anything which the States control must be available to the public.”

- 42 I have referred to the above because I agree with Judicial Greffier Le Marquand that the origin of contracting in the name of the Public of the Island of Jersey is shrouded in mystery. I also agree that the likely rationale for this was to draw a distinction between the Crown on the one hand and Jersey's Island Government on behalf of the general public of the Island. I further agree that the Public of the Island of Jersey has no mind or will independent of that of the States of Jersey. Just as Judicial Greffier Le Marquand found it difficult to distinguish between the Public and the States of Jersey for the purposes of determining whether documents were within the possession, custody or power of the public, I find it very difficult to distinguish between the Public of the Island of Jersey and the States of Jersey when dealing with immovable property. What is less clear to me is whether the Public of the Island of Jersey is a corporate body or other legal entity or whether it is a legal convention or custom which reflects how property is held for the States of Jersey as distinct from the Crown. However, the distinction does not matter for the purposes of the submission made to me.
- 43 In my judgment, even if the Public is a “**corporate body**” of a kind or a legal entity the Public is not a Corporation, Association or Trust established for a purpose beneficial to the whole community. At best it holds property for the States. I do not consider that property held in the name of the Public is held on a trust. It is either a legal convention or a corporate body of a kind as I have set out above. The reference in the proposition establishing JPH to the States of Jersey being entrusted with stewardship of property held in the name of the Public is not enough to establish an existence of any “*Public Markets Trust*” referred to at paragraph 1 of the defendant's Answer. The proposition says no more than States of Jersey is responsible for looking after property in the name of the Public. No other authority or document was produced to me showing the creation or establishment of any other trust for the benefit of the community of Jersey as a whole or that holding property in the name of the Public creates such a Trust. A trust also cannot apply directly to immovable property situated in Jersey (see Article 11(2)(iii) Trusts (Jersey) Law 1984). Yet I was not referred to any exception recognising the Public as holding immovable property on trust. The Public is also not an association incorporated under the Loi (1862) sur les teneures en fidéicommiss et l'incorporation d'associations. Rather its origins are “**shrouded in mystery**” and the only rationale offered for its existence is the distinction between property held by the Crown and property held by the executive of the government of the Island of Jersey, in other words the States. Alternatively, if holding property in the name of the Public is a legal convention pursuant to which property is held for the States of Jersey then such a convention does not bring the Public of the Island of Jersey within the definition found at Article 115(a) of the Income Tax Law.
- 44 I was also referred to Article 115(c) of the Income Tax Law which grants exemptions from income tax in respect of any income derived by the States from its own property. In light of this provision this is another reason why the States of Jersey is exempt from Income Tax not because property held in the name of the Public of the Island of Jersey is held on a

charitable basis but rather because there is a specific exemption contained in Article 115(c).

- 45 In my judgment therefore when the Public of the Island of Jersey enters into a lease for 9 years or less this is a service being supplied by the States of Jersey. The issue therefore arises as to whether this service is in the course of or furtherance of a business. If it is not in the course of or furtherance of a business then the States of Jersey is not liable to account for GST and therefore cannot under the terms of any lease pass on that cost if authorised by a lease to do so. If on the other hand the granting of a lease is in the course of or furtherance of a business then the States is liable for GST and can pass that on to a tenant as long as the terms of the lease permit it.
- 46 In this case it is not in dispute that at clause 6(b)(i) of the lease granted in 2005 the tenant was obliged to pay all existing and future taxes which were payable or might later become payable in relation to the Units leased. This clearly includes GST.

### Meaning of business for the purposes of the GST Law

- 47 In relation to the meaning of the word business neither party was able to draw my attention to any Jersey authority on the meaning of the word business.
- 48 My attention was drawn by the plaintiff and the defendant to various authorities of the English and Scottish Courts, which have considered the meaning of the word business. In relation to those authorities they are not always the same as the GST Law and therefore care needs to be taken to review the context in which the particular court was considering the meaning of the word business. In particular in relation to authorities on Value Added Tax ("VAT"), the United Kingdom value added tax legislation arises out of a European Union directive which provides expressly that national regional and local government authorities are not considered taxable persons for value added tax where they engage as local authorities. The approach taken is therefore not always identical to the wording contained in article 19 of the GST Law that I have to consider. Nevertheless, I still regard the authorities as helpful.
- 49 In *Rolls -v- Miller* [1884] 27 ch. D71 the English Court of Appeal held that the running of a charitable institution which provided board and lodging to inmates was contrary to the terms of the lease relating to the property which prevented the carrying on of any trade or business. At page 85 Cotton L.J. stated:—

***“There may be a great many businesses which are not trades, although in my opinion, receiving payment for what is done, using what you are doing as a means of getting payment with a view to profit— whether profit is actually obtained or not must of course be immaterial — is certainly material in considering whether what was being done is, or is not a***

***business, yet in my opinion, it is not essential there should be payment in order to constitute a business.*** And the mere fact that there is payment under certain circumstances to necessarily make a thing a business which, if there was no payment would not be a business.”

