Jersey & Guernsey Law Review – October 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

CRIMINAL LAW

Sentencing—Class C drugs

Att. Gen. v Page (Royal Ct: William Bailhache DB and Jurats Morgan, Fisher, Nicolle, Olsen and Liston) [2012] JRC 131

MT Jowitt, Crown Advocate; MJ Haines for Page; R Tremoceiro for Childs; RCL Morley-Kirk for Keane.

The defendants were sentenced to periods of imprisonment of between 2½ and 3 years by the Inferior Number of the Royal Court on counts of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a Class C controlled drug, (benzylpiperazine) contrary to art 61(2)(b) of the Customs and Excise (Jersey) Law 1999. Consistent with sentencing practice regarding trafficking in Class B and Class A drugs, the Inferior Number adopted a "starting point" approach, based on the quantity of drugs involved, before arriving at a sentence. The question was raised on appeal as to whether it was appropriate to adopt a "starting point" in a case of importation of Class C drugs.

Held—

Starting points in Class A and B cases. The Court of Appeal in *Att Gen v Campbell*[1] set a series of detailed starting points for drug trafficking in the Class B drug cannabis, making it plain that analysis by weight would not be appropriate for trafficking in amphetamines, normally dealt with, of course, in tablet form. As regards Class A drug trafficking, bands of starting points were set out by the Court of Appeal in *Rimmer v Att Gen*[2] (dealing with Class A drugs where the quantity could be measured by weight) and *Bonner v Att Gen*[3] where the quantity could be measured by the number of tablets.

Inappropriate in Class C cases. There had not been many sentencing decisions on drug trafficking in Class C drugs. Furthermore, in order to determine whether the starting point adopted by the court below in the present case was correct, the court would need to set out a table of starting points. It had, however, no evidence, scientific or otherwise, as to the prevalence of offending in Class C drugs, the effect of Class C drugs on the health of the taker, the variations in street value, or indeed any other potentially relevant factors. The *Bonner* table did not translate easily into Class C drugs. For these reasons the court concluded that the system of using starting points, which had been successfully applied for the purposes of consistency in sentencing in Class A and Class B drug trafficking offences, was not one that, at the moment, commended itself in relation to Class C drug trafficking.

Relevant factors in sentencing Class C traffickers. Consistency in sentencing drug trafficking in Class C drugs remained important. Furthermore the general principles applied in the case of Class A and Class B drugs were also relevant. Therefore: (a) the court will look when sentencing drug trafficking in Class C drugs to all relevant circumstances which will include the quantity of drugs and the closeness to the main supplier; (b) the court should ideally be made aware of the potential profit, and also should have knowledge as to the street value of the drugs in question (but recognising that street values go up and down, and that therefore these should be treated with some circumspection); and (c) the sophistication of the operation may well be a relevant factor.

LAND LAW

Unjust enrichment—proprietary estoppel—constructive trust—contract

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[1] 1995 JLR 136.
[2] 2001 JLR 373.
[3] 2001 JLR 626.

Flynn v Reid (Royal Ct: William Bailhache DB and Jurats Clapham and Le Breton) [2012] JRC 100

C Hall for the plaintiff; JN Heywood for the defendant.

The parties were an unmarried couple who had separated in 2005. The plaintiff sought a share of the value of the freehold house in which they had lived on various grounds. The house had been purchased in the sole name of the defendant because only he had housing qualifications. He provided the deposit but the bank loan providing the rest of the purchase price was borrowed in joint names. At the time of purchase the parties entered into a contract governing the occupation and financial arrangements regarding the house but it bore no relationship to what actually happened in that they had simply lived together as a couple. The plaintiff sought an order that the defendant sell the property and pay general damages for breach of contract and/or 50% of the equity or such other sum as the court deemed just. The plaintiff's claim was based on (i) breach of contract; (ii) proprietary estoppel; (iii) constructive trust; or (iv) unjust enrichment. At the time of trial the property had since been sold by the defendant and he had received the entire net proceeds of sale.

Held, granting the plaintiff a remedy in damages on the ground of unjust enrichment—

No importation of new regime for unmarried couples. The court would not as a matter of common law import a wholesale new quasi-matrimonial regime for unmarried couples similar to the court's powers under the Matrimonial Causes (Jersey) Law 1949. That was a matter for the legislature.

