Jersey & Guernsey Law Review – June 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

Security for costs

Cafe de Lecq Ltd v RA Rossborough (Ins Brokers) Ltd Royal Ct (Clyde-smith, Commr and Jurats Clapham and Allo) [2011] JRC 011

AD Robinson for the plaintiff/respondent; NF Journeaux for the defendant/appellant

The plaintiff, a Jersey company, claimed £953,500 from its insurance broker following the refusal of the plaintiff's insurers to cover losses caused by a fire. The Master refused the defendant's application for security for costs. The defendant appealed to the Royal Court. The question was raised as to the principles to be applied in determining an application for security for costs against a resident corporate plaintiff. The Master had found that there was a presumption or principle that Jersey resident plaintiffs, whether natural or corporate, should not be required to provide security and on the facts declined to award security.

Held, upholding the appeal—

Appellate approach. The approach of the Court on an appeal from a decision of the Master was well established: "the Court has ... to consider the matter afresh and reach its own conclusion whilst, of course, taking due account of the decision of the Master and the reasons for his decision": *Garfield Bennett v Philips*.[1]

Jurisdiction to award security for costs. Rule 4/1(4) of the Royal Court Rules 2004 provides that "Any plaintiff may be ordered to give security for costs". The Court has a very wide jurisdiction (covering corporate as well as individual plaintiffs) to order security for costs and the issue in the present case was the principles upon which that jurisdiction should be exercised.

[1] 6 November 2002, unreported, 2002/214.

Impact of European Convention on Human Rights—*Leeds v Admatch*. The impact of the ECHR on the general practice of ordering security against non-resident plaintiffs was considered by the Court of Appeal in *Leeds Utd v Admatch*.[2] Applications for security for costs against non-resident plaintiffs should be assessed on an individual basis: the indiscriminate practice of requiring security for costs from plaintiffs resident outside Jersey constituted discrimination on the ground of status under art 14 of the ECHR in that it impeded their right of access to the courts under art 6. Whilst the protection of the ability of a Jersey defendant, if successful, to enforce a costs judgment in its favour was a legitimate objective, the indiscriminate practice of requiring security from all non-resident plaintiffs was not a proportionate means of achieving it.

No presumption against security in the case of resident plaintiffs. A presumption or principle as found by the Master that Jersey resident plaintiffs, whether natural or corporate, should not be required to provide security was inconsistent with the decision in *Leeds* in that it discriminated between plaintiffs on the ground of their residence.

Principles to be applied following *Leeds*. The protection hitherto given to resident plaintiffs had now to be extended to all plaintiffs so that the practice following *Leeds* should be as follows:

Consistent with the policy that there should be access to the Courts for all, rich or poor, and without detracting from its wide discretion to order security where justice so requires, it will be the general practice of the Court not to require plaintiffs (wherever resident) to provide security because there is reason to believe that they will be unable to meet orders for costs against them save:

- In the case of corporate plaintiffs (wherever resident), security may be ordered on such grounds following the principles set out by the Court of Appeal in AE Smith & Sons Ltd v L'Eau des Iles (Jersey) Ltd.3

- In the case of non-resident plaintiffs, provision of security may be required to meet the legitimate objective of protecting the ability of defendants to enforce costs judgments outside the jurisdiction, such applications to be assessed on an individual basis.

Effect on beneficial owner not relevant. In determining an application for security for costs against a corporate plaintiff the Court is concerned with the effect of the order on the corporate plaintiff, not on its directors, beneficial owners or other backers.

Third party costs order not relevant. The possibility that the successful defendant may be able to apply for a costs order against a third party in the event that the assets of

[2] 2009 JLR 186.
[3] 1999 JLR 319.

the unsuccessful corporate plaintiff are insufficient to meet its costs should not be taken into account.

