CASE SUMMARIES

The following key indicates the court to which the case reference refers:

JRC	Royal Court of Jersey
GRC	Royal Court of Guernsey
JCA	Jersey Court of Appeal
GCA	Guernsey Court of Appeal
JPC	Privy Council, on appeal from Jersey
GPC	Privy Council, on appeal from Guernsey

CIVIL PROCEDURE

Injunctions—freezing orders—duty of full and frank disclosure—*inter partes* hearing

Cornish v Brelade Bay Ltd [2019] JRC 091 (Royal Ct: Bailhache, Bailiff, and Jurats Ramsden and Thomas)

NMC Santos-Costa for the plaintiffs; JD Garrood for the defendant

In an application for a freezing order, the question arose as to the extent of the duty of the applicant to make full and frank disclosure at an *inter partes* hearing.

Held:

(1) **Duty of full and frank disclosure in ex parte applications**. The duty of full and frank disclosure which falls on an applicant for a freezing injunction exists principally where the court is faced with an *ex parte* application. Because the court in those cases hears only one side, it is the duty of the applicant to disclose fully all matters relevant to the application, whether of fact or of law, which are or may be adverse to it. This is a "high duty" requiring the full, fair and accurate disclosure of all material information, and a duty to draw the court's attention to significant factual legal and procedural aspects of the case: *Memory Corporation plc v Sidhu*[1]; *Goldtron Ltd v Most Invs Ltd*[2].

(2) ***Inter partes* applications for freezing order.** However, underlying the obligation of full and frank disclosure is that it is an *ex*

[1] [2000] 1 WLR 1443.
[2] 2002 JLR 424.

parte application. Where the application for a freezing order is made on notice, as was the position here, the obligation for full and frank disclosure did not arise in the same way. A party must be frank in its submissions to the court. But it is no longer necessary for a party to set out in detail all the points which might be taken against him if the other party were present, because the other party is present and has the opportunity, through his advocate, to make his case.

Pleading—*Scott* schedule

Sampurna Properties (Jersey) Ltd v Blacks Outdoor Retail Ltd [2019] JRC 092 (Royal Ct: Master Thompson)

JN Heywood for the plaintiff; JD Garrood for the defendant

The parties were in dispute as to whether the defendant had complied with redecoration and repair works and other obligations as assignee lessor under a lease. The question before the Master in the present interlocutory judgment was whether a *Scott* schedule should be ordered.

Held:

(1) ***Scott* schedule**. A *Scott* schedule is a form of pleading which brings both parties' cases in relation to each of the disputed items together in tabular format in a single document which may easily be referred to by counsel, witnesses and the judge throughout the trial; the purpose of the schedule is to enable both sides to know what the issues are. A bare denial of liability for a particular item does not advance matters (see N Dowding QC and A Oakes, *Dilapidations—The Modern Law and Practice*, Westlaw, at para 38–18).

(2) **Guidance as to use.** The English *Civil Procedure Guide 2019* vol 2, para 2C 40/5.6, at 592, also contains guidance on *Scott* schedules and their use in the Technology and Construction Court in England including the following—

> "The secret of an efficient Scott Schedule lies in the information that is to be provided and its brevity, excessive repetition is to be avoided. It is important that the defendant's responses to any such Schedule are as detailed as possible . . . nevertheless before any order is made or agreement is reached for the preparation of a Scott Schedule both the parties and the court should consider whether this course (a) will generally lead to a saving of costs and time or (b) will lead to a wastage of costs and effort [because the Scott Schedule will be simply be duplicating earlier schedules or experts reports]. A Scott Schedule should only be ordered by the court or agreed by the parties in those cases where it is appropriate and proportionate."

(3) **Appropriate on case-by-case basis.** It will be necessary to consider on a case-by-case basis whether the ordering of a *Scott* schedule is needed and is proportionate and if so at what stage. In addition, just because the court has power to order a *Scott* schedule, this power should not detract from parties in their pleading setting out all material facts relied upon, which, the Master noted had not occurred in this case.

(4) **Disposal.** In the present case it was appropriate to order a *Scott* schedule to be provided before discovery. This was because the plaintiff's case in relation to why the defendant had failed to keep the premises in a state of good repair and why repair works had not been carried out had not been set out or pleaded in its order of justice beyond a bare assertion. The alternative would be otherwise to require discovery for every item of works carried out in the schedule of works even if not disputed. That would not be proportionate.