Claim in contract. The problem in this case was that the contract had been disregarded by the parties from the start and was an artificial arrangement. The court will not readily uphold documents which are a fiction: *Re Knights (Jersey) Ltd*.[4] As regards the four requirements for the creation of a valid contract laid down in *Selby v Romeril*,[5] the court emphasised—

> "In relation to the requirement for consent of the parties undertaking the obligations, there must be shown a true consent, a true desire, or, adopting the French word, '*volonté'* that the arrangement become legally binding between them."

The rules applied to a domestic contract as much as to a commercial contract. The contract did not in fact govern the relationship between

[4] 1950–66 JJ 207.
[5] 1996 JLR 210.

the parties and had not been intended to do so. Accordingly, plaintiff's claim based on contract was rejected. The court would have had to rewrite the contract to do otherwise.

Proprietary estoppel. The court's approach in Jersey as to whether proprietary estoppel was part of the law had been inconsistent. The central difficulty in applying the English doctrine of proprietary estoppel in Jersey was that it required the court to accept the principle that there is a theoretical division between the legal ownership of immovable estate in Jersey and its beneficial ownership. This was no doubt what Page, Commr had in mind when he referred in *Maçon v Quérée*[6] to possible situations where the tensions between the demands of equity and the deeply entrenched principles of Jersey land law might pose difficulties for the court which were intractable. The doctrine of proprietary estoppel was not part of Jersey law if its effect was to create an equitable interest in land that existed in parallel with the legal interest and this appeared to be the bedrock of the plaintiff's claim. Accordingly, the plaintiff's claim in proprietary estoppel was rejected. Furthermore, on the facts the requirements for proprietary estoppel were not met.

Constructive trust. The obvious difficulty in a claim for constructive trust over Jersey land was that art 11(2)(a) of the Trusts (Jersey) Law 1984 provides that "(2) Subject to Article 12, a trust shall be invalid—(a) To the extent that— . . . (iii) it purports to apply directly to immovable property situated in Jersey . . ." In *In re Esteem Settlement*[7] Birt, B expressed a provisional view *obiter* that art 11(2)(a) did not apply to a case of constructive trust where proceeds of fraud had been invested by a trustee in Jersey immovable property for his own benefit. That was not the case here and it was unnecessary to decide the point. There was no distinction in Jersey between legal and beneficial interests in immovable property. To accept that such equitable interests existed in immovable property would mean that it was no longer possible to indentify ownership of land by a check in the Public Registry. A constructive trust of Jersey immovable estate was therefore not possible in the circumstances such as those in the present case. This was also consistent with the decisions of the Guernsey courts in *Pirito v Curth*[8] and *Bougourd v Woodhead*.[9]

Unjust enrichment

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[6] 2001 JLR 80.

[7] 2002 JLR 53.

[8] 2003–04 GLR 218 (GCA).

[9] 2009–10 GLR 487.

(a) The doctrine of unjust enrichment is one which the Royal Court is prepared to recognise in principle (for example, in *quantum meruit* claims; in *Planning & Environment Cttee v Lesquende*[10]; and in *In re Esteem Settlement*[11]) but the Royal Court has deliberately refrained from setting out the limits of a claim of unjust enrichment.

(b) The jurisprudential basis of the doctrine in Jersey was to be found in Pothier's discussion of *quasi-délits*—"*des obligations qui ont pour seule et unique cause immédiate la loi*"[12]; see also Domat *Loix Civiles [Traité de Loi]*, chap 9, at para iv. This Roman law principle that *nemo ex alterius detrimento fieri debet locupletari*—no man ought to be made rich out of another's injury—was given effect in French decision of the Court de Casssation in *Patureau-Miran v Boudier*.[13] The relevant principle, which is not found in the *Code Civil* or other law but is seemingly based on natural law and general principles of *équité* of the kind described above, is that a person who, without any *cause*, obtains a benefit at the expense of another is bound to restore it. That was entirely consistent with the practice of the Royal Court over many years in allowing, as examples of unjust enrichment, claims for money paid by mistake of fact, or claims for damages on a *quantum meruit*.

(c) In Scots law, except in those cases where it can be shown that a title was held in trust although it is *ex facie* absolute, a distinction between the legal and beneficial interests in heritable (immovable) property is also not recognised. A remedy for co-habiting couples has been found in the restitutionary remedy of unjust enrichment: *per* Lord Hope, *Stack v Dowden*[14]*; Mackenzie v Nutter*[15]; *Satchewell v Macintosh*.[16] The court must ask itself: (a) has the appellant been enriched at the expense of the respondent and what is the nature of that enrichment? (b) if so, was that enrichment unjust? (c) if so, what remedy, in the particular circumstances of this case, is open to the respondent? and (d) is that remedy equitable?: *Mackenzie*.

