CASE SUMMARIES

The following key indicates the court to which the case reference refers:

JRC	Royal Court of Jersey
GRC	Royal Court of Guernsey
JCA	Jersey Court of Appeal
GCA	Guernsey Court of Appeal
JPC	Privy Council, on appeal from Jersey
GPC	Privy Council, on appeal from Guernsey

BANKRUPTCY AND INSOLVENCY

Assistance to foreign court—domestic insolvency proceedings—modified universalism

See CONFLICT OF LAWS (Companies—modified universalism)

CIVIL PROCEDURE

Discovery—waiver of privilege

Deripaska v Chernukhin [2021] JRC 206 (Royal Ct: Bompas, Mountfield and Storey JJA).

DM Cadin for the appellant; NMC Santos-Costa for the respondents.

The appellant appealed the decision of the Royal Court in *Chernukhin v Deripaska*,[1] whereby the learned Deputy Bailiff, though finding that there had been a waiver of privilege as a result of the content of three affidavits filed by the respondents, allowed the respondents to "turn the clock back" and amend the affidavits so as to avoid reference to the privileged material in circumstances where the affidavits had not yet been actively deployed in court. In this way the respondents were able to avoid a wider collateral waiver of privilege in relation to the matters referred to in the affidavits.

Held:

(1) **Waiver of privilege and amendment of disclosed material:**

(a) Waiver of privilege is an area where consideration of principles applied in England and Wales can assist in relation to those to be

[1] [2021] JRC 039.

applied in Jersey: *Café de Lecq Ltd v RA Rossborough (Insurance Brokers) Ltd.*[2]

(b) As a matter of public policy, the preservation of legal professional privilege is an important principle. There is a public interest in ensuring that communications between legal advisors and their clients may be frank and free and not emerge into the public domain if litigation is subsequently pursued.

(c) Nevertheless, there are circumstances in which privilege may be taken to have been waived; and if it is waived (in whole or in part) there is a public interest, which the court will supervise, in ensuring that the extent of material disclosed presents a materially fair picture. Equality of arms—the essence of a fair trial—means that there must be no "cherry-picking" of the material disclosed.

(d) What fairness requires depends upon the circumstances in which privilege is lost. It may, for example, be lost by mistaken disclosure of a particular document, or mistaken understanding of the extent of disclosure obligations; or it may be by deliberate reliance on the fact and content of legal advice taken. The distinction drawn by Leggatt, J (as he then was) in *Serdar Mohammed v Ministry of Defence*[3] between "true waiver" and "loss of confidentiality" was an important one. If, during the course of litigation, a party has disclosed a document to the other side which it could have kept confidential (in circumstances where this is not an obvious mistake triggering obligations on the other side's professional advisors to return it) then, in practical terms, the confidentiality in the document has been lost. The other side cannot "unknow" what they know, and it would be artificial to say that they cannot now rely upon the content of the document so disclosed for their own purposes. But the position is different, and more complicated, in relation to "true waiver", *i.e.* where one party has sought to deploy in court material which they could have chosen to keep privileged. In that context, the principles (as summarised by the English High Court in *TMO Renewables Ltd v Reeves*[4] applied.

(e) Where there has been such "true waiver" the issue then arises as to what flows from that, in order to ensure equality of arms between the parties. Where partial waiver has occurred, but the material not yet actively "deployed", the court may decide that the party which intended to rely on privileged material can instead withdraw that reliance. In

[2] 2011 JLR 182.
[3] [2013] EWHC 4478 (QB), at para 14.
[4] [2020] EWHC 789 (Ch), at 21.

other words, it can be put to its election as to whether to withdraw its reliance on privileged material, or to disclose the whole of it.

(f) The 1981 decision of a distinguished Court of Appeal in *Buttes Gas & Oil Co v Hammer (No 3)*[5] continued to apply notwithstanding that the issue was now likely to arise earlier in proceedings as a result of the modern approach to case management. *General Accident Fire & Life Assurance Corporation Ltd v Tanter (The Zephyr)*[6] and *Buttes Gas* showed that, even where there has been a waiver of privilege by "use" or "deployment" or "reference to" or disclosure of privileged material, the question of what to do about this, at least until after there has been "deployment in court" in the strict sense, is a question of fairness. In the conduct of this exercise, the importance of the principle of protecting legal professional privilege and the giving and taking of private legal advice must be weighed against the unfairness to the other party if this is done in a partial way "cherry picking" some parts of advice but not disclosing others.