Decision: On the facts, the plaintiff's prospects for success were to be discounted because at this interlocutory stage the merits were not obviously and heavily in favour of either party. The plaintiff conceded that (a) it would be unable to meet an adverse costs order from its own assets and (b) that if a security for costs order were made in the full amount requested, funding would be provided by its beneficial owner and that accordingly its cause of action would not be stifled. Thus, applying the balancing exercise set out in *AE Smith*, there would be no injustice to the plaintiff to an order for costs being made. As against that, there would be an injustice to the defendant if no security is ordered in that if it is successful, it will be unable to recover its costs from the plaintiff. The balance of justice was therefore in favour of security being ordered and the decision of the Master was overturned.

CONTRACT

Contracts of insurance—estoppel—*vices du consentement*—*reticence dolosive*

Sutton v Insurance Corp of the Channel Islands Ltd Royal Ct (William Bailhache, Deputy Bailiff and Jurats Kerley and Nicolle) [2011] JRC 027

PC Sinel for the plaintiff; MT Jowitt for the defendant

The plaintiff claimed £46,000 from the defendant under an insurance policy in respect of a lost Hublot Big Bang watch, which was specified on the policy. Shortly after purchasing the insurance, the plaintiff, as required by the defendant, supplied the defendant with a valuation by a firm of jewellers of a Hublot Big Bang watch in the sum of £46,000. The valuation was not addressed to anyone, there was no reference to a serial or model number and it transpired that the watch was not with the jewellers at the time of the valuation. On making the claim the plaintiff was unable, in response to the defendant's enquiries, to reveal from whom he had acquired the watch on the basis that it had been purchased for cash and an exchange of other watches from an unknown third party through an intermediary who had since died. At the time of entering into the contract the plaintiff failed to inform the defendant as to the unusual circumstances under which the watch had been acquired, the circumstances in which he had come into possession of the valuation and why the watch had not been in the custody of the valuer at the date of valuation. The defendant was not satisfied as to the ownership, genuineness or value of the watch and refused to pay. The plaintiff contended *inter alia* that the defendant was estopped by estoppel by convention from denying the adequacy of the valuation supplied on the basis that there was a common understanding that it met the requirements of the contract. The defendant argued *inter alia* that it had been induced to enter into the contract by innocent, or alternatively fraudulent, misrepresentations implicit in the delivery of the

valuation that the plaintiff was the owner of the watch and that it as a genuine Hublot Big Bang watch.

Held, dismissing the plaintiff's claim—

(1) The burden of proof was on the plaintiff to prove that (i) that the watch insured was a genuine Hublot Big Bang watch; (ii) that he acquired lawful title to it; (iii) that it had a genuine value of £46,000; and (iv) that it had been genuinely lost. That the plaintiff carried the burden followed from an analysis of the contract of insurance in question and the fact that the burden of proof generally lies on the party who makes assertions which need to be established for the purpose of adjudicating the claim or defence.

(2) As a matter of principle all insurance contracts governed by Jersey law are subject to *uberrima fides*. This is because this is the established market understanding of such contracts and because as a practical matter insurance contracts require that the parties act with good faith towards each other. Any material misrepresentation made by the insured to the insurer at the time of entering into the contract will entitle the insurer to avoid liability under the contract. In addition there were clauses in the particular contract which imposed express requirements of good faith.

(3) It might well be that an obligation of good faith on both sides is a common understanding in all contracts governed by Jersey law, though it was not necessary to decide this and full argument was not heard: see Domat, *Les Loix Civiles* (1745 ed), livre I, titre I, at ss xii and xiii; Le Gros, *Traité du Droit Coutumier* (1943) at p 350 when considering "De la clameur révocatoire ou deception d'outre moitié du juste prix"; and the judgment of the majority in *Snell v Beadle*.[4] On the other hand English law does not recognise the principle of good faith as having any general application: *Interfoto Pichers Library Ltd v Stiletto Visual Programmes Ltd*.[5]

