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

ADVOCATES

Duty to court

Sinel v Att Gen [2015] JCA 192 (CA: Martin, Pleming and Bennett JJA)

JD Kelleher for the appellants; H Sharp for the Attorney General.

On an appeal against a disciplinary sanction imposed by the Royal Court, the question arose as to the relationship of an advocate's duty to the court to his or her duty to the client.

Held:

The duty to the court overrides the duty to the client. This was explicit in r 2 of the Law Society Code of Conduct—

> "It is the duty of every member at all times to uphold the dignity and high ethical and technical standards of the legal profession, and to adhere to the terms of the oath sworn before the Royal Court. A member has an overriding duty to the Court to ensure in the public interest that proper and efficient administration of justice is achieved. A member must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court."

Accordingly the appellants had a paramount duty not to mislead the Court. The Royal Court's handling of this issue could not be criticised.

CIVIL PROCEDURE

Security for costs—appeals

Home Farm Developments Ltd v Le Sueur [2015] JRC 180 (Royal Ct: Le Cocq DB, sitting alone).

MD Taylor for the respondent; Mr Shane Holmes appeared in person and behalf of the companies Home Farm Developments Ltd and Strata Developments Ltd.

The respondent sought security for costs in respect of an appeal brought by the appellants.

Held:

Approach of Guernsey Court of Appeal adopted. Under para 12(4) of the Court of Appeal (Civil) Rules 1964 ("the Rules") the Royal Court had the power "in special circumstances" to order that security be given for the costs of an appeal as the court thinks just. The court's approach was now very much influenced by the decision of the Guernsey Court of Appeal in *Shelton v Barby*[1] which dealt with an application for security for costs with regard to an appeal under r 12(5) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964, which is in identical terms to r 12(4) of the Rules. Le Cocq DB set out in full paras 60–69 of that judgment, which in summary provide as follows.

The correct starting position was that where the State sets up an appeal system (creating rights of appeal as in the Bailiwick) access to that higher court also attracts full ECHR art 6 rights, but there are nevertheless significant differences at the appeal court level relevant to the exercise of the security for costs jurisdiction.

To allow impecuniosity of itself to be a ground—so that a meritorious appeal could be stifled through lack of means—would be to impair the very essence of the right of access to the courts. The correct approach is to look at the case in the round to see if there are special circumstances and whether or not it is right to make the order. The focus should be on the overall justice of the case, having regard to the interests of the appellant and the respondent, and the administration of justice more generally. In carrying out that exercise, the court will have to be satisfied from the evidence available that there is at least a risk that the successful respondent to an appeal will not recover the costs—or at least a substantial part of those costs.

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[1] Guernsey Court of Appeal Civil Division, 26/2015. See case note in (2015) 19 *Jersey and Guernsey Law Review* 353.

Impecuniosity may be particularly relevant when the appellant potentially subject to the imposition of a security for costs order seeks to establish that he is so lacking in funds (or backing, or lenders, and without public funding), that his appeal will be stymied.

In the Court of Appeal, the starting point for the exercise of the discretion to impose security is different. By this stage the appellant will have had his day in court, and the case determined against him.

At the appeal stage, it is far easier for the court to form a view of the merits, without the need for any close and detailed examination of the pleadings, the evidence and supporting documents. At this stage, the very restricted approach in *Porzelack KG v Porzelack UK Ltd*[2] need not apply.

There has to be a balancing exercise of the appellant's right of access to the court and the respondent's right not to be subjected to expensive court proceedings where, even if he wins, it will be at his expense (often very considerable expense). In this context, the court may want to consider the overall conduct of the litigation.

It had to be borne in mind that the rule refers to "special circumstances". This suggests, particularly now when read in the context of ECHR art 6, that the discretion must be exercised with a considerable degree of caution, and only where there are indeed shown to be truly special circumstances. However, where an appeal has no reasonable prospects of success it would not be a breach of the appellant's common law and art 6 rights for the court to seek to protect the respondent from having to resist such an unmeritorious appeal by the imposition of a security for costs order, even in the knowledge that the appellant is impecunious and unable to pay the costs so that he will not be able to proceed with his appeal. But the security for costs discretion at the appeal level is not to be used as a replacement for the generous rights of appeal under the 1961 Law.