50 At page 88 Lindley L.J. stated:—

***“When we look into the dictionaries as to the meaning of the word “business” I do not think they throw much light upon it. The word means almost anything which is an occupation; as distinguished from a pleasure — anything which is an occupation or duty which requires attention is a business — I do not think we can get much from the dictionary. We must look at the words in the ordinary sense and look at the object of the covenant; and looking at both I have no hesitation in saying that this is clearly within the words and the object of the covenant.”***

51 In the case of *South West Suburban Water Company -v- Guardians of the Poor of Saint Marylebone* [1904] 2 KB 174. Buckley J. held that the carrying on of the school was a business as follows at page 180:—

***“If I were to define the business carried on I should say that it is the business of providing for, maintaining and training pauper children, and that this is nonetheless a business because it is carried on, not for profit, but on the contrary, at a large expense.”***

52 In *Rael-brook Limited -v- Minister of Housing and Local Government* [1967] 2 Q.B. 65 the head note states:—

***“that neither the making of profit nor any commercial activity was essential for a process to be “carried on in the course of trade or business” within the meaning of Article 2(2) of Town and Country Planning (Use Classes) Order 1950 and a local authority's activity exhibiting all the possible features of a business other than the making of a profit or any commercial activity was not excluded.”***

53 At page 76 the judgment stated “neither the making of profit nor any commercial activity is an essential in order that a process may be carried on in the course of trade or business for the purposes of the definition.”

54 The reasoning continued “even on the meagre findings of fact in the present case it can be inferred that the provision of school meals by a local authority in possession of the building from 1940 to 1946 was “an occupation as distinguished from a pleasure” to quote Lindley L.J. in *Rolls v Miller* that it was continuous rather than sporadic and it was a serious undertaking earnestly pursued for the purpose of fulfilling a duty assumed by the occupier.”

55 A case on the other side of the line is *Customs and Excise Commissioners -v- Lord Fisher* [1981] 2 All ER 147. The first part of the head note states:—

**“Although the mere absence of profit motive was not conclusive to exclude an activity from being a business, on its true meaning ‘business’ in section 2(2)(b) of the 1972 Act excluded any activity which was no more than an activity for pleasure and social enjoyment.** There was a real difference between what was a business or trade and what was an activity for pleasure and social enjoyment, and, although that difference might sometimes be difficult to discern or prove, it was nevertheless a difference recognised by the 1972 Act, and the sharing of the costs of sporting or other pleasure activity did not by itself turn such an activity into a business. The taxpayer’s activities were in all respects indistinguishable from the private pleasure of a private shoot save for the matter of the contributions to its expenses, and the fact that the taxpayer could not run his shoot as a private shoot without contributions towards the costs of it did not, on the facts, make the taking of contributions from those who joined the shoot the predominant concern or purpose of the taxpayer in organising it.”

56 In the *Fisher* decision while finding for the taxpayer the judgment referred to the Scottish case of *Customs and Excise Commissioners -v- Morrison’s Academy Boarding Association* [1978] STC 1 — a decision of the first division of the inner house of the court session where the court listed different aspects of an activity which could be considered as being indicative criteria for determining whether the particular activity was a business as follows:—

**“(a) whether the activity is a serious undertaking earnestly pursued or a serious occupation not necessarily confined to commercial or profit making undertakings;**

**(b) whether the activity is an occupational function actively pursued with reasonable or recognisable continuity;**

**(c) whether the activity has a certain measure of substance as measured by the quarterly or annual value of taxable supplies made;**

**(d) whether the activity was conducted in a regular manner and on sound and recognised business principles;**

**(e) whether the activity was predominately concerned with the making of taxable supplies to consumers for a consideration;**

**(f) whether the taxable supplies were of a kind which subject to differences of detail are common made by those who seek to profit from them.”**

I find these criteria helpful.



