Jersey & Guernsey Law Review – February 2013

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

Costs—indemnity basis

Federal Republic of Brazil v Durant Intl Corp (CA: McNeill, JA sitting as a single Judge) [2012] JCA 160

DS Steenson for the applicants; EL Jordan for the respondents.

The plaintiffs applied for costs on an indemnity basis after the dismissal by McNeill, JA of the defendants' application for leave to appeal against the decision of Page, Commr (refusing leave to re-amend their answer and an application for leave to adduce fresh evidence). Page, Commr had already found the defendants' conduct in relation to this matter to be unreasonable and the application for leave to appeal arose from an application which had already been deemed to be so unreasonable by Page, Commr as to be deserving of an indemnity costs award below.

Held, awarding indemnity costs—

The grounds for indemnity costs were most recently considered by the Court of Appeal in *Leeds v Weston*.[1] In reviewing earlier decisions of the Court of Appeal, Jones, JA noted that there had to be some

[1] [2012]JCA088.

special or unusual feature justifying such an award, such as culpability, abuse of process, deceit, unreasonable behaviour, abuse of court procedures or the submission of unnecessary evidence; but not necessarily a lack of moral probity, malice or vexatious conduct. Although in the present matter the defendants did not oppose the application for indemnity costs, the matter fell within the discretion of the court and as the step was an unusual one, the application required consideration.

It will not always follow that a successful respondent on an application for leave to appeal and ancillary orders will be entitled to an award of costs on the indemnity basis because that has been the view of the court below against whose order an application for leave is being made. However, in the present case, an award of indemnity costs was justified. Page, Commr had already found the defendants' conduct in this matter unreasonable and had awarded indemnity costs in the court below. Faced with the knowledge that they had to show that something had clearly gone wrong, the defendants had advanced little if anything more than had been advanced in the Royal Court. McNeill, JA emphasised:

> "Applications for leave to appeal are serious matters and take up the time of respondents, busy practitioners and court resources . . . In my opinion, the presentation of the applications to this court, unsupported by contentions of substance, constitute unreasonable behaviour in that the circumstances [of the present case] show that there was no properly arguable basis for the applications. The applications should not have been made and the fair result and reasonable result in all the circumstances is that the respondents should be entitled to their costs on the indemnity basis."

COMPANY LAW

Articles of association

Trilogy Management v YT Charitable Foundation (Intl) Ltd (CA: McNeill, Montgomery and Nugee, JJA) [2012] JCA 204

SM Baker for the representor; JP Speck for the first respondent; NF Journeaux for the eighth respondent; the other respondents did not appear and were not represented.

The question was raised as to the proper interpretation of a reference to "profits" of a particular year in a Jersey company's articles of association.

Held, on the principles of construction—

Principles of construction of documents generally

Per Martin, JA, *La Petit Croatie Ltd v Ledo*,[2] summarising *dicta* of Page, Commr in *In re Internine Trust*[3]—

> "The aim is to establish the presumed intention of the parties from the words used; but the words used must be construed against the background of the surrounding circumstances, which means the circumstances that must be taken to have been known to the [parties] at the time. These circumstances include anything that would have affected the way in which the language would have been understood by a reasonable man, except that evidence of subjective intention is ordinarily inadmissible. The words must also be read in the context of the document as a whole, and should so far as possible be given their ordinary meaning; but a different meaning may have to be given to them if a reading of the document as a whole and common sense so require."

Where parties have used unambiguous language the court must apply it (*per* Lord Clarke in *Rainy Sky SA v Kookmin Bank*[4]). The court cannot rewrite the language which the parties have used in order to make it conform to business common sense: *per* Hoffmann, LJ in *Co-operative Wholesale Socy Ltd v National Westminster plc*;[5] cited in *Rainy Sky SA*, at para 23; *Socy of Lloyd's v Robinson*.[6] However, if the words used are capable of more than one construction, that which appears most likely to give effect to the commercial purpose of the agreement should be chosen: *per* Hoffmann, LJ in *Co-operative Wholesale Socy Ltd v National Westminster plc*; and *per* Lord Steyn in *Socy of Lloyd's v Robinson*; and *Rainy Sky SA* at paras 21, 23 and 25. The exercise of construction is therefore essentially a unitary one: *per* Lord Clarke in *Rainy Sky SA*, at para 21, "neither uncompromisingly literal nor unswervingly purposive": *per* Bingham, MR in *Arbuthnott v Fagan*.[7] The clearer the language that the parties have used, the slower the court should be to displace that meaning by reference to considerations of the commercial consequences: *LB re Financing No 3 Ltd v Excalibur Funding No 1 Plc*.[8]

