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

COMPANIES

Directors— powers and duties

Carlyle Capital Corporation Ltd (in liquidation) v Conway, Hance, Stomber, Zupon, Allardice, Sarles, Loveridge, Carlyle Investment Management LLC GCA (McNeill, Martin and Birt JJA) [2019] GCA 014

J Wessels and G Dawes for the appellants; I Swan and A Guggenheim for the first to fourth respondents; I Swan and G Bell for the fifth to seventh respondents; S Davies for the eighth respondent

The appellants were the liquidators of Carlyle Capital Corporation, a publicly listed investment fund. The first to seventh respondents were Carlyle's former directors and the eighth respondent was its investment management company. Carlyle entered into 30-day loan agreements with banks in the repurchase ("repo") market in order to buy US residential mortgage backed securities (RMBS). In a repo financing transaction, the assets were sold by the borrower (Carlyle) to the lender (the bank) at a price corresponding to their current market value, less a percentage known as the "haircut" (typically 2%). The haircut protected the lender even if the market price of the assets had fallen since the start of the repo period and the lender could quickly liquidate the RMBS in order to cover its exposure in the event of a default by the borrower. Carlyle's business model was highly leveraged (at 37 times its share value) in order to purchase large amounts of RMBS to increase the income return. The more borrowed money was used, the greater the total amount earned, which, after paying the costs of funding, would remain in Carlyle as profit upon its own small amount of capital invested. Whilst increased leverage magnified the profit, it also risked losses through exposure to price

changes, haircut increases and margin calls. The lending banks assessed the RMBS' market value by reference to third party pricing sources. The principal pricing agency was that known commonly as "IDP" prices. Carlyle's investment guidelines required it to maintain a liquidity cushion of 20% of its net asset value. By the beginning of August 2007, the value of Carlyle's RMBS had declined and Carlyle's repo lenders made increasing margin calls. Carlyle's liquidity diminished and it reduced its cushion to below the 20% guideline. Certain repo lenders then abandoned IDP prices and made margin calls based on the "repo price", namely the price at which repo lenders valued the RMBS. Repo prices were lower than IDP prices. By the end of August, almost all repo lenders were demanding haircuts of 3%. At an emergency meeting on 23 August, Carlyle decided (amongst other things) to retain RMBS and to seek to ride out the crisis until markets had stabilised. The respondents' case was that prices then available were too low to justify selling RMBS. After a brief improvement in the market, in late February 2008 Carlyle's liquidity shrank, and RMBS prices plummeted. At a meeting on 27 February, Carlyle decided to stop selling RMBS. Markets then worsened and on 6 March Carlyle was unable to meet margin calls of more than $400m. On 17 March, the Royal Court ordered the compulsory winding up of Carlyle.

Carlyle's liquidators brought claims of c$2bn against the respondents alleging that from the July 2007 board meeting until Carlyle's collapse the directors were in breach of their duty to exercise reasonable skill and care in managing its business. The core breach was said to be failing to insist that Carlyle either (i) sell down its RMBS assets to generate liquidity and reduce leverage, and/or (ii) raise additional equity capital to reduce leverage, and/or (iii) conduct a restructuring or orderly winding down. As regards fiduciary duty, it was alleged that the directors had breached their duty to act in good faith in the best interests of Carlyle. It was also alleged that the eighth respondent was liable in contract in connection with the performance of its duties as investment manager and that its negligence amounted to gross negligence, which was not exempted from the contract between it and Carlyle.

After a six-month trial, Marshall, Lieut Bailiff dismissed all the liquidators' claims. The appellants appealed and asked the appeal court to rehear the case and substitute its own findings for those of the court below. The appellants submitted that the trial judge was wrong to find that the failure to sell RMBS was not a breach of the duty of skill and care. The appellants argued that the respondents should, from September 2007, have sold RMBS to the value of $7.8bn (with a view to reducing the risk of default) in order to achieve a 40% liquidity cushion by the end of 2007. The appellants contended that the judge had applied the wrong test to the facts, and that decisions taken on 23

August 2007 required re-evaluation which would have demonstrated that the benefits of selling RMBS far outweighed any risks. At a meeting on 20 August, a sale of at least $4bn of Carlyle's RMBS had been approved at or above repo prices at a time when the directors were well aware that repo prices were lower than IDP prices. Carlyle's board had agreed, on 23 August, that sales at or above repo prices would be beneficial. The appellants argued that this evidence was not reflected in the judgment. The appellants claimed that this error affected the entire edifice of her reasoning.

