Jersey & Guernsey Law Review – February 2011
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

CIVIL PROCEDURE

Execution—*arrêt entre mains*

FG Hemisphere Associates LLC v (1) DR Congo and (2) La Générale des Carrières des Mines Royal Ct (Page, Commr, and Jurats Tibbo and Kerley) [2010] JRC 195

KJ Lawrence for the representor; J Harvey-Hills for the second respondent; AD Robinson for the party cited; the first respondent did not appear and was not represented

The representor was the assignee of the benefit of two arbitral awards against the first respondent ("Congo"). The amount outstanding was in excess of US$100m. The second respondent ("Gécamines") was a mining company incorporated in Congo. Gécamines in turn held shares in a Jersey subsidiary company ("GTL") and also the contractual right to receive certain payments from GTL under a contract governed by Belgian law. Although the arbitral awards were not against Gécamines, the representor argued that Gécamines was in reality an organ of state of Congo, and not a separate entity, and on that basis it sought the leave of the Royal Court to enforce the awards in Jersey against the Jersey-situate assets of Gécamines, which, it argued, comprised the shares owned by Gécamines in GTL and the right to receive the payments, which it contended were Jersey-situate assets.

On 19 March 2009, the Court granted interim conservatory relief in favour of the representor in the form of an immediate *arrêt entre mains* in respect of the shares and the right to receive the payments. Resisting confirmation of the Act of 19 March 2009 and distraint upon the shares and the right to payment, Gécamines contended that it was not an organ of state but was, as a matter of legal formality and in practice, a duly constituted independent entity in its own right. In the alternative, Gécamines and GTL argued (i) that the *situs* of the debt represented by the payments was not Jersey and therefore that the Court had no jurisdiction to attach it; (ii) that relief should be refused on the ground that there was a risk that Gécamines could be required to pay the debt twice; and (iii) that in reality there would not be any scope for the Viscount to collect the payments and therefore

that the Court should, as a matter of discretion, refuse to confirm the interim attachment orders against the payments.

Held, confirming the *arrêt entre mains*:

Separate personality or organ of state: The test was whether, at the relevant point in time, Gécamines was (a) under the control of the Congolese government and (b) exercised governmental functions: *per* Lord Denning MR, *Trendtex Trading Corp v Central Bank of Nigeria*.[1] Gécamines argued that the relevant time was the date of the trial, by which time (so Gécamines argued) it was not, if it ever had been, an organ of state. However, the Court held that the relevant time was 19 March 2009 which was the date of the seizure of the assets by the *arrêt entre mains*. On the facts, the Court concluded that both elements of the *Trendex* test were satisfied as at 19 March 2009. As regards the second limb (the performance of governmental functions), an entity which is constituted so that its purpose is to advance the industrial development, prosperity and economic welfare of the area in which it operates can be seen as effectively carrying out governmental functions and therefore to have assumed the position of an organ of government: *per* Cooke J in *Kensington Intl Ltd v DR Congo*.[2] The same applies, irrespective of its formal constitution, where an entity or its property is in practice made the instrument of the state for such purposes.

***Arrêt entre mains:* nature and effect:** The effect of an interim *arrêt entre mains* is to arrest or seize the named assets in the hands of the third party. This is more than just a bar from dealing. It is an appropriation of the asset by the court giving the judgment creditor immediate security in relation to the debt owed.

The extent of what is seized and owed is determined “at the time of the arrest”: Pothier, *Traités de la Procédure Civile et Criminelle*. The purpose of bringing the third party before the court is to “confirm” whether the interim order was properly made. Whether the interim order was properly made can only be assessed by reference to the facts and position existing at the time of the interim arrest. If it was and the order was therefore properly made, the interim order is simply *confirmée*. The arrest itself is in fact made at the time of the first order. Its effect is simply suspended pending the third party being summonsed to Court to have it considered, and where appropriate, confirmed.

GTL was, by closest analogy to the English legal position, a garnishee. Whilst not identical, there was clearly much similarity between the order of an interim *arrêt entre mains* and a garnishee order nisi (now called an interim third party debt order). Reference to English law regarding garnishees is therefore helpful and persuasive, albeit that an *arrêt entre mains* appeared wider and more flexible in its ambit (applying, for example, to all

[1] [1977] 1 QB 529.
[2] [2005] EWHC 2684 (Comm).

movable property of the debtor in the hands of the third party not just sums of money, and to future as well as present debts).