(4) Estoppel by convention derives from the English law of contract. The Court would need to be satisfied that the same gaps existed in the Jersey law of contract as necessitated the introduction of the doctrine of estoppel by convention before introducing similar principles into Jersey law. The Royal Court does apply promissory or equitable estoppel and it may be that estoppel by convention also forms part of Jersey law; but the Court doubted that it would apply in its entirety since the requirement of mutual understanding as to the basis on which a contract is to be performed, which is a *sine qua non* of estoppel by convention, is already part of the requirements for a valid contract, and if the assumption on which parties relied does not hold good the remedy probably lies in a claim that the contract should be set aside for *erreur*. However even if the doctrine formed part of Jersey law, the plaintiff had not established the necessary common understanding. To conclude that the defendant was unable to resist the plaintiff's claim upon the basis of

[4] 2001 JLR 118, at 42–46.
[5] [1998] 1 QB 433, at 449.

this valuation would be unconscionable. In effect it would mean that if an insurer accepts a valuation, or simply does not question a valuation and that valuation contains inaccurate information which the insurer could not have known at the time, the insurer is barred forever from contending that the valuation is false or inaccurate, or for some other reason cannot be relied upon. Nor had there been any representation by the defendant that the valuation was acceptable such as would found a claim in equitable estoppel.

(5) In a number of previous cases the Royal Court had elided mistake, misrepresentation and *erreur* and referred to principles of English law. The Court was concerned not with English or French law but the law of Jersey. This was to be identified from precedents where they exist and from customary law. Sometimes the cases can be more properly understood by reference to the law on *erreur*. The question goes to the issue whether there was a true common will or *volonté*. A fraudulent misrepresentation clearly allows a contract to be avoided. An innocent misrepresentation inducing a contract but not forming part of its terms may, depending on the facts, and in particular the materiality and actual impact of the representation, be a *vice du consentement* going to the issue whether there was a true common will or *volonté*, just as *erreur* or *dol*.

(6) On the evidence, the plaintiff's failure to inform the defendant as to (i) the questionable circumstances in which the watch was alleged to have been acquired; (ii) the questionable circumstances in which the plaintiff came to be in possession of the valuation; (iii) the fact that by the date of the valuation, the valuer had not had the watch in its custody for at least 8 weeks, amounted to a *réticence dolosive* which enabled the defendant to reject the claim. Fraud was not proved by the defendant except to that extent. The doctrine of *réticence dolosive* was useful in a case such as the present because it formed part of that package of principles which go to identify whether the parties to a contract of insurance, being a contract *uberrimae fides*, have that common will or *volonté* to make it, and thus provide a proper basis for an assertion that *la convention fait la loi des parties*. Not all silences have the effect of providing grounds for a claim in nullity. The party making that claim has to relate the alleged *réticence dolosive* to a material particular of the contract and its actual impact upon his will or *volonté* to make the contract in order to discharge the burden of showing that the claimed ground of nullity has been established: *Toothill v HSBC Bank plc*[6] considered.

(7) On the facts the plaintiff failed to discharge the burden of showing that he had acquired title to the watch in question, that it was a genuine Hublot Big Bang Watch, and that it had a value of £46,000, although on the balance of probabilities the Court was satisfied that he had lost a watch on the occasion in question.

Quantum meruit

[6] 2008 JLR 77.

Viberts v Powell Royal Ct (Philip Bailhache, Commr and Jurats Liddiard and Fisher) [2011] JRC 021

OA Blakeley for the plaintiffs; the defendant appeared in person.

The plaintiffs, a firm of advocates, had been acting on legal aid for the defendant. The defendant ceased their retainer and, having obtained a loan from a finance company, instructed Sinels on a fee paying basis and paid them a retainer of £5000. On learning this, the plaintiffs sought payment of fees for their legal services in the sum of some £25,000 and issued a summons, relying on their engagement letter which had been countersigned by the defendant. This set out various circumstances under which the defendant would be obliged to make a contribution to her fees. These circumstances had not arisen. However the engagement letter also provided: "In the event that your finances change ... then you must inform us immediately. If you do not inform us, then we reserve the right to charge you on what we believe your financial position is. If you do fail to update us, we will also apply for your Legal Aid certificate to be revoked". The plaintiffs relied on this provision, contending that the loan constituted a change in the defendant's finances and that they were entitled to their fees.