(d) This approach was consistent with the slender authority under Jersey law. The starting point is the legal interest. The court then looks at whether there has been enrichment which benefits the legal owner or owners or perhaps some of them, at the expense of the claimant in a

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[10] 1998 JLR 396.
[11] 2002 JLR 53.
[12] Pothier, *Traité des Obligations*, 9th edition, tome 1 chapter 1, para. 123.
[13] Cass. req. 15 June 1892.
[14] [2007] UKHL 17.
[15] [2007] SLT (Sh Ct) 17.
[16] [2006] SLT (Sh Ct) 117.

way that is unjustifiable. Approaching the problem in this way enabled the court to consider enrichment problems holistically, rather than in separate compartments.

(e) On the facts the court awarded the plaintiff a remedy in damages on the ground of unjust enrichment.

NUISANCE

Statutory Nuisance (Jersey) Law 1999

Fernando v Minister of Health (Royal Ct: William Bailhache DB and Jurats Le Breton and Olsen) [2012] JRC 102

FJ Benest for the appellant; H Sharp QC, HM Solicitor General, for the respondent.

In an appeal against an abatement notice issued to the appellant under art 5 of the Statutory Nuisances (Jersey) Law 1999, questions was raised as to the role of the court on such an appeal and the meaning of the word "nuisance" in the Law. The alleged nuisance complained of emanated from a collection of exotic birds.

Held, granting the appeal—

Test and burden on appeal. The appeal provisions in the Schedule to the Law were different from those in other statutes. So far as relevant in the present appeal, they were as follows—

"(3) The grounds referred to in paragraph (2) are—

(a) That the abatement notice is not justified by Article 5;

. . .

(c) That the Minister has refused unreasonably to accept compliance with alternative requirements, or that the requirements of the abatement notice are otherwise unreasonable in character or extent, or are unnecessary;

(d) That the time, or where more than one time is specified, any of the times, within which the requirements of the abatement notice are to be complied with is not reasonably sufficient for the purpose."

The ground under (a) required the court to consider whether the decision of the Minister was objectively right; it was not a *Token*[17] or

[17] *Token Ltd v Planning and Environment Committee* 2001 JLR 698

Wednesbury[18] test. The burden lay on the appellant to satisfy the court to the civil standard that the Minister's decision was not justified.

Meaning of "nuisance" in the 1999 Law

(a) So far as relevant, art 2(1)(h) of the 1999 Law provides that—

> "Subject to paragraphs (2) and (3), the following matters constitute 'statutory nuisances' for the purposes of this Law . . .
>
> . . .
>
> (h) Noise emitted from premises so as to be prejudicial to health or a nuisance."

The word "nuisance" was not defined. Did "nuisance" for this purpose have the same meaning as under the English tort of nuisance, given in particular that the Law was based on the Environmental Protection Act 1990? Could the English concept of nuisance be read into the definition on the basis that at the time of enactment of the 1999 Law it was perhaps understood that the Jersey law of nuisance followed English common law? Or was nuisance here a reference to the law of *voisinage*?

(b) The Court of Appeal in *Rockhampton Apts Ltd v Gale*[19] found the Royal Court had been correct in concluding in that case that there was no persuasive evidence that the English tort of nuisance had been assimilated into Jersey law. It was only in respect of the tort of negligence that the Jersey law of tort specifically followed English law. It was therefore impossible to construe the Statutory Nuisances (Jersey) Law 1999, where the word "nuisance" is used, as meaning that this was a reference to the Jersey law of nuisance which was the same as the English law of nuisance. *Rockhampton* may have been articulated later, but it is firmly based upon the law as it was perceived to have been for a very considerable period. Nor could it be concluded that the word "nuisance" in the 1999 Law had a technical definition which was the same as the English law of nuisance. Although the States could theoretically have adopted that approach, it would require the plainest language and in the absence of any such language, the statute could not be construed in that way.

(c) For the purposes of the appeal, because this was not a case in *voisinage* directly, the word "nuisance" in art 2 of the 1999 Law

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[18] *Associated Provincial Picture Houses Ltd. v Wednesbury Corp*. [1947] 2 All E.R. 680

[19] 2007 JLR 332.

means an act which a reasonable person would find harmful or offensive and for which there is a legal remedy. The difficulty surrounding definitions meant that the Minister should give urgent consideration to amending the Law. It was also of concern that the 1999 Law made the issuance of a statutory abatement notice by the Minister mandatory, rather than a matter of the Minister's discretion, whenever the Minister is satisfied that a statutory nuisance exists.