57 Gibson J. in Fisher at page 156 did warn:—

***“In my judgment it is essential to have in mind in seeking to apply these statements to any other case that their Lordships in the Morrison's Academy were, as I have said, dealing with an activity which was in all respects indistinguishable from the business of a boarding house keeper save for the profits; they had I believe no intention of dealing with or of laying down propositions applicable to an activity as in this case, which was in all respects indistinguishable from the private pleasures of a private shoot save for the matter of contributions to expenses.*”**

***I am confident that Lord Cameron did not intend to say that in all cases the absence of the purpose of gain is irrelevant to the issue whether the potential taxpayer is carrying on a business.*** It seems to me that there are many activities in which a potential tax payer may supply services for a consideration within the meaning of Section 5(8) of the 1972 and which will be so different from the ordinary concept of “business” that the presence or absence of the purpose of gain would be highly relevant to the determination of the question whether he was carrying a business.”

58 In *West Devon Borough Council -v- The Commissioners of Customs and Excise* [2001] WL 825212 the granting of an interest by West Devon Council in land in order to create an arts centre was held to have the characteristics of a business activity even though the underlining rationale of the lease was to create an arts centre for the public benefit. However the court held that the means adopted involved a business transaction ***“on terms applicable to private traders generally”***.

59 The mere fact that a body was carrying out a statutory duty did not prevent the activity from being supplied in the course of a business (see *National Water Council -v- Customs and Excise Commissioners* [1979] STC 0157). The head note states:—

***“Whether the supply of a particular service under the Water Act 1973 was made in the course of a business depended on to whom the supply was made, the contract or arrangement under which it was made, and whether the service was supplied regularly and on a wide scale.*** Once a business activity was established in relation to a particular service all supplies of that service were to be treated as being made in the course of that business unless there was a clear distinction between the circumstances in which the supply was made to outside organisations and those in which the supply was made to water authorities in similar bodies.”

60 On the facts the Court held that with regard to some of its activities the taxpayer was carrying on a business but where it was not doing so in it could not set off VAT on its services against VAT paid by it for goods or services supplied. At page 354 Neill J. stated:—

***“Accordingly, I consider that once a business activity has been***



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***established in relation to particular service, all supplies of that service should be treated as made in the course of that business unless there is a clear distinction between the circumstances on which the supply is made to outside organisations and those in which the supply is made to the water authorities and similar bodies.”***

- 61 Finally in the decision of the VAT Tribunal in London involving the City Council of Norwich No. 11822 the supply of sponsorship facilities by the Council was held to be a taxable supply for VAT. The Council was seen as entering into contractual relations with outside sponsors that applied to private traders generally. The Council were therefore carrying on business activities as the means of performing their statutory functions.
- 62 In light of the above authorities the following factors emerge as indicators whether or not an entity is carrying on a business:—
- (i) there is a distinction between carrying on activity for pleasure and social enjoyment from an activity for business or trade;
  - (ii) it is not necessary for any activity to make a profit;
  - (iii) the absence of profit is a factor that can be weighed in the balance as to whether the taxpayer is carrying on a business;
  - (iv) is the activity a serious undertaking or one earnestly pursued;
  - (v) is there reasonable or recognisable continuity;
  - (vi) does the activity have a certain measure of substance;
  - (vii) is the activity conducted in an regular manner and on sound and recognised business principles;
  - (viii) is the activity predominately concerned with the making of taxable supplies to consumers for a consideration;
  - (ix) are the taxable supplies of a kind which are commonly made by those who seek to profit from them.

63 I now have to consider how I apply these principles to the Market.

### **The legal status**

- 64 The starting point to consider if the Market is a business is to look at the legal basis upon which the Market was established and operated.