Held, giving judgment for the plaintiff—

(1) All the constituent elements of a contract were present (*Selby v Romeril*[7]) and there were no vitiating factors. The mutual obligations of the parties were to be found in the letter of engagement sent by the plaintiffs to the defendant, and countersigned by her. Taken in the round, the plaintiffs performed the obligations under the contract for legal services that they had entered with the defendant. The question was then whether the loan meant that the finances of the defendant had changed. The view of the Jurats was that it did constitute a change. The defendant was solvent and had a pot of money from which she could pay fees, even if on a balance sheet test her finances had not changed. The plaintiffs were entitled to judgment for fees incurred after the engagement letter had been countersigned by the defendant. However part of the sum claimed related to services provided before the that date and was not covered by the engagement letter. The plaintiffs were only entitled to payment on a *quantum meruit* basis for work done prior to the signature of the contract.

(2) Lawyers should as a matter of good practice report to clients periodically on the level of fees incurred, whether the client is legally aided or not, and whether the period is measured in time or in fee increments. Few clients could now afford an open cheque book approach. Further the whole approach to the provision of legal services was ripe for review. It was surely be time for the profession to reconsider its business model and to adopt what Professor Richard Susskind, in *The end of lawyers? Re-thinking the nature of*

[7] 1996 JLR 210.

legal services (Oxford, 2008) called the commoditisation or packaging of legal services for a fixed fee.

***Vices du consentement*—meeting of minds**

Incat Equatorial Guinea Ltd v Luba Freeport Ltd Royal Ct (William Bailhache, Deputy Bailiff and Jurats Le Cornu and Liddiard) [2011] JRC 83A

M Goulborn for the plaintiffs; D Le Maistre for the defendant

The defendant contended that the parties had by an exchange of emails reached a settlement of their dispute and that the proceedings should therefore be discontinued. The issue was raised as to whether the requirements of Jersey law for a binding contract had been fulfilled. Both parties agreed that the proper law of the putative contract was Jersey law.

Held—

Requirements for a valid contract. In *Selby v Romeril*[8] the Royal Court adopted art 1108 of the French Code Civil, which was based upon the writings of Pothier, an author whose commentaries on the law of contract have been held in the highest regard in Jersey, and held that there were four requirements for the creation of a valid contract: (i) the consent of the party undertaking an obligation; (ii) that party's legal capacity to enter into a contract; (iii) "*objet*" or subject matter of the contract; and (iv) a legitimate "*cause*" or reason for the obligation to be performed.

Grounds of nullity. It is because the concept of *volonté* is so important to the making of contractual arrangements that the grounds of nullity which exist for *erreur*, *dol*, *déception d'outre moitié* and *lésion* become so comprehensible, since they go to whether there is truly a common will to the contracting parties—in other words, the reality of the parties' consent: *Marett v Marett*.[9]

Authority of *Chitty*. *Chitty on Contracts* is a helpful textbook in assisting the Royal Court in construction cases, where the language of a particular contract which is under consideration in the Royal Court is similar to the language which has been under consideration in the English courts. But it is a textbook which is to be approached with some caution insofar as the law of Jersey is concerned, as the basic principles of Jersey law do not have the same provenance. In this case the defendant inappropriately relied on *Chitty*. The Court also said, since Jersey law was to be applied to the contract, that expressions such as "offer and acceptance" and "invitation to treat" were not particularly helpful in considering the issue that was before it.

[8] 1996 JLR 210.
[9] 2008 JLR 384.

***Erreur*.** *Erreurs obstacle* were distinguished in *Marett* as being of these kinds—*erreur sur la nature du contrat* (a mistake as to the nature of the agreement), *erreur sur l'objet* (a mistake as to the subject of the agreement) and *erreur sur l'existence de la cause* (mistake as to the basis or purpose of the agreement). Each of these three kinds of *erreur* prevented the subjective meeting of minds which was essential for a valid contract to be formed.