(g) The question of fairness also arises in relation to whether the party which has sought to rely on privileged material can change its mind. If there has been a partial disclosure of that which would otherwise be privileged, it may be possible nonetheless to turn the clock back (or "put the cat back in the bag") if this is done before the matter reaches trial. Whether this can be done is a question of what fairness demands in the particular circumstances of an individual case. While it is likely to be more difficult after the evidence has been "deployed in court" in the strict sense and at that point, it may be that the position cannot be retrieved, at least not without unfairness to the other party.

(2) **Disposal:** In the present case, the Deputy Bailiff held that the material in which privilege had been waived had not yet been "deployed in court" in the strict sense. This was obviously correct, as there had never been (and still has never been) an occasion when the court had been presented with the three affidavits and invited to make a substantive determination by reference to the evidence contained in them. Already at the first hearing of the pre-trial review the court was concerned with the character of the three affidavits and the question of privilege; and by the time of the substantive hearing of the pre-trial review the respondents were seeking to withdraw them as evidence to be given at the trial by the three deponents and to rely on the amended affidavits instead. The Deputy Bailiff went on to hold that justice could be served by permitting the respondents to abandon their reliance on the

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[5] [1981] QB 223.
[6] [1984] 1 WR 100.

three affidavits. There was no error of law in that finding, and consequently the appellant's appeal on that basis failed.

COMPANIES

Compulsory winding up—grounds for winding up—inability to pay debts

JJW Ltd (in liquidation) v Aareal Bank AG [2021]GCA021 (GCA: McNeill, Montgomery and Bompas, JJA)

J Barclay for the appellant; A Williams for the respondent.

The appellant appealed against a compulsory winding up order made by the Royal Court under s 406(e) of the Companies (Guernsey) Law 2008, which allows the court to order the winding up a company where it is "unable to pay its debts within the meaning given in section 407" of that Law. The winding up order was granted on the basis that the Company failed to pay or secure a debt demanded in a statutory demand in the sum of over €22m, being the amount of a judgment against the company in favour of the respondent entered by the Commercial Court of Paris and upheld by the Paris Court of Appeal.

After the Royal Court granted the compulsory winding up order, the *Cour de Cassation* quashed the judgment of the Paris Court of Appeal. The appellant applied to admit, *inter alia*, the *Cour de Cassation*'s judgment as fresh evidence in the appeal.

Held: dismissing the application and the appeal:

(1) **Admission of fresh evidence:** On an appeal against a winding up order, the critical date is the date that the winding up order was made and it is at this date that the appeal court should decide whether or not the winding-up order was properly made.[7] Where a court has ruled in favour of a claimant that a debt is due, this ineluctably determines that the claimant is a "creditor", even if the judgment is the subject matter of an appeal. It may be that a stay could be obtained but, if not, there is a judgment debt.[8] In any event, the judgment of the *Cour de Cassation* only had the effect of overturning the Paris Court of Appeal's decision, meaning that the judgment debt from the decision of the Commercial Court of Paris remained in existence. Application dismissed.

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[7] *In re Industrial and Commercial Securities plc* (1989), 4 BCC 320, at 324F–H, *per* Knox, J.

[8] *El-Ajou v Dollar Land (Manhattan) Ltd*, [2007] BCC 953, at 955, *per* Warren, J.

(2) **Appeal against compulsory winding up order:**

(a) To rely upon a statutory demand seeking payment of a foreign judgment, a creditor did not require to first obtain enforcement of the judgment in Guernsey. Creditors with a judicial determination from a foreign jurisdiction should not have reduced protection than creditors without any judicial determination.

(b) As to the respondent's contention that the Royal Court had erred in that the question whether there was a genuine dispute was for the judge not the Jurats, the sole issue of how the winding up application should be disposed of was one of mixed fact and law. Absent any erroneous directions on law and procedure, it was for the Jurats to consider the factual circumstances put before them and to identify whether any legal test is met and how a discretion is to be exercised. The Court of Appeal had limited power to interfere with the exercise of discretion by the Royal Court.[9] None of the well-known circumstances permitting such interference existed in the present case.

(c) The fact that there were legal proceedings in another jurisdiction did not provide conclusive evidence of a genuine and substantive dispute. Appeal dismissed.

CONFLICT OF LAWS

Companies—modified universalism

Investin Quay House Ltd (in liquidation) v BUJ Architects LLP [2021] JRC 233 (Royal Ct: MacRae, Deputy Bailiff, and Jurats Ronge and Christensen)

HB Mistry for the plaintiff; SJ Alexander for the defendant.

