Jersey & Guernsey Law Review – June 2012

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 LITIGATION

Appeals from the Magistrate's Court—concluded appeal—new evidence

Syvret v Att Gen (Royal Ct: Pitchers, Commr, sitting alone) [2012] JRC 022

Mr Syvret in person; SM Baker for the Attorney General

The appellant sought to re-open a concluded appeal against conviction in the Magistrate's Court on the ground that new evidence was available. The following issues were raised: (1) Does the Royal Court have jurisdiction to re-open a decision determining an appeal against conviction in the Magistrate's Court? (2) If there is such jurisdiction, what is the test to be applied where it is sought to re-open the appeal because of fresh evidence? (3) Did the evidence relied on in the present application pass that test?

Held, dismissing the appeal—

Jurisdiction. There was no further appeal from a decision of the Royal Court on appeal from the Magistrate's Court: art 26(2), Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949. Any power to re-open a final decision on appeal had therefore to lie in the inherent jurisdiction of the court. The need for finality in litigation was to be balanced against a requirement to avoid injustice to a litigant

(*Taylor v Lawrence*[1]), in particular in the case of a criminal conviction (as in *Interfact Ltd v Liverpool City Council*[2]). The possibility of a Jersey court recognizing inherent powers that are not provided in statute had been recognised by the Jersey Court of Appeal in both the civil (*Mayo Associates SA v Cantrade*[3]) and criminal jurisdictions (*Jones v Att Gen*[4]). Statute forbade further appeals from the Magistrate's Court but was silent as to re-opening existing appeals. There was no other statutory remedy available. It would be odd if there were no power to put right a gross injustice. The Royal Court did therefore have jurisdiction to permit the re-opening of a concluded appeal from the Magistrate's Court and admit fresh evidence. It was not necessary to consider a possible alternative route to the same end via the Human Rights (Jersey) Law 2000.

What is the test? Usually the application would take the form of an application to admit new evidence (but not necessarily, as in the case of a conviction which was later regarded as legally flawed). In fresh evidence cases, the starting point was the test for admitting fresh evidence on appeal, set out in *Hume v Att Gen*;[5] this test was equally applicable to appeals from the Magistrate's Court: *Knapp v Att Gen*.[6] The new evidence must: (i) have been unavailable at the trial; (ii) be relevant; (iii) be capable of belief; and (iv) be such as might have caused the original tribunal of fact to have a reasonable doubt as to the defendant's guilt. This, however, was only a starting point: bearing in mind the principle of finality in litigation, any application to admit fresh evidence after an appeal had been concluded must be even more carefully scrutinised. The court should bear in mind that the purpose of this power is, while respecting the need for finality in litigation, to provide a remedy where there is a real danger that an injustice has occurred. It is not intended to provide a pretext for a disgruntled litigant to seek endlessly to re-open a concluded case. In considering applications to re-open a concluded appeal and admit fresh evidence, assistance could be found in the statutory test for the UK Criminal Cases Review Commission set out in s 13 of the Criminal Appeal Act 1995.

Did the new evidence satisfy the test? The new evidence sought to be adduced by the appellant did not satisfy the test for the admission of

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[1] [2003] QB 528 at 6.
[2] [2010] 2 Cr. App. R. 29.
[3] 1998 JLR 173.
[4] 2000 JLR 103.
[5] 2006 JLR *N* [36].
[6] 1991 JLR *N*–7b.

new evidence in a current appeal; the test in relation to a concluded appeal would be more stringent. The application was accordingly dismissed.

CRIMINAL LAW

Sex offenders—notification order—appeals

Att Gen v E (Royal Ct: Clyde-Smith, Commr and Jurats Clapham and Nicolle) [2011] JRC 217B

SM Baker for the appellant; AP Begg for the respondent

The question arose as to the principles to be applied by the Royal Court on an appeal in relation to an order made by the Magistrate's Court under art 5(4) of the Sex Offenders (Jersey) Law 2010 that a certain period of time elapse before the defendant could apply for an order that he was no longer subject to a notification order imposed pursuant to art 5. In the present case the Magistrate's Court had ordered that the minimum period for the notification order should be one year. The Attorney General appealed. Article 5(4) of the 2010 Law provides—

> "Unless the court is satisfied that there is an exceptional reason why a shorter period would be appropriate, the period specified under paragraph (1), (2) or (3) must be a period of at least 5 years, being a period that the court is satisfied takes into account—(a) the likelihood of the person re-offending; and (b) the seriousness of the offence committed by the person".