Disposal. Applying the above principles on the facts, the application for security for costs was not granted.

COMPANIES

Insolvent winding up—pooling of assets and liabilities

In re Huelin Renouf Shipping Ltd [2015] JRC 206 (Royal Ct: Le Cocq DB, and Jurats Kerley and Grime).

NM Sanders for the representors.

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[2] [1987] 1 WLR 420.

The question arose as whether the court could consolidate the liquidation of a Jersey company, Huelin-Renouf Shipping Ltd ("Huelin-Renouf Jersey"), which was being wound up in a just and equitable winding up under art 155 of the Companies (Jersey) Law 1991, with the insolvent liquidation of its Guernsey sister company Huelin-Renouf Shipping (Guernsey) Ltd ("Huelin-Renouf Guernsey").

Held:

Power to amalgamate liquidations. It was clear that the court had power to make the orders sought. Under art 155(4) of the 1991 Law gave the court a very broad discretion and art 170(1), which had been expressly included in the just and equitable winding up order, provides that—

> "The liquidator [in a creditors' winding up] may, with the sanction of the court, or the liquidation committee (or, if there is no such committee, a meeting of the creditors): (a) pay a class of creditors in full; (b) compromise any claim by or against the company."

Accordingly, the powers available to the court in this matter were very wide-ranging and there was nothing that in the wording of the 1991 Law which would prevent the court from making the order sought.

Earlier cases involving two or more Jersey companies. The court had, on earlier occasions, ordered the pooling of assets: for example, *In re Alan Roberts, in re Corebits Services Ltd (in liquidation) and Zoombits Ltd (in liquidation)*,[3] where the two companies were in creditors' winding-up where it was disproportionate to work out the assets and liabilities of each company individually. Whilst in that case both of the companies were Jersey companies, the principle applied equally to the present situation. There were also a number of examples in which the court has in the past authorised the pooling of assets in cases of *désastre.*[4] In so doing, it is the interests of creditors that should be borne primarily in mind: *In re Royco Investments Co Ltd*[5].

Interests of creditors favoured pooling. The affidavit evidence before the court made it abundantly clear that the affairs of the companies Huelin-Renouf Guernsey and Huelin-Renouf Jersey were inextricably intertwined and the court was satisfied that it would be impractical or in any event very expensive to unravel all of their assets

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[3] [2011] JRC 166.
[4] Dessain and Wilkins *Jersey Insolvency and Asset Tracking* (4th edn, at 5.25.2).
[5] 1994 JLR 236.

and liabilities, and the cost would ultimately be prejudicial to the creditors of those companies. The Royal Court of Guernsey had also taken the view that it would be in the interests of the Guernsey creditors for this pooling to take place.

Disposal. Accordingly, the court accepted the opinion of the joint liquidators that the pooling of the assets of Huelin-Renouf Jersey and Huelin-Renouf Guernsey was in the best interests of the creditors of both companies and ordered that (i) the assets and liabilities of Huelin-Renouf Jersey and Huelin-Renouf Guernsey be consolidated; (ii) such consolidation to be effected by way of a transfer of the assets and liabilities of Huelin-Renouf Guernsey to Huelin-Renouf Jersey; and (iii) the joint liquidators' costs incidental to the representation are to rank as a cost of the liquidation of Huelin-Renouf Jersey.

CRIMINAL LAW

Discretionary life sentences

C v Att Gen [2015] JCA 159 (CA: McNeill, Pleming and Perry JJA)

AM Harrison for the appellant; RCP Pedley, Crown Advocate.

The appellant, on a plea of guilty, had been sentenced to life imprisonment (with a minimum term of 10 years imposed under Part 3 (discretionary life sentences) of the Criminal Justice (Life Sentences) Jersey Law 2014) for the offence of rape. The appellant accepted that there was a proper basis for the minimum term of 10 years but appealed against the sentence of life imprisonment.

