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

Discovery—electronic discovery—costs order against advocates

The Law Trust Ltd v JTC Trust Co Ltd [2020] JRC 212 (Royal Ct: Thompson, Master of the Royal Court)

SMJ Chiddicks and PC Sinel for the plaintiff and third parties; MC Goulborn for the defendant.

In proceedings in which the plaintiff, as current trustee, alleged breaches of duty by the defendant, as former trustee, the parties' advocates exchanged correspondence on the question of discovery. The plaintiff's advocates took the view that electronic discovery was necessary. The defendant's advocates replied that the quantity of documents did not justify a costly discovery exercise. The Master had by letter reminded the parties of the requirements in respect of discovery and electronic discovery. Proactive obligations in relation to the conduct of directions hearings are set out in Practice Direction RC 17/05 and, in relation to electronic discovery, Practice Direction RC 17/08. The Practice Direction then sets out in more detail what information is to be provided. The matter came before the Master at an adjourned directions hearing.

Held:

(1) **Failings of parties' advocates regarding discovery**

(a) The Master did not have sufficient information from either party to decide whether or not electronic discovery was required and whether discovery should be limited. In order to advance an argument that electronic discovery was not necessary, a business with the level of sophistication of the defendant needed to explain what systems were

held, how much relevant data relating to the dispute was stored on those systems and what was the most effective way of approaching discovery. The defendant's approach fell significantly short of what was expected and did not comply with the general obligations of a party and advisers at a directions hearing. Nor had the plaintiff provided sufficient information. In particular, although the plaintiff and third parties had concluded that an electronic discovery exercise was required, the information required by paras 11 and 13 of Practice Direction RC 17/08 had not been supplied in advance of the hearing. This information was essential so that the court could make an informed decision.

(b) In all the circumstances, the matter ought not to be adjourned and a general discovery order was made, albeit that once the required information pursuant to Practice Direction RC 17/08 was provided, it was open to any party to come back and seek to vary that order.

(2) **Costs order against parties' advocates**

(a) The starting point was the overriding objective contained in r.1/6 of the Royal Court Rules. Rule 1/6(5) provides "The Court must further the overriding objective by actively managing cases". This included managing the process of electronic discovery and whether discovery should be limited so that the obligations on parties are proportionate. Rule 1/6(4) provides that "The parties are required to help the Court to further the overriding objective". The Master concluded that includes legal representatives and, to the extent there was any doubt about this, para 17 of Practice Direction RC 17/05 states "If any party or its adviser is unprepared for a directions hearing the Court may make such wasted costs orders as are appropriate". The general principles set out in Practice Direction RC 17/08 for discovery of documents held in electronic form made it clear that legal representatives as well as parties should have regard to the general principles. Similarly, the obligations in paras 10 to 17 of this Practice Direction apply to legal representatives as much as parties. Advocates also owe a responsibility to the court to ensure that a client's discovery obligations are met (see para 20 of Practice Direction RC 17/07 on discovery and *Hanby v Oliver*,[1] explored in *Haddad v GB Trustees Ltd*[2]).

(b) The court had wide powers in making costs orders, contained in art 2(1) of the Civil Proceedings (Jersey) Law 1956. Ultimately what costs order is made is about doing justice between the parties. Rules of

[1] 1990 JLR 337, at 347, l.40.
[2] [2018] JRC 227, at paras 30 and 31.

procedure should be complied with: *Reg's Skips v Yates*[3] in which a personal costs order against an advocate was made.

(c) In the light of his findings in this case, the Master ordered that costs of the directions hearing should be borne by the parties' legal advisers themselves. This was in contrast to the usual order made on a directions hearing, which would be costs in the cause, absent serious adversarial argument on a particular issue.

CONFLICT OF LAWS

Forum non conveniens

MB and Services Ltd v United Company Rusal plc [2020] JRC 034 (Royal Ct: Birt, Commr and Jurats Olsen and Pitman)

WAF Redgrave for the plaintiffs; ECP Mackereth for the defendant.

The plaintiffs commenced proceedings in Jersey against the defendant, a Jersey company, for breach of confidence and conspiracy to injure relating to unlawful use of confidential information and/or infringement of patents held by the first plaintiff. The defendant now sought to have these proceedings stayed on the ground of *forum non conveniens*, it being contended that the Russian courts were both available and clearly or distinctly the appropriate forum to hear the action.