(d) As regards excessive noise, and following *Key v Regal*,[20] the test on this appeal was whether the appellant had shown on the balance of probabilities that the noise emitted from his house arising from the parrots and other exotic birds on the premises was not so excessive that no reasonable land owner in the neighbourhood should be expected to have to bear it.

SUCCESSION

Probate—presumption of death

In re Neill (Royal Ct: Clyde-Smith Commissioner and Jurats Le Cornu and Milner) [2012] JRC 106

The daughter of the putative deceased appeared in person; CMB Thacker for the third party convened.

The son of the putative deceased sought a grant of probate in Jersey but could not provide evidence of death. On a reference by the Registrar of Probate, the court was asked to determine whether the father, of whom no news had been heard for over seven years, could be presumed to have died. A declaration of presumed death was opposed by the applicant's sister on the ground that there could be other explanations for the absence of news of their father. The son filed an answer to his sister's contentions but did not file an affidavit, although he had been directed to do so by the court, and did not attend the hearing.

Held, dismissing the application—

Presumption of death at customary law and associated order under the Probate (Jersey) Law 1998

(a) *Rebuttable presumption of death after 7 years*. Under Jersey customary law, there is a presumption of death seven years after the last news: "*Considérant que par la Coutume de ce Bailliage, un absent est légalement présumé mort et que sa succession est réputée ouverte après le laps de sept années révolues à partir de la dernière*

[20] 1962 JJ 189.

nouvelle".[21] Although there was no recent report of its application, this principle had been applied consistently in a number of cases in the 18th and 19th centuries (see *Godfray v West*,[22] *Marett v Robin*[23] and *O'Boyle v Le Masurier*[24]) and there was no doubt that it remained part of the customary law. A similar presumption applies under English law.[25]. There is no bar from calling evidence to rebut the presumption and it is therefore a rebuttable presumption.

(b) Article 7(4) of the Probate (Jersey) Law 1998 provides—

> "If the Inferior Number is satisfied that the death of the person to whom the application relates may be presumed beyond all reasonable doubt to have occurred on or after a certain date, it may make a declaration to that effect and such order as the circumstances require."

Persuasive and evidential burdens

(a) In this case, it was the son who was applying for a grant of probate and the burden (the persuasive burden) was upon him to satisfy the court beyond all reasonable doubt that the death of his father may be presumed.

(b) Where a presumption operates, the court may draw a certain conclusion: following *Phipson on Evidence*, para. 6–16. On most occasions this will be in the absence of evidence in rebuttal, thus assisting the party who bears the burden of proof on that issue. The effect of a presumption may be to require less evidence than would otherwise be necessary.

(c) Further, following *Phipson on Evidence* (para 6–17), where a rebuttable presumption of law applies in favour of one party (in this case, the son) on the proof or admission of one fact (no news for seven years) another fact (the death of the father) is to be presumed. Once the presumption applies, the evidential burden is on the other party (in this case, the sister) to disprove the presumed fact. Even if the sister adduced evidence sufficient to rebut the presumption, the persuasive burden remained on the son to satisfy the court that the death of his father should be presumed.

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[21] *Du Val v Le Gros* Exs 1877 Dec. 3rd, as referred to by Le Gros, *Traité du Droit Coutumier de L'Île de Jersey*, p. 86
[22] (1888) 212 Ex 411
[23] (1897) 218 Ex 423
[24] (1905) 223 Ex 500.
[25] *Phipson on Evidence* 16th edition, at para 6–26.

Disposal. The standard of proof required under art 7(4) of the Probate (Jersey) Law 1998, beyond all reasonable doubt, was high (being the standard required in criminal cases). The son had filed an answer seeking to respond to the assertion that his father might still be alive, but he had failed to file an affidavit as directed or to attend the hearing; this was not conduct conducive to the discharge of the persuasive burden upon him as an applicant for a grant. The court had also been deprived of the ability to hear his evidence and to have it tested on oath in relation to a number of troubling matters. The court could only proceed on the evidence before it and this was enough to rebut the presumption. The court therefore declined to make the declaration.