Held, allowing the appeal and substituting a period of three years—

Test on appeal. Article 18(1) of the 2010 Law provides that an appeal shall be by way of a review. The notification requirements under the 2010 Law are a civil matter: *per* Bailhache, DB, *Att Gen v M*[7] and *Att Gen v Velosa*.[8] However art 18(3) of the 2010 Law, as it presently stood, obliged the court to apply the criminal law to the present appeal (a *projet* to amend the Law in this respect by way of the Sex Offenders (Amendment) (Jersey) Law 201- having been withdrawn pending revision also to the Court of Appeal (Jersey) Law 1961). The principles for a civil appeal by way of review were therefore not applicable. Nor did the standard test on an appeal against sentence (namely whether the decision was wrong in principle or manifestly excessive) have application because this was not an appeal against sentence. The legislation is concerned with the protection of

[7] [2011] JRC 174.
[8] [2011] JRC 026.

potential victims and does not intend the fixing of the period to be part of the sentence: *Velosa*. The appropriate test on an appeal by way of review in criminal proceedings is that applied on appeals to the Royal Court from decisions regarding bail made by the Magistrate's Court: *Att Gen v Skinner*;[9] applied in *Att Gen v Godel.*[10] The court has to be satisfied either that the Magistrate positively misdirected himself, or the proceedings were irregular, or that he gave a decision which no reasonable Magistrate could properly have given.

Issues of ECHR non-compliance. The view had been expressed by the Ministry of Justice that the use of the phrase "exceptional reason" in art 5(4) of the 2010 Law may impose a stricter limit than any "necessary and proportionate" derogation from the right to private and family life in art 8 of the ECHR and that the reference in art 5(4) to the "seriousness of the offence" being taken into account, coupled with the ability of the court to apply notification requirements retrospectively, may be breach of art 7 of ECHR (no punishment without law): see the report appended to the draft Sex Offenders (Amendment) (Jersey) Law 201-. Article 4(1) of the Human Rights (Jersey) Law 2000 provides that "So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights." The court accordingly read down art 5(4) of the 2010 Law so that it applied in a Convention-compliant manner: that is to say, as not requiring an exceptional reason but a reason necessary and proportionate for the prevention of crime and so that the seriousness of the offending was only relevant as one factor for the assessment of the risk of re-offending.

Principles underlying notification requirements. The principles underlying and justifying the notification requirements were analysed by Kerr J in *Re Gallagher's application for judicial review*;[11] applied in Jersey in *Att Gen v Roberts.*[12] The legislation had created a scheme the purpose of which is to protect potential victims from sexual harm by setting out a period of at least 5 years for the notification requirements which will be the minimum period that will apply to all who come within its purview, unless the court is satisfied that there is a reason why a shorter period would be appropriate applying the read-down test in (2) above.

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[9] 1994/127.
[10] [2009] JRC 249.
[11] (2003) NIQV 26.
[12] [2011] JRC 050.

Disposal. Rather than referring the matter back to the Magistrate, the court (using its general power under art 18(3) of the 2010 Law to make such order as it considers necessary to give effect to its determination of the appeal) brought the matter to a close without further delay by substituting the period which on the facts it considered was appropriate, namely a period of three years.

FAMILY LAW

Adoption—"special circumstances"

In re C (Royal Ct: Bailhache, B and Jurats King and Liddiard) [2009] JRC 036B

The applicant appeared in person; EL Hollywood for the Attorney General as *amicus curiae*

The sole male applicant sought to adopt infant twins, one of whom was female. Article 11(3) of the Adoption (Jersey) Law 1961 provides—

> "An adoption order shall not be made in respect of a female infant in favour of a sole applicant who is male, unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order."

The question therefore arose as to what special circumstances must exist in order for the court to make the adoption order sought in respect of the female twin.

Held, granting the order –

Authority relating to repealed UK provision. A similar provision had been included on UK adoption legislation until the Adoption Act 1976. The words in the provision "very strong": *R v Liverpool Justices, ex p W*:[13] not only must there be special circumstances, but the whole proceeding must be treated as an exceptional measure. The English cases were, however, of little assistance in determining what might constitute "special circumstances".