The plaintiff, an insolvent Jersey company which had commenced a creditors' winding up under the Companies (Jersey) Law 1991, sought an injunction to prevent the defendant, one of its creditors, from continuing with a winding up petition that the defendant had presented in the English High Court prior to the commencement of the creditors' winding up in Jersey. The English High Court had held that it had jurisdiction to wind up the company on the basis that the company's COMI (centre of main interest) had always been in England or alternatively on the basis that it could wind up the company as an unregistered company.

[9] See *Carlyle Capital Corp Ltd v Conway*, Judgment 11/2012, C.A. 23 March 2012, unreported.

The plaintiff argued that the principle of modified universalism meant that it was appropriate for the company to be wound up under the law of its place of incorporation. The defendant argued that the effect of conducting the winding up in Jersey, rather than England, would be to deprive a Jersey liquidator of the possibility of asserting a preference claim in respect of certain loan repayments which had been made by the company to its sole shareholder and director. The repayments fell outside the 12-month period allowed for by art 176A of the 1991 Law but would fall within the longer 2-year period allowed for preference claims against connected persons under s 240 of the Insolvency Act 1986. The defendant argued that the application for an injunction was a tactical ploy designed to protect the position of the sole shareholder and director to the detriment of the company's creditors.

Held:

(1) **Modified universalism**. Universalism in this context means that where a company is being wound up in the jurisdiction of its incorporation, the courts of that jurisdiction ought to view their own insolvency proceedings as paramount. There is a powerful public interest argument in support of such an approach and that it is in the interest of every country that companies with multinational assets and operations should be wound up in an orderly fashion under the law of the place of their incorporation: *Singularis Holdings v Price Waterhouse Coopers*;[10] *Pensioenfonds v Krys.*[11] This was the appropriate starting point in this case.

(2) **Decision**. Although it ordered that this matter be determined as a *cause de brievété*, the court was sitting to determine the claim for interlocutory injunctive relief on an *inter partes* basis and not the trial of the action as a whole. Accordingly, the court applied the well-known principles set out in *American Cyanamid v Ethicon.*[12] Applying those principles, the plaintiff's application for an interlocutory injunction was declined. The following observations were made:

(a) The court disagreed with the defendant that there was no serious issue to be tried. Merely because the company's centre of main interest is in one jurisdiction does not necessarily mean that it is not managed and controlled in another. In any event, the starting point for the court should be that insolvency proceedings should take place in the jurisdiction in which a company is incorporated for the reasons above.

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[10] [2014] UKPC 36.
[11] [2014] UKPC 41.
[12] [1975] AC 396.

(b) On the facts, damages were not an adequate remedy for either party.

(c) As to the balance of convenience, however, if the defendant were prohibited from pursuing the petition before the English proceedings, particularly in circumstances where the High Court had made a finding that it had jurisdiction, there was no prospect of the preference claim being pursued, let alone realised. The potential injustice to the defendant and other creditors of the plaintiff was significant and outweighed the inconvenience to the plaintiff and its sole shareholder in particular. Whilst it was desirable for there to be one set of insolvency proceedings in one jurisdiction, and in most circumstances this is the jurisdiction where the debtor resides or is incorporated, there was no doubt that, in the particular circumstances of this case, it was appropriate to decline the application for interim relief sought and thus to permit the English insolvency proceedings to continue. The learned Deputy Bailiff added that the decision might well have been different had the Jersey insolvency process began (say) a year ago. But it had not.

(d) It was also relevant that there was some evidence (although no finding were made) that the sole shareholder and director was attempting to prefer himself to other creditors. The court would not, in the particular circumstances of this case, grant the relief sought by the plaintiff for the purpose of enabling him to rely upon certain features of Jersey insolvency legislation in order to defeat the legitimate claims of third parties.

COURTS

Royal Court—judgment—discretion to hand down judgment after settlement reached

Hore v Valmorbida [2021] JRC 242 (MacRae, Deputy Bailiff, and Jurats Christensen and Dulake)

D Evans for the plaintiffs; JMP Gleeson for the defendants.

The question was raised as to whether the court retains, as a matter of law, a discretion to deliver a judgment when a trial is concluded but before the judgment has been handed down, in circumstances where the parties have settled the proceedings and, secondly, if the court does retain its discretion, whether the discretion should be exercised in this case.