***Situs* of debt:** The relevant principles could be distilled from *New York Life Ins Co v Public Trustee*[3] and *Kwok v Estate Duty Commr*[4] and the commentary to Rule 120 in *Dicey, Morris and Collins*, 14th ed, vol 2, p 1116. These principles include the following: (i) the *situs* of a debt owed by a corporate body is the place where that body resides; (ii) residence for this purpose is where that body "carries on business"; (iii) if a body carries on business in more than one place, it is regarded as resident in each of those locations and, subject to the next point, a debt owed by it will be treated as being sited in each of those places; (iv) however, if one rather than another of those places has been expressly or impliedly selected as the place where it is recoverable, then that will be regarded as its *situs*; (v) a debt payable in the future is no less a debt than one that is currently payable, and is subject to the same rules as regards *situs*. In the application of those principles, residence for tax purposes is irrelevant. What matters is—as for the purposes of jurisdiction—where the corporation "carries on business". But the rationale underlying this is to identify the place where a corporation can be found and made subject to enforcement. A company is therefore also resident where it is incorporated: *Kwok*. The fact that GTL was incorporated in Jersey with its registered office in Jersey was therefore sufficient to make it resident in Jersey for the present purposes irrespective of where its daily business activities were conducted, its directors happened to live or its bank accounts were located. The only other contender for residence was Congo on the basis that GTL may carry on business there. But, even assuming that that were the case, a Congo *situs* for the debt would only operate to the exclusion of Jersey if there had been a contractual stipulation, express or implied, that the debt was to be discharged in Congo. It was clear on GTL's own evidence that there was no such contractual stipulation. It followed that the debt was situated in Jersey and susceptible to execution in Jersey by the process of *arrêt entre mains.*

Double jeopardy: It was argued for GTL that the debt should not be distrained upon to satisfy the claims of the representor because GTL would still be exposed to being required to pay Gécamines and therefore be at risk of double jeopardy. The principles developed by the English courts in this respect were ones that it would entirely appropriate for the Royal Court to follow in relation to the confirmation of an *arrêt entre mains*. In English law the effect of a final third party debt order or garnishee order absolute is not only to direct the third party or garnishee to pay the garnishor instead of his original creditor but, upon such payment, also to discharge, *pro tanto*, the third party garnishee from liability to his former creditor: the second element is regarded not just as a consequence of the first but as an integral part and necessary concomitant of the first. Where the debt is situated abroad, an English court will not make a final third party debt order unless it is clearly shown that the foreign court would regard the debt as

[3] [1924] 2 Ch 101.
[4] [1988] 1 WLR 1035.

automatically discharged by the order of the English court; it is for the judgment creditor to establish this but the court does not evaluate the risk of the third party being required to pay twice: *Société Eram Ltd v Cie Intle*.[5] *Eram* was, however, distinguishable since the debt in present case was situated in Jersey. The mere fact that the debt was governed by non-Jersey law (Belgian law) did not make it a "foreign debt" for the purposes of the principle in *Eram*. That, however, was not the end of the matter. Where a debt is situate in the jurisdiction where enforcement by third party debt order is sought, and is not therefore a "foreign debt" for the purposes of *Eram*, the Court nonetheless retains a discretion to refuse to make a final order where it is satisfied by evidence that there is a real risk that the third party could be compelled to pay the debt again by its original creditor, even if this is the result of the foreign court purporting to exercise an extravagant extraterritorial jurisdiction: *Deutsche Shcachtbau-und Tiefbohrgesellschaft mbH v Shell Intl Petroleum Co Ltd*.[6] But the risk must be real and—unlike the case of a foreign debt—it is for the third party garnishee to establish it. GTL had produced no evidence that any such risk existed. It followed that there was no ground in this respect on which the Court could or should, as a matter of discretion, decline to confirm the interim *arrêt entre mains*.

