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

CAPACITY AND SELF-DETERMINATION

Costs at public expense—protective costs order

In re B (Medical) [2020] JRC 065 (Royal Ct: Sir William Bailhache, Commissioner, sitting alone)

RCL Morley-Kirk for the first respondent; JN Heywood for the second respondents

The Minister brought an application under the Capacity and Self-Determination)Jersey(Law2016 for a"best interests" decision regarding the residence of the first respondent ("the patient"). The second respondents were the parents of the patient ("the parents"). The best interests application raised the issue as to whether any restrictions ought in the patient's best interests be placed on the parents access to him. The parents instructed counsel privately at the beginning of the application but it became apparent that the proceedings were to be longer and more complicated than first envisaged. In addition, an advocate was appointed to represent the patient at public expense. The parents now sought a protective costs order and payment of their costs out of public funds.

Held:

(1) **Private and public interests**. The fact that the parties had a private interest in the outcome did not render a protective costs order inappropriate, although it was unlikely that there would be many other protective costs orders made in private law proceedings because private interests would be more likely to dominate than the public

interest: *Flynn v Reid.*[1] However, in the present case the parent's contribution to the proceedings was as much a public interest contribution as that of the Minister. The public interest was the care provided to people unable to care for themselves.

(2) **Appropriate that parent's costs be met out of public funds**. Cases such as the present were very like public law children cases—the similarity is that decisions are taken affecting the lives of those lacking capacity. How as a society we treat the vulnerable defines us. As with public law children cases, the views of parents—and also their own rights under the European Convention—meant that convening the parents to the applications made by the Minister is appropriate. It was also appropriate that where a best interests decision in connection with the person of a patient is the subject of an application to the court, the public should accept the cost. This was reinforced on the facts of the present case where it was quite unfair that the costs of the Minister and of the independent capacity advocate were met by the public, but the costs of the parents would, absent an order being made, have to be met by them personally. There was no justice in such an outcome. It was therefore ordered that the parents should have a contribution from public funds to the costs which they have incurred in relation to the present application to the same extent as the costs of the independent capacity advocate, and that these should be paid out of the court and case costs vote of the Judicial Greffe in the usual way. In monetary cases, not concerned with the person of the patient, different principles may apply.

(3) **No adverse costs order save in exceptional circumstances**. In principle no costs orders should be made against parents who are joined to the process because the court should have the advantage of their views and they should not be inhibited in giving them, save in exceptional circumstances. In principle, one would also not expect any application for costs to be brought against the Minister in this case, should he be unsuccessful.

CIVIL PROCEDURE

Norwich Pharmacal order—collateral use of disclosed information

Satfinance Investments Ltd v Valla Ltd [2020] JRC 027 (Royal Ct: MacRae, Deputy Bailiff, sitting alone).

CFD Sorensen for the plaintiff; DJ Read for the defendant.

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[1] [2013] (2) JLR 280

The plaintiff obtained a *Norwich Pharmacal* order which required the defendant to disclose specified material to it. This included an undertaking to the effect that, without the leave of the court, the information obtained would only be used for the purpose of identifying assets which could be the subject of freezing orders, in the context of the certain proceedings commenced in England and Wales. The plaintiff sought leave to use the material disclosed in the further proceedings in England and New York and any additional proceedings which related to the same subject matter.

Held:

(1) **Variation of restrictive undertakings**. There appeared to be no previous Jersey authority where an undertaking given in the context of *Norwich Pharmacal* relief has been varied. The Royal Court Rules were silent. The Royal Court needs to be careful when considering a commentary on the equivalent jurisdiction in the English CPR as this does not apply in Jersey. Nonetheless, it was clear that the Royal Court may release, modify or vary a restrictive undertaking such as this. Furthermore, the court noted from previous decisions that the court is keen to ensure that victims are assisted where the financial services industry has been used as an instrument of wrongdoing (although there was no suggestion of that the defendant in this case was a participant to any wrongdoing). As Sumption JA noted in 2006 in *Durante v Att Gen*[2]—

> "It has for some time been the policy of the legislature and of the executive agencies exercising statutory powers that the commercial facilities available in Jersey should not be used to launder money or mask criminal activities here or anywhere else."

The present case was said to be one of civil fraud, and the court will wish to assist victims of fraud whenever it can.