COMPANIES

Compulsory winding up—distribution of assets

In re Conqueror Holdings Ltd [2019] GRC 038 (Royal Ct: Collas, Bailiff)

MJ Adkins and JA Tee appeared for the applicants; the respondent was not represented

Conqueror Holdings Ltd ("the company) was a Guernsey company formed as an SPV to acquire land with planning permission to construct a 50-room hotel in North Greenwich ("the property"). The project was financed by secured lending and by 41 "off the plan" sales on long leases of individual rooms to investors ("the room buyers") all of whom had entered into individual agreements with the company ("the agreements"). The room buyers had, pursuant to the agreements, paid deposits as part payment of the purchase price. The company did not have sufficient funds to complete the work. In 2017, it was placed into administration. The administrators wrote to the room buyers notifying them that their agreements had been terminated. The administrators subsequently sold the property for £4.6m and the following day paid £1,990,953 to the secured loan note holders. On 20 March 2018, on the administrators' application, the Royal Court ordered that: (i) the administration be terminated, having achieved its purpose; (ii) the company be compulsorily wound up; and (iii) the administrators be discharged and re-appointed as joint liquidators of the company. Prior to insolvency, the company had received notices of rescission from 12 of the room buyers. In November 2018, the liquidators applied to the Royal Court seeking orders that the room buyers be admitted as creditors of the company and rank as unsecured

creditors in the distribution of the company's assets in the respective amounts paid to the company by each of them. They sought, alternatively, amongst other things, a direction from the court as to the proper admission and ranking of the room buyers in the liquidation and/or their rights with respect to the proceeds of sale. The question arose as to whether the room buyers could be said to have a beneficial interest (in the form of an equitable lien) in the proceeds of sale of the property; in other words, whether the liquidators held the proceeds of sale on trust. Expert evidence on this issue in English law was adduced as that was the governing law of the agreements and the property was located in England. English counsel opined that the room buyers had no beneficial interest in the proceeds of sale of the property under English law.

Held: The Guernsey rules governing the distribution of assets of an insolvent company would be applied as the company was a Guernsey company and the Royal Court had appointed the liquidators under the Companies (Guernsey) Law 2008 ("the Companies Law"). Further, the distribution of assets of the insolvent company was governed by s 419 of the Companies Law and the net proceeds of sale had been transferred to a bank account on the Island. The room buyers did not have any beneficial interest in the proceeds of sale of the property under English law and the position did not change when the net proceeds of sale were deposited into a Guernsey bank account. Section 1 of the Trusts (Guernsey) Law 2007 (as amended) sets out the circumstances in which a trust is said to exist. No Guernsey trust could have come into existence when the proceeds of sale were transferred to Guernsey. Identifying whether Guernsey law recognised the room buyers as having an equitable lien over the proceeds of sale required the application of conflict of laws principles. The Guernsey court will generally recognise an equitable lien over proceeds of sale which have arisen under English law, subject to any overriding rule of Guernsey law granting title to someone else. The question of whether the lien afforded a room buyer priority over other creditors in the distribution of the assets of the company fell to be determined by reference to ss 418 and 419 of the Companies Law. After a liquidator's remuneration, the second priority was given to "any rule of law as to preferential payments" (s 419(a)). This provision was a reference to s 1(7) of the Preferred Debts (Guernsey) Law 1983, the effect of which in the instant case would require any security interest to be discharged before paying any other liabilities of the company. For an equitable lien under English law to amount to a security interest within the meaning of the relevant legislation, a written security agreement between the secured party and the debtor was required. Since the equitable liens arose by operation of English law, there was no written security agreement. With the exception of pledge in respect of chattels,

no form of security interest in moveable property is capable of being created under Guernsey customary law. Guernsey law did not offer any remedy which would give the room buyers any right to claim a secured interest or any priority over unsecured creditors in the distribution of the company's assets. In accordance with s419 of the Companies Law, the company's assets were to be applied in satisfaction of the its debts and liabilities *pari passu*; all creditors, including the room buyers, would recover the same proportion of the debt they were owed. All persons who entered into contracts with the company and paid a deposit for the construction and lease of hotel rooms were entitled to be admitted as creditors of the company, though as unsecured creditors in the distribution of the company's assets, in the respective amounts paid to the company by each of them.