Inutility and abuse of process: GTL argued that confirmation of the *arrêt*, would, in any event, serve no useful purpose and should therefore be refused as a matter of discretion. Rejecting this contention, and distinguishing *In re Kaplan*,[7] the Court stated (a) that there no reason to proceed on the assumption that GTL would not comply with the confirmed order regarding the debt; (b) that if GTL did not comply, the representor would be able to seek judgment and apply for a *désastre* in respect of GTL; (c) that, in relation to an application for *désastre*, it did not matter that GTL had no assets the test under the Bankruptcy (Désastre) (Jersey) Law 1990 being one of cash flow and it being sufficient to show default in paying one debt: *In re Rosedale Investments*;[8] and (d) a declaration of *en désastre* would have the effect of vesting the entirety of GTL's assets in the Viscount; how far the Viscount would be prepared, in practice, to go in trying to get in those assets would depend to a large extent on how far the representor was prepared to fund his efforts; it was not necessary or appropriate for the Court to speculate about what obstacles the Viscount might or might not encounter in the course of any *en désastre* proceedings involving GTL. The facts of *Kaplan*, being a request for assistance in the enforcement of a foreign penal process, were quite different.

Judgments and orders—judgments issued in draft

FG Hemisphere Assocs v (1) DR Congo and (2) La Générale des Carrières des Mines Royal Ct (Page, Commr, and Jurats Tibbo and Kerley) [2010] JRC 178C

[5] [2004] 1AC 260.
[6] [1990] 1AC 295.
[7] 2009 JLR 88.
[8] 1995 JLR 123.

KJ Lawrence for the representor; J Harvey-Hills for the second respondent; AD Robinson for the party cited; the first respondent did not appear and was not represented

The question was raised as to whether the Court, after having distributed a draft judgment to the parties, could agree permanently to withhold the judgment if the parties settled their dispute before the judgment was formally handed down.

Held, dismissing the application:

Authorities: There were no Jersey authorities. The leading English case was *Prudential Assur Co Ltd v McBains Cooper*,[9] which had since been applied in *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No 3)*[10] and *Gurney Consulting Engrs v Gleeds Health & Safety Ltd (No 2)*.[11] The parallels between English and Jersey practice were sufficiently close for the principles adopted in England to be, for the most part, followed in Jersey.

Jurisdiction: So far as jurisdiction goes (in courts of first instance, at least): (i) up until the point when the Court starts to deliver judgment, parties to civil litigation are at liberty to settle their dispute and that if they do so there ceases to be any lis in respect of the court has any jurisdiction to adjudicate; but (ii) the issue in draft of the text of a reserved judgment is regarded as the start of the process of delivery of judgment and from that point onwards the parties are no longer in a position, of their own volition, to prevent the court from completing that process by formally handing down judgment; and (iii) in situations of the latter kind whether to withhold judgment or to proceed to formal delivery, in whole or in part, becomes a matter of discretion for the trial judge.

Discretion: Factors regarded by the courts as material or potentially material included (i) the purpose of the practice of supplying reserved judgments in draft, (ii) whether the judgment deals with points of law of general interest, (iii) the parties' wishes, (iv) the saving of time and expense likely to result from a settlement, and (v) whether one or more of party might be taking advantage of the practice to try prevent publication of an adverse otherwise unwelcome judgment.

Normal expectation that judgment will be formally handed down: All other things being equal, it was far better for parties to settle their disputes than to litigate them and that the courts will ordinarily encourage and facilitate settlement. But once a draft judgment is made available to the parties other public interest factors are engaged. The parties' desire to settle their dispute, and to avoid any costly appeals process, was one factor to be taken into account by the Court but not the overriding or even the principal factor: *Prudential Assur*. Practice Direction RC10/01, as with the equivalent practice in the English High Court, made it abundantly clear that the procedure is intended to serve only

[9] [2000] 1 WLR 2000.
[10] [2001] 1WLR.
[11] [2006] EWHC 536 (TCC).

three limited purposes; there is no indication that it is intended to make more material available to the parties in order to assist them to settle their dispute: *Prudential Assur*. It is just and convenient that the Court retains a discretion; but the normal expectation should be that, once the stage of distributing a draft judgment has been reached, the matter will proceed to formal delivery, and that the discretion to withhold judgment is one that should not lightly be invoked or exercised.

Decision: As in *Prudential Assur*, the judgment in the present case, whilst also dealing with factual matters, concerned important matters of law which were of general interest, particularly in the context of a jurisdiction where there was a major financial services industry. The public interest in publication of the substantial sections of the judgment dealing with points of law outweighed the parties' wishes. Further, it appeared that the first respondent had until recently not been willing to join in informing the Court that previous settlement discussions were in progress and it had suited its interests at that stage to allow the case to take its course. The Court considered it profoundly unsatisfactory for the first respondent, having now seen the Court's judgment in draft, to adopt a very different stance. The judgment was not, moreover, one that lent itself easily or satisfactorily to be anonymised; nor did it lend itself to the extraction of discrete points. Accordingly, the Court was in no doubt that the judgment should be handed down and published in the usual way.