Held: dismissing the appeal:

Principles for discretionary life sentence. The offence of rape carries at customary law a maximum sentence of life imprisonment and is therefore a discretionary sentence. The principles identified in the decisions of the English Court of Appeal in *R v Hodgson*,[6] *R v De Havilland*,[7] *Att Gen's Reference No 32 of 1996 (Whittaker)*[8] and *R v Chapman*[9] should apply in Jersey. A discretionary life sentence should be passed only where the offender has been convicted of a very serious offence and where there is good reason to believe that the offender may be a serious risk to the public for a period which cannot be determined at the date of sentence. On this basis, the imposition of such a sentence is consistent with the structure of the 2014 Law: the

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[6] (1968) 52 Cr App R 113.
[7] (1983) 5 Cr App R (S) 109.
[8] [1997] 1 Cr App R (S) 261.
[9] [2000] 1 Cr App R (S) 377.

minimum term is fixed to represent the period of imprisonment necessary to reflect the seriousness of the offending (retribution and deterrence), while release is a matter for the panel created under art 17, on the basis that the offender no longer poses a danger to the public (see art 19(5)). To impose a discretionary life sentence where the offender does not pose a serious danger to the public would be inconsistent with the 2014 Law, and wrong in principle.

Decision. It was common ground that the offences committed by the appellant were very serious, warranting a severe sentence. The Royal Court did not confine its decision to pass a sentence of life imprisonment to the seriousness of the offence. The Royal Court had accepted, and proceeded on the basis, that the appellant, if at large, was likely "to remain a danger to adolescent and pre-pubescent females for an indefinite time". There was ample material before the Royal Court to support this conclusion. The Court of Appeal reached the overall assessment that the sentence of life imprisonment was not wrong in principle.

Inconsistent verdicts

E v Att Gen [2015] JCA 199A (CA: Martin, Montgomery and Anderson JJA)

E on his own behalf with SE Fitz as *amicus curiae*; SJ O'Donnell, Crown Advocate for the Attorney General.

The applicant sought leave to appeal against conviction on 13 offences of indecent assault, indecency and attempted incest on his sister. He was found not guilty of two offences of indecent assault and incest. The applicant sought leave on the ground that a substantial miscarriage of justice had occurred. He contended, *inter alia*, that the verdicts of guilty were inconsistent with the not guilty verdicts and thus the guilty verdicts were unreasonable.

Held:

Cases where inconsistent verdicts call for appellate interference. Under the principle established in *R v Durante*[10] and *R v Hunt*,[11] the burden of showing that verdicts were inconsistent fell on the applicant. The applicant also accepted that not only must inconsistency be established but it must also be shown to be such as to call for interference by an appellate court: *R v Bell*.[12] Inconsistency will

[10] [1972] 56 Cr App R 708 at 714.
[11] [1968] 52 Cr App R 580.
[12] England and Wales Court of Appeal 15 May 1997, unreported.

normally only call for appellate interference if it is not possible to postulate a legitimate chain of reasoning which could reasonably explain the inconsistency. A jury does not necessarily act inconsistently if it accepts some parts of a witness's evidence and rejects others: *Rogers v R.*[13] Credibility and reliability are "not a seamless robe": *per* Buxton LJ, *R v G.*[14] This analysis was adopted by the Jersey Court of Appeal in *X v Att Gen.*[15] On a true analysis, the verdicts in question were not inconsistent.

***Cilgram* and other cases did not extend the principles**. It was also suggested that there may be a category of exceptional cases, such as *R v Cilgram*,[16] where, even if there is no logical inconsistency, the court may nevertheless decline to uphold the convictions. *Cilgram* and other cases cited by the court did not form a separate category establishing a principle under which an appeal may be allowed notwithstanding the absence of irrational inconsistency. These cases all turned on their particular facts and no extended principle could be extracted. None of the doubts about the safety of the convictions that were expressed in those cases applied in the present case.

FAMILY LAW

Powers of court under Children (Jersey) Law 2002 for the transfer and settlement of property

P v Q [2014] JRC 146A (Royal Ct: William Bailhache DB, sitting alone).

ME Whittaker for the applicant; C Hall for the respondent.