Held:

(1) **Court has discretion to deliver judgment notwithstanding settlement.** The court had no doubt that the customary law of Jersey should be developed in the same way that English common law and the common law of various other Commonwealth jurisdictions has been

developed. Accordingly, the court has a discretion to deliver a judgment notwithstanding that the parties have compromised after a trial which has concluded with full argument being heard (as in this case), but before the process of handing down a judgment has commenced.

(2) **Exercise of discretion in this case.** As to whether discretion should be exercised in this case in favour of handing down a judgment, the court would do so in this case. It was relevant that the legal issues dealt with in the judgment were important issues in the law of contract which were either the subject of conflicting authority or no authority. The evidence given at trial had also exposed the first defendant as serially dishonest. There was no unfairness to him in revealing his conduct and it was in the public interest for a person with his profile to have his dealings exposed.

CRIMINAL LAW

Appeals—appeals against conviction in Magistrate's Court

Bouchard v Att Gen [2021] JRC 236 (Royal Ct: MacRae, Deputy Bailiff, and Jurats Crill and Blampied)

The question arose whether the court could quash a conviction in the Magistrate's Court, following a guilty plea, on a charge of driving a vehicle whilst unfit through drink or drugs contrary to art 27 of the Road Traffic (Jersey) Law 1956. The appellant had pleaded guilty on the basis of medical evidence that he had TMC in his blood but the evidence had in fact been contaminated in the process of testing.

Held:

(1) Article 17 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 did not permit an appeal against conviction after a guilty plea. However, the court noted from the decision of the Royal Court in *Harding v Att Gen*,[13] relying on the earlier case of *Bish v Att Gen*,[14] that it does retain a jurisdiction to entertain an appeal against conviction, notwithstanding the entry of a guilty plea, where the appellant either did not appreciate the nature of the offence, or there were other grounds entitling the court to do so. The appellant in this case did understand the nature of the offence and the court needed to be extremely careful when identifying other circumstances when grounds may exist entitling the court to entertain an appeal against conviction against the background of a guilty plea.

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[13] [2010] JRC 167; 2010 JLR *N* [44].
[14] [1992] JRC 86; 1992 JLR *N*–6.

(2) There would always need to be wholly exceptional circumstances to permit an appeal in such circumstances and the court did not purport to identify such circumstances in advance as they will depend on the facts of the case. However, the court was satisfied that in the circumstances, namely where the appellant elected to plead guilty exclusively by reference to expert evidence that, in fact, was entirely wrong, and demonstrated to be so, thus undermining the entire basis of the conviction, that the court has a jurisdiction to consider an appeal against conviction. In these circumstances the court permitted the appellant to appeal his conviction and quashed the same.

FINANCIAL SERVICES

Guernsey Financial Services Commission—appeals

X v Chairman of the Guernsey Financial Services Commission [2021] GRC046 (GRC: Marshall LB)

NJ Barnes for the appellant; L Evans for the respondent.

This was an interlocutory application made in proceedings in which the applicant was appealing to the Royal Court decisions made in respect of him by the respondent. The respondent had indicated that it would be represented in the underlying proceedings by an employee who was a barrister qualified in England and Wales but was not a Guernsey advocate. The appellant sought a declaration that the respondent had submitted an invalid skeleton argument because it had not been signed by a Guernsey advocate and an order that the respondent not be permitted to be represented by a person who is not admitted to the Guernsey Bar.

Held: application dismissed:

(1) **The skeleton argument** (*obiter*): There was no legal requirement in the Royal Court Civil Rules 2007 for a skeleton argument to be signed by a Guernsey advocate. The weight to be placed on such a skeleton argument would be determined by the judge at the relevant hearing. However the issue did not need to be determined because the respondent attended court with a substitute skeleton argument bearing a signature of a Guernsey advocate.

(2) **Rights of audience:** A duly authorised employee of a corporate body (be that a limited company, or a corporation created by statute) may present its case at a hearing, being in effect its properly authorised mouthpiece.[15] This followed from the position, accepted by the appellant, that a company may appear in court by its director. In both

[15] *Smith v Carey Olsen (Guernsey) LLP*, 2019 GLR 1, at para 12.

cases, such person speaks *as* the corporate body, rather than *for* the corporate body. The person in question must be duly appointed by the proper authority within the relevant corporate entity to present that entity's case to the court. Any such representative will need, therefore, to be in the position to prove such authority if required to do so. The GRC did not make any finding in respect of any other relationship possibly falling within the categories of persons permitted by *Smith*, which would need to be considered on their particular facts if and when they arise.