Comment (Natasha Newell): This judgment establishes that the Guernsey court will generally recognise an English equitable lien, subject to any overriding rule of Guernsey law granting title to someone else. In the absence of a written, enforceable, security agreement, such a lien will not, however, afford a creditor priority over other creditors in the distribution of the assets of the insolvent company.

FAMILY LAW

Children—appeals in public law cases

In re Linda (Care proceedings) [2019] JCA 033 (CA: Bailhache, Martin and Logan Martin, JJA)

MR Godden for the applicant; PF Byrne for the Minister; MJ Haines for the mother; RS Tremoceiro for the father.

On an appeal against a decision of the Royal Court under para 4 of Schedule 2 to the Children (Jersey) Law 2002, approving the placement of a child off-Island, the Court of Appeal considered *inter alia* the applicable appellate test.

Held:

(1) **Test on appeal.** In a public law children's cases of this nature, all practicable answers may to some extent be unsatisfactory. Even if the appellate court would have preferred a different answer, it should not interfere unless it can be said that the judge's decision was "wrong". It was not useful to consider whether different shades of meaning are intended by expressions such as "blatant error" or "clearly wrong"; but for the purpose of such appeals an appellate court should only interfere if the court below has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but rather

has exceeded the generous ambit within which a reasonable disagreement is possible: *In re B (a child)*[3]; *G v G*[4]; *Re B-S*[5].

(2) **Position where witnesses heard.** If the judge below has had the benefit of seeing witnesses and hearing evidence, the appellate court must give very careful consideration to whether the decision below was "wrong" in this sense: *In re B (a child)*[6].

MONEY

Security interests—security trustee—blessing exercise as trustee of power of sale

In re Bayswater Road (Holdings) Ltd [2019] JRC 102 (Royal Ct: Birt, Commr, and Jurats Blampied and Thomas)

JD Garrood for the representor; the respondent did not appear and was not represented

A secured party holding a security interest in shares, created under the Security Interests (Jersey) Law 2012 ("Security Interests Law"), and acting as a security trustee, sought to exercise its powers of enforcement over the collateral. It having proved impossible to sell the collateral to a third party, a sale was now proposed to a party related to the secured lender. The security trustee was concerned that, in effecting a related-party sale, it might later be claimed that it had acted in breach of art 46 of the Security Interests Law. By way of protection, it sought the approval of the court for the sale under both art 52 of the Security Interests (Jersey) Law 2012 and art 51 of the Trusts (Jersey) Law 1984.

Article 46 of the Security Interests Law provides that—

> "a secured party who sells collateral under this Part owes a duty—
>
> (a) to take all commercially reasonable steps to obtain fair market value for the collateral, as at the time of the sale;
>
> (b) to act in other respects in a commercially reasonable manner in relation to the sale; and
>
> (c) to enter any agreement for or in relation to the sale only on commercially reasonable terms."

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[3] [2013] UKSC 33, *per* Lord Wilson, at para 38.
[4] [1985] 1 WLR 647.
[5] [2013] EWCA Civ 1146.
[6] [2013] UKSC 33, *per* Lord Neuberger, at para 93.

Article 52 of the Security Interests Law is headed "Court may facilitate realization of collateral" and provides that the court may, on the application by the secured party when an event of default has occurred, make orders facilitating the realisation of the collateral—

> "if it appears to the Court reasonably necessary to do so in order to make it possible or practicable for the secured party to exercise his or her rights under this Part."

Held:

(1) **No power under Security Interests Law to approve exercise of power of sale.** The use of the court's powers under art 52 was governed by the words—

> "if it appears to the Court reasonably necessary to do so in order to make it possible or practicable for the secured party to exercise his or her rights under this Part . . ."

In the present case, the security trustee did not need the court's assistance in order to be in a position to sell the collateral. It was in a position to do that now. The security trustee's concern was not that it was not in a position to sell the collateral, it was that it wished to have the protection of a court order in case it is alleged that it is not complying with art 46(2) by taking all commercially reasonable steps to obtain fair market value for the collateral. This did not fall within art 52. The Security Interests Law did not confer a power upon the court to make an order prior to any sale that such sale will comply with the requirements of art 46.

