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

ARBITRATION

Grounds for appealing arbitrator's award

McAulay (Market Buildings) Ltd v Sports World International Ltd GRC Judgment 2/2016 (McMahon DB)

RG Shepherd for the appellant; MGA Dunster for the respondent

The appellant landlord challenged an award of an independent arbitrator in a rent review dispute. The lease was for a term of 15 years; the rent would be at a reduced rate for the first two years and reviewed after three years. The appellant argued that the parties had agreed that the approach to adopt was to amortise rent adjustments in respect of comparable properties over the course of the entire term of the lease. This approach had been acknowledged in the initial submissions of both parties' experts to the arbitrator. The respondent tenant argued that there was no such agreement and that the comparable figure provided subsequently by its expert to the arbitrator, which was for the reduced commencement rent, should be used. The arbitrator adopted the comparable figure provided by the respondent's expert on the basis that he considered it "normal" when analysing rents to look at the average rent over the period between commencement and the first review. The appellant applied for the award to be set aside and for the matter to be remitted for determination by a different arbitrator, arguing that the arbitrator: (i) had erred in law by reaching a conclusion on a valuation basis that had not been advanced by either party and then failing to invite submissions from the parties on his approach; and (ii) had strayed beyond what was permissible by referring to his own experience of what was "normal".

Held:

Whilst the Court could properly take guidance from English legislation and case law, it must exercise caution because the Arbitration (Guernsey) Law, 1982, as amended, had not developed as far as the Arbitration Act 1996. Specifically, the 1982 Law simply required an appellant to establish that the decision was wrong in law, and did not impose the additional consideration, provided for by s 68 of the 1996 Act, that the irregularity complained of must have caused or would cause substantial injustice to the appellant. The Guernsey law was therefore closer to the Arbitration Act 1950, and the principles applicable under the previous UK legislative regime could be applied. The test set out in *Tostevin v Newhouse*[1] continued to be the correct one: an appellant was required to demonstrate that an arbitrator's award could not stand because it was unlawful. It was not sufficient to show that the award being appealed was different from a decision that would have been reached by the Court on the same material. Section 23 of the 1982 Law provided that where an arbitrator has misconducted himself or the proceedings the Court may remove him and may set the award aside. "Misconduct" in this context implied that the arbitrator acted in bad faith; it included procedural errors, including a technical breach of the rules of natural justice. It was a principle of natural justice that where an arbitrator wished to reach a conclusion on a valuation basis that had not been advanced by either party, he must invite submissions from the parties. Nowhere in either party's materials was it mentioned that the Arbitrator should have looked at the average rent over the period between commencement and first review. If he considered that to be the "normal" approach, he should have put this approach to the parties for their comments. By failing to do so, the arbitrator adjudicated on a basis that took both parties by surprise and stripped them of the opportunity of a fair hearing. The arbitrator's failure to seek the parties' comments was a procedural error that was sufficiently serious to warrant setting aside the award.

BANKRUPTCY

Désastre—dégrèvement

Investec Bank (Channel Islands) Ltd v Booth [2016] JCA 025 (CA: Calvert-Smith, Bompass and Birt JJA)

MLA Pallot for the appellant; A Clarke for the respondent; the Viscount appeared in person

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[1] Unreported, 9 August 2013.

This was an appeal by Investec against a decision of the Royal Court granting the application of the respondent ("Mr Booth") to be declared *en désastre* and, as a result, held that the application of Investec for an order that Mr Booth's property be adjudicated renounced, with a view to *dégrèvement*, fell away. The Royal Court had been faced simultaneously with conflicting applications. If it granted a declaration of *désastre*, it could no longer order an adjudication of renunciation as a result of art 10 of the Bankruptcy (*Désastre*) (Jersey) Law 1990. Conversely, if it granted the application for an adjudication of renunciation, it could no longer order a *désastre* as a result of art 5 of the 1990 Law. Investec submitted that the Royal Court should have granted the application for an adjudication of renunciation with the result that it would have had no jurisdiction to grant a *désastre*.

Held:

General nature of the two proceedings. The general nature of a désastre and a *dégrèvement* was more fully described in *Super Seconds Ltd v Sparta Investments Ltd*[2] in the judgment of Sumption JA at 115–117. The modern approach of the Court is generally to prefer a *désastre* as being the most appropriate form of procedure where a debtor is unable to pay his debts: *Super Seconds*.