Held, dismissing the appeal:

The evidence was clear that as at 20–23 August 2007 the directors were content for there to be a sale of RMBS of $4bn "at or about repo marks"/repo prices. It was clear, from the judgment below, that the judge had erroneously used the words "its existing marks" to refer to IDP prices as opposed to repo marks in circumstances where it was clear that the reference should have been to "repo marks". However, the existence of such an error did not have the result that the issues were at large for determination by the Court of Appeal or that the case must be sent back for even a partial retrial. Even if findings had been made (i) that Carlyle was prepared to sell a material tranche of RMBS in August 2007 at or about repo prices, (ii) that Carlyle was not at that point concerned that such sales would send a damaging message to the market, and therefore (iii) that such sales could have been undertaken without risk, those findings would not, in themselves, lead ineluctably to a conclusion that the relevant defendants were in breach of their duties as directors. The misrepresentation on the part of the representatives of the respondents was incompetent and wholly unacceptable but not intentional or deliberate.

The court rejected the appellants' contention that even though there was no absolute requirement to restore the liquidity cushion, it was a breach of duty not sell RMBS and replenish liquidity. The premise that no reasonable director could have believed that selling at repo prices would produce a downward price spiral was wrong because (i) it assumed consistency in repo prices whereas from August 2007, repo lenders set their own prices; (ii) it depended on the correctness of the proposition that repo prices were distressed prices, in the sense that they represented the lowest price that the RMBS would achieve on a forced sale (which the evidence showed was not the case); and (iii) there was ample evidence that selling (into an adverse market when dependent on slim liquidity) created the risk of a liquidity spiral. The court's conclusion on this point was wholly unaffected by the judge's mistaken view that Carlyle was only prepared to sell at IDP prices.

However startling the history of Carlyle's short life appeared at first sight, its failure was the result of circumstances beyond the control of

any board of directors. The court agreed with the Lieutenant Bailiff's view that the appellant's claim depended entirely on hindsight. Even if the Lieutenant Bailiff had not misunderstood the evidence as regards August 2007, a proper consideration of the August evidence was not a sufficient basis for this appellate court to interfere with her decision. There was ample evidence to support the judge's conclusions that there was no breach of duty. The judge was right to decide that the actions of the individual defendants were taken in the *bona fide* belief that they were in the best interests of Carlyle and its creditors. Although the defences raised by the respondents did not arise for decision, as they were argued, the court felt that resolution of some of them may be of assistance in the future. In particular, (i) the directors of Carlyle would have been able to rely on a provision in its articles exempting them from liability in certain circumstances, despite not being included in their contacts of employment. Reinforcing the decision in *Perpetual Media Capital Ltd v Enevoldsen*,[1] the court ruled that "where a person accepts appointment as director, the starting point will be that he does so upon the terms set out in the articles"; (ii) that, for the purposes of s 106 of the Companies (Guernsey) Law 1994, "misfeasance" did not include a simple breach of the duty of skill and care. Further and as a result, any alleged wrongful retention of RMBS was a simple allegation of negligent breach of duty, and did not constitute misfeasance for the purposes of s106; (iii) as a consequence, the provisions of s 67F of the Companies (Guernsey) Law 1994, which render void exoneration and indemnification provisions which exempt or indemnify a person from claims under s 106, did not have effect on the facts of this case; and (iv) had the court found that Carlyle's directors had been in breach of duty, they would not have been guilty of wilful default or wilful neglect. This would have meant that they were able to rely on the provisions of Carlyle's articles in (i) above, which carved out instances of wilful default or wilful neglect. In order for a person to be guilty of wilful default (or misconduct or wrongdoing) it was necessary for the person concerned to have suspected that his conduct might constitute a breach of duty but to have decided to continue with the conduct nevertheless.