INJUNCTIONS

Interlocutory injunctions—undertaking in damages—inquiry into damages

Morelli v Morelli [2021] JRC 221 (Royal Ct: Sir William Bailhache, Commr, sitting alone).

M Morelli for the plaintiffs; JM Sheedy for the defendants.

The court considered whether it should proceed with an inquiry into damages pursuant to undertakings given by the plaintiffs when obtaining interim injunctions *ex parte*. The defendant's application for the inquiry was resisted by the plaintiffs.

Held:

(1) **Legal principles**:

(a) This appeared to be the first occasion on which the Royal Court had been asked to order an inquiry into damages pursuant to the undertakings given by a plaintiff in obtaining injunctions *ex parte* in an Order of Justice. It was appropriate to pay close regard to a number of English cases (including *SCF Tankers Ltd (formerly known as Fiona Trust and Holding Corp) v Privalov*[16] and *Abbey Fording Ltd (in liquidation) v Hone*[17]) because the practice directions in Jersey for obtaining ex parte injunctions have been taken from comparable practice directions and cases in England and Wales.

(b) A plaintiff seeking an interim injunction of this nature is required to give an undertaking in damages because they might not be successful in their claim and the defendant may be caused loss by the injunction. The undertaking is not given to the defendant. It is given to the court. There is no contract between the plaintiff and the defendant which the defendant might claim has been breached. It is the court which is in the

[16] [2017] EWCA Civ 1877.
[17] [2014] EWCA Civ 711, [2015] Ch 209.

driving seat as to whether the undertaking given by the plaintiff should be enforced.

(c) The following principles applied:

(i) The court has discretion whether to enforce an undertaking in damages. The first step in the process is for the defendant to apply to the court to exercise its discretion to order an inquiry into damages and give consequential directions.

(ii) If the court decides to enforce the undertaking, the party seeking to enforce the undertaking bears the burden of proof, including the burden of showing causation. Causation requires that the damage would not have been sustained but for the injunction.

(iii) Once a party has established a *prima facie* case that the damage was exclusively caused by the relevant order, then in the absence of other material to displace that *prima facie* case, the court can, and generally would, draw the inference that the damage would not have been sustained but for the injunction. In other words, the court seeks to approach and deal with this question of causation in a common-sense way, having regard to the reality of the position which the enjoined party faces.

(iv) Although the claim brought on an undertaking in damages is not generally a contractual claim, it was well established that the measure of damages is assessed by having regard to the rule in *Hadley v Baxendale.*[18] The second rule in *Hadley v Baxendale* enables the court to take into account any special circumstances known to both parties at the time the contract was made—by transposition to this type of claim, any special circumstances relating to the defendant which were known to the plaintiff at the time he gave his undertaking *ex parte* in order to obtain the injunction.

(v) The emphasis at the present stage of the procedure, when the court is considering whether to order an inquiry, is upon whether the injunction had been wrongly granted and if so whether the causative test in principle has been met. In considering the causation issue, the court should consider how the losses claimed fall within the rule in *Hadley v Baxendale* and indeed, in an appropriate case, the court is

[18] [1854] 9 Ex 341.

> also entitled in its exercise of discretion to have regard to the likely measure of loss which it is said has been sustained.

(2) **Disposal.** In this case the court declined to exercise its discretion in favour of ordering an inquiry into damages (a) because, applying *Hadley v Baxendale*, causation of loss had not been shown and (b) because of certain other reasons on the particular facts.

LAND LAW

Licitation—contract governing end to indivision

E v F [2021] JRC 197 (Royal Ct: Master Thompson)

DS Steenson for the plaintiff; the first defendant and second defendants appearedin person

On an application for summary judgment for *licitation*, the question arose whether the remedy of *licitation* applied where the parties have entered into a contract which provides that their co-ownership can be brought to an end by a procedure involving an open market sale and rights of pre-emption. The parties differed as to the value of their respective interests as determined by the contract.

Held, refusing the application for summary judgment for *licitation*:

(1) **Remedy of *licitation*:**

(a) In *Ritson v Slous*[19] the general principle was stated by Le Masurier, Bailiff:

> "Any one shareholder in land owned in equal shares can compel his co-owners to join in putting an end to the indivision, and failing agreement, the procedure of 'licitation' is invoked and the land is put up for auction and knocked down to the highest bidder. By that means the highest market price is obtained, and each co-owner is free to bid and so has an opportunity of becoming the single owner."