Debt owed to *tenant apres dégrèvement* is discharged. On the proper construction of the *Loi (1880) sur la Propriété Foncière* the debt owed to a creditor who takes a property as *tenant après dégrèvement* is discharged.

Debtor may apply for *désastre* until a renunciation is actually ordered. A debtor has a right to bring an application for a *désastre*, and the Court has jurisdiction to grant the application, at any time until the court grants an adjudication of renunciation. Furthermore Practice Direction RC15/02 specifically that, on the date upon which the creditor will be seeking an adjudication of renunciation, the debtor may attend to apply for a *désastre* or a *remise de biens*. It followed that Mr Booth was entitled to apply for a *désastre* unless and until an adjudication of renunciation was actually ordered. The Royal Court was faced with the two conflicting applications and it therefore had had to consider them both.

Disposal. The Court of Appeal, considering the conflicting applications afresh, concluded that, on the facts, a *désastre* was the better course. (a) The starting point was that in the ordinary course of events a *désastre* is preferable to a *dégrèvement* because the 1990 Law reflects the legislature's view of the appropriate balance in the modern

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[2] 1997 JLR 112.

day between the interests of creditors and debtors; (b) if the figures suggested unsecured creditors would be materially better served by a *dégrèvement*, that would be a powerful argument in favour of a *dégrèvement* rather than a *désastre*, but on the facts the Court was not satisfied that there would be a material benefit to unsecured creditors in a *dégrèvement*; (c) the fact that the creditor would lose control of the situation in a *désastre* and any decision would ultimately be a matter for the Viscount was not a sufficient reason to order a *dégrèvement*; (d) the legislature had determined in the 1990 Law that it was appropriate (subject to the Court's ability to extend or reduce the period) that a debtor should be relieved of his liabilities after a period of four years following a *désastre*. In the case of a *dégrèvement*, a debtor is never released from unsatisfied liabilities owed to creditors who have renounced or not participated in the *dégrèvement*. This will often be a powerful argument in favour of a *désastre* (although this argument would not apply if there was only one creditor who takes as *tenant après dégrèvement*); (e) the ability of a spouse or civil partner to make an application under art 12 of the 1990 Law, which was relevant in this case, was a further pointer in favour of a *désastre*; (f) the appellant contended that the value of his properties was higher than had been accepted by the Jurats in connection with his unsuccessful application he had made for a *remise de biens* and if he were correct, a *désastre* would achieve a better outcome than a *dégrèvement*, which was also a legitimate point in favour of a *désastre*.

CIVIL PROCEDURE

Application for extension of time in which to appeal

Romain Zaleski v GM Trustees Ltd GCA Judgment 9/2016 (CA: Collas B)

CJ Hay for the applicant; N Kapp for the respondent

The applicant applied for an order that time for serving a notice of appeal against a judgment of the Royal Court be extended. The application was made over two months after expiry of the deadline. The advocate originally dealing with the applicant's case had died and the applicant's new advocates had not been able to access the files held by the original advocate's firm. The applicant argued that in such exceptional circumstances leave to extend time should be given without any consideration of the merits of the appeal. In support of this argument the applicant relied on CPR 3.9 and the English decision in *R (Hysja) v Secy of State for the Home Department*,[3] which said that

[3] 2014 EWCA Civ 1633.

"in most cases the merits of the substantive appeal would have little to do with whether it was appropriate to grant an extension of time" and "in most cases the Court should decline to embark on an investigation and firmly discourage argument directed to them."

Held:

In the exercise of the Court's power under r 17(1) of the Court of Appeal (Civil Division) Rules 1964 to extend time to file a notice of appeal, the Court must consider: (i) whether there was a sufficiently arguable appeal; and (ii) whether as a matter of discretion an extension of time should be granted. This in turn involved a consideration of: (a) the explanation given for the applicant's failure to lodge the notice in due time and his subsequent delay in so doing; (b) any prejudice as a result of the late service of the notice and the consequent delay in hearing the appeal; and (c) any other relevant factors (*Gaudion v Weardale Ltd*[4]). The inference that the merits of an appeal are never relevant was not accepted. The applicant's new advocates stated that they were unable to advise the applicant on the merits. The Court therefore had no option but to dismiss the application. However the Court would consider a further application, if supported by a skeleton argument setting out the grounds of appeal and assessing their merits. Nonetheless, even the death of the applicant's advocate would not justify excessive delay on his part and any further application would have to contain a detailed explanation of the delay both prior to, and following, the instruction of the new advocates. Application dismissed.