[1] 2014 GLR 57.

CRIMINAL LAW

Sentencing—relevance of English Sentencing Guidelines

Att Gen v Manning [2018] JRC 230 (Royal Ct: Sir William Bailhache, Bailiff, and Jurats Nicolle, Crill, Thomas, Ronge, Dulake)

M Temple, QC, Solicitor General appeared for the Crown; EL Burns for the defendant

The defendant, a solicitor, was sentenced by the Superior Number following guilty pleas to 20 counts of fraudulent conversion; one count of fraudulent conversion by a trustee; and one count of failing to comply with the requirements of art 19 of the Money Laundering (Jersey) Order 2008, contrary to art 37(4) of the Proceeds of Crime (Jersey) Law 1999.

Held:

England and Wales Sentencing Guidelines were not helpful on quantum. It should not be necessary for the court to feel obliged to keep saying to both Crown and defence that the court finds the English Sentencing Guidelines produced by the Sentencing Council for England and Wales unhelpful in terms of quantum of sentence. The English Sentencing Guidelines were designed in England and Wales pursuant to a statutory scheme which Jersey does not have; they were intended to ensure consistency between courts across that jurisdiction; they take into account a myriad of different statutory sentencing options not all of which are available in Jersey; and they require a tick box approach to sentencing which neither the Royal Court nor the Court of Appeal has found to be appropriate. Sentences are approached on a different basis in Jersey and already have a wider basis than is the case in England and Wales because a judge and Jurats together form the Jersey sentencing court.

Sentence. On the particular facts, taking account of the mitigating and aggravating features identified in *R v Barrick*,[2] which had been applied on several occasions in Jersey, the court sentenced the defendant to a total of 3½ years' imprisonment. The most suitable way of arriving at that sentence in this case was to apply 3½ years' imprisonment on each fraudulent conversion count, with 8 months' imprisonment on the money laundering count, to run concurrently.

EMPLOYMENT

Termination—termination by notice without cause—damages

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[2] (1985) 7 Cr. App R (S) 142).

Alwitry v States Employment Board [2019] JRC 014 (Royal Ct: JA Clyde-Smith, Commr, and Jurats Olsen and Grime)

SMJ Chiddicks for the plaintiff; M Temple, QC Solicitor General for the defendant

Having accepted an offer of employment with the respondent, the respondent dismissed the plaintiff before he had started. The respondent took the view that the plaintiff's behaviour over the immediately preceding period justified his summary dismissal: it was alleged that his manner of interaction with his future colleagues and senior hospital management was such that it fundamentally undermined their trust and confidence in him. The plaintiff brought a claim for breach of contract, and sought exemplary or punitive damages.

The contract of employment did not contain any express right on the part of the respondent to terminate by notice without cause. There was also an entire agreement clause. Notice of termination was not required in cases of gross misconduct, gross negligence and loss of registration. Termination for cause on other grounds, including conduct not amounting to gross misconduct or "some other substantial reason" required notice.

Held:

Termination of the contract of employment had been invalid. The purported termination of the plaintiff's contract of employment had been invalid. In particular the plaintiff had not repudiated the contract (principles stated by *Chitty on Contract*, 33rd edn, adopted; *Neary v Dean of Westminster*[3] followed) and there had also not been a fundamental breakdown in the working relationships between the parties giving the defendant "some other substantial reason" under the contract for terminating the plaintiff's contract of employment.

Quantum. Where the employer has the contractual right to dismiss the employee without cause, damages for such dismissal are limited to the amount the employee would have earned had he been given proper notice, as provided for in the contract. The majority of contracts of employment give both the employer and the employee the right to terminate the relationship without cause on giving the prescribed period of notice. Any issues as to the fairness of those dismissals are governed by the unfair dismissal employment legislation, in England the Employment Rights Act and in Jersey the Employment (Jersey) Law 2002.