Le Masurier Bailiff further stated that it was—

> "the incontestable right of the owner of an undivided share of any real estate to enforce the sale of such real estate, and we know of no rule of law which prevents this Court from divesting a person of his property when the justice of a case dictates that that be done."

[19] 1973 JJ 2341.

(b) *Licitation* must be effected by public auction in order to ensure that the proper market price was obtained and that the recalcitrant co-owner can themselves bid: *Fallaize v Fallaize.*[20]

(c) It was evident from *Ritson* and *Fallaize* that in deciding whether or not to grant the remedy of *licitation* the court will have regard to the justice of a case. The Royal Court is a court of *équité*. *Licitation* is a remedy of last resort.

(2) **Licitation where there is a contract governing the process of ending co-ownership:**

(a) In *Ritson v Slous* Le Masurier Bailiff observed that the remedy of *licitation* was available "failing an agreement". There was no distinction in principle between co-owners at the outset of their relationship or at any time during the relationship reaching agreement about an alternative remedy to *licitation* from an agreement being reached about a sale once one co-owner wants their interest in a property realised. Parties are free to reach agreement at any time about how to realise their interest. Where *licitation* applies is if agreement has not or cannot be reached or an agreement has been breached. There is therefore nothing wrong in principle with the parties, as they did in this case, agreeing to a sale taking place on the open market, rather than by an auction and to reaching such an agreement when they acquire a property and where is no desire on the part of one party to realise their interest.

(b) However, although the parties had entered into such a contract, if any contractual agreement between the parties did not work, or one party refused to abide by the terms of any agreement, then *licitation* will be ordered.

(3) **Disposal:** On the particular facts, the just order was for the Royal Court should determine first the respective interests of the plaintiff and the defendants as a *cause de brièveté*. Once their interests had been determined the relevant clauses could then take effect. If any party, then did not comply with the relevant clause of the agreement the remedy of *licitation* being available at that stage.

Comment [Andrew Bridgeford]: As part of this judgment the Master held that *licitation* would be available as a last resort in the event of a breach of the contract governing the co-ownership in this case. It would also seem arguable, however, that if co-owners of immovable property have entered into an enforceable and applicable contact regarding how their co-ownership is to be brought to an end, and this provides for a

[20] 1996 JLR 261.

process different to *licitation*, then the remedy for breach of this contract should lie in the law of contract rather than the customary law of *licitation*. This appears to be the approach of the Scottish courts in relation to the remedy, analogous to licitation, of "division or sale and division": see *Fraser v Fraser*,[21] and *Upper Craithes Fishings Ltd v Bailey's Executors*.[22] Faced with such a situation, it might then be timely for the court to re-examine afresh the restrictions under Jersey customary law which make specific performance generally unavailable, as a matter of principle, as a remedy for the breach of a contract envisaging the transfer of immovable property.

TRUSTS

Costs—indemnity from trust fund

Fort Trustees Ltd v ITG Ltd [2021] GCA048 (GCA: Crow; Perry and Storey JJA)

NJ Robison for the appellants; JM Wessels for the respondents.

This was a renewed application, to the full panel of the Court of Appeal, for leave to appeal a decision of Lieutenant-Bailiff Hazel Marshall, QC concerning the entitlement of a trustee or former trustee to an indemnity out of the trust assets in the long-running litigation regarding the Tchenguiz Discretionary Trust ("TDT") (reported at 2021 GLR 10). The parties were agreed as to the principles to be applied to determine whether leave to appeal should be granted, namely: (1) unless it appeared that the appeal would have no prospects of success, permission would be given; and (2) even where there was no prospect of success, the court had discretion to grant leave if there were relevant exceptional circumstances.

Held:

(1) **Prospects of success:** The single ground of appeal was that Marshall, LB had erred by applying the wrong test in respect of the respondents' application to strike out most of the appellants' pleaded objections to amounts claimed by the respondents in their proof of debt under their indemnity for legal costs incurred in certain aspects of the TDT litigation, during and after their trusteeship of the TDT. There was no merit in the sole ground of appeal and accordingly the appellants failed at the first hurdle of the test.

(2) **Public interest:** The appellants argued that the issue of "breadth of a trustee's right to indemnity" under art 26(2) of the Trusts (Jersey)

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[21] 2014 Hous LR 66.
[22] 1991 SC 30, *per* Lord President Hope.