Domicile of choice

Nora Cooney v AFR Executors (Guernsey) Ltd et al GRC Judgment 1/2016 (Royal Ct: McMahon DB)

GSK Dawes for the plaintiff and interested parties; MG Ferbrache for the defendants

The plaintiff sought a declaration that her late husband, Patrick Cooney, was, at the date of his death, domiciled in Jersey. The declaration was opposed by one of her sons and two of her granddaughters (the daughters of that son) who argued that the deceased was domiciled in Guernsey. He was residing in Guernsey at the time of his death and his last will and testament stated: "I declare my domicile to be in the Island of Guernsey and that I have abandoned any previous domicile I may have had." The plaintiff argued that a proper analysis of the life of the deceased supported a finding that he had previously established a domicile of choice in Jersey and that his

[4] (1997) 24 GLJ 83.

domicile remained unchanged at his death. The difference between Jersey succession law, which still included an element of forced heirship, and Guernsey successoral law with *prima facie* freedom of testamentary disposition, had significant consequences for the heirs. The matter was heard as a preliminary issue.

Held:

It was common ground that Guernsey law should adopt the same principles as English law when ascertaining a person's domicile. The consistent approach of the Royal Court in Guernsey was to derive guidance English principles and especially from Dicey, Morris and Collins, *The Conflict of Laws*, 14th ed (2006). Domicile of choice was a conclusion or inference which the law derived from the fact of a person fixing his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. Regard should be had to the series of rules set out in *Dicey*. An existing domicile was presumed to continue until it was proved that a new domicile had been acquired. A declaration in a will was not determinative of the matter but was one of the factors to be considered. It was relevant that the deceased knew that a change of succession laws of Guernsey in 2011 meant that he would enjoy complete testamentary freedom if Guernsey law applied. In the context of domicile, the burden of proof fell on the person asserting domicile. Consequently, the plaintiff bore the burden of establishing the acquisition by the deceased of a domicile of choice in Jersey. If she achieved that, the defendants would have the burden of establishing that the deceased's domicile of choice subsequently became Guernsey. Applying these principles, in the circumstances, the Jurats found that the plaintiff had failed to discharge the burden of proof on the balance of probabilities that the deceased had, during his periods of residence in Jersey, the intention to remain residing there permanently or indefinitely. It was unanimously concluded that the deceased was domiciled in Guernsey.

Comment: This decision, albeit fact-sensitive, is a rare instance of the Royal Court tackling the issue of domicile.

Extension of time in which to appeal

Tranquility Holdings Ltd v Invista Real Estate Investment Management (CI) Ltd GCA Judgment 8/2016 (CA: Birt JA)

M Newman for the applicant; PTR Ferbrache for the respondent

The applicant, a unitholder in an investment fund, had claimed against the manager of the fund for alleged breaches of duties of care and fiduciary duties. The action was struck out under r 52(2) and summarily dismissed under r 19 of the Royal Civil Court Rules 2007,

on the basis that the applicant had no realistic prospect of proving either that the respondent acted in breach of duty or, even if it had, that its decisions caused the applicant loss (the judgment). The applicant applied for an order that time for serving a notice of appeal against the judgment be extended (the extension application) and for leave to appeal the judgment (the leave application). The applications were made just under three months after expiry of the deadline within which to appeal. In support of the Extension application, the applicant relied on CPR 3.9 and the English decision in *R (Hysja) v Secy of State for the Home Department*,[5] which said that—

> "in most cases the merits of the substantive appeal would have little to do with whether it was appropriate to grant an extension of time [and] in most cases the Court should decline to embark on an investigation and firmly discourage argument directed to them."

The matter was decided by the Guernsey Court of Appeal on the basis of written arguments from both parties.