***Erreur* distinguished from no meeting of minds.** However the doctrine of *erreur* was generally applied to vitiate a contract which had been made where the *erreur* went to the heart of the *volonté* to make the contract; so that one could genuinely say that there was a lack of true consent to make it: see Pothier, *Traité des Obligations* (1827 ed.), B.29, nos 17–19, This was not the same as saying that there had never been a meeting of minds in the first place.

Decision. On a proper construction of the email correspondence, the plaintiffs' agreement had been subject to contract and there was no sufficient meeting of minds so as to be able to conclude there was a contractual agreement. The application for an order of discontinuance was accordingly dismissed.

CRIMINAL LAW

Stay of proceedings

Warren v Att Gen Privy Council (Lord Hope, Lord Rodger, Lord Brown, Lord Kerr and Lord Dyson)

O Pownall QC and S Baker for the appellants; D Farrar QC and N Povoas for the Attorney General

The appellants were convicted by the Royal Court after a jury trial of conspiracy to import 180kg of cannabis into Jersey. A crucial part of the prosecution case comprised evidence obtained by the States of Jersey police as a result of bugging a hire car as it was being driven across France, Belgium and the Netherlands. The police were advised by a Crown Advocate that (a) they should not record conversations without the consent of the relevant foreign authorities but, nevertheless, (b) the Royal Court would be unlikely to exclude valuable evidence obtained solely on the basis that it had been obtained unlawfully and that this was ultimately an operational matter for the police. The States of Jersey Police bugged the car notwithstanding that the relevant foreign authorities had only given permission for a tracking device to be fitted. The States of Jersey Police deliberately misled the foreign police and authorities by saying the devices fitted were only a tracking device and a back-up tracking device. The Attorney General for Jersey and the Jersey Chief of Police were also misled. There were, however, significant countervailing factors which weighed against a stay (see (2) below). At a preparatory hearing the Royal Court (Tucker, Commr) rejected the appellants' applications for (a) the evidence to be excluded under art 76(1) of the Police Procedures and Criminal Evidence (Jersey) Law 2003, and

(b) a stay of the proceedings on the grounds of abuse of process by reason of prosecutorial misconduct. The appellant's appeals against those decisions were refused by the Court of Appeal (Vaughan, Steel and Jones, JJ.A, *Warren v Att Gen*[10]). The appellants appealed to the Privy Council against the refusal of a stay. A successful appeal would have lead to a quashing of the convictions.

Held, dismissing the appeals—

(1) The Court has power to stay proceedings in two categories of case (*R v Maxwell*[11]): (a) where it will be impossible to give the accused a fair trial—in this category, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more, and no question of the balancing of competing interests arises; and (b) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case.

(2) The present case would fell into the second category. In this category, a stay will be granted if the court concludes that in all the circumstances a trial will "offend the court's sense of justice and propriety" (*per* Lord Lowry in *R v Horseferry Road Mags' Court, ex p Bennett*[12]) or will "undermine public confidence in the criminal justice system and bring it into disrepute" (*per* Lord Steyn in *R v Latif*[13]). A balancing exercise is involved. Each case depends on its own circumstances. In abduction and entrapment cases the court would generally conclude the balance favours a stay. But rigid classifications are undesirable. *Dicta* of Lord Brown in *Latif* comprised a useful summary of some of the relevant factors. A "but for" test was not necessarily determinative. It was further unhelpful and confusing to say that the second category of case is founded on avoiding unfairness to the accused; unfairness to the accused is the focus of the first category. The Jersey Court of Appeal's criticism of *R v Grant*[14] in this regard was rejected by the Board.

(3) The focus of the appeal had to be the decision of the Commissioner: the appeal had to fail unless it was shown that the Commissioner's decision was not one which was reasonably open to him or that he failed to take into account material factors or took into account immaterial factors. The Appellants contended *inter alia* that the Commissioner failed to have sufficient regard to the investigative strategy of the police in this case calculated to ignore the laws of Jersey and foreign states and to mislead the Attorney General, the Crown Advocate advising the police, the Chief of the Jersey States Police as well as the foreign authorities. The case for a stay had considerable weight. The police were unquestionably guilty of grave prosecutorial misconduct; this was also a "but for" case. However there were factors which, taken cumulatively, the Commissioner was entitled to conclude weighed heavily against a stay:

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[10] 2009 JLR 248.
[11] [2010] UKSC 48.
[12] [1994] 1 AC 42, 74G.
[13] [1996] 1 WLR 104, 112F.
[14] [2005] EWCA Crim 1089.