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[3] [1999] IRLR 228.

However, none of these cases address the position where, as in the present case, the employer's right to terminate the relationship has been contractually fettered so that, as here, the defendant could only terminate the plaintiff's employment for cause. The defendant had no cause to terminate his employment. His purported dismissal was therefore invalid and there is no notice period to act as a restraint on damages, as acknowledged by Lord Mance in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*,[4] and by Sir Michael Birt in *McDonald v Parish of St Helier*.[5]

The court was not concerned here with the fairness of the plaintiff's dismissal but with its validity, and having found it to be invalid, there was no basis upon which it could properly restrict damages to the notice period required for a valid dismissal for cause. This was because the defendant could not claim that it had the right to dismiss the plaintiff without cause on notice, being the contractual position that underlay the *Johnson* exclusion area, *i.e.* the principle that an employee is not entitled to attempt to circumvent the statutory unfair dismissal regime and bring a claim at common law for damages where it is alleged that his dismissal breached the implied term of trust and confidence (*Johnson v Unisys Ltd*[6]). Nor did the case fall within the *Gunton* extension (*Gunton v Richmond-upon-Thames LBC*[7]).

Punitive and exemplary damages. In *Rookes v Barnard*,[8] the House of Lords held that exemplary damages could be awarded in two circumstances, namely (i) cases of "oppressive, arbitrary or unconstitutional action by the servants of the governments" and (ii) cases in which "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to [the claimant]". There was no authority cited for the award of exemplary or punitive damages in cases of breach of contract and it was long established that damages in English common law were not available to compensate for the manner of an employee's dismissal. The award of exemplary or punitive damages in tortious claims following *Rookes v Barnard* was recognised in Jersey in *West v Lazard Bros*,[9] and *Hayden-Taylor v Canopius Underwriting Ltd*,[10] but there was no authority for the award of such damages in cases of

[4] [2011] UKSC 58.
[5] [2005] JRC 074.
[6] [2001] 2 WLR 1076.
[7] [1981] Ch 448.
[8] [1964] AC 1129.
[9] 1993 JLR 165.
[10] [2014] JRC 221.

breach of contract, let alone employment contracts. Damages for breach of contract in Jersey are in the nature of compensation, not punishment, and exemplary or punitive damages would not be awarded in this case.

FAMILY LAW

Financial provision—equality—special contribution

S v T [2019] JRC 003 (Royal Ct: JA Clyde-Smith, Commr, and Jurats Grime and Ramsden)

CRG Davies for the petitioner; BJ Corbett for the respondent

In a "big money" divorce case, the respondent sought ancillary relief. The matrimonial wealth had been accumulated during the marriage but as the primary result of the petitioner's special entrepreneurial skill which had resulted in a business she had established being sold for a consideration in excess of £22 million.

Held:

Statutory basis of division. Articles 28 and 29 of the Matrimonial Causes (Jersey) Law 1949 set out the powers of the court to order a transfer of property or the making of a lump sum or sums, the opening language of which is the same for both articles. Section 25 of the (England and Wales) Matrimonial Causes Act 1973 contains similar but not identical language, and the list of factors set out in that section are applied by the courts of Jersey when exercising powers to grant ancillary relief upon divorce or judicial separation.

Yardstick of equality. The House of Lords decision of *White v White*[11] established the principles of fairness and non-discrimination and the yardstick of equality; but it was also pointed out that the yardstick of equality did not inevitably mean equality of result. It was the yardstick against which the outcome of the s 25 exercise was to be checked. It was recognised that the source of the assets might be a reason for departing from the yardstick of equality, although the importance of source will diminish over time. The sharing principle applies with less force to non-matrimonial property, namely property which is not the product of matrimonial endeavour: see *Hart v Hart.*[12] In the present case, the family wealth was the product of matrimonial endeavour to which the sharing principle applied with force but one spouse had nevertheless made a special or stellar contribution.

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[11] [2001] 1 AC 596.
[12] [2017] EWCA Civ 1306, at para 62.