TRUSTS

Confidentiality—anonymisation of trust judgments—criticisms of settlor etc

Re C Trust (Royal Ct: Clyde-Smith Commr and Jurats Kerley and Nicolle) [2012] JRC 098

MH Temple appeared in person; RJ MacRae for the first and second respondents; PD James for the fourth respondent

The court had set aside an instrument of appointment, by which certain grandchildren had been excluded from a Jersey trust during the lifetime of the settlor's widow, on the ground that the decision of the trustees was one at which no reasonable trustee could have arrived. Although the application had been brought under art 51 of the Trust (Jersey) Law 1984 these were hostile proceedings which came within the fourth of the categories described in *Re S Settlement*,[26] namely hostile litigation to be heard and decided in open court. The judgment was critical of the widow, the father, the trustee and the protector. The trustee, the protector and the widow sought anonymisation and redaction of the judgment.

Held, refusing the application—

Anonymity in relation to trust cases. The leading authority was *JEP v Al Thani*[27] but the principles to be applied in cases involving rectification of trusts had been helpfully summarised by Bailhache, B in the case of *In re Sanne Trust Co Ltd*[28] at paras 2–7 and were well-established—

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[26] 2001 JLR *N*–37.
[27] 2002 JLR 542.
[28] [2009] JRC 025B.

(a) The court recognised two conflicting principles: (i) that justice must be done in public (the burden being on the party seeking an order for hearing in camera to prove that that was the only way in which justice could be done); and (ii) that private trusts should remain confidential.

(b) Administrative applications under art 51 of the Trusts (Jersey) Law 1984 are customarily heard in private. But an application for the rectification of a settlement or other trust document is not an administrative matter. Applications for rectification involve the commission of a mistake by someone and the exercise of a judicial discretion as to whether that mistake can be put right. There was no public interest in sparing the blushes of professional advisers. On the contrary, there might be said to be a public interest in ensuring that such errors are put into the public domain. Furthermore, the exercise of the court's discretion may affect others, particularly tax authorities; as a matter of generality there was no justification for sitting in private to hear an application for the rectification of a trust document.

(c) There was no compelling reason why the mistakes of professional advisers should involve the public exposure of family arrangements which would otherwise have remained entirely private. The two principles referred to above were reconciled in such cases by the court sitting in public but redacting the judgment so as to excise any reference to the name of a beneficiary and/or a settlor or protector.

Decision. In the present case, just as errors made by professional advisers in rectification cases were said in *Re Sanne* to be of public interest, so the conduct of trustees and protectors carrying on trust company business in the Island was just as much of public interest. Anonymisation and redaction of the judgment in respect of the widow, the trustees and the protector so as to protect minors from acquiring knowledge of what had happened was not a matter for the court but for those with parental responsibility. The fact that information that would otherwise be confidential to the trust was now in the public domain, to the extent necessarily referred to in the judgment, was an inevitable consequence of proceedings being conducted in public. Further the suggestion that, having given the judgment publicly, the court should be invited to take steps to avoid the Family Division of the English High Court being aware of its terms was rejected. The court had stressed the importance of the Family Division in England basing any decision it makes upon the true financial position of the parties and the duty is upon the trustee to make sure that the fullest information is available to the parties and, through them, to the Family Division: *In re*

H Trust.[29] The court accordingly rejected the applications. The judgment was to be published in full, save to the extent necessary to protect the grandchildren from being identified and to protect the privacy of the family members as *per Re Sanne*.

Confidentiality—disclosure to foreign court

In re M Trust (Royal Ct: Birt B and Jurats Le Cornu and Marett-Crosby) [2012] JRC 127

AD Robinson for the representors; RJ MacRae for the first respondent; the second respondent appeared in person.

Adult beneficiaries of four BVI-law governed trusts sought the leave of the court for the disclosure to the Family Division of the English High Court of certain documents which had been made available to them in the course of a prior application by their trustee to the Royal Court for directions. They had already made undertakings to make these disclosures on 24 hours notice to the Family Division and were resident in England. Their difficulty was that the directions proceedings in the Royal Court had been held in private and they might therefore be held in contempt of the Royal Court if they made any such disclosures required by the Family Division without the further leave of the Royal Court.

Held, granting leave to the representors in part—

Jurisdiction. The trusts were governed by the law of the BVI but the trustee was a Jersey company resident in Jersey and the administration of the trusts was carried on in Jersey; hence the court had jurisdiction under art 5(b) and (d) of the Trusts (Jersey) Law 1984.

Confidentiality in applications for directions

(a) Applications for directions by trustees under art 51 of the Trusts (Jersey) Law 1984 were an important part of the supervisory jurisdiction of the court in relation to trusts. They are invariably held in private because the application will often concern legally or commercially sensitive matters and they are administrative rather than adversarial proceedings. They do not usually determine civil rights for the purposes of art 6 of the ECHR.