Court in favour of legislative reform. The generalised assumptions which could be presumed to be behind art 11(3)—the possibility of sexual or other abuse and the proper parenting skills for a female child—were no longer appropriate. These were merely examples of many different circumstances which ought to be considered by a court in determining the best interests of a child. The court hoped that the legislature would consider the repeal of art 11(2).

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[13] [1959] 1 All ER 337.

It was also not difficult to envisage circumstances in which art 11(2) conflicted with the duty of the court under art 3 to give first consideration to the welfare of the child.

Convention rights. The point was raised in argument but it was not necessary to decide whether this provision was compliant with art 8 Convention rights (right to family life). The court expressed some doubt as to whether an objective and reasonable justification could be shown for art 11(2).

Disposal. On the facts there were "special circumstances" justifying a departure from the general rule. It was relevant that (a) the infants were twins and should not be separated; (b) the applicant was a homosexual involved in a stable relationship; (c) the children subject to the application came from a troubled background where the parents had learning difficulties and such children were not easy to place with adopters; (d) the parenting abilities of the applicant and his partner appeared to be exceptional.

Comment: [Barbara Corbett] This case clearly highlights the need for an amendment to adoption law in Jersey, which has not kept pace with changes in society and the consequential use of adoption to provide homes and families for children in need of permanency. By clearly stating that "None of the generalised prejudices against the capabilities of a father or a mother seems to us any longer to have a place in the Law" the Royal Court has acknowledged the need for change. When statute law in Jersey is not amended, judges have to be creative to meet changed circumstances.[14]

The Adoption (Jersey) Law 1961 is being amended to take into account the recent passing of the Civil Partnerships (Jersey) Law 2012 to permit joint adoption by civil partners, which will go some way to resolving the difficulties with the current law. However, the opportunity should not be missed to also repeal art 11(3) of the 1961 Law, as urged by the Royal Court in *In re C*.

INJUNCTIONS

Interlocutory injunctions—disclosure orders

Dalemont v Senatorov (Royal Ct: Bailhache, DB, sitting alone) [2012] JRC 014

SM Baker for the plaintiff; MJ Thompson for the first and third defendants; PG Nicholls for the second and fourth defendants

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[14] See Hanson *Justice in our time: the problem of legislative inaction*, 2002 JL Rev 74–76.

The plaintiff as assignee sought to sue on a judgment of the Russian courts which had been obtained against the first defendant, an individual resident in Russia. The plaintiff further sought to pierce the corporate veil of the second defendant, a Jersey foundation, in order to enforce the judgment against the assets of the second defendant and to set aside certain further transactions involving the third and fourth defendants with a view to restoring certain assets to the second defendant for the purposes of enforcement. By way of interlocutory support of its claim, the plaintiff obtained *ex parte* a *Mareva* injunction in respect of assets situated in Jersey and a worldwide order for the disclosure of assets against each of the defendants. By the present summons, the first defendant, being a resident of Russia, sought to limit the obligation of disclosure to assets situated in Jersey on the ground *inter alia* that the court lacked jurisdiction to make a worldwide disclosure order against a non-resident where there was no worldwide *Mareva* injunction to be policed.

Held, dismissing the application—

Jurisdiction. The court had jurisdiction to make the order for worldwide disclosure of assets by a non-resident defendant in an appropriate case. *Krohn GmbH v Varna Shipyard*[15] was to be distinguished because in that case the sole purpose of the proceedings in Jersey was a *Mareva* injunction coupled with a disclosure order. The current proceedings were not so limited: by substantive action the plaintiff was suing on the Russian judgments in Jersey and also sought relief by way of Pauline action. It was accepted for the first defendant that he was a necessary and proper party and the second defendant was a Jersey foundation and therefore unquestionably resident. The court's jurisdiction was therefore established and there was no reason why the court should not be able to exercise the fullest jurisdiction against him. Further, although there was no worldwide *Mareva* injunction to be policed, this was a post-judgment disclosure order. The jurisdiction to make a post-judgment worldwide disclosure order is (in the words of Birt, DB in *Africa Edge SARL v Incat Equipment Rental Ltd* [16]) "particularly applicable" where the judgment debtor is a resident of Jersey. The words "particularly applicable" indicated that there were other circumstances where this jurisdiction was applicable and the present post-judgment case was just such a proceeding where the jurisdiction arose. It was also relevant that the disclosure order in the present case could not be ignored with impunity by the first defendant

[15] 1997 JLR 194.
[16] [2008] JRC 175.

since he could, for example, be disbarred from defending the present proceedings.