(2) **Principles for allowing collateral use**. The equivalent jurisdiction in England and Wales is governed by r 31.22 of the CPR, under which the *court's* discretion when giving permission is wide and did not appear to differ markedly from the practice before the introduction of the CPR. Nonetheless, it should be borne in mind that this was not a statutory imposition of a condition limiting disclosure, but an undertaking accepted by the court in these proceedings. Referring to Gee, *Commercial Injunctions*, para 25–04ff, as to the exercise of this jurisdiction, the court observed that: the bar is high; the applicant must show cogent and persuasive reasons why any particular

[2] [2006] JLR 112

document should be released amounting to special circumstances permitting collateral use; account is taken of the purpose for which the documents or information is now sought to be used, and the likely consequences of releasing or not releasing the recipient from the undertaking or the restriction in the rules, including any possible prejudice which might be suffered by the party provided the disclosure and taking into account the public interest; and there is also a strong public interest in facilitating the just resolution of civil litigation (*Tchenquiz v Director of the Serious Fraud Office*[3]).

(3) **Disposal**. In this case, the defendant did not allege that any prejudice would be suffered by it if the court permitted disclosure. The court had sufficient knowledge of the English and New York proceedings in order to be able to satisfy itself that special circumstances, constituting a cogent reason for permitting collateral use, existed in respect of the material to which the court has been referred. The court did not have such comfort in relation to other proceedings not yet issued and accordingly the court declined to grant permission in relation to such future proceedings.

CONTRACT

Interpretation—interlocutory state of proceedings

Trico Ltd v Buckingham [2020] JCA 067 (CA: McNeill, Montgomery and Mountfield JJA)

H Sharp QC for the plaintiff; JS Dickinson for the defendant.

On an appeal against the decision of the Royal Court to uphold the decision of the Master to refuse the plaintiff's application for summary judgment, so that a question which involved the interpretation of a side letter should proceed to trial, the Court of Appeal considered the principles for the interpretation of contracts generally and in particular their application in interlocutory applications for summary judgment on a contract the interpretation of which is disputed.

Held:

(1) **Principles for the interpretation of contracts**. English principles governing the interpretation of contracts are followed, though the decisions of the English courts are not binding: *De La Haye v De La Haye*,[4] *Trilogy Management v YT*,[5] *Trilogy*

[3] [2014] EWHC 1315 (Comm) and [2014] EWCA (Civ) 1409

[4] [2018] JRC 233

[5] [2012] (2) JLR Note 19

Management v YT.[6] The Court of Appeal noted the views of the Supreme Court, as set out by Lord Hodge in *Wood v Capita Insurance Services Ltd*[7]:

(a) The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement.

(b) This is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.

(c) Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance.

(2) **Side letter in this case required greater emphasis on factual matrix**. The creation of the particular side letter in this case fell squarely within Lord Hodge's category of contracts, the correct construction of which may be achieved by a greater emphasis on the factual matrix, because of their informality, brevity or the absence of skilled professional assistance. Such was the lack of linguistic clarity that examining the text alone did not easily yield a clear answer as to its objective meaning. The Court of Appeal therefore disagreed with the Royal Court's approach that the drafting history was irrelevant. The court adopted the unitary exercise of considering both the words of the text and the factual matrix. This was not—it was emphasised—to attempt to have an enquiry into the subjective intentions of either party, but rather so that matters in doubt as to the construction which a fair, informed and objective bystander would place upon those words

[6] [2012] JCA 152
[7] [2017] AC 117

could be analysed with the full facts in mind. In the particular circumstances of this case, a full examination of the circumstances and commercial context in which the side letter was agreed might prove to be an important element leading to an objective construction of the linguistically ambiguous terms and import of the side letter.

(3)**Disposal of present interlocutory appeal**. The question of construction for the purposes of the present appeal arose at an interlocutory stage. Adopting the iterative approach in *Wood*, and having examined the numerous affidavits and exhibits, there was insufficient evidence of the context in which the side letter arose to enable the Court of Appeal to determine the issue of construction on an interlocutory basis. The court concluded that the Royal Court had been right to refuse to grant summary judgment. The Royal Court had, however, also given its decision its decision on the construction of the side letter. In fidelity to the principles in *Wood*, the Royal Court ought to have declined to do so on an interlocutory basis.