The question arose as to whether the powers of the court under art 1(1)(a) or (b) of Schedule 1 of the Children (Jersey) 2002 for the "transfer" or "settlement" of "property" include the power to order a deferred sale of jointly owned immovable property if the court considers that it is in the best interests of the child to do so. Is "property" to be construed to mean all property, whether movable or immovable, or is it limited to movable and immovable property excluding immovable property situated in Jersey?

Held:

Trusts over Jersey immovable property prohibited by the Trusts (Jersey) Law 1984. There was no previous case law but the

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[13] [2004] EWCA Crim 489.
[14] [1998] Crim LR 483.
[15] [2010] JCA 212.
[16] [1994] Cr LR 861.

Deputy Bailiff noted that this was a situation which was liable to become increasingly commonplace. On the one hand, the imposition of a trust over Jersey immovable property might appear contrary to art 11(2) of the Trusts (Jersey) Law 1984. Article 59(2)(d) of the 1984 Law provides that "Nothing in this Law shall derogate from the powers of the Court which exist independently of this Law . . . to make an order relating to matrimonial proceedings" was not relevant in the present case because these were not matrimonial proceedings.

Purposive construction of the Children (Jersey) Law 2002 allows such trusts. Nevertheless, there was no doubt that the purpose of art 15 and Schedule 1 of the 2002 Law was to make provision for the welfare of children. Accordingly, a purposive construction of the legislation would reach the conclusion that "property" ought to be given its natural meaning of all property, whether movable or immovable, and whether in the case of immovable property that property is situated in Jersey or elsewhere.

Purposive approach consistent with international conventions to which the Island is a party. It also seemed right to rely on the construction of the legislation which most accorded with the International Covenant on Civil and Political Rights, to which the Island had signed up through the UK. Article 26 of that Covenant provides—

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This was not part of Jersey domestic legislation but (as in the case of the ECHR before it was incorporated into Jersey law) it was relevant (a) to resolve ambiguities and legislation; (b) in considering the principles on which the court should exercise a discretion; and (c) when the common law is uncertain: *Benest v Le Maistre.*[17] This construction was also fortified by Schedule 1 by the knowledge that the Island is also party to the International Covenant on Economic, Social and Cultural Rights. The court was entitled to have regard to the international treaties to which the Island is a party in reaching the conclusion that the word "property" is to be given a meaning which

[17] 1998 JLR 213.

has the same effect under the law as a whole where arrangements are being made for illegitimate children as for legitimate children.

Conclusion. For these reasons, the court had power under Schedule 1 of the 2002 Law to make an order for the transfer or settlement of Jersey immovable property to or for the benefit of a child.

SUCCESSION

Wills—conflict of laws—meaning of "United Kingdom" in will intended to cover Jersey assets

In re Krishnan dec'd [2015] JRC 181 (Royal Ct: Birt Commr, and Jurats Kerley and Ramsden)

DV Blackmore for the applicant.

A testator who died domiciled in Hong Kong possessed certain assets in Jersey and in the Isle of Man but none in the United Kingdom. By her will she devised her assets "in the UK" but did not refer to any assets in Jersey or the Isle of Man. The question arose as to whether the will could be admitted to probate in Jersey, on the basis that the references to the UK were to be interpreted as including Jersey, or whether the Jersey estate was in fact intestate. A preliminary issue arose as to whether the court could proceed without the persons who would benefit on intestacy having notice of the proceedings and having an opportunity to make representations to the court.

Held:

Court must be alerted to the question as to notification of persons who would be entitled to the Jersey estate if the will is ineffective as regards the Jersey estate. It was important that, when presenting a representation which raises an issue as to whether a will is valid and can be admitted to probate, consideration is given to the question of notification of those who might have an interest in arguing against the validity of the will (such as those inheriting on intestacy or under a previous will) and the court needs to be specifically alerted to the issue, so that it can give consideration as to whether such parties should be convened or otherwise given the opportunity to participate. In the present case, on the directions of the court, notice was given to the person who would have inherited the Jersey estate had it been intestate and she confirmed that she did not object to the representation. With this confirmation, the court was therefore willing to proceed with the substantive application.