- The offence with which the Appellants were charged was serious.
- The ringleader, Warren, was a professional drug dealer of the first order.
- The unwise advice of Crown Advocate to some extent mitigated the gravity of the misconduct of the police.
- There was no attempt to mislead the Jersey court. It was always intended that circumstances in which the evidence was obtained would be revealed to the appellants and Court would be required to decide whether to admit it under art 76(1) of the 2003 Law.
- There was real urgency in this case.

The Commissioner had to undertake a difficult balancing exercise. It was impossible for the Board to characterise the decision to refuse a stay in this case as perverse or one which no reasonable judge could have reached.

(4) Lord Hope stressed that the range of operational decisions which the police may take does not include deliberate law-breaking at home or abroad. Lord Rodger emphasised that, given the size of Jersey, its geographical position near France and close contacts with the UK, the States of Jersey police frequently have to co-operate with other forces which are subject to different laws. The conduct of the police in this case was not only wrong in principle but risked damaging relations with other police forces and law enforcement agencies. The fact that the Board had warned the police not to repeat such conduct would be a factor to be taken into account in future cases.

FAMILY LAW

Appeals—evidence

In re NN Royal Ct (Clyde-Smith, Commr and Jurats de Veulle and Nicolle) [2011] JRC 016

CM Fogarty for the appellant; RE Colley for the respondent.

The father of two children, who was not married to the mother, appealed to the Royal Court against the decision of the Family Registrar to (a) order indirect contact between him and the children, and (b) decline to order that he have parental responsibility. At the hearing before the Deputy Registrar the father indicated that, contrary to expectation, he would not be giving evidence. The Registrar ruled that that whereas there was authority under English law for the proposition that parents can be compelled to give evidence in public law cases, there was no authority to support the proposition that the Court can compel a parent to give evidence in private law cases. She therefore accepted that the father could not be compelled to give evidence and indicated that if he did not do so she would make her decision on the basis of the material before her.

Held, in relation to test on appeal and the father's declining to give evidence—

Test on appeal. The test on appeal is that now set in *Downes v Marshall*[15]:

"an appeal from the Family Registrar should only be allowed if there has been a procedural irregularity or if, in exercising his discretion, he has taken into account irrelevant matters, or ignored relevant matters, or otherwise arrived at a conclusion which the Court believes to be wrong."

Under this new test, the Court places greater weight on the Deputy Registrar's exercise of discretion, recognising her expertise, exposure to the primary evidence and the length of time spent processing and hearing the particular case. Under the new test, it was not open for the father to seek on appeal an order that he did not seek from the Registrar unless the Royal Court first set aside the decision of the Deputy Registrar under the new test.

The father's failure to give evidence. No point was taken on appeal as to whether it was correct that a parent could not be compelled to give evidence in private law proceedings concerning children. Article 2 of the Children (Jersey) Law 2002 requires the Court to give paramount consideration to the welfare of the children when determining any question with respect to their upbringing. Bearing this in mind the Court expressed the view that it must at the very least be entitled, if not obliged, to indicate to the parties the evidence it would wish to hear in order properly to discharge its statutory duty and it must be the duty of the parties to provide that evidence if reasonably possible. It cannot be for a party to decline to provide evidence in the face of an express request by the Court, and even if he or she cannot be compelled by the Court to provide that evidence, then depending on the questions that fall to be determined, the Court may well have to draw inferences adverse to that party, although it is clear that in this case the Deputy Registrar did not do so.

Children—separate representation

In re Q Royal Ct (Birt, Bailiff and Jurats Le Breton and Morgan) [2011] JRC 054

V Myerson for the Minister for Health and Social Services; D Gilbert for Q; TVR Hanson for the guardian of Q; C Hall for the mother.