Held:

The Court would follow the considerations laid down in *Gaudion v Weardale Ltd*[6] when deciding whether to exercise its power under r 17(1) of the Court of Appeal (Civil Division) Rules 1964 to extend time. The matter would be determined in line with established Channel Islands' authority and the approach in England and Wales would not be followed; albeit the Court would have reached the same conclusion had it done so. The Court was not satisfied that the applicant's explanation for the delay, namely the ill health of a director of the applicant company, amounted to a satisfactory excuse. There would be a material prejudice to the unitholders in the fund if the extension application were to be granted as it would delay the winding up of the fund and distributions to the unitholders. Crucially, there was no reasonable prospect of a successful appeal on the issue of causation because, *inter alia,* in reaching his decision the Bailiff had not failed to have sufficient regard to matters to which he should have, nor had he placed excessive reliance on inappropriate evidence or authority. Regard was also had to the applicant's failure to comply with a court order for payment of costs despite its apparent ability to continue funding its own lawyers. In view of the failure of the extension application, the leave application was not considered and both applications were dismissed.

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[5] 2014 EWCA Civ 1633.
[6] (1997) 24 GLJ 83.

Comment: This decision, and that of *Romain Zaleski v GM Trustees Ltd*,[7] is a reminder of the principles associated with extending time in which to appeal.

Refusal to place on pending list—leave to appeal—interlocutory judgments

Acorn Finance Ltd v Powell [2016] JCA 063 (CA: McNeill, Bompass, and Doyle JJA)

The appellant/defendant appeared in person; OJ Passmore for the respondent/plaintiff; HJ Heath as *amicus curiae*

Questions arose as to whether a refusal of the Royal Court to allow a defendant to place a matter on the pending list was an "interlocutory" judgment or order, requiring leave to appeal under art 13(1)(e) of the Court of Appeal (Jersey) Law 1961, the scope and nature of that power and whether that power was cut down by art 6 in Schedule 1 to the Human Rights (Jersey) Law 2000.

Held:

Meaning of interlocutory judgment. Article 13(1)(e) of the Court of Appeal (Jersey) Law 1961 provides that an appeal from an "interlocutory" judgment or order requires (subject to exceptions of no relevance for the present case) leave of the Court. What is material is the nature of the application which results in the judgment or order, as opposed to the nature of the judgment or order: only if the application is one which will result in a final disposition of the case, whether it fails or succeeds, will the application give rise to a final judgment or order. Otherwise the application will result in an interlocutory judgment or order, even if the outcome has been to dispose finally of the rights of the parties: *Salaman v Warner*,[8] applied in *Planning & Environment Committee v Lesquende*.[9] In the present case the Court of Appeal declined to narrow that test. This was an appeal against an interlocutory decision and leave to appeal was accordingly required.

Discretion to prevent matter being put on pending list. Notwithstanding the mandatory terms in Royal Court Rules, r 6/6(1), it was established that as a matter of principle the Court may refuse to place an action on the pending list, and instead give judgment on the plaintiff's summons, when it is clear that there is no defence to the

[7] Guernsey Judgment 9/2016.
[8] [1891] 1 QB 734 at 736.
[9] 2003 JLR 15, approved by Southwell JA as a single judge of the Court of Appeal 2003 JLR *N* [8].

plaintiff's action. This is because it would be an abuse of process to prevent the plaintiff from having the judgment to which the plaintiff is unquestionably entitled and instead to insist on further cost and delay in having the action proceed further: *Eves v Hambros Bank (Jersey) Ltd*[10]; *Kells v Cashback.*[11]

That discretion and Convention rights. Article 6 in Schedule 1 to the Human Rights (Jersey) Law 2000 (giving effect to art 6 of the European Convention on Human Rights) conferred a right of access to the courts, and required a measure limiting the right, such as striking out, to be proportionate: *per* Birt B in *Canavan v Mackinnon.*[12] The power was not contrary to art 6. The effect of a decision, in exercise of the Court's inherent power, to refuse to place a case on the pending list is that summary judgment is given in favour of the plaintiff. The decision can only be given because, after consideration at a hearing at which the defendant has an opportunity to be present and make submissions, the Court has concluded that the plaintiff is entitled to the judgment against the defendant. The judgment follows a public hearing before the Court, and judgment is given in public. If, in any case, the hearing is not fair or the correct procedure is not followed, the dissatisfied party may seek to appeal. Importantly, if in any case the Court fails to direct itself properly, for example failing to recognise that the defendant does have a "discernible defence", or one "which is capable of being mounted" (the expressions used by Montgomery JA in *Kells*) which ought to have led to the case being placed in the pending list, or that there was some other good reason for requiring a trial, the defendant may again seek to appeal.