Held:

(1) **Applicable principles**

(a) These were to be found in *Spiliada Maritime Corp v Cansulex Ltd*,[4] and summarized in *Federal Republic of Brazil v Durant International Corp*[5]: the court is concerned to establish which is the appropriate forum for the trial of the action, *i.e.*, that in which the case may be tried most suitability in the interests of all the parties and the ends of justice. Lord Goff also approved use of the expression "the natural forum" as being that with which the action had the most real and substantial connection. This generally requires summary examination of the connecting factors, such as matters of practical convenience (accessibility to courts, parties and witnesses and the availability of a common language) and the system of law to be

[3] 2008 JLR 191.
[4] [1987] 1 AC 460.
[5] 2010 JLR 421, at para 19.

applied to the issues, the place of wrongful act or omission and the place of harm: *Supreme Court in Lungowe v Vedanta Resources plc*.[6]

(b) Where, as in this case, proceedings are brought as of right because the defendant is resident in the jurisdiction, the burden on the defendant is not just to show that Jersey is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than Jersey. In this way, proper regard is paid to the fact that jurisdiction has been founded in Jersey as of right.

(c) In some cases, the international nature of the dispute in question may mean that there is no natural forum. There is no reason why English courts should not refuse to grant a stay in such cases where jurisdiction has been founded as of right: *Spiliada*, at 47.

(d) The exercise which the court undertakes when considering the appropriate forum is limited: *Spiliada* at 465; *VTB Capital plc v Nutritek International Corp.*[7]

(e) There is then a second limb to the *forum non conveniens* test. Even though the court has concluded that there is another available forum which *prima facie* is clearly more appropriate, it will not grant a stay if there is a real risk that justice will not be obtained in the foreign court. The burden of showing this falls upon the plaintiff.

(2) **Decision as to appropriate forum**. In this case, the residence of witnesses, the relevant documentation and the need for translation into English all pointed to Russia as the appropriate forum; and so did, in particular, the fact that the claims for breach of confidence and in the tort of conspiracy, upon analysis under the principles of private international law, were subject to Russian law as the proper law. The defendant therefore satisfied the court that Russia was distinctly or clearly the forum which had the most real and substantial connection and in which the case may be tried most suitably in the interest of the parties and the ends of justice.

(3) **Decision as to risk of injustice**. Comity required the court to be extremely cautious in reaching such conclusion (*AK Investment CJSC v Kyrgyz Mobil Tel Ltd*[8]) and focus on the facts of the case (*Deripaska v Cherney*[9]). The experts for each party in this case were agreed that the Russian (Arbitrazh) court was not immune to external or political

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[6] [2019] 2 WLR 1051.
[7] [2013] 2 AC 337.
[8] [2011] UKPC 7.
[9] [2009] EWCA Civ 849.

influence, albeit that this was rare. The difficulty was therefore knowing where the limits of such influence were (as noted by Christopher Clarke J in *Cherney v Deripaska*.[10] On the particular evidence of what had already occurred in this case, coupled with the involvement and character of Mr. Oleg Deripaska, who still had a substantial interest in the defendant and who was close to the Russian state, the court concluded that there was a real risk that the plaintiffs would not receive justice if this particular case were heard in Russia. Accordingly, although the defendants had discharged the burden of showing that Russia was clearly or distinctly a more appropriate forum than Jersey, the court would not stay the current Jersey proceedings.

SOLICITORS

Disciplinary proceedings—striking off

Att Gen v Manning [2019] JRC 171 (Royal Ct: Birt, Commr and Jurats Ramsden, Thomas, Ronge, Christensen and Austin-Vautier)

M Temple, Q.C., Solicitor General appeared for the Crown; EL Burns for the respondent.

The respondent, a solicitor (*écrivain*) of the Royal Court, had been sentenced to a total of 3½ years imprisonment in respect of twenty counts of fraudulent conversion, one count of fraudulent conversion by a trustee and one count of failing to comply with the requirements of the Money Laundering (Jersey) Order 2008. The money was taken from client accounts held for curatorships and a trust in order to pay for obligations of other clients owing to a deficit in his general client account. The Attorney General now applied for an order that the respondent be removed from the roll of solicitors of the Royal Court, pursuant to the inherent jurisdiction of the court, which is expressly preserved by art 32 of the Law Society of Jersey Law 2005.