CRIMINAL LAW

Withdrawal of guilty plea

Att Gen v Chereches [2020] JRC 035 (Royal Ct: MacRae, Deputy Bailiff, and Jurats Blampied and Dulake)

MR Maletroit, Crown Advocate; MJ Haines for the defendant.

The defendant brought an application to vacate a guilty plea.

Held:

(1) **Legal principles for allowing withdrawal of guilty plea**. The relevant principles had recently been set out in *Att Gen v Padfield* (as yet unpublished). At customary law the court had a discretion to allow a defendant to change his plea from guilty to not guilty. That discretion had now been codified under art 79 of the Criminal Procedure (Jersey) Law 2018.

(2) **Discretion where plea unequivocal.** A guilty plea must be unequivocal; the court must be satisfied that the guilty plea represents a clear acknowledgement of guilt. There is, however, a discretion to allow an unequivocal guilty plea to be withdrawn. This is to be exercised very sparingly, particularly where the plea is entered with the benefit of legal advice: *Att Gen v Durkin*.[8] Such a plea may still be allowed to be withdrawn if it becomes apparent that the accused did not appreciate the elements of the offence to which he was pleading

[8] [2004] JRC 068

guilty or if the facts relied upon by the prosecution do not add up to the offence charged: *Blackstone Blackstone's Criminal Practice*, para D22.11 (2019).

(3) **Procedure—affidavit normally required**. In most cases, an affidavit should be sworn by the defendant and the advocate who represented them when their plea was entered. In the absence of sworn evidence it is difficult for the defendant to persuade the court to exercise its discretion to withdraw a guilty plea, particularly when such discretion is to be exercised very sparingly.

(4) **Disposal**. In the present case the court found that (a) the plea had been unequivocal; and (b) it had been entered into on instructions to counsel and there was no evidence to the effect that the defendant did not appreciate the elements of the offence, nor that the facts relied upon by the prosecution to not add up to the offence charged.

JUDICIAL REVIEW

Sufficient interest

Scott v Minister for Treasury & Resources [2020] JCA 114 CA (Montgomery JA) sitting as a single judge

Judgment on the papers.

In *Scott v Minister for Treasury & Resources*,[9] Clyde-Smith Commr refused to grant the applicant leave to apply for a judicial review of the decision of the Minister for Treasury and Resources to distribute the States of Jersey strategic reserve or other funds to businesses under phase 2 of the Government Co-Funded Payroll Scheme ("the scheme"). The applicant now sought leave to appeal. He sought to bring his application in the interests of the citizens of Jersey and in his own interest as a person who has been denied any benefit under the scheme. The applicant argued in summary that the scheme discriminated unfairly against persons who do not qualify for support under the scheme and was ultimately likely to be wasteful of the resources of the Government of Jersey.

Held, affirming the decision of the Royal Court:

(1) **Requirement of "sufficient interest" for judicial review**. A person may not bring an application for judicial review unless that person has a "sufficient interest" in the matter to which the claim relates: *Cooper v Att Gen*[10] and r 16/2(11) of the Royal Court Rules.

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[9] [2020] JRC 095
[10] [2005] JCA 156

The modern approach is case specific and there is no general definition of sufficient interest. Some claimants may be considered to have sufficient standing where a claim is brought in the public interest even if they do not have any direct financial interest in the outcome. As Sedley J observed in *R v Somerset County Council, Ex p Dixon*[11]—

> "there will be, in public life, a certain number of cases of apparent abuse of power in which any individual, simply as a citizen, has a sufficient interest to bring the matter before the court."

(2) **Requirement satisfied in this case at interlocutory stage**. In the present case, if the applicant's claim had any merit, he arguably had sufficient standing, at least at the leave stage, to bring an application for judicial review. However, he failed to satisfy the further requirement for leave for judicial review—that he should have a realistic prospect of success—and accordingly leave to appeal the decision of the Royal Court was refused.

PARTNERSHIP

Limited partnerships—disclosure to limited partners

IQ EQ 1986 Ltd v Agilitas 2013 Private Equity GP Ltd [2020] JRC 119 (Royal Ct: Clyde-Smith Commr, and Jurats Ronge and Austin-Vautier)

EB Drummond for the representor; MW Cook for the respondents.

The question was raised as to the rights of a limited partner under art 26 of the Limited Partnerships (Jersey) Law 1994, or alternatively the customary law, for orders against a general partner for inspection and disclosure of documents.