65 The Jersey Order in Council of 1802 on Public Markets states as follows:

***“That the Petitioners having found it necessary, on account of the ruinous state and bad condition of the publick Market House of the said Island, to build a new one at a more convenient place and upon a better and more expensive plan, the same has been effected at the Publick Charge of the Island, and at a considerable expense; That the Butchers' Stalls in the old Market House were, by immemorial usage, disposed of by the Vicomte, to each Butcher for life; which practice, however ancient, has been found by experience liable to great abuse on the part of the Butchers, and inconvenience to the Publick; That, in order to remedy this, and to set the new Market on a proper establishment, the Petitioners proposed to Matthew Gosset, Esquire, the present Vicomte, to give up his right of disposing of the Butchers' Stalls and to accept in lieu thereof an adequate annual compensation, in order that, when any of the said Stalls become vacant by the death of the present Butchers, the same might be leased out to others by authority of the States, for a term of years only; That the said Matthew Gosset, Esquire, after consulting with Your Majesty's Procurator and Advocate General on the subject, has agreed to give up the disposing of the Butchers' Stalls in the new Market House, for and in consideration of the annual sum of eight hundred Livres, order money, to be paid to him every Christmas, by order and under the guarantee of the States of the said Island, as appears by an instrument annexed to the said Petition; That the Petitioners, conceiving the arrangement above mentioned, however advantageous to all parties, not to be valid in itself nor binding on the Vicomte's Successors, without Your Majesty's Royal Sanction first obtained; The Petitioners therefore humbly pray that Your Majesty will be graciously pleased to approve of the above mentioned agreement entered into between the Petitioners and Matthew Gosset, Esquire, Vicomte of the said Island, by which he gives up the disposing of the Butchers' Stalls in the new Market, for and in consideration of the sum of eight hundred Livres, order money, to be paid to him annually at Christmas, by order and under the guarantee of the States of the said Island; and that the said agreement and compensation remain in force between the States and all successive Vicomtes hereafter; That on the death of the Butchers who at present hold the Stalls for life, the States be at liberty to lease the said Stalls, as they become vacant, for a term of years, and that the produce of such leases be wholly applied towards the repairing, preserving and cleansing of the said new Market, under such regulations as the States of the said Island may judge expedient to make from time to time for the good order, police and keeping up of the said Market.”***

66 The above agreement was approved by an Order in Council issued by the Privy Council on 10<sup>th</sup> March, 1802, and registered in the Royal Court on 10<sup>th</sup> April, 1802. The effect of the Order in Council was to permit the States to lease stalls, the income from leases being used to repair, preserve and cleanse the new Market. What seems to have given rise to the

Order in Council is firstly the poor condition of the previous Market and secondly abuses in relation to granting leases of Market stalls for life.

67 There is no reference in the 1802 Order in Council to the Market being held in any form of Trust. It is also clear that the Market was constructed by the States and owned by the States.

68 In 1885 the States passed the Loi (1885) Touchant L'Administration des Marches Publics. The 1885 Law contains four articles as follows:—

***“1 ?La régie, l'administration et la police des Marchés sont du ressort des états, et seront exercées selon les ordres et sous les directions de cette Assemblée, par le Ministre responsable pour Transport and Technical Services.***

***2 Les états ou le Ministre responsable pour Transport and Technical Services, par délégation des états, nommeront un ou plusieurs Inspecteurs dont le devoir sera de faire observer les Règlements qui pourraient être établis de temps à autre pour le meilleur avantage desdits Marchés et ce sous la direction dudit Ministre.*** Le Connétable et les Centeniers de la paroisse de St. Hélier sont également chargés de veiller au maintien de la paix et du bon ordre dans lesdits Marchés.

***3 Les états auront le droit d'émaner des Règlements pour le bon ordre, la police et l'entretien des Marchés, et pourront, comme par le passé, louer les boutiques, étaux et emplacements dans les Marchés, afin de subvenir aux frais qu'entraînent l'administration et l'entretien des Marchés.***

***Les états sont également autorisés à établir des Règlements pour la régie et l'entretien des Abattoirs Publics, ainsi que pour réglementer le débit de viande de boucherie, tant en dedans qu'en dehors des Marchés.***

***Les Règlements émanés en vertu de cet Article resteront en vigueur jusqu'à leur rappel ou modification.***

***4 Les amendes imposées par les Règlements qui pourraient, de temps à autre, être établis en vertu de l'Article 3, seront au bénéfice de Sa Majesté.”***

69 Article 3 reconfirms the power of the States to grant leases in order to subsidise the cost of administering and maintaining the Markets. Article 3 is consistent with the 1802 Order in Council which requires the produce of any leases to only be applied to repairing, preserving and cleansing of the Market.