Held:

(1) The respondent had on numerous occasions fraudulently converted money from client accounts. The fact that he used the money to pay for obligations of other clients rather than for his own personal expenditure was beside the point. The court observed that members of the public are entitled to expect that moneys placed with members of the legal profession on client account are entirely safe. If a lawyer steals or fraudulently converts money which is held for a client, he or she be will be struck off. Such an approach was required for the

[10] [2008] EWHC 1530 (Comm).

purpose referred to by Bingham MR in *Bolton v Law Society*,[11] namely that there should be amongst members of the public a well-founded confidence that any lawyer whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.

(2) Following *Bolton*, and in Jersey *Att Gen v Michel*,[12] there was therefore no alternative to striking off the respondent from the roll of solicitors, and the court so ordered.

STATUTES

Interpretation—retrospective effect

In re Tantular [2020] JCA 013 (CA: McNeill (President); Martin, and Williams JJA)

TVR Hanson for the appellants; AJ Belhomme for the first respondent; CFD Sorensen for the Viscount; MW Cook for the third respondent.

The appellants sought costs against the Attorney General following their successful appeal in the case of *In re Tantular*.[13] The question was raised as to whether the Attorney General was protected against an order for costs by art 2 of the International Co-operation (Protection from Liability) (Jersey) Law 2018. Article 2 protects a public authority in Jersey from liability in damages, costs and consequential claims when providing assistance in good faith pursuant to a request made by a relevant authority of a country or territory outside Jersey under certain scheduled legislation. Aside from the issue of retrospectivity, the Attorney General would, in this case, have fallen within the category or persons who could benefit from the provisions of the 2018 Law. However, the 2018 Law had only come into force on the day of the Royal Court's judgment which had been the subject of the appeal and the question was therefore raised as to whether it applied to an application for costs

Held, as to the issue of retrospectivity:

(1) The proper approach was not to decide what label to apply to the legislative provision, procedural or otherwise, but to see whether the statute, if applied retrospectively, to a particular type of case, would impair existing rights and obligations: *Yew Bon Tew v Kenderaan Bas Mara.*[14] The principle against retrospective effect protected accrued rights or obligations from retrospective alteration, unless it were sufficiently clear that such an alteration had been intended. The

[11] [1994] 1WLR 512, at 518.
[12] 2012 (1) JLR 415.
[13] [2019] JCA 207.
[14] [1983] AC 553.

strength of that presumption varied in different circumstances and it was not normally regarded as applicable to purely procedural provisions: *Warren v Att Gen.*[15]

(2) Absent special circumstances, a party to litigation enjoys, from the outset, a right to seek costs. Similarly, and again absent special provisions, a party to litigation is taken to be aware from the outset that there is a potential liability for costs. Further, the right to seek costs was also an asset in respect of which there could be a valid assignment (such as would highly likely to be part of any agreement between a litigant and a third-party funder). To give the 2018 Law retrospective effect would therefore deprive the appellants in this case of an asset, the accrual of which right had in fact already been recognised by a prior order in these proceedings which, in general terms, had left over consideration of liability for costs.

(3) In some circumstances someone acquiring an asset which, of its nature, is subject to legislative controls as to the rights and responsibilities of the owners of such assets, or changes in the law as stated by the courts, may not be able to claim that she or he should be immune from changes in legal rules. This could apply, for example, in relation to existing families, the ownership of property or the employment of a workforce or taxation on a source of income arranged before the date of imposition of the tax. This did not apply here. A specific right had accrued and the construction contended for by the Attorney General would deprive the appellants of that right.

(4) In the whole circumstances there was therefore no compelling reason to confer retrospective effect upon the 2018 Law. Upon an ordinary construction, art 2 related to "any act done in the discharge or purported discharge of the public authority's functions under any enactment specified in Schedule 1" after the coming into force of the provision. It was true that the appellate proceedings had taken place subsequent to coming into force of the 2018 Law but they were not affected by art 2. To a great extent, the work of an appellate court is to appraise the determination and orders of the court of first instance and, where appropriate, to correct what, in its judgment, are errors in the determination; albeit there may be occasions where new issues emerge. In this case, art 2 of the 2018 Law did not operate to relieve the Attorney General of liability for the costs of the appeal as "any act done in the discharge or purported discharge of the public authority's functions" had not been separate from, but merely a continuation of, the stance at first instance.

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[15] 2009 JLR *N* [44].