(b) It was of vital importance that, if such applications are to serve the purposes for which they are intended, information and documents received by those who are convened as parties to such proceedings should be held in confidence. The trustee is under a duty and must feel able to make full and frank disclosure in relation to the application. It

[29] 2006 JLR 280.

must be able to summarise the arguments for and against the proposed course of action, including any weaknesses or possible risks in relation to what is proposed: *Deery v Continental Trust Co Ltd.*[30] Claims to privilege and confidence were expected be upheld by an English court: *Deery*; and in English law, *Midland Bank Trust Co Ltd v Green*[31].

(c) Given the clear public interest reasons for hearing such applications in private, it is a contempt of court for a party to publish information which he only receives as part of such an application. If a party to art 51 proceedings is already in possession of documents independently of the application, the fact that they are produced and referred to by another party in the art 51 proceedings held in private did not prohibit the first party from using those documents in other proceedings or, indeed, publicly; but, if he was not hitherto in possession of those documents and has only received them as a result of the art 51 proceedings, then it would be a contempt for him to disclose them to any other party: *Westbond International Bank Ltd v Cantrust (CI) Ltd.*[32]

(d) Applying that to the facts of the present case, it would be a contempt of court for the adult beneficiaries to disclose without leave of the court any document which they received in the proceedings by the trustee for directions save to the extent that they were in possession of such documents independently of the proceedings. They had therefore very properly brought the present application for leave.

General observations. The court respectfully invited the Family Division to consider very carefully whether it needed to make any order that the adult beneficiaries disclose material relating to the proceedings for directions. If the Royal Court were to find that the Family Division began routinely to make orders requiring disclosure of applications by trustees brought in private, the court would have to consider amending its procedures either so as heavily to redact any material served on English-resident beneficiaries or to preclude material from being sent out of the jurisdiction and allowing only inspection within the jurisdiction. That would seem to be in no-one's interests.

Legally privileged material and sensitive material. If, despite this, the Family Division considered that some disclosure should be made, the court hoped that it would have regard to the following remarks in relation to two categories of material indentified by the

[30] [2010] JRC 001.
[31] [1980] Ch 590.
[32] [2004] JRC 111.

court and the trustee in present case: legally privileged material and sensitive material.

(a) As regards legally privileged material, the court very much hoped that the Family Division would recognise the protection necessary for legally privileged material and would not order its disclosure. The Royal Court was not willing to grant consent to the disclosure of legally privileged material identified in the present case, whether in the form of the original advice or in the form of documents which quote from or otherwise identify the content of that advice.

(b) As regards other material which the court identified as sensitive material, in the very unusual circumstance of the case and taking into account the nature of the material in question (which was not particularly sensitive), the adult beneficiaries should be given leave to disclose the sensitive material if required to do so by the Family Division. The court nevertheless expressed the hope that the Family Division would respect the nature of the directions' proceedings and not order disclosure of the sensitive material.

Powers and duties of trustees—whether *bon père de famille*

In re A & B, re C Trust (Royal Ct: Clyde-Smith, Commr. and Jurats Kerley and Nicolle) [2012] JRC 086B

MH Temple for himself; RJ MacRae for the first and second respondents; PD James for the fourth respondent.

The representors, through their guardian, sought to set aside an instrument of appointment under which they were effectively excluded from the beneficial class of a Jersey trust during the lifetime of their grandmother.

Held,

(a) The court set aside the instrument of appointment for the reasons fully given in the judgment.

(b) *Obiter*. Under Jersey customary law, a person in the position of a trustee for a minor (a *tuteur*) is required to act as a *bon père de famille*: *Payne v Pirunico Trustees Ltd*.[33] This obligation, which existed equally under Guernsey customary law, had been expressly incorporated into the duties of trustees under s 18(1) of the Trusts (Guernsey) Law 1989. It had not been expressly incorporated into the duties of trustees under art 21 of the Trusts (Jersey) Law 1984. That Law was not a codification of laws regarding trusts. It might,

[33] 2001 JLR 1.

therefore, be argued that under Jersey law and in the context of a family trust involving minor children such an obligation applies to a trustee. It might not add anything to the existing duties of a trustee under art 21 but it had a powerfully paternalistic element. Jersey law had recognised the paternalistic nature of trustees' powers: see *In re Esteem Settlement.*[34]

[34] 2001 JLR 7, para 38.