Concluding remarks: The Court found it unsatisfactory that it had not been informed earlier about the settlement discussions between the parties. Although there was no Rule of Court in Jersey (as there was now in England) relating to the matter, the Court emphasised the importance of parties and their legal advisers informing the Court immediately they become aware of any development that may make it unnecessary for judgment to be delivered. This was not just as a matter of courtesy but in the interests of the efficient administration of justice. Depending on the circumstances, the Court may decide to carry on with preparation of its judgment: but the point was that the Court should have the opportunity for itself to decide how to proceed.

It was also appropriate to remind legal advisers of the very strict terms as regards confidentiality contained in Practice Direction RC10/01.

CRIMINAL PROCEDURE

Appeals from Magistrate's Court—case stated

Wakeham v Att Gen Royal Ct (Philip Bailhache, Commr, sitting alone) [2010] JRC 217A

CM Fogarty for the appellant; SM Baker for the respondent.

On an appeal by case stated from the Magistrate's Court under art 21 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949, the questions were raised (1) as to whether the Court has jurisdiction to hear the appeal in circumstances

where the Crown had discharged the appellant from the prosecution and there had therefore been no final determination; (2) as to whether, on the correct construction of art 29(2)(b) of the Police Procedures and Criminal Evidence (Jersey) Law 2003, a police officer is empowered to enter and search premises in circumstances where the police officer has no reasonable grounds for believing that the arrested person presents a danger to himself or others. Article 29(2) provides, so far as relevant:

> "(1) A police officer may search an arrested person, in any case where the person to be searched has been arrested at a place other than a police station, if the police officer has reasonable grounds for believing that the arrested person may present a danger to himself or herself or others.
>
> (2) Subject to paragraphs (3) to (5), a police officer shall also have power in that case—
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> ...
>
> (b) to enter and search any premises in which the person was when arrested or immediately before the person was arrested for evidence relating to the offence for which he or she has been arrested."

Held, dismissing the appeal:

Jurisdiction where no final determination: In England, notwithstanding the very wide terms of s 111 of the Magistrate's Court Act 1980 (which was equivalent art 21 of the 1949 Law), the jurisdiction of magistrates to state a case and of the Divisional Court to hear an appeal by case stated has been circumscribed. If the magistrates have been sitting as examining magistrates, or if they have made an interlocutory ruling, they have no jurisdiction to state a case. If, on the other hand, there has been a final decision, including a decision as to jurisdiction, that is amenable to the case stated procedure: *Streames v Copping*.[12] Ordinarily the decision in *Streames* would be of strong persuasive authority and it had been followed by Tucker, Commr in *Syvret v Att Gen*.[13] However the prior decisions of the Royal Court in *Att Gen v Campbell*[14] and *Att Gen v Freitas*[15] could not be reconciled with *Streames*. These decisions could not be regarded as having been given *per incuriam* but constituted settled jurisprudence (*la jurisprudence constante*) showing that the Court has occasionally exercised jurisdiction pursuant to art 21 of the 1949 Law to hear an appeal by case stated notwithstanding the fact that there has been no final decision in the court below. The underlying rationale of the policy in England was to

[12] [1985] 1 QB 920
[13] [2009] JRC 165.
[14] [2004] JRC 060.
[15] [2009] JRC 176.

prevent the criminal proceedings being held up by interlocutory matters. But the same risk did not apply in Jersey because the magistracy was composed entirely of professional judges rather than lay magistrates as in England, and they were perfectly competent to exercise the discretion given to the under art 21 of the 1949 Law sensibly and in accordance with the law. The Court therefore had jurisdiction to hear the appeal.

Refusal where application frivolous: Article 21(4) of the 1949 Law empowers the Magistrate to refuse to state a case (other than where the request is made by or under the direction of the Attorney General) where the Magistrate is of opinion that the application is frivolous. "Frivolous" for this purpose does not mean lacking seriousness or being silly, but rather futile, misconceived, hopeless or academic: *R (on the application of Forest Heath DC) v North West Suffolk (Mildenhall) Mags' Ct*.[16] The appeal in this case was futile and academic since the appellant had been discharged from the prosecution and awarded her costs in the court below. The fact that the appellant wished to bring a civil action against the police, and believed that that a ruling that the Relief Magistrate had misinterpreted art 29 of the 2003 Law would assist her in that regard, was entirely academic in the context of the appeal. The appeal was therefore frivolous within the meaning of art 21(4) of the 1949 Law and was accordingly dismissed.