Court acknowledges common mistake of assuming Jersey is part of UK. As the court stated in *In re Reid*,[18] the fact that Jersey is not part of the United Kingdom is not always understood by those not familiar with constitutional niceties.

Application of law of last domicile to question of validity and interpretation. As the deceased died domiciled in Hong Kong, the law of Hong Kong governed the essential validity and interpretation of the will. The court received expert affidavit evidence as to Hong Kong law. Under that law extrinsic evidence may be admitted to assist in the interpretation of an ambiguous provision in a will. In this case, there was evidence to support the contention that the deceased understood and intended the expression the "United Kingdom" to extend to the Channel Islands and the Isle of Man.

Disposal. As in *Re Reid* and in *Re Estate El-Kaisi*,[19] the court was satisfied from the extrinsic evidence produced that, when using the expression "the United Kingdom" the testator intended the expression to cover assets situated in Jersey. It followed that the will covered the Jersey assets and that probate of the will could accordingly be granted.

TRUSTS

Insolvency

In re X Trusts [2015] JRC 96C (Royal Ct: Clyde-Smith Commr, and Jurats Nicolle and Liston)

NGA Pearmain for the representor; EL Jordan for the third respondent; CJ Swart for the sixth respondent; JMG Renouf for the seventh respondent.

The question arose *inter alia* as to the effect of the "insolvency of a trust" on the duties of trustees.

Held:

Insolvency in relation to trusts. To talk of an insolvent trust was a misnomer. A trust is not a separate legal entity and cannot, as a matter of law, be insolvent. The accounts of the trusts had been drawn up as if they were separate legal entities, but the assets and liabilities disclosed by those accounts were in fact the assets and liabilities of the trustees and it is to them that creditors would have recourse, unless security had been granted by the trustees over the trust assets. However, talking of a trust being insolvent is a useful form of shorthand.

Applicable test is a cash-flow test. The test for the insolvency of a trust is a cash-flow test, rather than a balance sheet test. A trust was to

[18] [2008] JRC 213 at para 14.
[19] 2000/241A.

be distinguished from an estate where the affairs of the deceased are being finally wound up and a balance sheet test of insolvency is applied (*Del Amo v Viberts, Collas Crill*[20]). With its ongoing conduct of business and activities, a trust was to be equated for this purpose to the insolvency of individuals and companies, to which a cash-flow test applied.

Insolvent trust, shift to interests of creditors rather than beneficiaries. In relation to estates, insolvency brings about a shift towards the interests of the creditors analogous to that seen in company law. A trust that becomes insolvent should thereafter be administered on the basis that it is insolvent, treating the creditors, rather than the beneficiaries, as the persons with the economic interest in the trust: *Del Amo*. As a matter of logic and principle, it was difficult to see how else an insolvent trust should be administered by the trustee and supervised by the court.

Principle applies to holder of fiduciary power. This had to apply as much to third parties holding fiduciary powers in relation to the trust as it does to the trustee (the position in relation to non-fiduciary powers was not canvassed). Using the wording of Lord Parker in *Vatcher v Paull*[21] it would be beyond the scope of any fiduciary power created in the trust deed for it to be exercised on the insolvency of the trust other than in the interests of the creditors, for whom the trust is now being administered. Thus once there is an insolvency or probable insolvency of a trust, the trustee and all those holding fiduciary powers in relation to the trust can only exercise those powers in the interests of the creditors.

Advisability of seeking creditor consent or directions of court. The trustee or fiduciary of such a trust would be wise therefore to exercise their powers either with the consent of all of the creditors or under directions given by the court.

Duty to creditors as a whole class, not majority. A trust being administered on the basis that it is insolvent, is administered for the benefit of the creditors as a class and not for the majority of them, however large that majority may be, in the same way that a liquidator of a company in a creditors' winding up owes his or her duties to the creditors of the company as a class, not to individual creditors: *Hague v Nam Tai Electronics (No 2)*.[22]

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[20] 2012 (1) JLR 180.
[21] [1915] 1 AC 372.
[22] [2008] UKPC 13.