Construction of articles of association

In the construction of the articles of association of an incorporated entity there are severe limits on the admissibility of surrounding

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[2] [2009]JCA221, para 11.
[3] 2005 JLR 236, at para 62.
[4] [2011] 1 WLR 2900, at para 23.
[5] [1995] 1 EGLR 97.
[6] [1999] 1 WLR 756.
[7] [1995] CLC 1396.
[8] [2011] EWHC 2111 (Ch), at para 46.

circumstances. Evidence of surrounding circumstances is probably admissible only to the extent of identifying persons, places or other subject matter referred to in the articles. Extrinsic evidence is not admissible for the purposes of implying a term based on business efficacy. To allow reference to extrinsic circumstances for such a purpose would permit the notional possibility that different implications would arise between the company and different subscribers: *Bratton Seymour Service Co Ltd v Oxborough*[9] (addressing a question of implication but equally applicable to the construction of express terms). The memorandum and articles of a company, once registered, constitute a statutory contract, the terms of which are available to any member of the public, and as such cannot be affected by extrinsic matters known only to certain persons: *Att-Gen of Belize v Belize Telecom Ltd.*[10]

CRIMINAL LAW

Sentence

Att Gen v Rzeszowski (Royal Ct: Birt, B and Jurats Clapham, Le Cornu, Morgan, Marett-Crosby, Nicolle, Crill, Liston, Blampied, de Veulle and Tibbo) [2012] JRC 198

H Sharpe, QC, HM Solicitor General for the Crown; JC Gollop for the defendant.

The defendant was convicted on six counts of manslaughter by reason of diminished responsibility. Three of the victims were children.

Held, as regards the question of jurisdiction to impose a minimum term of imprisonment—

(1) The correct sentence in this case would have been one of life imprisonment because of the material risk of future violence found by the court on expert evidence. The great advantage of a life sentence was that, after the minimum period imposed has passed, a defendant is only released if the Parole Board considers it safe to do so. However, it was not possible to impose a life sentence because of a lacuna in the Criminal Justice (Mandatory Minimum Periods of Actual Imprisonment) (Jersey) Law 2005. The defendant had been convicted of manslaughter in respect of which the sentence was discretionary. The 2005 Law did not enable for the court to order a fixed minimum period of imprisonment in cases of a discretionary, as opposed to a

[9] [1992] BCLC 693, at 698 and 699.
[10] [2009] 1 WLR 1988, at para 36.

mandatory, term of life imprisonment. The court could only make a recommendation. In those circumstances, if the defendant were transferred to England, the Parole Board would not feel able to exercise its role and it was therefore likely that the defendant would spend the rest of his life in prison without possibility of release. In a case of manslaughter that did not seem appropriate.

(2) The court therefore regretfully concluded that it could only impose a determinate sentence. This would mean that at some stage the defendant would be released, even if still considered a danger to himself or to others. The court urged speedy reform of the 2005 Law to deal with the lacuna that had arisen in this case.

(3) A determinate sentence of 30 years' imprisonment, concurrent on each of the six counts, was imposed. Deportation at the end of sentence was also recommended.

PLANNING LAW

Planning history

Hobson v Minister for Planning & Environment (Royal Ct: William Bailhache, DB and Jurats Morgan and Olsen) [2012] JRC 214

NM Santos-Costa for the appellants; D Mills for the respondent; JD Kelleher for the applicants.