Where there is a special or stellar contribution. In *Charman v Charman*,[13] the English Court of Appeal, building on what had been said in *White v White* and *Miller v Miller*, concluded in para 64 that a—

> "proper evaluation under section 25(2)(a) of the parties' different contributions . . . should generally lead to an equal division of their property, unless there was a good reason for the division to be unequal."

The question of contribution should be approached in much the same way as conduct, namely that it should be taken into account only in so far as it may be inequitable to disregard it: see *per* Baroness Hale in *Miller v Miller*.[14] In *Charman* it was held that it was hard to conceive that, where such a special contribution was established, the percentages of division of matrimonial property should be nearer to equality than 55%/45%; but also, following a very long marriage, fair allowance for special contribution within the sharing principle would be most unlikely to give rise to percentages further from equality than 66.6%/33.3%.

Disposal. In the present case, the court accepted that the petitioner had made a special contribution to the family welfare by virtue of her exceptional entrepreneurial skill and it would be inequitable to disregard this. The matrimonial assets were divided as to 37% to the respondent and 63% to the petitioner, which was within the ranges advised in *Charman*. The court also conducted a cross-check for fairness and concluded that the proposed distribution of the family assets, which had been invested in other businesses and asset types, did not give the respondent an unfair proportion of the copper-bottomed assets.

MENTAL HEALTH

Legal proceedings—settlement—sanction by court

Re A (as delegate for B) [2018] JRC 225 (Royal Ct: Clyde-Smith, Commr, and Jurats Nicolle and Pitman)

C Campbell for the representor

The representor was the delegate (formerly curator) of B, who had been seriously injured in an accident in France caused by C. The representor was minded to accept a settlement offer by C's insurers and sought the approval of the court, initially under art 43(17) of the

[13] [2007] 1 FLR 1246.
[14] [2006] 2 AC 618, at para 146.

Mental Health (Jersey) Law 1969. However, the hearing took place three days after that Law was repealed and replaced by the Capacity and Self-Determination (Jersey) Law 2016. The representor now had power to accept the offer under the 2016 Law but sought the court's blessing.

Held, giving the court's blessing on the facts:

No safe mandatory safe harbour under 2016 Law; but ability to seek court's blessing. Under the 2016 Law, the delegate had power to accept the offer, but conversely there was no such mandatory safe harbour for the delegate as there had been under the 1969 Law. The delegate is accountable for the decision and it was therefore reasonable for delegates faced with difficult or "momentous" decisions to seek the protection of the court analogously with how a trustee could seek the court's blessing. Article 24(5) of the 2016 Law expressly empowered the court to make further orders or to give directions to a delegate as to the decision he or she proposes to take.

Role of court if surrender of discretion. The representor had not purported to surrender to the court the powers delegated to her and so the decision remained hers. There was no provision under the 2016 Law for such surrender, but if there is some factor, such as a vitiating conflict of interest, which militates against the delegate making the decision, then the court considered that art 24(5) would give the court ample power, on an application, to remove the power to make that decision from the delegate, so that the court or another appointed delegate can make the decision, pursuant to art 24(2)(a), on P's behalf.

Role of court if no surrender of discretion. Where a delegate retains the power to make the decision, but seeks the protection of the court by way of a direction or authority to make the decision in the manner proposed, the role of the court was a limited one and analogous with the role of the court when a trustee seeks the blessing of the court for a particular exercise of power without surrendering discretion. The court will be concerned as to whether the delegate has properly formed the view that the decision he or she proposes to make is in the best interests of P. In other words, it will be concerned with the limits of rationality and honesty and will not withhold approval merely because it would not make the decision in the manner proposed. The court will, however, act with caution, because if it approves the decision (after full and frank disclosure of everything relevant to that decision), no interested party will thereafter be able to complain that the decision was not in P's best interests. The court may usefully follow its approach to an application by a trustee to have a

decision blessed, suitably adapted, as set out in the case of *In re S Settlement*,[15] namely to consider first, whether the delegate has the power to make the decision and, secondly, to be satisfied that (i) the delegate's opinion has been formed in good faith; (ii) the opinion is one of a reasonable delegate acting in accordance with his or her duties and obligations under the 2016 Law; and (iii) it has not been vitiated by any actual or potential conflict of interest.

