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

BANKRUPTCY

Costs of *désastre*—Viscount's costs

In re Rockingham Invs Ltd [2019] JRC 165 (Royal Ct: Birt, Commr, sitting alone)

The Viscount appeared in person; JD Garrood for the first and second respondents; the third respondent in person

The court considered, for the first time, the issue of costs following its decision, after review under art 31(7) of the Bankruptcy (Désastre) (Jersey) Law 1990, to overturn the Viscount's rejection of a claim submitted in a *désastre*. The creditor whose claim had been rejected by the Viscount (ACJ) sought orders (1) that its costs be paid out of public funds rather than the assets of the *désastre*, and (2) that the Viscount's own costs in these proceedings should rank after payment of ACJ's claim.

Held:

(1) **The Viscount was not liable for costs unless acting unreasonably**

(a) The court retains a general discretion as to costs in relation to an art 31(7) review. An important factor is that the Viscount is a public officer undertaking a public function often involving a need to make a decision on matters of some complexity and difficulty and, provided that she has acted conscientiously and reached a reasonable decision, it would be wrong to penalise the public purse simply because the court on review reaches a different decision. The importance of that factor means that, in the ordinary course, it is unlikely that the court will order the Viscount to pay the costs of a creditor who has been

successful on such a review in the absence of some form of unreasonableness on the Viscount's part, either in relation to the original decision or in relation to the conduct of the review.

(b) In the present case the Viscount had not acted unreasonably and the balance came down in favour of not awarding costs against the Viscount.

(2) **The Viscount's properly incurred costs cannot be subordinated by the court.** It was not open to the court to order that the Viscount's costs should rank after those of ACJ. The order of payment under art 32 of the 1990 Law was mandatory and the Viscount's properly incurred costs were first on the list. Given the decision that the Viscount had acted reasonably, it followed that in principle the costs were properly incurred (subject to reasonable quantum) and accordingly had to be paid ahead of other claims in the *désastre*.

CONTRACT

***Résolution*—contract of employment**

De Sousa v Danny Yau Ltd (t/a Princess Garden) [2019] JRC 169 (Royal Ct: Bailhache, Bailiff, sitting alone)

MP Cushing for the appellant; LA Ingram for the respondent.

The appellant appealed against a decision of the Jersey Employment and Discrimination Tribunal dismissing her claim for unfair dismissal. The tribunal found that, by failing to turn up for work for 14 days and not making contact with her employer, the appellant had resigned or, alternatively, that in those circumstances the employer had been entitled to treat her conduct as a resignation. The appellant argued that she had not resigned. She argued that the tribunal erred in law by failing to direct itself that in order to constitute a resignation from employment there must be clear and unambiguous communication to this effect between the parties.

Held:

(1) In *Hamon v Webster*,[1] the court held that, other than in relation to leases, the court would prefer the English approach at para 67. Accordingly the court held in that case that an innocent party could terminate the contract where the breach of contract was one which went to the root of the contract, or where the contract itself specifically

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[1] 19 July 2002, unreported, noted at 2002 JLR *N* [30].

provided that he would have a right to terminate the contract in respect of the breach in question.

(2) In *Grove v Baker*,[2] the court accepted the rule as expounded in *Hamon v Webster* that termination is permitted without going to court where the breach is sufficiently serious or the contract gives a specific termination right covering the reach in question. The Royal Court did not agree, however, with the proposition that the law of termination of contract followed exactly the English model. The court held that whilst the law relating to *résolution* is not dissimilar to the English remedy of termination for breach, it is different in that the remedy of *résolution* in Jersey law is available at the discretion of the court whenever the failure to comply with an obligation can be said to be sufficiently serious to justify a cancellation of the contract.[3]

(3) In French law, the remedy of *résolution* required, in principle, resort to the court. However there was now developing case law in France which enabled a contracting party unilaterally to bring to an end a contract in the case of serious non-performance by the other contracting party.[4] This was consistent with the approach advanced in *Hamon v Webster* and *Rossborough (Ins Brokers) Ltd v Boon.*[5] Whenever a contract has been terminated without judicial sanction for what is alleged to be a serious case of non-performance of obligation under the contract, in essence the terminating party takes the risk that his unilateral termination will be successfully challenged. Adopting this approach allows for a convenient termination of contracts for breach of obligation without reference to a court, and a mechanism for challenging such a termination through judicial process if that should be appropriate.