(2) **Court able to bless decision of a security trustee as trustee.** However, the security trustee was acting as a trustee. The jurisdiction of the court to bless a momentous decision by a trustee was well established, as were the principles to be applied; see *In re S Settlement.*[7] Given the unqualified requirements of art 46(2) of the Security Interests Law, a security trustee will invariably owe the duty set out in that article to the person who has provided the collateral. There must therefore be a substantial risk that a breach of that duty would give rise to a claim for compensation. In the circumstances, it was entirely appropriate that in this sort of case a security trustee should be able to request the court to bless its decision to realise collateral if this is considered to be a momentous decision. On the facts, the court was satisfied that the proposed sale price was comfortably in excess of the market price, that the trustee had taken all commercially reasonable steps to obtain fair market value for the

[7] [2001] JRC 154; 2001 JLR *N* [37].

collateral and had acted in all other respects in a commercially reasonable manner in relation to the sale and the terms of the proposed share purchase agreement. Accordingly the court approved the decision.

SUCCESSION

Wills—revocation—oral revocation

In re Voisin Executors Ltd [2019] JRC 080 (Royal Ct: Clyde-Smith, Commr, and Jurats Ramsden and Dulake)

AD Hoy for the representor; JC Turnbull for the first respondent; an affected party appeared in person

The executors of a will sought directions as to how they administer it. Under the terms of the will, the residue was left to the testator's nephew and niece. However it was contended that the gift to the nephew had been orally revoked by the testator at a meeting with her advocate shortly before she died. The advocate's contemporaneous note of the meeting was that the residue "would now go to [the niece] alone."

Held:

(1) **Revocation of testamentary disposition.** "*Le testament est un acte révocable à volonté*" (Le Gros, *Droit Coutumier de Jersey*, at 124). Revocation requires an act of revocation, accompanied by the intention to revoke ("*animus revocandi*"): *In re Beaugié*[8]; Basnage, *Commentaire sur la coutume de Normandie*, 3rd ed, vol 2, art 412, at 171 (1709).

(2) **Method of revocation.** The statutory restrictions on the methods of revocation which apply in England under the Statute of Frauds 1677 and the Wills Act 1837 had no application in Jersey. Jersey customary law does not prescribe any particular formality for the revocation of a will provided that there is an act of revocation, accompanied by the intention to revoke (*animus revocandi*). Another testamentary disposition is not necessary; the revocation may be effected by other means such as such as tearing it up, or writing cancelled across it, provided always that the intention is clear: *In re Bull*.[9] Under Jersey law, an oral declaration made before a witness can constitute an act of revocation. Whether there has been an effective oral declaration will be a matter of evidence and will depend upon an analysis of the words used. They must be clear and unambiguous and be expressed in

[8] 1970 JJ 1579, at 1585.
[9] 1999 JLR 228.

absolute terms so as to take effect at once (the court was concerned with a conditional revocation) and be accompanied by the intention to revoke. It was possible for a will to be partially revoked in writing and there was no reason why an oral revocation should be any different, save that it would need to be absolutely clear as to what part of the will was being revoked.

(3) **Unsatisfactory to revoke a will orally.** Nevertheless an oral revocation was a very unsatisfactory way of managing one's testamentary affairs. If, unusually, an oral declaration has been resorted to, it would be important to have it reduced to writing with the minimum of delay.

(4) **Disposal on the facts.** On the facts, the court held that at the meeting with her advocate the testator had expressed the intention of giving the whole of the residue of her estate to her niece, which was to be put into legal effect, but there was on the facts of this case no clear and unambiguous act of revocation of the gift taking effect at once. Had it been imperative for the change to take place at once, then a simple codicil could have been written out in hand and executed before a witness then and there. There would have been no need to rely on the unusual and inherently unsatisfactory oral declaration.

TRUSTS

Trust assets—mistake—alternative rights of action

In re J Settlement [2019] JRC 111 (Royal Ct: Bailhache, Bailiff, and Jurats Crill and Hughes)

D James for the representors; the respondents did not appear.

In an application under art 47G of the Trusts (Jersey) Law 1984 by a trustee or other person to set aside the exercise of a power in relation to the trust or trust property on the ground of mistake, it is necessary that—

> "(3) . . . where the trustee or person exercising a power—
>
> (a) made a mistake in relation to the exercise of his or her power; and
>
> (b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that mistake, and
>
> the mistake is of so serious a character as to render it just for the court to make a declaration under this Article."