Construction of art 29, 2003 Law: *Obiter*, the Relief Magistrate was correct in his interpretation of art 29 of the 2003 Law. The powers conferred by paras (1) and (2) of art 29 were free standing powers which related to three different sets of circumstances. The first set of circumstances was where the arrested person has been arrested at a place other than a police station *and* the police officer has reasonable grounds to believe that the arrested person may present a danger to himself or others (art 29(1)). The second set of circumstances was where the person has been arrested at a place other than a police station and the officer wishes to search that person for anything which the person might use to assist him or her to escape from lawful custody or which might be evidence relating to an offence (art 29(2)(a)). The phrase "in that case" in the opening lines of para (2) related back to the clause "the case where the person to be searched has been arrested at a place other than a police station" in para (1). The third set of circumstances was where the person has been arrested at a place other than a police station and the officer wishes to "enter and search any premises in which the person was when arrested or immediately before the person was arrested for evidence relating to the offence for which he or she has been arrested" (art 29(2)(b)). In each of those situations, art 29 of the 2003 Law confers a power of search (subject of course to the other provisions of art 29) upon a police officer.

MENTAL HEALTH

Curators—non-resident curators

[16] [1997] EWCA Civ 1575.

Curatorship of Mr L & Mr B Royal Ct (Birt, B and Jurats de Veulle, Tibbo, King, Le Cornu, Liddiard, Kerley, Marett-Crosby and Nicolle) [2010] JRC 151

H Sharp, QC, Solicitor General for the Attorney General; the prospective curators appeared in person.

In *Re Curatorship of Mrs B*[17] the Inferior Number held that there was no absolute prohibition on the appointment of a curator who is non-resident of Jersey but that the Court would only make such an appointment in exceptional circumstances. Further applications having been made by non-residents, the matter was now referred to the Superior Number.

Held:

No absolute bar but exceptional circumstances required: Agreeing with the Court in *Mrs B*, there is no absolute bar on a non-resident curator. The Court must balance the benefit of the appointment (perhaps because it involves the appointment of a loving child) against the risks inherent in control of the assets passing out of the jurisdiction. The inherent risks are such that it is only in exceptional circumstances that it will be in the interdict's best interests for a non-resident to be appointed.

Security bond required: Any such appointment should be accompanied by a security bond (save in exceptional cases, such as where the estate is very small). As to the level of the bond, a suitable starting point for the consideration of the Court should be a bond equal to 70% of the liquid assets up to a maximum of a £1 million bond. By liquid assets, the Court meant assets such as cash, securities and tangible movables; immovable property, whether in Jersey or elsewhere, would for this purpose be regarded as an illiquid asset.

Submission to the Court required: A non-resident curator should also undertake to submit to the jurisdiction of the Royal Court in all matters concerning the curatorship or any claim against the curator.

Solicitor General and Registrar's enquiries: Special care needed to be taken by the Solicitor General and the Registrar when making enquiries in the case of a non-resident curator. The results of the enquiry should be explained to the Court in each case where it is being suggested that a non-resident curator should be appointed. In particular, the status, experience and record of the applicant curator will be relevant as well as the nature of that person's relationship to the interdict.

Condition as to location of assets: In *Mrs B,* the Court suggested that a condition of the appointment should be that the interdict's tangible movable property should remain within the Island, any bank accounts should be maintained with banks in

[17] [2007] JRC 232.

the Island, and any investments should be made through a Jersey nominee or intermediary. It was hard to be over prescriptive but the Court took the view that careful consideration should be given as to the imposition of a condition which ensures that the maximum amount of property remains within the Island and therefore subject to the supervisory control of the Court.

Legal proceedings—protection for acts done

Highfield v Health & Social Servs Min Royal Ct (Philip Bailhache, Commr, sitting alone) [2010]JRC143A

DF Le Quesne for the plaintiff; MH Temple for the defendant.

> Article 50 of the Mental Health (Jersey) Law 1969 provides:
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> "50. Protection for acts done in pursuance of this Law
>
> (1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which the person would have been liable apart from the provisions of this Article in respect of any act purporting to be done in pursuance of this Law or any Order made thereunder, unless the act was done in bad faith or without reasonable care.
>
> (2) No civil or criminal proceedings shall be brought against any person in respect of any such act without the leave of the Superior Number of the Royal Court, and the Superior Number shall not give leave under this Article unless satisfied that there is a prima facie case for the contention that the person to be proceeded against has acted in bad faith or without reasonable care."