(4) It was also consistent with the principles underlying *la convention fait la loi des parties* that where a contract provides a basis for the termination of the contract without recourse to the courts, then, subject to the exercise of judicial discretion should there be room for that, any such termination in accordance with the agreed contractual terms will be valid. It was unnecessary to circumscribe the cases where the court might exercise such a discretion, although there were at least two. The first concerned contractual penalties where for many years, the Royal Court has set aside or reduced a contractual penalty if the amount provided for is excessive. The second is in relation to lease contracts which contain a provision that in the event of late payment of

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[2] 2005 JLR 348.
[3] Fairgrieve, *Comparative Law in Practice*, at 165 (2016).
[4] Fairgrieve, *Comparative Law in Practice*, at 162 (2016).
[5] 2001 JLR 416.

rent or breach of covenant by the lessee, the lease is automatically cancelled, termination of the lease, including a contract lease, expressly needs the court's consent in order to ensure that the contractual right is not exercised unconscionably.

(5) In *Société Générale, London Branch v Geys*,[6] the Supreme Court held that contracts of employment are not an exception to the general rule that a repudiated contract is not terminated until the repudiation is accepted by the innocent party (Lord Sumption dissenting). The Royal Court was not bound by English contract law. There was an important distinction arising from the fact that contracts of employment are not subject to an order of specific performance, both at customary law and under the tribunal's jurisdiction pursuant to the Employment (Jersey) Law 2003. The court therefore declined to follow the majority decision in *Société Générale*.

(6) Where the implied duty of good faith in an employment contract is destroyed, that goes to the heart of the contract and the party who causes that state of affairs to come about cannot assert against the innocent party that the contract continues.

(7) In the present case, the tribunal found that the employer had acted reasonably in treating the appellant's failure to turn up for work for 14 days as a resignation. This was a reasonable evaluative decision. But it was also equally valid to say that the conduct of the appellant had destroyed the implied trust and confidence which the contracting parties to a contract of employment need to have with each other. This amounted to a repudiation of the contract. There was, moreover, nothing in the definition of the circumstances in which an employee is dismissed (art 62 of the Employment (Jersey) Law 2003) which gives the employee rights if the employee resigns on his or her initiative.

CRIMINAL PROCEDURE

Proceeds of criminal conduct—forfeiture order—human rights

AG v Ellis [2019] JRC 141 (Royal Ct: Clyde-Smith, Commr, and Jurats Olsen and Dulake)

MT Jowitt for the representor; PG Nicholls for the respondent.

The Attorney General sought an order under art 11(4) of the Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018 ("the FoA Law") forfeiting a bank account in Jersey in the name of the respondent on the ground that it was "tainted property". This was on the basis that the Attorney General had reasonable grounds to believe that the Jersey

[6] [2012] UKSC 63.

account had been established by the respondent for the purpose of evading UK tax. Questions were raised as to whether (1) the Attorney General had "reasonable grounds to believe that property held in the bank account is tainted property", as is required by art 10(2) in order to enable the Attorney General to give the requisite notice commencing the summary procedure set out in the FoA Law; and (2) whether the whole of the account was subject to forfeiture irrespective of the amount of tax evaded.

Held:

(1) **Attorney General's reasonable grounds to believe tainted property.** On the facts, all the conditions in art 10(2) for the giving of notice by the Attorney General were fulfilled.

(a) The court noted, in particular, that art 10(2) of the FoA Law requires that, in order to give the requisite notice to a bank, the Attorney General must have "reasonable grounds to believe" that the bank account is "tainted property". Within the definition of "tainted property", however, art 2(1) provides for the lower test of "reasonable suspicion" on the part of the Attorney General. "Reasonable grounds to believe" requires both an honest belief and reasonable cause for that belief (see *Sophianou v Defence Cttee*[7]). Bearing in mind the draconian nature of this legislation, it was right to apply the higher test of "reasonable grounds to believe".

(b) The definition of "tainted property" in art 2(1) has two parts. Under the first part it means property "found" to have been "used in, or intended to be used in, unlawful conduct". The second part is concerned with property "found" to have been "obtained in the course of, from the proceeds of, or in connection with, unlawful conduct." This second part is concerned with the proceeds of crime: *Doraville Properties Corp v Att Gen.*[8]

(c) There is a presumption that in exercising his powers under the FoA Law the Attorney General was acting properly (*Acturus Properties Ltd v Att Gen*[9]) and the onus is upon the respondent to show that there were no reasonable grounds upon which he could have come to the belief that the account was tainted property. The respondent had not discharged that burden and in any event the court was satisfied that the Attorney General did have reasonable grounds to believe that the account was tainted property on the information then available to him.

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[7] 1987–88 JLR *N*–17a.
[8] 2016 (2) JLR 44.
[9] 2001 JLR 43.