Leave was refused in this case.

COMPANIES

Directors' fiduciary duties—conflicting interests—powers of court under art 76 of the Companies (Jersey) Law 1991

Stock v Pantrust International SA [2016] JRC 053 (Royal Ct: Clyde-Smith, Commr, and Jurats Fisher and Thomas)

SC Thomas for the representor; N-LM Langlois for the first and third respondents; ML Preston for the fourth respondent

For the first time, the Royal Court considered an application under art 76 of the Companies (Jersey) Law 1991 for the setting aside of a

[10] 1995 JLR 344 at 351.
[11] [2012] JCA 140; 2012 (2) JLR *N* [16].
[12] 2012 (2) JLR *N* [17].

transaction on the ground of non-disclosure of a conflicting interest by a director. The Court also considered directors' general fiduciary duty and the requirements of the company's articles of association dealing with directors' conflicts of interest.

Held:

Directors' fiduciary duty. The English fiduciary duties of directors referred to by Mummery LJ in *Towers v Premier Waste Management Ltd*,[13] as underlying the general duties owed by directors under the Companies Act 2006, also underlay the duties of directors under the Companies (Jersey) Law 1991. Thus, a company is entitled to the undivided loyalty of its directors; a director's liability for disloyalty in office does not depend on proof of fault or proof that a conflict of interest has in fact caused the company loss; a director's potential conflict of interest may arise, for example, in connection with a business opportunity. If a director obtains the opportunity for himself, he will be liable to the company for breach of duty regardless of the fact that he acted in good faith or that the company could not, or would not, take advantage of the opportunity.

Inadequacy of statement that no declared interest prevented voting etc. A conflict of interest arose on the facts. A statement in the board minutes recorded that—

> "The Chairman noted that, under the arts of Association of the Company, no declared interest prevented any of those present from being entitled to vote at or from being counted in the quorum of the meeting."

This manifestly did not discharge the duty of the affected directors to disclose "the nature and extent" of a conflict under art 75 of the 1991 Law or under art 116 of the company's articles of association which was in like terms.

Express ability to vote etc on certain matters presupposed disclosure of interest. A provision in the company's articles providing that a director was entitled to vote and be counted in the quorum on certain matters in relation to which a conflict presupposed that the conflict had already been properly declared under the provisions of art 116 of the arts of Association and under the overriding requirements of art 75(1) of the 1991 Law.

Requirements of art 76(3). In the present case, there had been a conflict of interest which had not been properly disclosed under the

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[13] [2011] EWCA Civ 923.

company's articles or art 75(1) of the 1991 Law. Article 76(3) provides that—

> "Without prejudice to its power to order that a director account for any profit or gain realised, the court shall not set aside a transaction unless it is satisfied that—
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> (a) the interests of third parties who have acted in good faith thereunder would not thereby be unfairly prejudiced; and
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> (b) the transaction was not reasonable and fair in the interests of the company at the time it was entered into."

The burden of showing that these conditions are met rests on the party seeking to have the transaction set aside. On the facts of the case, this applicant failed to satisfy the Court that the conditions were met.

COURTS

Declaratory judgment—meaning of "ordinary course of business"

SWM Ltd v Jersey Financial Services Commn and Att Gen [2016] JRC 014 Royal Ct (Le Cocq, Deputy Bailiff, and Jurats Grime and Sparrow)

OA Blakeley for the appellant; BH Lacey for the respondent; HM Solicitor General in person

The Jersey Financial Services Commission had, by a direction under art 23 of the .Financial Services (Jersey) Law 1998, required the representor (SWM) to commission a report from Grant Thornton on the suitability of certain investment advice it had given. Grant Thornton concluded that the advice had been unsuitable. SWM wished to challenge this by commissioning a further expert's report. The Commission had, however, under the terms of its direction required SWM not to make any payments other than in the ordinary course of business without its prior written consent. The Commission declined to consent, contending that the commissioning of the further expert's report fell outside SWM's "ordinary course of business". The representor sought a declaration that its commissioning of a further report in these circumstances was "in the ordinary course of business".