The question was raised as to whether art 50(2) requires leave to be obtained prior to the issuance of proceedings and if so whether proceedings commenced without leave were a nullity. In the present case, the plaintiff, an in-patient suffering from mental disorder, injured himself in an attempt to escape. He issued proceedings exactly three years after the incident, averring that the Minister had failed in his duty of care to protect him from injuring himself. The plaintiff did not, however, obtain the prior leave of the Superior Number. If the proceedings commenced without leave were a nullity his claim would now be time-barred. Against this, the plaintiff contended that the immunity conferred by art 50, and in particular the reference to "acts purporting to be done pursuant to this Law", should be given a narrow, purposive construction. The purpose of the provision, so the plaintiff argued, was to protect professional people working with mentally ill patients from unmeritorious claims and not to protect the Minister from failure in his duty to provide a safe and appropriate system of care for such patients.

Held, declaring the plaintiff's proceedings null and void:

Legislative history and purpose: The immunity conferred by art 50 was based upon very similar provisions in the English Mental Health Act 1959. The legislative history of the equivalent English section is encapsulated at paras 8–11 of the judgment of Lord Bingham of Cornhill in *Seal v Chief Constable of South Wales*.[18] The purpose of the statutory immunity and the requirement to obtain leave before commencing proceedings was the protection of staff working with mental patients from having to face the stress of baseless accusations in court.

Decision—wording of statute was clear: The Court had a great deal of sympathy with the plaintiff's argument (which had found favour with the minority in *Seal*). If a purposive approach were adopted, there would be little reason to exculpate the Minister. But, although the immunity in art 50(1) and the gateway in art 50(2) should be narrowly and strictly constructed, the exclusionary words could hardly be clearer. Article 3 of the 1969 Law set out the functions of the Minister in relation to the Law. They included making arrangements for the care of persons suffering from mental disorder, including the provision of residential accommodation and "the care of persons for the time being resident in accommodation so provided." The Minister owed a duty of care to the plaintiff, but that duty was qualified by the immunity conferred by art 50(1). The only way to overcome that immunity was by leave from of the Superior Number pursuant to art 50(2). The plaintiff failed to seek such leave, and in such circumstances, the Court had no jurisdiction to hear the plaintiff's suit. The proceedings were therefore declared null and void and dismissed.

Postscript: The extremely wide immunity conferred by art 50 was no longer justifiable in so far as it extended to the State and ought to be urgently reconsidered. At the very least, if the immunity were to remain, the judicial power to grant leave should be unfettered. The Court noted, however, that it had previously urged reform of other provisions of the Mental Health (Jersey) Law 1969 but all to no avail (*Att Gen v O'Driscoll*[19]; *Att Gen v Le Blancq*[20]; *Att Gen v Harding*[21]; and *Att Gen v Highfield*[22]).

SUCCESSION

Executors and administrators—costs

Mackinnon v Mackinnon Court of Appeal (Beloff, Steel and Pleming JJA) [2010] JCA 187

AK Mackinnon on his own behalf; NF Journeaux for the respondent.

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[18] [2005] EWCA Civ 586.
[19] 2003 JLR 390, at 404.
[20] [2003] JRC 165.
[21] [2009] JRC 198 at para 42.
[22] 2009 JLR *N* [24].

The appellant was the executor of his mother's will of movables. Disagreement arose between him and the respondent (his brother) concerning the administration of the estate and in particular the length of time that it was taking. The respondent issued a representation seeking, *inter alia*, orders that the appellant draw up an inventory and accounts and finalise the administration of the estate within such time as the Court specified. Orders substantially in the form requested were granted. The respondent accordingly sought an order that the costs of and incidental to the representation be paid by the appellant an indemnity basis, and a further order that the respondent be prevented of his usual indemnity as executor against the estate. Resisting such orders, the respondent argued in the Royal Court that there had been difficulties with the administration of the estate, and in particular difficulties arising (so he had been advised by his English lawyers) by reason of his obligations under the Proceeds of Crime Act 2002 ("POCA") which prevented him agreeing to the respondent's proposals. The Royal Court (*Representation of Kenneth James MacKinnon*[23]) noted that the case raised the extent of its jurisdiction to penalise an executor in this way and the relevant test to be applied. Bailhache, Commr held that the test was whether the executor's conduct had demonstrated an element of intransigence or unreasonableness so as to cross the threshold of reasonably justifiable behaviour. On the facts, the Royal Court held *inter alia* that the appellant's concerns about POCA were exaggerated and that the appellant's conduct had crossed the threshold of reasonably justified behaviour as from a certain date, so as to justify the imposition of personal liability for costs, and that he was accordingly to be deprived of his usual indemnity out of the estate in respect of costs. The respondent's costs were awarded against him on the standard basis, the appellant's breach of duty being not so grave as to justify indemnity costs. The appellant appealed to the Court of Appeal.

