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

"Best interests" decision

Health & Social Servs Min v. B [2020] JRC 153 (Royal Ct: Bailhache, Commr and Jurats Ronge and Hughes)

RCL Morley-Kirk for the first respondent; EL Wakeling for the second respondents

The first respondent lacked capacity to decide where he should live. The Minister for Health and Social Services applied under art 27(1)(a) of the Capacity and Self-Determination (Jersey) Law 2016 for a specific health and welfare decision as to the first respondent's residence. Article 3(1)(c) of the 2016 Law requires an act done, or a decision made, on behalf of a person lacking capacity to be done or made in the person's "best interests", a concept further elucidated by art 6. The question arose as to the principles to be applied in making a "best interests" decision under the 2016 Law.

Held:

(1) **Authority under Metal Capacity Act 2005.** The 2016 Law, and in particular art 6 ("Best interests"), is substantially modelled on the Mental Capacity Act 2005 of England and Wales. Accordingly, decisions of those courts were of particular interest and the decision of the UK Supreme Court in *Aintree Hospitals NHS Foundation Trust v James*[1] was particularly helpful.

[1] [2013] UKSC 67; [2014] 1 AC 591.

(2) **"Best interests" not objective, but has objective elements.** The best interests test focuses on the patient as an individual rather than on the conduct of the medical professionals, and it considers all the circumstances, both medical and non-medical. This involves an element of substituted judgment, where the court is considering what it would do objectively on behalf of the patient, but this is not conclusive—the court should take into account the wishes and feelings of the patient as an individual and any factors which it is thought he might consider if he were able to do so (there being reference in both s 4 of the 2005 Act and in art 6 of the 2016 Law to the beliefs and values which would be likely to influence his decision if he had capacity). That requires the court to consult with carers and family interested in the patient's welfare as to what would be in his best interests and what his own views would have been. The best interests test therefore goes further than a substituted judgment test because one is required to accept that the preferences of the person concerned are an important component in deciding where the best interests lie. Overall, therefore, the test is not an objective assessment, albeit it contains elements of objectivity, but the court is required to take a step back and look at the welfare of the patient in the widest sense, taking into account not just medical factors but social and psychological factors, putting itself in the place of the individual patient and asking what his attitude to the question might be.

(3) **"Best interests" decision is not a foolish decision.** Nevertheless, and following English authorities, a best interests decision must not be a foolish one—the statute requires the decision to be a best interests decision and it follows that it is not open to the court, assuming on the evidence that it is satisfied that the patient, if he had capacity, would have taken a bad decision, to take that bad decision in his best interests—because it would not be a best interests decision.

COMPANIES

Merger—construction of agreement

Energy Investments Global Ltd v Albion Energy Ltd [2020] JCA 258 (CA: McNeil, Bailhache and Storey JJA)

DM Cadin for the appellants; AD Hoy for the respondent

The facts, so far as relevant to the legal issues referred to below, were as follows. The respondent sold its shares in a Jersey company to the appellant. Under the terms of the share purchase agreement, the consideration was to be paid in three instalments. This was supported by a Jersey law security interest given by the appellant over the shares, the secured liabilities being expressed to be the appellant's obligation

to pay any unpaid portion of the consideration. The third instalment was not paid. The English High Court granted the respondent summary judgment in respect of the outstanding money.[2] The respondent then sought to exercise its security over the shares. The Royal Court acceded to the respondent's request for certain orders under art 52 of the Security Interests (Jersey) Law 2012 facilitating the respondent's enforcement of its security. In doing so, the Royal Court rejected, in particular, the appellant's argument that the effect of the doctrine of merger (under which a cause of action merges into a judgment obtained in respect of such cause of action and is thereby extinguished such that no new proceedings can be brought in relation to that cause of action) was that, having obtain a judgment for the secured liabilities in the English High Court, the respondent was no longer able to enforce its security interest for the claim. On appeal by the appellant, questions were raised *inter alia* as to whether the Royal Court had correctly applied the doctrine of merger and had properly construed the ambit of the security under the security interest agreement (SIA).

Held, dismissing the appeal:

(1) **Doctrine of merger.** Agreeing with the Royal Court and the parties, the doctrine of merger forms part of Jersey law. The doctrine is a substantive rule about the legal effect of a judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: *dicta* of Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*[3] followed. In considering the effect of the doctrine in a particular case, the court had to examine the nature of the underlying obligations by construing the relevant agreements.