The question was raised in care proceedings as to whether a child in question (Q) should continue to be separately represented by an advocate . Q was 14 years old at the time of the judgment. Her views as to the desired outcome of the care proceedings differed from those of the guardian appointed to represent her.

Held—

[15] 2010 JLR 265.

(1) In England and Wales there had been a change of approach. Whereas previously considerations of welfare of the child played a large part in considering whether the child was of sufficient understanding to instruct an advocate, more weight was now given to the need for a child to feel that his or her views have been properly communicated to the court: see *Mabon v Mabon*[16] in private law cases and *Re K and H*[17] in public law proceedings.

(2) However all of the English decisions were made in the context of rules of court which provided that, if there was a conflict between the views of the guardian and those of the child, the solicitor had to act on the instructions of the child if the child was of "sufficient understanding". That was not the case in Jersey. Article 75 of the Children (Jersey) Law 2002 deals with the appointment of both a guardian and a lawyer: *Re KK*.[18] Both appointments are discretionary, unlike in England and Wales. Thus, unlike in that jurisdiction, there is no obligation for a lawyer to be appointed even where the child is of sufficient understanding. given the very different statutory background, and given the need always to have regard to the welfare of a child in all public and private law proceedings concerning children, the Court could adopt a somewhat more flexible approach than in England and Wales when the views of the guardian differ from those of the child. In such cases the Court should ask itself two questions—

(i) Is the child of sufficient understanding to give instructions directly to his or her lawyer? Clearly, if not, that is the end of the matter and the lawyer will continue to act on the instructions of the guardian, with the guardian fulfilling his duty to convey the wishes and feelings of the child to the Court notwithstanding the different view of the guardian as to where the child's best interests lie.

(ii) If the child is of sufficient understanding, the Court should go on to consider whether welfare considerations lead to a conclusion that the child should nevertheless not be authorised to instruct his or her lawyer direct, so that the lawyer continues to take instructions from the guardian.

The Court would, however, take into account in reaching a decision the changing climate of opinion as to the importance of the autonomy of the child as described by *Mabon*.

(3) Although the article does not refer in terms to a "guardian", it is under art 75 that the person conventionally called a guardian in family proceedings is appointed, not r 4/2 of the Royal Court Rules.

(4) The test for "sufficient understanding" is not the same as that known as "Gillick competence". The level of understanding that enables a child to make an informed decision whether to submit to medical treatment or to a psychiatric examination is a much

[16] [2005] 2 FLR 1011.
[17] [2007] 1 FLR 2043.
[18] [2010] JRC 220.

higher level of understanding than is required to enable him to give instructions to a lawyer on his own behalf (see Thorpe, J in *Re H* at 449). Some guidance was to be found in a booklet entitled *Good Practice in Child Care Cases* published by the Law Society of England and Wales. While the decision as to competency is ultimately a matter for the court, assisted if necessary by expert evidence, much weight should be given to the views of the lawyer who is taking instructions from the child: *Re M (Minors) (Care proceedings: child wishes)*.[19] In order to have sufficient understanding to be permitted to instruct a lawyer independently of the guardian, a child does not have to have sufficient judgment and wisdom to know what is best for that child. The test is whether the child understands what is involved and is able to give coherent (rather than correct) instructions.

(5) Applying those principles to the facts, the Court concluded that Q had sufficient understanding to be competent to instruct her advocate and that there were insufficiently strong concerns about any adverse welfare consequences for her representation to be removed at what was a late stage. The Court therefore ordered that her representation continue.

MENTAL HEALTH

Legal proceedings

Highfield v Minister for Health & Social Services Court of Appeal (Sumption, Steel and Rowland, JJA) [2011] JCA 023

DF Le Quesne for the appellant/plaintiff; MH Temple for the respondent/defendant

Article 50 of the Mental Health (Jersey) Law 1969 provides:

"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."

[19] [1994] 1 FLR 749.