Held, allowing the appeal:

Jurisdiction and principles: The jurisdiction to award costs in a probate action is derived from art 2 of the Civil Proceedings (Jersey) Law 1956. The position in England and Wales regarding the circumstances in which an executor may be deprived of his indemnity out of the estate are described in *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, 2008 ed, para 66-02ff. The following principles could be derived regarding the executor's indemnity for own costs and the award of litigation costs of another party against him:

(a) Dishonesty or fraud may be a sufficient but is not a necessary basis for either refusing the representative payment of his own costs out of the estate or for fixing him with liability to pay the other party's costs: *In re Beddoe, Downes v Cottams*.[24]

[23] [2009] JRC 218.
[24] [1893] 1 Ch 547.

(b) The basic test is whether the costs to justify payment out of the estate were properly incurred.

(c) Mere negligence or honest mistake will not deprive the representative of payment; but other than that what is sufficient misconduct cannot be precisely described and will be a matter of fact and degree.

(d) The refusal of payment of his costs out of the estate does not necessarily entail as its consequence the fixing of him with liability to pay the other party's costs, but the Court may penalise him in both ways.

Element of intransigence or unreasonableness required: Affirming statements of principle by Bailhache, Commr at first instance (para 15), no material distinction was to be drawn in the context of the costs of an administrative action between the position of an executor and the position of a trustee. Both owe fiduciary duties. The question being discretionary, it is not possible to lay down any hard and fast rules. Nonetheless, an executor or trustee has a margin of discretion, being free to conduct himself, and to take decisions, within the parameters of a reasonable framework as he sees fit. It may be that the margin of discretion for a professional executor or trustee who is being remunerated should be more narrowly circumscribed. But that is not the case here. An unremunerated executor or trustee will not lightly be ordered to pay the costs of litigation if he has made an innocent mistake or acted in a manner which has *ex post facto* been shown to be misguided or even careless. At the same time, a legatee or beneficiary is entitled to expect a reasonable level of competence, proportionality and good sense from the person entrusted with protecting his interests. An element of intransigence or unreasonableness was required before an executor can be held liable to pay the costs of a legatee in an administrative action. It is not necessary to show fraud or dishonesty, but the executor's conduct must have crossed the threshold of reasonably justifiable behaviour.

Reasonable for executor to rely on legal advice: Evaluation of the facts and the consequent exercise of discretion being pre-eminently a matter for the tribunal of first instance, the Royal Court's decision could only be overturned on the ground of material error, including mistaken self-direction. However in reaching its judgment the Royal Court had expressed the view that the appellant's difficulties under POCA were not as great as the appellant had imagined. The Royal Court should have rather asked itself whether the appellant reasonably thought that his problems under POCA impeded him. Although the legal advice received by the appellant regarding POCA appeared questionable, it was not necessary to consider its merits. It was true that an executor cannot always rely upon counsel's advice to exculpate him from a finding of irrational behaviour (*Re Beddoe*) but the appellant was a layman and it was not irrational for him to follow legal advice as to his obligations under POCA.

As a matter of general principle, the executor is entitled to recover the costs of the administration from the estate: Wills and Successions (Jersey) Law 1993, art 15. If, therefore, an executor brings an application to the Court regarding the administration of the estate, he will ordinarily be able to recover the costs of such an application from the gross moveable estate. If an executor is ordered to pay the costs of administration of an estate personally it must follow that he is to be deprived of his usual indemnity out of the estate. He may also be ordered to pay the costs of another party to proceedings but the two orders are not umbilically linked. In this case, given the appellant's reliance on legal advice (whether right or wrong) the usual order had to follow, *i.e.* that he could claim his costs against the estate in respect of the respondent's representation.