(2) **Doctrine applicable to a foreign judgment under Jersey customary law.** In this case the judgment was an English High Court judgment and it was thus, from the perspective of Jersey, a foreign judgment. Under English common law the doctrine of merger did not apply to a foreign judgment. This exception was removed by the Civil Jurisdiction and Judgments Act 1982. The Jersey courts were neither bound by the previous common law nor the English statute. Instead the court had to consider what was right as a matter of principle. In that limited context it could have regard to the fact that Parliament had abrogated the common law rule. It was unclear what principled reason lay behind the rule. All modern authority suggested that comity between courts was an important factor to take into account, as Jersey

[2] *Albion Energy Ltd v Energy Invs Global BRL* [2020] EWHC 301(Comm).
[3] [2013] UKSC 46, [2014] AC 160 at para 17.

courts had also emphasised. Furthermore, a foreign judgment can operate as *res judicata* in cause of action estoppel where the remedy is the same and the law in England has developed to allow issue estoppel in respect of matters covered by a foreign judgment in an appropriate case: *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)*.[4] The approach of Lord Wilberforce in *Carl Zeiss* in relation to issue estoppel could be carried over.

(3) **Effect of merger on security**. The effect of the doctrine of merger, after judgment had been obtained, was not to extinguish the contractual obligation to pay; rather, the creditor's private right to seek to enforce it had been superseded or replaced by a higher right of public decree. The nature of the right to obtain judgment for payment was sufficiently different from the taking of security to secure that obligation that it could not be said that the right to security merged into the judgment.

(4) **Construction of relevant agreements**. The Royal Court may have expressed itself too widely in raising the concern that, if the doctrine applied to a judgment so as to supersede the right to enforce security, secured parties would generally lose their security if they did not enforce it prior to obtaining judgment; for that might be what parties intend, although not common place. The Court of Appeal referred to the principles of construction of documents summarised by Page, Commr in *Re Internine Trust*[5] approved by the Court of Appeal in *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd*.[6] The court also had regard to the rules for the interpretation of contracts set out by Pothier, *Traité des Obligations*, Part 1, Chapter 1, at art VII. The court was enjoined by both Pothier and the English authorities to look at the document as a whole. Construing the SIA as a whole and also the share purchase agreement, it could not be said that the effect of the SIA was that the security available to the respondent ceased to be available when judgment was taken against the appellant.

CONTRACT

Interpretation of documents

Energy Invs Global Ltd and Heritage Oil Ltd v Albion Energy Ltd [2020] JCA 258. See COMPANIES (Merger—construction of agreement)

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[4] [1967] 1 AC 853 HL.
[5] 2005 JLR 23.
[6] [2012]JCA152; 2012 (2) JLR *N* [19].

CRIMINAL PROCEDURE

Proceeds of criminal conduct—forfeiture of assets—human rights

Att Gen v Ellis 2020 JRC 245 (Royal Ct: Birt, Commr, and Jurats Crill and Austin-Vautier)

MT Jowitt QC, Solicitor General, appeared for the Attorney General; the respondent did not appear and was not represented

The Royal Court had previously determined that the respondent's bank account in Jersey was "tainted property" for the purposes of the Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018, on the basis that he had opened the account in the 1980s and had paid into it money from his legitimate business activities with the intention of evading UK income tax on that income. In *Att Gen v Ellis*,[7] the court further held, however, that it would be disproportionate and therefore contrary to art 1 of the First Protocol of the European Convention on Human Rights[8] to forfeit the whole account rather than just the proportion which represented the evaded tax. It also held that the burden lay on the Attorney General to satisfy the court that what he was seeking by way of forfeiture was proportionate.

In *Att Gen v Ellis*,[9] the Court of Appeal granted an appeal by the Attorney General. The Royal Court had been correct to hold that the whole balance represented tainted property; it was not merely the unpaid tax that was tainted property, rather it was the whole balance of the account from time to time, because that account was an instrumentality of tax evasion as it was opened for the purpose of committing tax evasion and was used for that purpose. The Royal Court had been wrong, however, to place weight on the English decision of *Ahmed v HMRC*[10] because that case was concerned with English legislation which, unlike the Law, dealt only with the proceeds of crime and not with the instrumentalities of crime. The evidential burden in relation to the issue of proportionality lay on the respondent not the Attorney General. Whilst there may be a working assumption that a forfeiture order will be made in respect of all the tainted property in any particular case, that is not, the Court of Appeal held, a legal presumption and can be rebutted in any particular case by a respondent adducing suitable evidence to show that it would be disproportionate to forfeit all of the tainted property and therefore a breach of art 1 of the First Protocol of the ECHR. The Court of Appeal therefore

[7] [2019] JRC 219.
[8] Incorporated into Jersey law by the Human Rights (Jersey) Law 2000.
[9] 2020 (1) JLR 268.
[10] [2013] EWHC 2241 (Admin).

remitted the matter to the Royal Court for reconsideration of the issue of proportionality.

The matter was therefore remitted to the Royal Court. The respondent did not appear and was not represented.

Held, ordering the whole balance to be forfeited:

(1) Since the respondent had not produced any evidence, it was impossible for the court to know what proportion of the account represented evaded tax and what proportion represented legitimate earnings which would remain after all outstanding tax and penalties were settled.