Held:

Jurisdiction to make the declaration sought. Jersey law had not adopted the technical approach of English common law on declaratory judgments but rather the boarder and more flexible approach followed by Scottish law; the Court should not become embroiled in a technical consideration of whether a matter can be categorised as a future or hypothetical right but should adopt a broader approach and consider

whether there is a live practical question with practical consequences when deciding whether to exercise its discretion to grant declaratory relief: *In re Curatorship of X*.[14] On ordinary principles, the Court had jurisdiction to make the declaration sought.

Effect of declaration on any future decision to prosecute. The Court accepted that it should approach with circumspection and caution any request for a declaration that might have a direct effect on the exercise of the judgment of the Attorney General in whether or not criminal proceedings should be brought. The making of a declaration was a matter of discretion for the Court and the importance of not impinging upon the Attorney General's jurisdiction will be something that a Court would bear in mind. However the Court was not being asked to do this but instead was being asked to express an opinion as to the meaning of an administrative direction. A declaration of the Court in this case would not necessarily be determinative of a decision of the Attorney General to prosecute and was too far removed from the possible exercise in the future by the Attorney General of such a power. A declaration made by the Court in these circumstances did not usurp the function of the Attorney General. This approach was supported by Zamir and Woolf, *The Declaratory Judgment*, 4th ed, at 4–206.

Meaning of "ordinary course of business". *Ashborder BV v Green Gas Power Ltd*,[15] although dealing with the interpretation of security documentation, provided useful guidance as what is meant by the ordinary course of business. Without seeking to be definitive or restrictive, the present Court made the following observations: (i) the expression should be given its ordinary English meaning; (ii) the expression "ordinary course of business" does not preclude a single, one-off exceptional act which the company might never have done before nor never do again; (iii) actions which are likely to preserve or protect a company's business against a threat to it may well be in the ordinary course of its business; (iv) the question of whether or not an action is in the "ordinary course of business" may be fact specific and cannot be isolated from the context in which a company conducts its business.

Decision. In the present case what SWM wished to do, in order to defend its business, arose naturally from the regulatory environment in which it operated, and was accordingly, whilst exceptional, within the ordinary course of SWM's business. The position might have been different if the effect of the proposed expenditure were to take SWM

[14] 2002 JLR 259.
[15] [2004] EWHC 1517.

below its adjusted net liquid assets (ANLA) requirements, but that was not the case on the facts.

EMPLOYMENT

Minimum wage law/unfair dismissal

Eva Linda Lange v John Waters GRC Judgment 4/2016 (Royal Ct: McMahon DB)

The appellant was not represented; MGA Dunster for the respondent

In the first appeal of its kind, the appellant challenged the Employment and Discrimination Tribunal's approach to calculating the number of hours she worked and therefore whether she had been underpaid under the Minimum Wage (Guernsey) Law 2009. She claimed that, as a worker provided with tied accommodation at her workplace who was required to be available on site to answer calls, all her sleeping hours should be included for the purposes of the minimum wage law. The Tribunal had rejected her argument. It followed the approach set out in the UK National Minimum Wage Regulations 2015 and the Commerce and Employment Department's Guide, *Statutory Minimum Wage*, to find that, where a worker's place of work is also her home, only the hours spent awake for the purpose of carrying out duties could attract the minimum wage. The appellant also appealed the decision to dismiss her claim for unfair dismissal insofar as she relied on asserting a relevant statutory right (the rights to be paid a minimum wage, to be given a statement of pay and to a weekly rest period). She argued that the Tribunal had misconstrued s 12 of the Employment Protection (Guernsey) Law 1998 and that the Tribunal was bound to conclude that her dismissal was automatically unfair. She also suggested that a significant number of the findings of the Tribunal were perverse as being contrary to the evidence it considered.