- 70 The Market is not therefore an organisation which has as an object the making of a profit to produce income for the States of Jersey. Rather by reference to both the 1802 Order in Council and the 1885 Law income from leases has to be applied towards the cost of administering and maintaining the Market. The Market in that sense is not a profit making body. That does not mean however there cannot be a surplus of income over expenditure in any given year; it is a matter for the States acting through JPH as to what reserves might be built up over time to meet future maintenance costs of the Market. If JPH or the Inspector were to take an unreasonable view of such costs they may as entities exercising a public function be open to challenge by way of judicial review on the usual grounds.
- 71 Articles 2 and 3 of 1885 Law recognise the power of the States to issue regulations. Such regulations were issued in 1947 under the Public Markets (Administration) (Jersey) Regulations 1947. Those regulations gave powers to direct that the Market may only be used for certain specified purposes (Regulation 3), directed when the Market may open and close (Regulation 4) established rules relating to the cleansing of the Market and stalls (Regulations 6–9), and relating to obnoxious substances and fires (Regulation 10). There are also rules relating to letting of shops and stalls and the numbering of shops and stalls and when rent is paid (regulations 11, 12 and 14) as well as other controlling provisions (see regulations 15–18).
- 72 Regulations 19 and 20 set out penalties in terms of a power to fine in respect of offences for failing to adhere to Regulations 4, 7 to 11 and 14 to 18. Certain of those fines may be raised summarily. I deal later in this judgment with the effect of the power to fine.
- 73 Clause 6(cc) of the lease granted in 2005 requires the Defendant:–
- “To comply with the provisions of the Public Markets (Administration) (Jersey) Regulations 1947, (and/or such other Regulations as may from time to time be enacted) and keep the premises open for business during the hours that the Property is open to the Public or during such other hours as may be determined by the Lessor or its duly authorised agent from time to time.”*
- 74 Clause 9 of the lease also provides in language that is not unusual for a lease that if the defendant were to at any time to “fail or neglect to perform or observe any of the covenants stipulations, conditions or agreements on the part of the lessee herein contained to be performed and observed” then the lessor was entitled to terminate the lease and apply to Court for an order of cancellation. The 1947 Regulations are therefore part of the lease as well as having the force of statute.
- 75 In relation to the statutory regime pursuant to which the Market operates, it is clear to me it is not an activity for pleasure and social enjoyment. Its purpose from the outset has always been to regulate the leasing of Units by the States to meet the costs of running the Market.

76 The Market when first built was conducted as a serious undertaking namely the leasing of

market stalls and the maintenance of the market based on the 1802 Order in Council; the 1885 Law reconfirms that approach. The Market's activities based on the materials produced to me has always been pursued as such an undertaking and no evidence was produced to suggest otherwise. It is also plain that the Market has both recognisable continuity and substance.

- 77 Mr Mark Grant deposed in his affidavit to which I have already referred that all income and costs associated with the running of the Market were budgeted within the revenue budget of JPH. However his affidavit also made clear that such income is solely used to meet the repair and maintenance of the Market. He further explained that the Market as an asset sits on the States of Jersey balance sheet attributed to JPH and JPH is also responsible for any capital expenditure and depreciation and similar charges. This evidence, which was not challenged, is also consistent with the Market operating as a business.
- 78 The fact that the Market is not administered by a States trading operation (which is the responsibility of the Minister for Economic Development) but rather comes under the remit of JPH is not a sustainable argument, having regard to the statutory regime and the evidence I have referred to, that the Market is not being run as business. I consider it is clear that the rationale underlying the agreement referred to in the 1802 Order in Council was for the market to be operated on a proper and regular manner, that is how it appears to have been operated since and it is how it is operated now.
- 79 The activity of letting premises is the sort of activity that is ordinarily treated under the GST law as being a taxable supply. I see no distinction between the granting of leases in the private sector and the granting of leases in the Market. But for the 1802 Order in Council and the 1885 Law the Market otherwise could be run as a profit making enterprise if it were owned by a private individual or company.
- 80 The terms of the lease and the assignment also do not contain anything that might not be found in a lease in a market owned privately or indeed in a shopping centre run entirely as a profit making venture.
- 81 Although it was said by the defendant that the 1947 Regulations go further than a lease in the private sector, the rules contained in those regulations also form part of the lease assigned to the defendant. For the most part the regulations also refer to matters that could also be found in leases in the private sector in markets or shopping centres managed for profit. The ability to define how parts of the Market may be used, when the Market may open and close (Regulation 4), obligations to keep markets in repair (Regulation 5) rules relating to Public Health (Part 2 of the 1947 Regulations), rules relating to letting of shops and the numbering of shops (Regulations 11 and 12), the obligation to pay rent in advance (Regulation 14) and the obligation to comply with instructions given by someone on behalf of the lessor (Regulation 15) are all matters that could be found in the terms of a lease. I do not consider that a trial of this matter is required to establish that the 1947 Regulations contain terms that can be found in private sector leases.