SUCCESSION

Executors and administrators—powers and duties—authority to execute will

In re P [2019] JRC 002 (Royal Ct: Sir William Bailhache, Bailiff, and Jurats Crill and Blampied)

VL Grogan for J Melia, delegate for P; M Temple, QC, Solicitor General, for the Crown

In the circumstances that had arisen, P would die intestate in respect of a substantial part of her estate, which her brother would then inherit. It was said that the evidence was that she would not have wanted her brother to inherit from her, having fallen out with him, and the proposed will instead would benefit charities which she had favoured in an earlier revoked will and an earlier unexecuted will. This was the first occasion on which a delegate had applied to the court, pursuant to art 30 of the Capacity and Self-Determination (Jersey) Law 2016 for authority to execute a will on behalf of a person lacking capacity.

Held:

English authority. Article 28(3) of the Capacity and Self-Determination (Jersey) Law 2016 provides expressly that only the court may exercise power in relation to the execution of a will on behalf of an interdict. The power of the court is set out in art 30, which is very similar to provisions in the Mental Capacity Act 2005 in the United Kingdom—see ss 1–4, 18(1), 20(3) and Schedule 2. A number of English decisions were accordingly referred to and were of some interest but the court did not accept their reasoning in entirety.

General relevance of how P might wish to be remembered, doubted. In particular, the court would not apply without qualification the statement of English law (see *In re P*[16]) that for many people it is in their best interests that they be remembered with affection by their family as having done "the right thing" by their will, and thus taking

[15] 2001 JLR *N* [37].
[16] [2009] EWHC 163.

the way they are remembered by their family as a key factor. In the present case the brother knew that P had not provided for him substantially in her will and it would be an artificial, perhaps even unconvincing, exercise to place much emphasis on the suggestion that memory of the deceased would be improved by a decision objectively reached by the court following a statutory test, unless there is some sufficiently convincing evidence before the court that the wishes of the person lacking capacity were that the particular recipients under the approved will should benefit.

Actual or perceived wishes or feelings of P are likely to be a key factor. Article 6 of the 2016 Law, which makes detailed provision for the best interests test, applies to the making of wills and also to a number of decisions that might fall to be taken under the 2016 Law: see art 3(1)(c). While the whole of art 6 needed to be considered in relation to the making of wills, the past and present wishes and feelings of the person lacking capacity was likely to be the dominant consideration for the court. In some cases it may be relatively straightforward—*e.g.* where the person lacking capacity has already given instructions for the making of a will but before signing it has an accident which tragically deprives him of capacity. In those circumstances the court would authorise the making of the will. In other cases, there may have been a supervening circumstance which might have affected the wishes and feelings of the person lacking capacity. In both circumstances, the dominant feature would be the actual or perceived wishes and feelings of that person. To take any other approach would be to construe the legislation as conferring upon the court a very wide discretion, whereas the discretion should be exercised narrowly on the basis of what has been described as the balance sheet of factors for ascertaining "best interests" contained in art 6(2)–(4).

Disposal. On the particular facts, a file note in 2009 showed that at that time P did not intend to benefit either her brother or the charities. The court was therefore unable to authorise the delegate to execute the will in question in favour of the charities. The charities were however given liberty to apply.

TRUSTS

Rectification

B & C v Virtue Trustees (Switzerland) AG [2018] JCA 219 (CA: McNeill, Martin and Collas, JJA)

WAF Redgrave for the appellants; J Harvey-Hills for the first and second respondents; NH MacDonald for the fifth respondent; CJ Swart for the sixth respondent

The appellants were beneficiaries under a Jersey discretionary trust. They appealed against a decision of the Royal Court rectifying the trust. This was the first occasion that the principles of rectification have been considered by Jersey Court of Appeal.