Held:

Section 2(3) of the 2009 Law empowered the Department of Commerce and Employment to issue regulations clarifying when a person was, or was not, to be treated as working. Given that the Department had not exercised these powers, there was arguably a lacuna in the Guernsey legislative framework. This gap could not be made good by importing UK regulations which drew a distinction between types of work, only some of which would be included for the purposes of the national minimum wage. Nor could it be filled by looking to the Department's Guide, which used terms similar to the UK regulations but did not have the force of law. Section 32(2) of the 2009 Law gave little guidance: it stated that for the purpose of the Minimum Wage Law, "performing services" was to be regarded as work; it did not provide that a person was only working when

performing services. There was nothing in the applicable legislation that limited working hours to those where the worker was actually active, as opposed to available to work under the terms of her contract. The Tribunal erred in law by reading such a limitation into the domestic legislative framework. In the absence of applicable statutory guidance, the starting point for the minimum wage calculation was the complainant's contract of employment. The contract required the employee to work six days a week with a rest break of two hours per day. It did not deal with night-time arrangements and did not specify the hours to be worked and for which the minimum wage must be paid. The appellant's contractual working hours were therefore 22 hours per day, six days per week. The contract was poorly drafted, but that was not sufficient reason to ignore it. The Tribunal was wrong in law to overlook the contract in order to find a solution it regarded as "just and equitable". The appeal against the minimum wage calculation was allowed and the Tribunal's decision would be substituted with an award on the correct basis under the terms of the 2009 Law. However, the appeal against the Tribunal's findings of fact was dismissed. An appellate court would only interfere with factual findings if it were satisfied that there was no evidence on which those findings could reasonably have been arrived at or that for some other reason those findings were perverse. The Tribunal was entitled to find that the first occasion on which the appellant raised the question of the failure to provide a payslip was her resignation letter and concluded that the right in s 12 of the 1998 Law required the employee to have actually asserted the right in question prior to the termination of the employment, rather than only at the same time. That was the correct approach in law. There was nothing to suggest perversity in the Tribunal's findings or that its findings were contrary to the weight of the evidence.

Comment [Natasha Newell]: This is the first time the Royal Court has heard a matter relating to Guernsey's minimum wage legislation. The Deputy Bailiff's analysis of the legislation underlines the importance of ensuring that a contract of employment clearly stipulates the hours to be worked and for which the minimum wage must be then paid. In this case, the respondent's liability arose from a poorly drafted contract, in which the night-time arrangements were not dealt with in such a way as to avoid the necessity of paying the minimum wage in respect of all of them.

TRUSTS

Mistake as to tax consequences

In re S Trust and T Trust [2016] JRC 259 (Royal Ct: Bailhache, Bailiff, and Jurats Kerley and Liston)

JP Speck for the representors; J Harvey-Hills for the trustees; R Gardner appeared in person

On application to set aside certain transfers into trust on the ground of mistake, and for declarations that the trusts themselves were void or voidable, questions were raised as to the relationship between the established test for setting aside a trust on the ground of mistake pursuant to art 11 of the Trusts (Jersey) Law 1984 and the provisions of art 47E.

The intended purpose of the arrangements had been to minimise UK inheritance tax. The result, however, had been the opposite in that it would have the effect of incurring substantial additional tax charges. The representors sued their UK advisers in the English High Court and these proceedings had been compromised by an indemnity from one adviser which was expressly conditional upon the representors taking steps reasonably required to reduce their tax liabilities by lawful means. If the present relief were granted to the representors, the additional tax charges would not be payable.

Held:

Test established by case law re setting aside trust established by mistake under art 11. Prior to 25 October 2013, when art 47E came into effect, there was an established line of authority in relation to the setting aside of a trust established by mistake. Article 11 of the Trusts (Jersey) Law 1984 provides that a trust is invalid to the extent that the Court declares that it was established, *inter alia*, by mistake. The test in relation to applications under art 11 was well settled. In the case of *In re Lochmore Trust*,[16] the Court confirmed that there were three questions to be addressed: (a) Was there a mistake on the part of the settlor? (b) Would the settlor not have entered into the transaction but for the mistake? (c) Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?

Article 47E. Article 47E appeared on the other hand to be dealing only with dispositions into trust. In many cases the two would be inextricably linked but the relationship between art 11 and art 47E was not easy to determine: *Representation of the Robinson Annuity Investment Trust*;[17] *Boyd v Rozel Trustees (Channel Islands) Ltd*.[18] In the present case there was some distance in time between the establishment of the trusts and the dispositions now called into question; but looking at the arrangements as a whole the Court was in

[16] [2010] JRC 068.
[17] [2014] JRC 133.
[18] [2014] JRC 056.

no doubt that the two were inextricably linked. There could, however, be factual circumstances where this is not the case and the terms of art 47A *et seq* would carry particular relevance.