- 82 In deciding on whether or not the market is run as a business I have considered the effect of the power to fine contained in Articles 19 and 20 and whether the existence of these powers means that it is arguable that the Market is not to be run as business because of this power.
- 83 The defendant in his submissions expressly drew my attention to guidance issued in the United Kingdom in relation to whether or not a local authority should register for VAT. The guidance indicated that if an entity had power to fine it would be acting as a public authority under the VAT regime and therefore not carrying on a business (See Section 5.4 of HMRC VAT Notice Number 749 dated April 2002). That section provides as follows: –

***“5.4 Am I ‘acting as a public authority’?***

***You act as a public authority when you are a public body (see section 2) and you carry out activities for services of the community under a special regime applicable to you — that is under different legal conditions from those that apply to private traders.***

***For example, you act as a public authority when the law gives you:***

***the right to make people or organisations pay for a service you provide without giving them any say in what you provide and how you provide it; and***

***powers to impose penalties on them if they do not comply.”***

- 84 In relation to this guidance as noted above it is issued pursuant to a regime which is not identical to the GST law. There is no equivalent under the GST law of a special legal regime for local or parish authorities in Jersey. The amount of any fine is also small and it was accepted by both parties is hardly ever invoked, if at all. Moreover the potential consequences for the defendant if he were to fail to adhere to the 1947 Regulations are much more serious in terms of the potential loss of tenure than any power to fine namely loss of his premises. In addition, the lease in the present application allows the defendant to give 6 months' notice in writing. Assuming the lease before me is in a form commonly used in the Market no tenant is obliged to remain a tenant in the market if he does not wish to adhere to the 1947 Regulations and any tenant is free to look for premises elsewhere. Apart from the power to fine, it is plain to me that under the 1947 Regulations the Market is run as a business.
- 85 In relation to the power to fine, I have therefore reached the conclusion that the existence of this power is not a point which requires either a trial or a preliminary issue. The existence of the power to fine does not disclose a reasonable ground of defence and does not fundamentally alter the basis upon which the Market is otherwise run which is clearly the States of Jersey carrying on a business.



## Other defences raised

- 86 The defendant also raised other points which I deal with briefly.
- 87 Firstly in relation to the argument that the provision of the Market is a benefit to the community as whole, while in one sense that is true, the fact that the Market's existence benefits the community in the sense of having access to a market, is insufficient to create a trust. It also does not take the operation of the Market outside the GST law. The Market is still operated as business even if the public benefit from its facilities and therefore falls within the definition contained in the GST law.
- 88 Secondly the defendant in his additional skeleton argument referred to various statements of principle on the rights on individuals. These statements of principle while important do not alter the conclusion that I have reached in relation the interpretation of GST law. In particular they do not assist with the construction of whether the Market is being operated as a business. Nor in my view do they lead to an arguable case that the Public holds the market on the basis of a charitable trust for the people of Jersey.
- 89 Thirdly I do not regard Articles 3 and 7 of the Public Finances (Jersey) Law, 2005 as giving rise to an argument that property held in the name of the Public of the Island of Jersey is held on trust.
- 90 Fourthly the matters at paragraph 8 of the defendant's Affidavit are not evidence of the existence of a trust. They also do not assist me in the construction of whether or not the Market is operated in the course of or in furtherance of a business. In reaching this view I accept that the defendant genuinely holds the concerns set out but they are concerns of a political nature where the defendant, as is his right, disagrees with decisions taken by the Island's Government.
- 91 Finally I was referred to Article 2(4) of the GST Law. I understand this clause to be referring to individuals who act as directors of companies or other officers of entities with legal status and that it is intended to make clear that services provided by such officers are provided by the business for which they act as an office holder. Article 2(4) does not assist in defining what is a business for the purposes of the GST Law.

## Conclusion

- 92 In conclusion, for the reasons set out in this judgment, I am satisfied that the defendant's Answer does not amount to a defence to the plaintiff's claim and therefore should be struck out and judgment entered for the plaintiff. I am satisfied that the Market is operated in the course of a business or in furtherance of a business. The States of Jersey is therefore obliged to account for GST on rent charged to its tenants and is also entitled to recoup that



GST from the defendant under the terms of the lease assigned to the defendant in 2009. I am further satisfied that the defendant has not raised any issue which necessitates a trial or a preliminary issue being heard. I am also satisfied that the defendant has failed to raise any argument which amounts to a defence even an improbable one or one that is only shadowy. The defendant has therefore not satisfied me that there is an issue or question in dispute which ought to be tried or that there is some other reason which requires a trial of this action. Accordingly, I give judgment in favour of the plaintiff for the sum of £268.20 being the amount claimed by the plaintiff.