Law 1984 should be examined in the public interest, as Guernsey and Jersey must be able to offer the certainty to settlors of knowing what the money in a trust is to be used for. The panel rejected this argument, on the basis that this was essentially a dispute of fact (albeit involving significant sums of money). There were no issues of principle or points of law of general application and a judgment on this issue would be of little or no guidance to subsequent litigants.

(3) **Extension of time (*obiter*):** A renewed application for leave was not an appeal against the decision to refuse leave, but a second opportunity to obtain leave for the proposed ground(s) of appeal and it must be brought expeditiously.[23] The appellants acknowledged they required an extension of time under r.17(1) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 to serve their notice of appeal outside of the one-month period from the date of the judgment being appealed, prescribed by r.3 of the Rules. The whole period from the date of the judgment being appealed to the date that the appellants applied to the full court for leave to appeal fell to be considered under r.17 (ignoring the periods between the earlier applications for leave to appeal and their determination). The appellants' explanation for the delay (amounting to 73 days excluding the ignored periods) that their lawyers were involved in other more urgent aspects of the litigation during the period in question was not a sufficient justification. Accordingly, the panel would have been minded to refuse the extension of time sought, unless it had thought that the prospects of a successful appeal were good.

Trust protector—powers and duties—power of appointment—consent

Trustees—powers and duties—application for directions—approval of momentous decision

In re Piedmont Trust and Riviera Trust [2021] JRC 248 (Royal Ct: Sir Michael Birt, Commr, and Jurats Ramsden and Olsen.

NM Sanders for the representors; FB Robertson for the first respondent; JP Speck for the second and third respondents; MP Renouf for the fourth respondents; the fifth respondent did not appear and was not represented; D James in person; SA Franckel in person; RS Christie for the eighth respondent

The trustees of two trusts sought the approval of the court of their decision to appoint all the assets of the trusts amongst the beneficiaries in specified proportions. Although all the beneficiaries were agreed that

[23] *Fort Trustees Ltd v ITG Ltd*, [2021] GCA 029, *per* McNeill, JA (*obiter*).

the trusts should be terminated, there was disagreement as to how the trust funds should be allocated as between different beneficiaries. Under the terms of the trusts, the consent of the protector was required for the appointments in question. In this regard, two issues in particular arose: (a) what documents and information ought trustees to supply to a protector; and (b) what is the correct approach of a protector when deciding whether to consent to proposals by trustees for a distribution?

Held:

(1) **Documents and information for protector:** The position described in *Ogier Trustee (Jersey) Ltd v CI Law Trustees Ltd*[24] in relation to incoming trustees was in principle equally applicable to protectors. A protector owes fiduciary duties to the beneficiaries and, in order to fulfil those duties, the protector must have access to such documents and information as are reasonably necessary. To the extent that it is the trustees who are in possession of such information and documents, it is their duty to supply them to the protector and such duty may be enforced by the court on the application of the protector. What documents and information may be reasonably necessary will vary from case to case.

(2) **Protector's role and the court's role:**

(a) The paramount duty of a protector is to act in good faith in the best interests of the beneficiaries. In pursuance of this duty, as in the case of trustees, regard must be had to relevant considerations, irrelevant considerations must be ignored, and a decision made which a reasonable protector could arrive at—but the decision must be the protector's own: to like effect, see *Rawcliffe v Steele.*[25]

(b) One of the reasons that the court exercises a limited review function on a blessing application is that, as described in *S v L*,[26] a settlor does not choose the court as a trustee; the settlor chooses the appointed trustee. The court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. Accordingly, the court does not simply substitute its own discretion for that of the trustee.

(c) A protector is in a different position from that of court. The settlor has decided that a protector (often himself or a longstanding friend or adviser whose judgment he trusts) should be appointed pursuant to the trust deed and has specified those matters where the protector's consent

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[24] [2006] JRC 158 ; 2006 JLR *N* [35].
[25] 1993–95 MLR 426, at 529.
[26] [2005] JRC 109, at para 22; 2005 JLR *N* [34].

is required. The settlor must be taken in those circumstances to have intended that the protector should exercise his own judgment in exercising those powers. It follows that, depending on the circumstances, a protector may well be entitled to veto a decision of a trustee which is rational, in the sense that the court would bless it: the decision of Kawaley, J in the Supreme Court of Bermuda dated 7 September 2021 in the case of *Re X Trusts*,[27] in this respect, not followed.