Exercise of court's discretion. The question was then whether the jurisdiction should in the court's discretion be exercised in the present case. The uncontested chronology suggested that it would be just for the plaintiff to have the benefit of disclosure orders to assist in the enforcement of its existing judgment. Further, in a post-judgment case, the use of the Island's financial services to hide assets so as to defeat a judgment creditor is as a matter of policy something to be discouraged, was a strong one. The courts should endeavour to ensure judgment debtors cannot escape judgments with impunity. It was also relevant that the plaintiff might otherwise be deprived of a practical remedy: *AK Investment CJSC v Kyrgyz Mobil Tel Ltd.*[17]

SUCCESSION

Executors and administrators—fees—insolvent estates

In re Moralee (Royal Ct: Clyde-Smith, Commr, sitting alone) [2012] JRC 038

AJ Clarke for the representor; CMB Thacker for the first respondent

The questions arose as to (1) whether an executor has a right to charge personal remuneration; (2) whether that right could be exercised in circumstances where the estate was insolvent; (3) whether the costs of administration carried out prior to a grant of probate, and in particular where the work in question had been carried out by third parties, could be properly charged to the estate; and (4) whether costs of administration enjoyed preferred status in an insolvency.

Held,

Executor is a fiduciary with no right to remuneration unless authorised by will. An executor is in a fiduciary position and like a trustee is subject to the rule that he should or she is not allowed to derive any personal advantage from the administration of the estate that is not expressly authorised: *Bray v Ford.*[18] An executor's remuneration is dependent on appropriate authority in the will and in the absence of such remuneration the executor must, like all fiduciaries, act gratuitously.

Position if the estate is insolvent. In the present case, the executor had authority under the will to take remuneration but the estate was

[17] [2011] 4 All ER 1027.
[18] (1876) AC 44.

insolvent. A testator can give authority to the executor to charge remuneration only to the extent that he has free funds to do so; such authority is therefore not effective against his creditors: *In re White, Pennell v Franklin.*[19] Insolvency brings about a shift in focus towards the interests of creditors analogous to company law where a summary winding up becomes a creditors' winding up. An executor cannot therefore continue to charge fees if the estate is insolvent unless he has the authority of the creditors or an order of the court. The court would be cognizant of the need for the estate to be competently administered and would not ordinarily expect a professional executor to act gratuitously. The court has inherent power to allow remuneration in a proper case (*Landau v Anburn Trustees Ltd*;[20] *In re Duke of Norfolk Settlement Trusts*[21]) and recognises the need for professional skills in the management and administration of trusts (*HSBC Trustees v Rearden*[22]). A balance sheet test of insolvency appeared the more appropriate for the present purpose. The absence of a statutory regime for the administration of insolvent estates meant that personal representatives should make greater use of their ability to seek directions from and the protection of the court.

Costs of administration prior to grant. The costs of administration can include work carried out prior to the grant being issued, provided that such work does not constitute intermeddling for the purposes of art 23(1) of the Probate (Jersey) Law 1998. Further, the doctrine of "relation back" applied in Jersey: the administrator's title relates back to the time of decease and he may ratify dispositions done by others which were for the benefit of the estate or otherwise in the due course of administration. Work done by lawyers prior to the grant of probate with a view to locating of the will, advising on domicile (*inter alia*) and arranging for the appointment of an executor dative properly formed part of the cost of the administration of the estate, if ratified by the executor. Such work did not constitute intermeddling. However the costs required careful scrutiny by the executor and must be reasonable costs. The executor was entitled to assistance of the court in this regard; the bills submitted by the lawyers were therefore referred to the Judicial Greffier.