Held:

(1) **General law of partnership; duty of good faith**. The 1994 Law modified the customary law regarding partnerships; but the customary law applies except to the extent inconsistent with the express provisions of the 1994 Law: art 40. The customary law principles, following Pothier, have much in common with the common law: *Bennett v Lincoln.*[12] The court is, however, not bound to adopt Pothier when ascertaining the customary law of Jersey, in particular in relation to concepts that would not be appropriate for modern times:

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[11] [1998] Env LR 111, 117

[12] [2005] JLR 125

Cannon v Nicol.[13] It was indisputable that a contract of partnership was one of good faith, requiring honesty and fair dealing as between the partners and all partners are in the absence of agreement to the contrary entitled to share in the management of partnership business and to enter into obligations on its behalf, subject to the overriding duty of good faith. The duty of good faith is common with English law (see *Lindley and Banks on Partnerships*, 20th ed, para 16–06).

(2) **Right of a limited partner to inspect partnership records**. A key aspect of the 1994 Law is that a limited partner has no liability for the debts or obligations of the limited partnership unless he or she participates as a general partner in the management of the business (art 19(1) and (2)). With no involvement in management, which is undertaken by the general partner, art 13 secures for a limited partner certain rights, including the right to inspect and take copies of the "limited partnership records". "Records" is not defined, but art 8(4) requires that certain limited records be kept at the registered office of the limited partnership, available for inspection. Article 9 requires that accounting records be kept.

(3) **Meaning of "limited partnership records" in art 13(1)(a) and court's discretion**

(a) On proper analysis the "limited partnership records" in art 13(1)(a) of the 1994 Law comprise (i) the formal documents required to be maintained at the registered office of the limited partnership under art 8(4); (ii) the accounting records required to be kept under art 9; and (iii) all other records of the partnership business kept by the limited partnership. The extent of those records will depend on the nature of the partnership business, its mode of conduct and the terms of the governing documents read in the light of current business practice—a "functional test"; see *Inversiones Frieira SL, Inversiones Valea SL v Colyzeo Investors II LP, Colyzeo Investment Management Ltd*,[14] decided in relation to an English limited partnership under the UK Limited Partnerships Act 1907.

(b) The issue of what should be disclosed should not be approached on an abstract basis by reference to categories or types of documents, but by a review by the general partner of what documents actually exist and an assessment whether they form part of the partnership records.

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[13] [2006] JLR 299

[14] [2011] EWHC 1762 (Ch)

(c) The motive or purpose of a limited partner exercising its rights under art 13(1)(a) is irrelevant, because the right is expressed in unqualified terms.

(d) Article 13(1)(a) establishes the core right of the limited partner to inspect the limited partnership records, but when it comes to invoking the aid of the court, art 26(1) gives by its terms the court a discretion as to what order it will make. The court would have the same discretion under the customary law.

TRUSTS

Mistake—English law trust

Re FG Mileham (Building Contractors) Ltd Remuneration Trust [2020] JRC 045 (Royal Ct: Birt Commr and Jurats Thomas and Ronge)

PM Livingstone for the representors; D Petit, director of the first respondent; NGA Pearmain in person.

The representors sought to have a trust set aside on the ground that it had been established by mistake. The trustee was a Jersey company and the administration was carried out in Jersey but the proper law of the trust was English law.

Held, granting the application on the facts and applying English law:

(1) **Case to be determined under English law.** The trustee being a Jersey company and the administration being carried out in Jersey, the court had jurisdiction under art 5 of the Trusts (Jersey) Law 1984. But the proper law of the trust was English law and art 11(2)(b)(i) (power of the court to declare a Jersey-law trust invalid because established by mistake) was irrelevant. The court had to decide the matter according to English law.

(2) Need for English counsel's opinion in such cases. The court expected in such cases to be provided with an English counsel's opinion, setting out the relevant English law on mistake and applying it to the facts. No such opinion had been provided. Given that English law on this topic had been authoritatively established in *Pitt v Holt, Futter v Futter*[15] and that the court was very familiar with that judgment, the court was willing in this case to proceed without an opinion on English law. However, it was best practice in future cases

[15] [2013] UKSC 26

that applications of this nature should be supported by an opinion from English counsel where the trust is governed by English law.