A question arose *inter alia* as to whether the fact that the trustee and/or settlor could pursue a claim against professional advisers for negligent

tax advice should prevent the court regarding the mistake as being "of so serious a character as to render it just for the court to make a declaration under this Article".

Held:

(1) **Position where beneficiaries have a claim against trustee.** It was not obvious that courts should come to the rescue of a trustee or his professional advisers for a mistake that one or other might have made in circumstances where, had there been no trust, the trustee as client would have sued the professional adviser for the loss in question. However, the court is not attracted by the proposition that beneficiaries should be left to a remedy of bringing litigation against trustees or professional advisers. Beneficiaries are usually not at fault and (in the case of tax-related mistakes) will have already incurred loss by reason of unnecessary tax charges. To force them to incur further expense in what may be uncertain litigation when the law allows for the avoidance of a decision made in breach of the trustees' duties was unnecessary, undesirable and unjust: *In re Onorati Settlement.*[10]

(2) **Position similar where trustee has claim against adviser.** The question in the present case was whether the same approach should be taken where the potential plaintiffs in a negligence action would be the trustee and/or the economic settlor, rather than the beneficiaries. It was not obvious that it would be in the interests of beneficiaries to drive trustees down a route of seeking funding for litigation purposes, or alternatively risking trust monies for such a venture. The approach should therefore be extended to trustees in circumstances such as these. Accordingly, it was just in the present case to grant relief under art 47G in respect of the trustee's mistake.

Trust assets—mistake—different kinds of mistake

In re G Trust [2019] JRC 056 (Royal Ct: Bailhache, Bailiff, and Jurats Blampied and Averty)

MW Cook for the representors; DP Le Maistre for the minor and unborn beneficiaries.

The representors, as settlors, sought pursuant to art 47E of the Trusts (Jersey) Law 1984 the setting aside of certain transfers into trust which had mistakenly been made by them from UK bank accounts. The UK source of the funds had resulted in a UK inheritance tax liability, although neither of them were at any material time resident, ordinarily resident or domiciled in the UK, and nor were they British citizens. A

[10] 2013 (2) JLR 324.

question was raised as to whether Jersey law relating to the setting aside of voluntary dispositions into trust follows English law in making fine distinctions between different types of mistake, not all of which are sufficient for this purpose.

"Mistake" for the purposes of art 47E (and 47G) is defined in art 47B(2) as including (but not limited to)

> "(a) a mistake as to—
>
> (i) the effect of,
>
> (ii) any consequences of, or
>
> (iii) any of the advantages to be gained by,
>
> a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property;
>
> (b) a mistake as to a fact existing either before or at the time of, a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property; or
>
> (c) a mistake of law including a law of a foreign jurisdiction."

Held, as to the meaning of mistake:

(1) **Distinctions between different kinds of mistake under English principles of equity.** As is pointed out by the authors of *Goff & Jones on the Law of Unjust Enrichment* (Westlaw, 9th ed, at paras 9–41 – 9–54, English law distinguishes three different situations:

(i) *incorrect conscious beliefs*, where, owing to the claimant's ignorance of some fact or facts, he held an incorrect conscious belief which caused him to act;

(ii) *incorrect tacit assumptions*, where the claimant acted on the basis of a tacit assumption about some fact which was falsified by some other fact of which he was ignorant, or simply he acted on the basis of an incorrect tacit assumption about a fact; and

(iii) *mere causative ignorance*, where the claimant made neither an active nor a tacit mistake and simply acted in a state of what is called mere causative ignorance. The English position appears to be that a court has no power to give relief where there is mere causative ignorance: *Pitt v Holt.*[11]

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[11] [2013] UKSC 26.

(2) **Application of statutory definition in Jersey.** However this was not the approach under the law of Jersey when the court receives applications under art 47E. The jurisdiction to give relief is statutory and requires the court to decide whether there was any mistake as defined by art 47B(2) of the Trusts (Jersey) Law 1984. The court was pleased to reach the conclusion that it was inappropriate to make these distinctions; the distinction between an incorrect tacit assumption and mere causative ignorance was rather artificial, and the intellectual space between incorrect tacit assumptions and mere causative ignorance was almost impossible to find because tacit assumptions will invariably be mistakes only when the maker of the assumption is ignorant of some material fact.

Security trustee—blessing exercise as trustee of power of sale. See MONEY (Security interests—security trustee)