(d) Article 1 defines "unlawful conduct" as conduct "(a) constituting an offence against a law of Jersey; or (b) which, if it occurs or has occurred outside Jersey, would have constituted such an offence if occurring in Jersey". If tax evasion had occurred in Jersey it would be an offence of either *Foster* fraud (*Foster v Att Gen*[10]) or under art 137(1) of the Income Tax (Jersey) Law 1961. It was conduct, therefore, which came within the definition of "unlawful conduct" in art 1(1) of the FoA Law. The fact that tax liabilities in the UK can be discharged without criminal sanction and the fact that there has been no criminal charge in the UK had no bearing on whether or not there was unlawful conduct as defined, which was concerned with transposing the conduct to Jersey. The account was used in, or intended to be used in, that unlawful conduct. The respondent's conduct meant that the account fell fully within the definition of tainted property in art 2 of the FoA Law.

(2) **Convention rights: proportionality.** However the FoA Law also needed to be considered in the light of Convention rights. Applying the approach in *Ahmed v HMRC*[11] and in particular *R v Waya*[12] the position in the Jersey was as follows: (i) art 1 of the First Protocol of the European Convention on Human Rights (protection of property) is one of the Convention rights to which the Human Rights (Jersey) Law 2000 applies; (ii) that means that under art 4, legislation must be read and given effect in a way which is compatible with that Convention right; (iii) that means that the FoA Law must be read and given effect in a way which avoids violation of that Convention right; (iv) a forfeiture order which does not conform to the test for proportionality will constitute such a violation and it is incumbent upon the court to provide a remedy for any such violation. The court in the present case had no information on the amount of tax evaded by the respondent. It needed to be addressed on whether it is proportionate to forfeit the whole of the account or just that part that represented the taxes evaded.

Proceeds of criminal conduct—freezing of assets—human rights

Prospective Applicant v States Police (Chief Officer) [2019] JRC 161 (Royal Ct: Clyde-Smith, Commr and Jurats Ramsden and Christensen)

WAF Redgrave and CFD Sorensen for the applicant; H Sharp QC for the respondent.

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[10] 1992 JLR 6.
[11] (2013) EWHC 2241 (Admin).
[12] [2012] UKSC 51.

The applicant sought by way of judicial review the quashing of the decision of the Jersey Financial Crimes Unit taken on 8 November 2018 to maintain its refusal to consent to the normal operation of certain bank accounts. The original decision of no consent had been made on 31 July 2018 following the filing, pursuant to the Proceeds of Crime (Jersey) Law 1999, of a suspicious activity report by company administrators in Jersey.

It was contended by the applicant *inter alia* that the maintenance of no consent infringed the applicant's rights under art 1 Protocol 1 (A1P1) of the European Convention on Human Rights, which has effect pursuant to the Human Rights (Jersey) Law 2000. A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Held:

(1) **Potential for injustice of consent regime: Garnet**

(a) The Royal Court had on a number of occasions remarked upon the potential for injustice from the application of the Jersey consent regime. The "informal freeze" is potentially of indefinite duration if the bank retains its suspicion even if there is no prosecution, whereas in the UK provision had been introduced by the Proceeds of Crime Act 2002 for a moratorium period and deemed consent: Chief Officer of *States Police (Chief Officer) v Minwalla*,[13] *Gichuru v Walbrook Trustees (Jersey) Ltd.*[14]

(b) However in *Customs & Excise v Garnet Invs Ltd*,[15] the Guernsey Court of Appeal held that the clear overall purpose of the equivalent provisions was to create an extremely wide ranging "all crimes" prohibition in money laundering; that the effect on a bank was the practical effect of the operation of the criminal law rather than an aid

[13] 2007 JLR 409.
[14] 2008 JLR 131.
[15] 2011–12 GLR 250.

to the freezing of property; and that given differences in the nature of financial services business in the UK and Guernsey one could understand that the time limits introduced by the 2002 Act had not been introduced. The decision in *Garnet* was a decision of the highest persuasive authority in respect of equivalent legislation and legislative history and there was no doubt that the Jersey Royal Court should follow its findings as to the applicable law. The fact that at the time of the decision in *Garnet* Guernsey had no general offence of failing to disclose possible money laundering was of no consequence to the Guernsey Court of Appeal's analysis, and evidence of how the no consent regime was used today did not undermine the Guernsey Court of Appeal's conclusion as to the legislative purpose of the consent regime.

(2) **Period of no consent may become disproportionate for purposes of Convention property rights.** In *Garnet*, the Guernsey Court of Appeal held that it was not reasonable to imply into the statutory consent regime itself any period of time in which consent has to be granted in order to avoid what may in practice be an extended effective freeze. However the Guernsey Court of Appeal then turned its attention to A1P1. It did find the second paragraph of A1P1 engaged, but concluded that the decision was not an excessive interference with *prima facie* property rights. It followed that there therefore could come a point when the continued imposition of no consent would become disproportionate having regard to the Convention right.