Relationship between art 11 and art 47E. As the Court indicated in *Robinson Annuity*, the only difference between the test adumbrated in the cases and the statutory test under art 47E is that the wording concerning the seriousness of the mistake is inverted. In the statute, the Court decides whether a mistake is so serious as to render it just for the Court to make a declaration under the art, whereas in the judicially adumbrated test in relation to mistake, the question is whether the mistake is so serious as to render it unjust on the part of the donee to retain the property. The judicial test is whether it is unjust on the part of the donee to retain the property whereas the focus of the statutory test is whether it is just for the Court to make a declaration that a disposition of property to a trust is voidable with some or no effect as the Court determines because of a mistake made by the donor. These were very fine margins, and whilst in most cases the result of the statutory and the judicial tests would be the same, it was not certain that there will not be some factual circumstances which might make the distinction between the two tests relevant. In the present case, in so far as the transfers included the transfer which immediately constituted the trusts, art 11 would seem to apply. In so far as the transfers were made to an existing trust, art 47E would apply.

Mistake can be as to tax consequences. It was clear that, whether under art 11 or under art 47E, it does not matter whether the mistake was of fact, law, as to the effect or as to the consequences. Accordingly a mistake as to the tax consequences of a trust or a transfer to a trust is a mistake for these purposes (see *Re S Trust*[19]) and, agreeing with Birt B in *Robinson*, the definition of "mistake" in art 47B(2) is to like effect.

Pitt v Holt; Futter v Futter. The Court received representations in writing from HMRC that the trusts should not be set aside, relying in particular on certain passages in *Pitt v Holt* and *Futter v Futter*[20] to the effect that there had to be some mistake either as to the legal character or nature of the transaction or as to some matter of fact or law which was basic to the transaction and accordingly it was submitted that the respondents' mistake was a mistake as to the tax consequences rather than to the effect of the transaction. It was further submitted by HMRC that it would not be unconscionable to leave the transaction uncorrected because the motivation for setting up the trust and

[19] 2011 JLR 375.
[20] [2013] UK SC 26.

transferring money into the trust was to mitigate a tax liability and there were no special circumstances regarding consideration such in *Pitt* or *Futter*.

The Court observed that *Pitt v Holt* was a decision of the Supreme Court which although not strictly binding naturally received in the Royal Court of Jersey the utmost respect. Nonetheless, the Supreme Court was not concerned with the law of Jersey. Any appeal from the Royal Court of Jersey went to the Privy Council and not to the Supreme Court. This is not a distinction without a difference. The Privy Council could be expected to have regard both to the law and to the policy interests to the Island of Jersey in deciding an appeal from the Jersey Court of Appeal and the Royal Court, considerations which obviously played no part in *Pitt v Holt*. The Island's legislature had adopted statutory provisions by the Trusts (Amendment No 6) (Jersey) Law 2013 which had no application in Great Britain and Northern Ireland, but which formed part of the law of Jersey which the Privy Council would naturally apply. No doubt in addition, the Privy Council would wish to pay careful regard to the numerous judgments of the Royal Court over a prolonged period, and the views expressed by at least four different judges on this subject.

Lord Walker placed the emphasis in different ways in other parts of his judgment and at para 122 he could be regarded as having expressed a "but for" test which was the second part of the *Lochmore Trust* test and reflected in art 47E(3)(b). In the present case the mistake as to tax consequences of their dispositions into trust made by the Representors was, contrary to the representations of HMRC, basic to the transaction—it was fundamental to the transactions, because, but for their mistakes, the transactions would never have occurred.

The Court further observed that there was something unattractive about the proposition that the Court should come to the rescue of foreign taxpayers who had sought to avoid paying their contribution to their government's outgoings. By a small margin, however, the Court determined to grant the relief in the prayers to the representations. The Court's sympathy arose from a recognition that all litigation is stressful, and the anxiety would have been increased by the knowledge that if the litigation were to be unsuccessful, there were really serious tax consequences flowing from the misguided attempts to avoid their obligations as citizens of the United Kingdom in the first place. The Court considered this to be a pretty naked attempt to avoid those obligations but on balance these representors and their families had suffered enough.