This was a third party appeal under the modified procedure against a decision to grant planning permission for the construction of a garage at a property within the Coastal National Park and thus within the ambit of Policy NE6 of the Island Plan 2011—which contains the strongest presumption against all forms of new development. Permission had been granted to the planning applicants in 2006 for the demolition of the previous Les Creux Hotel on the site and the construction two five-bedroomed dwellings, one of which was the subject property and the other was owned by the appellants. That permission was subject to a number of conditions by which planning control was maintained over any further development at the site. The present appellants purchased their property in 2008. It was contended by the appellants that this planning history was relevant: it had been envisaged by the terms of the 2006 consent that there would be no further development of the site. However the planning officer's report in February 2012, which the Planning Applications Panel considered to be the 2012 application under appeal, did not contain under the heading of "relevant planning history" any references to the Ministerial decision in 2006 relating to the whole of the Les Creux Hotel site. The appellants' appeal was based *inter alia* on the Minister's failure to consider appropriately the planning history of the area.

Held, on the issue of planning history—

There was no doubt that previous planning history is a material consideration although it did not follow that like cases must be decided alike: *Trump Holdings Ltd v Planning & Environment Cttee*;[11] *North Wilts DC v Environment Secy.*[12] Inconsistency on the part of the decision taker in planning matters is capable of being a sufficient ground for setting aside the decision on appeal under the Planning and Building (Jersey) Law 2002, and therefore the decision taker may be required to justify any change of approach on his part: *Caesar Invs Ltd v Planning & Environment Cttee.*[13]

In the present case, whilst the Minister was free to take a different approach from his predecessor, the previous approach ought to have been made known to the Planning Applications Panel, particularly in the present case for two reasons—first because the development fell within the Coastal National Park, and secondly because the relevant previous decision was taken in the very recent past. Previous planning decisions probably became less relevant the longer the period of time between the first and second decisions. In this case, however, the change in approach over a three year period did amount to an inconsistency and there was no real explanation for it. Given all the circumstances, including the fact that the planning policy appeared to be more restrictive in this zone than previously, this inconsistency was unreasonable.

SUCCESSION

Wills—rectification

In re Shumka (Royal Ct: Clyde-Smith, Commr and Jurats Fisher and Nicolle) [2012] JRC 159

RJ Michel for the executors.

The deceased, a resident of Canada, had revoked all her wills dealing UK and Channel Islands property, believing in particular that she no longer held any property situated in Jersey. However she owned shares in GUS plc which, unbeknownst to her, in late October 2006 had through a demerger become Experian Group plc, a company incorporated in Jersey. The result was that she has died intestate in so far as her assets in Jersey were concerned.

Held—

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[11] 2004 JLR 232.
[12] [1992] 65 P&CR 137.
[13] 2003 JLR 566.

The court has power to rectify a will whether by deleting, substituting, or adding words; as there was no justification for drawing a distinction between a deletion and any other change, the court could make any change which would correct a manifest error and make a will accord with the testator's clear intentions. The inability of the English courts to go beyond the power to delete was based upon the wording of the Wills Act, which was of no application in Jersey and there were no Jersey precedents which denied a power of rectification: *In re Vautier (née Boyle).*[14]

In the case of wills, the remedy of rectification is one which must be used sparingly and with extreme caution. The testator is no longer present to tell the court what he intended. The parties before the court may have reasons of their own for seeking to "change" the wording used by the testator. However, where the court is satisfied by clear and compelling evidence that a mistake has been made and that the words used do not reflect the testator's intentions, the court may grant the discretionary remedy of rectification so as to alter the wording (whether by deletion, substitution or addition) so as to carry out those intentions: *In re Vautier*.

As in the case of rectification of trusts, any applicant would have to make full and frank disclosure of all the material facts: *In re Vautier.*

The evidence before the court was both clear and compelling that a mistake had been made in the drafting of the current will. It should have extended, as had the deceased's previous will, to cover assets held in the Channel Islands, specifically Jersey. As presently drafted it did not reflect the deceased's intentions. The court was satisfied that full and frank disclosure had been made. The court therefore ordered rectification of the will so that cl 1.1 of the will was to read: "This is my last will in respect of my property in the United Kingdom and the Bailiwick of Jersey and extends only to such property." Costs of and incidental to the representation were ordered to be borne out of the gross of the deceased's personal estate situated in Jersey.

TORT

Negligence

Morley v Reed (Royal Ct: Clyde-Smith, Commr and Jurats Clapham and Olsen) [2012] JRC 127A

DS Steenson for the plaintiff; JN Heywood for the first defendant.

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[14] 2000 JLR 351.