Priority for costs of administration. The costs of administration are preferred over all other claims: Le Gros, *Traité du Droit Coutumier de l'Ile de Jersey*, "Du Droit de Préférence sur le Meuble dans les

[19] (1898) 2 Ch 217.
[20] 2007 JLR 250.
[21] (1982) Ch 61.
[22] [2005] JRC 130.

Faillites"; art 15 of the Wills and Successions (Jersey) Law 1993. Does this extend to work done by others which is subsequently ratified by the executor? The executor has a right of retainer over the assets in his hands, allowing the executor to withdraw from the assets and distribute to himself and other creditors of the same degree in full: *In re Rhoades.*[23] The right of retainer cannot, however, defeat claims given priority in a bankruptcy: *Att Gen v Jackson.*[24] Costs incurred by the executor and the costs incurred by third parties in the administration of the estate were of equal degree. But the executor had a right of retainer to withdraw from the assets in his hands enough to pay himself in full in respect of costs of the administration of the estate.

TRUSTS

Third party funding agreements

In the matter of the Valetta Trust (Royal Ct: Birt, B and Jurats Morgan and Fisher) [2011] JRC 227

LJ Springate for the representors and the new trustees; PD James for the minor and unborn beneficiaries

The question arose on a *Beddoe* application as to whether an agreement whereby a third party would provide litigation funding in return for a share of the proceeds was lawful under Jersey law.

Held, approving the agreement –

Maintenance and champerty. Historically, maintenance (which is support for litigation without a legitimate interest in it) and champerty (which is maintenance in return for a share of the proceeds) were considered to encourage judicial corruption and they were both criminal offences and torts under English law. The Criminal Law Act 1967 abolished them as such in England and Wales but expressly preserved the common law restriction on contracts of maintenance and champerty in so far as they were against public policy or otherwise illegal. As far as Jersey law is concerned, contracts of maintenance and champerty are also not inherently unenforceable or illegal. But, as in England, the particular agreement under consideration will be unenforceable to the extent that it is contrary to public policy.

Evolving concerns of public policy. Public policy is, however, susceptible to change. In England it had now been recognised that it was desirable, in order to facilitate access to justice, that third parties

[23] (1899) 2 QB 347.
[24] (1932) AC 365.

should be able to provide assistance. The same policy considerations applied in Jersey and there was now no material difference in this issue between Jersey law and English common law. The provision of the Code of 1771 that "Personne ne pourra contracter pour choses ou matières en litige" refers only to disputes which are actually in the process of being litigated. In considering a funding agreement, the underlying issue of public policy which the court has to consider in each case is whether the agreement "has a tendency to corrupt public justice": *Giles v Thompson.*[25] This requires close attention to the nature and surrounding circumstances of the particular agreement. The modern authorities showed a flexible approach and courts have generally found agreements under consideration to be enforceable. Certainly the mere fact that assistance is provided in return for a share of proceeds does not make the agreement unenforceable.

Key features of agreement. The agreement in the present case was valid. Its key features were: (a) the funder not only agreed with the plaintiffs to provide the legal costs of the plaintiffs but also to meet any adverse costs orders made against them; (b) in return, any damages recovered either by negotiation or by award from the court were to be applied first in reimbursing the funder for all the costs which were incurred and thereafter the proceeds were to be split between the plaintiffs and the funder. The proportion going to Harbour commenced with the greater of 25% of the proceeds or twice the legal costs of the plaintiffs, and increasing according to the length of time that the proceedings took, reaching a maximum of 50% or three times the legal costs of the plaintiffs, whichever was the greater; (c) control of the litigation rested with the plaintiffs although they had to keep the funder informed and agreed to conduct the litigation in accordance with the reasonable advice of their lawyers; (d) the funder had the right to terminate the agreement if satisfied that there had been a material adverse decline in the prospects of success. The funder would in those circumstances remain liable for all costs incurred during the existence of the agreement and for adverse costs to the date of termination.

Conditional fee arrangements. The agreement at issue was a third party funding agreement. The position is very different in the case of a conditional fee agreement between a litigant and his lawyer. It was a requirement of public policy that advocates, being officers of the court, should be prevented from putting themselves in a position where their own interests could conflict with their duties to the court. Unlike in England and elsewhere, where statutory relaxation has permitted

[25] [1993] 3 All ER 321.

conditional fee agreements, the position in Jersey remained unchanged.