(3) **Test of disproportionality.** In *Interush v Police Commr*,[16] the Hong Kong Court of Appeal adopted the four-step proportionality test (overlapping in nature) applied in English and European jurisprudence in order to decide whether a measure infringing a right is justified. Applying this test, the court asked: (i) whether the intrusive measure pursues a legitimate aim; (ii) if so, whether it is rationally connected with advancing that aim; (iii) whether the measure is no more than necessary for that purpose; and (iv) whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroads made into the rights of the individual, in particular whether it resulted in an unacceptably harsh burden on the individual. The first three steps, following *Garnet*, were met. It was the fourth part of the test, namely whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the rights of the individual, in particular whether it results in an

[16] [2019] HKCA 70.

unacceptably harsh burden on the individual, that following *Garnet* now came into play.

(4) **Disposal.** There was no judicial guidance on the point at which the maintenance of a no consent will become disproportionate, nor was the court in a position to give such guidance. Each case will depend on its own facts. In this case the court was reviewing a decision to maintain the no consent taken by the JFCU on 8 November 2018, when the no consent had only been in place for some three months and the JFCU was still in the process of gathering and collating evidence. Given the importance of tackling money laundering, it simply could not be said that as at the 8 November 2018 the practical effect of the no consent letter over the company bank account placed an unacceptably harsh burden on the applicant. The judicial review therefore had to fail.

EVIDENCE

Background evidence—admissibility

Priestley v Att Gen [2019] JCA 143 (CA: McNeill, Montgomery and Collas JJA)

IC Jones for the appellant; JC Gollop, Crown Advocate.

The appellant was convicted of six offences of indecent assault and four offences of procuring acts of gross indecency committed against two complainants. Two of the offences of indecent assault involved the first complainant (Complainant 1). The remainder of the offences involved a second complainant (Complainant 2). He appealed against conviction on the grounds that a substantial miscarriage of justice had occurred, contending that the learned Commissioner had been wrong to admit as background evidence, evidence from Complainant 2 that the appellant had indecently assaulted her in England when he was one of the responsible adults who accompanied Complainant 2 and others on a visit to England before the commission of the offences on the indictment. The appellant also contended that evidence given by Complainant 1 in relation to inappropriate touching by the appellant on occasions other than those charged should not have been admitted.

Held:

(1) **Test of admissibility of background evidence.** The test for the admissibility of background evidence was that identified by the

English Court of Appeal in *R v Pettman*,[17] adopted in Jersey in the judgment of Nutting JA in *U v AG*:[18]

> "Where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

(2) **Relevance and necessity.** The Privy Council in *Myers v DPP*[19] recently observed that the admission of background evidence needs cautious handling if it is not to become a token excuse for admitting the inadmissible, but where the evidence adds something, beyond mere propensity, which may assist the jury to resolve one or more issues in the case, or is the unavoidable incident of admissible material, as distinct from interesting background or context, the justification exists for overriding the normal prohibition on proof of bad behaviour. Similar concerns were expressed in *R v Dolan.*[20] However, neither *Myers* nor *Dolan* doubt the *Pettman* principles. Relevance and necessity are the touchstones for the admission of background evidence. The fact that evidence is disputed did not affect the application of the *Pettman* principles. Necessary evidence, whether contested or uncontested, may be admitted provided its probative value outweighs its possible prejudicial effect.

(3) **Disposal.** On the facts, the events in England regarding Complainant 2 were necessary background material. The Commissioner had concluded and had been entitled to conclude that the material was necessary and that the account placed would be "incoherent or incomplete". As to the evidence of inappropriate touching of Complainant 1, the exclusion of this evidence would have presented the jury with an artificial picture of the relationship that would have adversely affected their ability to assess Complainant 1's reliability and credibility. The evidence of the persistent sexual interest that the appellant showed in Complainant 1 was necessary to provide a complete and comprehensible picture of their relationship. In any event, the written directions to the jury, about which no complaint was made, correctly directed the jury that the evidence had been admitted

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[17] English CA, 2 May 1985, unreported.
[18] 2012 JLR 349.
[19] [2016] AC 314, at paras. 51–55.
[20] [2003] 1 Cr App R 18.

merely as background evidence and, even if accepted, did not establish any of the offences charged in the indictment.

JURISPRUDENCE

Reception of English law—sentencing guidelines

Priestley v Att Gen [2019] JCA 143 (CA: McNeill, Montgomery and Collas JJA)

IC Jones for the appellant; JC Gollop, Crown Advocate.