(d) In the context of a power to consent, as in this case, a protector's discretion lies within a narrower compass than that of a trustee. It is emphatically not the duty of the protector to take that decision or to force the trustee into making a decision which the protector would make if they were the trustee by stating that he will only consent to a particular decision. Such conduct would also almost certainly not be in the interests of the beneficiaries and would be likely to lead to deadlock requiring the intervention of the court.

(e) A protector may often find that he should consent to a discretionary decision of a trustee on the basis that it is for the benefit of one or more of the beneficiaries even though, if the protector had been the trustee, they might have made a different decision thought to be even more beneficial. In this connection, it is to be expected and indeed encouraged for there to be full and open discussion between trustee and protector, with a view to finding something upon which they can both agree.

Trustees—powers and duties—exercise of discretion—sanction of court

In re May Trust [2021] JRC 137 (Royal Ct; Sir William Bailhache, Commr, and Jurats Ramsden and Averty)

A Kistler representing the minor and unborn beneficiaries.

The trustee of a Jersey discretionary trust sought the court's blessing for a distribution of approximately half the value of the trust fund. An unusual feature was that the distribution was to intended to be passed on by the beneficiary to a charitable foundation, which was itself a beneficiary and that, it being paid in two tranches, the beneficiary intended to claim gift aid on only one tranche of the gift to the charity and pay full UK tax in respect of the other.

Held:

(1) Unusually in this case, the beneficiary would be deciding how much gift aid to claim and therefore how much tax he voluntarily

[27] [2021] SC (Bda) 72 Civ.

wished to pay. In the circumstances, just as tax may be a relevant feature on the facts in mistake, *Hastings-Bass*, rectification or variation applications, the court would approach the present question in strict trust law terms, construing the relevant provisions in the trust and applying usual principles as to what might be thought to be a proper appointment for the benefit of a beneficiary.

(2) As to the question of "benefit", the court summarised the position as follows. The decision of a trustee that a particular appointment is for the benefit of a beneficiary in the case of a discretionary trust must be one to which the trustee could reasonably arrive having regard to the terms of the deed. In making that journey, the trustee will have regard to the law which is to the effect that "benefit" is to be widely construed. Thus, unless the deed otherwise provides, "benefit" as a matter of principle: (a) goes wider than financial benefit and includes donations to charity (*The Wigwam Trust*[28]), the payment of debts to HM Revenue (*Marc Bolan Charitable Trust*[29]) and avoiding the detriment of parents of beneficiaries facing large tax claims arising from the transfers into the trust which they have made (*In re N*[30]); (b) may include the application of trust monies to provide social or educational benefits for the beneficiary in question; (c) may include the application of trust monies in discharge of a moral obligation which the beneficiary, in receipt of the appointment which the trustees have resolved to make in his favour, subjectively accepts is one that should be discharged from that appointment (*X v A*[31] not followed in this respect).

(3) The case fell within the second category mentioned in *Public Trustee v Cooper*,[32] an unreported decision of Hart, J, namely where a trustees wishes to obtain the blessing of the court for the action on which they have resolved and which is within their powers. The court applied the established threefold test set out in *In re S Settlement.*[33] In particular, as regards the second limb of the test, namely whether the proposed distribution was one that a reasonable trustee, properly informed, could make, the court had to ask itself: (a) whether the proposed distribution was for the benefit of the appointee, and (b) whether the quantum of the proposed distribution was such that it would be a reasonable exercise of their express power under the trust to ignore interests of other beneficiaries and the full and unfettered discretion

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[28] [2020] JRC 228.
[29] 1981 JJ 117.
[30] 1999 JLR 86.
[31] [2006] 1 WLR 741.
[32] English High Ct, unreported decision of 20 December 1999.
[33] 2001 JLR *N* [37].

afforded to them and thus not inappropriate having regard to the obligations of the trustees towards the other beneficiaries. The payment to the charitable foundation was consistent with prior philanthropic gifts out of the trust and the decision of the proposed appointee not to claim full gift aid did not detract from the benefit to the charitable foundation and further fitted with the social justice aspirations of the family. As regards the quantum of the distribution, considerable funds would still be available in the trust and, given the acceptance by all adult beneficiaries of the values and ethos of philanthropic giving, and their support for the proposed distribution, it was not unreasonable that the trustees should reach the conclusion that they could properly rely on the power to ignore interests notwithstanding their obligation to have regard to their obligations towards the other beneficiaries. The court accordingly approved the proposed distribution.