The question was raised as to the principles of negligence applicable to car drivers. The accident in question occurred as the driver was attempting to turn right at a junction.

Held—

The essential ingredients of actionable negligence are: (i) the existence of a duty to take care owing to the plaintiff by the defendant; (ii) failure to attain that standard of care prescribed by the law; and (iii) damage suffered by the plaintiff which is causally connected with the breach of duty to take care: *Rudd (née Lowry) v Hudson*.[15]

The driver of a motor vehicle owes a duty to exercise reasonable care and skill towards all persons using the highway and therefore both the plaintiff and the defendant owe to each other a duty of care: *Rudd*. The relevant standard of care was set out in *Goad v Butcher*[16]—

> "to take reasonable care to avoid causing injury to other road users whom he should reasonably have foreseen might be affected by his actions. That means he had a duty to act as a reasonably prudent and careful driver . . ."

This is not a counsel of perfection as the court in the same case observed at para 11: "a driver will not be held negligent simply for failing to achieve that."

The question which had to be asked and answered was whether the defendant's decision to turn right across the carriageway was negligent at the time he took it in the light of the position he was in, and what he knew or ought to have known at that moment (*Lambert v Clayton*[17]). As to the latter, the English High Court held in the case of *Taylor v Tyler*[18]—

> "a motorist who is performing a manoeuvre of turning right must make sure that the road ahead is either clear or the traffic is so far away that it will not be inconvenienced by the vehicle turning right impeding the carriageway which it is about to cross."

It had always been the case that exceeding the speed limit, though an offence, is not in itself negligence imposing civil liability (*Barna v Hudes Merchandising Corp*[19]).

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[15] 1977 JJ 2055, at 2062.
[16] [2011] EWCA Civ 158, at para 10.
[17] [2009] EWCA Civ 237, at para 30.
[18] QBD, 29 November 2000.
[19] (1962) Crim LR 321; 106 Sol Jo 194, CA.

TRUSTS

Conflict of interest—application for court's sanction

In re E (Royal Ct: William Bailhache, DB and Jurats Kerley and Liston) [2012] JRC 141

BR Lincoln for the representor; RJ MacRae for the first respondent.

The court was asked to sanction a settlement agreement by which all claims which the beneficiaries of a Jersey trust might have against the trustee and other connected parties were to be settled, and pending litigation discontinued. Having a conflict of interest, the trustee surrendered its discretion to the court. The adult beneficiaries had approved the agreement so that the issue before the court was whether to sanction it on behalf of the minor and unborn beneficiaries. A counsel's opinion on behalf of the minor and unborn beneficiaries by Daniel Hochberg, QC provided to the court concluded that the compromise agreement, which reflected compensation of some 68% of the pleaded claim, was in the circumstances not unreasonable.

Held—

The trustee had a clear conflict of interest. There were four categories of case where the court was asked to adjudicate on a course of action taken or proposed to be taken by a trustee: *In re S Settlement*;[20] *Public Trustee v Cooper*.[21] The third category, which applied in the present case, is that of surrender of discretion, properly so called. In such cases the court will only accept a surrender of discretion for a good reason, the most obvious good reason being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest; if it accepts the surrender, the court then exercises its own discretion in relation to the relevant matter: see *dicta* of Robert Walker, J in an unnamed case referred to in *Cooper*.

In the present case it might be argued that the trustee had made the settlement agreement not as trustee but rather as a defendant in proceedings, so that the court's supervisory jurisdiction was not engaged. However the court's sanction of the agreement was necessary because the settlement would prevent future claims against the trustee by the minor and unborn beneficiaries, whom the trustee, because of its conflict of interest, was not in a position to represent. It was therefore entirely right that the trustee had surrendered its discretion

[20] 2001/154; 2001 JLR *N* [37].
[21] 20 December 1999, unreported Judgment of the High Court of England.

and the court accepted that surrender. The court's engagement was thus to bless the settlement agreement on behalf of the minor and unborn beneficiaries.

On the facts, the settlement agreement marked a reasonable settlement and compromise of the claims and was therefore approved on behalf of the minor and unborn beneficiaries, subject to an undertaking by the trustee and certain connected parties not to pursue certain other possible claims against the first respondent, raised in the pleadings, which did not appear to be covered by the terms of the settlement agreement.