The appellant was sentenced by the Superior Number for six offences of indecent assault and four offences of procuring acts of gross indecency committed against two complainants. The sentence was five years' imprisonment concurrent on all counts (bar an offence committed against one complaint when 17, on which a concurrent sentence of four and a half years imprisonment was passed). He sought leave to appeal his sentence on the grounds that it was manifestly excessive.

Held:

(1) The issue raised was whether the sentence passed should have reflected more closely the sentence that would have been passed in England and Wales under the Sentencing Council Sexual Offences Definitive Guideline and whether it was excessive by reference to recent sentencing decisions in the Royal Court.

(2) In *Att Gen v K*,[21] the Jersey Court of Appeal held that: (i) the courts in Jersey are entitled to fix sentencing levels without having regard to the sentencing guidelines in England and Wales; (ii) the sentencing guidelines may serve two legitimate purposes: first, the analysis of aggravating and mitigating factors in the guidelines may prove useful in the assessment of the seriousness of any offending in Jersey, and secondly, the sentencing levels envisaged by the guidelines may reflect the Jersey courts' own assessment of the appropriate sentencing level for a particular offence. (iii) Nevertheless, the courts in Jersey must decide on the appropriate sentence for any offence before it. It does not follow that because guidelines were helpful in any particular case, they would always be helpful. These propositions were founded on principle, based on the marked structural differences between the application of the criminal law in Jersey from that in England and Wales.

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[21] [2016] JRC 158, at para 27.

(3) A comparison between the offence of sexual assault under s 3 of the Sexual Offences Act 2003 and the offence in Jersey of indecent assault did not suggest that they are identical and thus *prima facie* the guideline may not be a useful comparator. In any event even if the Sentencing Council Sexual Offences Definitive Guideline applied, the appellant's analysis of both culpability and harm demonstrates that the guidelines would be likely to have led to a similar overall level of sentence.

(4) Reference to other first instance sentencing decisions of the Royal Court is of limited utility since such cases turn substantially on their own facts.

(5) *Harrison v Att Gen*[22] confirms that, in the absence of special factors, the Court of Appeal will not interfere with Royal Court sentences. An appeal will only be allowed if the Court of Appeal is satisfied that a sentence is manifestly excessive or wrong in principle. The overall sentence of five years' imprisonment in this case was neither excessive nor wrong.

SENTENCING

Immigration—deportation

Gomes v Att Gen [2019] JRC 157 (Royal Ct: Birt, Commr and Jurats Ronge and Dulake)

AE Binnie for the appellant; CLG Carvalho for the respondent.

The appellant was sentenced in the Magistrate's Court to 12 months' imprisonment on three counts of larceny. The magistrate also recommended that the appellant should be deported at the end of her sentence. The appellant appealed against the recommendation for deportation.

Held:

(1) ***Camacho* test.** Applying the test in *Camacho v Att Gen*,[23] before making a recommendation for deportation, the court must conclude: (i) that the defendant's continued presence in Jersey would be detrimental to the public good; and (ii) deportation would not be disproportionate having regard to the rights of the offender and her family to respect for family life under art 8 (right to respect for private and family life) of the European Convention on Human Rights.

[22] 2004 JLR 111.
[23] 2007 JLR 462.

(2) **First limb: detrimental to the public good.** The court agreed with the magistrate that the first limb was satisfied. The offences in this case involved a clear breach of trust and a significant sum of money stolen from a vulnerable victim. Furthermore, the offending was repeated on three occasions over a period of just over six months. As the Bailiff stated in *Bunea v Att Gen*,[24] the gravity of offending is a very material factor when considering whether the defendant is a person whose presence is conducive to the public good of the Island. The magistrate had correctly concluded that the appellant's continued presence was detrimental.

(3) **Second limb: proportionality with art 8 rights.** However, on the facts of this case the second limb of the *Camacho* test was not satisfied. Article 8 permits interference with the family life of an offender if it is necessary "for the prevention of disorder or crime . . . or for the protection of the rights and freedoms of others." As the Bailiff said in *J v Lieut Governor*,[25] this imports the need for an assessment of proportionality. Balancing the interests of the community against the art 8 rights of the appellant and her family, it was not proportionate in this case to recommend deportation. Most significantly, the appellant had been resident in Jersey for some 23 years, almost half her life. It was her home and had been for a long time. She had strong roots here. She also had a good work record and wider family in the Island. The appeal was accordingly allowed on this ground.

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[24] [2019] JRC 056A at para 13.
[25] 2018 (1) JLR 421, at para 53.