On 26 January 2007 the appellant, who had been compulsorily detained in a mental health unit, sustained severe injuries to his left ankle as a result of attempting to escape. He issued proceedings contending that the Minister owed him a duty to take reasonable care for his safety during his detention and that the Minister was vicariously liable for the negligent failure of staff at the unit to take reasonable steps to prevent him from trying to escape and injuring himself. However the appellant did not, prior to issuing the proceedings, obtain the leave of the Superior Number as required by art 50 of the 1969 Law. Since he had commenced the proceedings only at the very end of the applicable prescription period any further action was now time-barred. The Royal Court held that art 50 applied and that the proceedings were a nullity for want of compliance with the requirements of art 50(2). The appellant appealed, arguing *inter alia* that art 50(2) applied only to proceedings against health professionals and not to proceedings against the Minister and thus in effect that art 50 is subject to an implicit limitation corresponding to the express limitation in s 139(4) of the United Kingdom Mental Health Act 1983, which was introduced by amendment in 1982.

Held, dismissing the appeal—

(1) Article 50(1) is substantive and art 50(2) procedural. The appellant's problem arose as a result of art 50(2) which imposed a condition on the right to bring an action. He had to satisfy the Superior Number before bringing the proceedings that there is evidence of negligence amounting to a *prima facie* case. He did not seek to do that and it was now too late. It was common ground that if art 50(2) applied to the present proceedings, its effect would be to make them a nullity and that the Court would have no jurisdiction to entertain them: *Seal (FC) v Chief Constable of South Wales Police*.[20]

(2) Access to a court is a fundamental constitutional right and a statute should not be construed as restricting it unless it does so in clear terms. However art 50(1) did not seek to restrict access to Court, but was rather a substantive provision which dealt with the elements of a cause of action, and art 50(2), which did restrict access to the courts, did so in clear words.

(3) The expression "act purporting to be done in pursuance of this law" in art 50(2) could not be read literally because to do so would be to go beyond anything which, given the width of the statutory powers and functions of the Minister, the legislature could rationally be supposed to have wanted to achieve (for example, construed literally, it would include acts giving rise to liability under agreements with contractors employed to provide goods or services to mental health facilities). Wholly general words in a statute may be given a limited construction by reference to the subject-matter, context and purpose of the enactment in question: *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*.[21] The English courts have found that the implicit limits on the general language of the

[20] [2007] UKHL 31.
[21] [1971] AC 850.

equivalent provision in s 141 of the Mental Health Act 1959 are to be found in the concept of control: *Pountney v Griffiths*.[22] The essential feature of the Mental Health Act 1959 and the Mental Health (Jersey) Law 1969 is that they authorise public officials and hospital staff to do that which would otherwise be a wrongful invasion of a patient's liberty, namely to detain him and while he is detained to control him. Against that background, art 50 of the Jersey Law, like s 141 of the Mental Health Act 1959, applies to acts of a defendant purportedly done in the exercise of the statutory function of exercising control over a patient. By that test, the acts alleged against the Minister by the appellant were within the scope of the art 50(2). (Whether art 50(2) will also apply to a failure to exercise proper control over a patient resulting in injury or loss to a third party raised further questions and was best left until such a case arose.)

(4) This argument that art 50(2) did not apply in favour of the Minister was not sustainable for the following reasons: (a) it was directly inconsistent with the language of art 50(1), which provided that "no person" shall be liable for the relevant class of acts, and with that of art 50(2), which provides that proceedings in respect of such acts may not be brought against "any person"; (b) in the great majority of cases the Minister will be concurrently liable (vicariously) with a health professional (who is liable personally) and the same act could not be treated rationally as being done and not done purportedly pursuant to the Law; (c) the expressions "want of jurisdiction" and "in bad faith" in art 50(1) were more appropriate to the Minister directly exercising statutory discretions than his agents performing ordinary care functions; (d) the statutory purpose of protecting hospital staff from harassment by unfounded litigation would not be served by preventing actions without leave against the health professional personally responsible, but allowing them against the Minister, since they would still commonly have to give evidence in the case and respond to allegations about their conduct (which was identified as major concern on health professionals in the UK White Paper of 1978).

[22] [1976] AC 315.