Held, as regards the relevant principles:

Principles for rectification. The law of Jersey on rectification was the same as the law of England. The principles had, however, been stated too summarily in *Re Sesemann Will Trust.*[17] The court of Appeal adopted the first four points below from para 4–069 of *Lewin on Trusts* (19th ed.) and added three further points: (a) there must be convincing proof to counteract the evidence of a different intention represented by the document itself; (b) there must be a flaw (that is an operative mistake) in the written document such that it does not give effect to the settlor's intention; (c) the specific intention of the settlor must be shown—it is not sufficient to show that the settlor did not intend what was recorded, it must also be shown what he did intend; (d) there must be an issue capable of being contested between the parties affected by the mistake notwithstanding that all relevant parties consent; (e) there must be there must be full and frank disclosure; (f) no other remedy which achieves the same end must be available; and (g) even when the requirements for rectification are satisfied, the court retains a discretion whether or not to rectify.

Relevant intention where trust established by declaration of trust. Where a trust has been established, as in the present case, by a declaration of trust by the initial trustee, it is necessary for the court to be satisfied that the trust did not represent the true intention of *that trustee*, as the only party to the declaration of trust. It was reasonable to start from the position that the intentions of initial trustee and the economic settlor would be likely to coincide, but it was still necessary to consider whether or not the facts supported that initial view.

Extent of rectification. In principle, rectification should be granted to the extent necessary, but no further, to give effect to the true intention.

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[17] 2005 JLR 421.

Revocation—undue influence

In re Jasmine Trustees [2018] JRC 210 (Royal Ct: Birt, Commr, and Jurats Olsen and Ramsden)

NM Sanders for the representors; FB Robertson for the second respondent; MP Renouf for the sixth respondents; the other parties did not appear and were not represented

The settlors of two Jersey trusts reserved, under the terms of the settlements, a power of revocation. They purported to exercise this power. The question of the effectiveness of the revocations was raised with the trustee by a discretionary beneficiary, who argued that the decision to revoke the trusts had been vitiated *inter alia* by undue influence exerted by her father on the settlors. The trustees remained neutral but brought proceedings for directions as to the validity of the revocations. The trustees and the beneficiary filed evidence.

Held:

Reserved power of revocation is beneficial power. A power of revocation reserved to the settlor on the creation of a settlement, since the effect of exercising it will be to re-vest the assets in him, is necessarily a beneficial power: *Lewin on Trusts*, 19th edn, at 29–016; *TMSF v Merrill Lynch and Trust Co (Cayman) Ltd.*[18] It followed that the exercise of such a power of revocation cannot be set aside on the grounds, for example, of fraud on a power. However in this case the contention was that the exercise of the power could be set aside as being under the undue influence (or mistake).

Undue influence. The law of undue influence in Jersey is similar to that of English law: *Toothill v HSB Bank plc.*[19] The classic statement was to be found in the judgment of Lord Nicholls of Birkenhead in *Royal Bank of Scotland v Etridge (No 2*).[20]

Whilst in most cases, the victim of the undue influence will bring the action, the revocation of a trust by a settlor may be impugned on this ground by a beneficiary. In this case, a discretionary beneficiary of the trusts would have had standing to bring proceedings to set aside the revocation notices on the ground of undue influence. It followed that the discretionary beneficiary had standing to raise the issue where the proceedings were brought by the trustees.

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[18] [2012] 1 WLR 1721 (PC), at para 62.
[19] 2008 JLR 77, at para 28.
[20] [2002] 2 AC 773, at paras 6–8.

The evidence for undue influence was supported by the absence of denials from the settlors or from the father: see *per* Lord Lowry in *R v Inland Revenue Commrs, Ex p TC Coombs & Co*[21] with the support of the rest of the committee; approved by Lord Sumption in *Prest v Prest,*[22] though the point was subject to modification in matrimonial cases.

On the evidence, the court found that the revocation notices had been had been executed by the settlors under undue influence on the part of the father and should be set aside and declared invalid as a result.

[21] [1991] 2 WLR 682.
[22] [2013] 2 AC 415, at para 44.