(2) Further, the account had been opened and used in its entirety as a tool or instrumentality to commit tax evasion and to retain the benefits of that tax evasion. The account had no other purpose. There was a public interest in discouraging the use of bank accounts in Jersey for tax evasion as opposed to legitimate tax planning.

(3) For these reasons, the forfeiture of the entire account was proportionate and would not constitute a breach of art 1 of the First Protocol of the ECHR.

EMPLOYMENT

Employment and Discrimination Tribunal—appeals—admission of new evidence

Raducan v Pizza Express Ltd [2020] JRC 253 (Royal Ct: Clyde-Smith, Commr sitting alone)

The appellant appeared in person; VS Milner for the respondent

On an appeal to the Royal Court against a decision of the Employment and Discrimination Tribunal, the appellant sought to adduce new evidence.

Held, dismissing the application:

(1) **Principles for admission of new evidence on appeal from tribunal.** In the absence of authority on the principles to be applied, guidance could be found in relation to appeals to the Court of Appeal from the Royal Court. In that context it is necessary that the further evidence: (1) could not have been obtained with reasonable diligence for use at the trial; (2) is such that, if given, would probably have an important influence on the result of the case, although it need not be decisive; and (3) must be apparently credible, although it need not be

incontrovertible: *Hacon v Godel.*[11] The courts have been sparing in the exercise of this power, having regard to the well-known maxim that there should be a finish to litigation. As to what the Royal Court might do with that new evidence, bearing in mind that its role in an appeal under the Employment (Jersey) Law 2003 is restricted to questions of law and that the tribunal is the fact-finding body, the court observed that it had power to remit a case to the tribunal (*Voisin v Brown*[12]).

(2) **Disposal**. In the present case, applying the test in *Hacon* on the particular facts, the application to adduce the new evidence was refused.

HUMAN RIGHTS

Right to respect for private and family life—deportation

M v Minister for Home Affairs [2019] JRC 222B (Royal Ct: Birt, Commr and Jurats Olsen and Pitman)

SEA Dale for the applicant; SA Meiklejohn for the Minister

The court considered an application for judicial review to quash decisions of the Minister for Home Affairs to make a deportation order in respect of the applicant and later not to revoke that order. The decision to deport the applicant was made on the ground that the Minister deemed the applicant's deportation to be conducive to the public good based the offences he had committed. It was argued for the applicant that the decisions were disproportionate having regard to the applicant's long-standing personal and family life on the Island and his rights under art 8 of the European Convention on Human Rights.[13]

Held, quashing the deportation order:

(1) **Principles for both recommendation for deportation order and order itself**. The two-limbed test for a recommendation by the court for deportation (*Camacho v Att Gen*[14]) applied equally to the making of a deportation order by the Minister, that is to say: (i) the defendant's continued presence in Jersey must be detrimental to the public good; and (ii) deportation must not be disproportionate having regard to the rights of the offender and his family to respect for family life under art 8 Convention rights.

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[11] [1989]JCA181.
[12] [2007]JRC047.
[13] Incorporated into Jersey law by the Human Rights (Jersey) Law 2000.
[14] 2007 JLR 462.

(2) **Approach on judicial review where art 8 rights engaged**. In a human rights case, the court will subject the decision of the Minister (previously Lieutenant Governor) to intense and anxious scrutiny on an objective basis to see whether he has, within the discretionary area of judgment accorded to him, struck a fair balance between the relevant interests, namely the offender's right to respect for his private and family life on the one hand, and the prevention of crime and disorder and (in the case of drug trafficking offences) the protection of the health, rights and freedoms of others, on the other; the burden falling on the Minister (*De Gouveia v Lieutenant Governor*[15]). The traditional *Wednesbury* standard of unreasonableness—was the decision of the decisionmaker so unreasonable that no reasonable decisionmaker could reach it?—is inappropriate where the decision under review engaged a fundamental right or important interest. It is not open to the decision maker to risk interfering with fundamental rights in the absence of compelling justification: *R v Lord Saville of Newdigate, ex p A.*[16] There are nonetheless constraints upon the court's powers to intervene. First, the court is not a fact-finding body in this exercise and it would be very rare for any evidence other than affidavit evidence to be considered. Secondly, there is deference to the decision taker. A higher degree of scrutiny on human rights grounds is still not a full merits review. What is needed is that the court examine what reasons have been given, whether they comply with the fundamental rights of the applicant and in particular whether the lawfulness of what has been done meets the structured proportionality test that the courts now apply, recognising that the decisionmaker has a discretionary area of judgment: *J v Lieutenant Governor*.[17]

(2) **Disposal**. The court concluded on the particular facts that the Minister's decision to make a deportation order, and subsequently to refuse to revoke it, fell outside the Minister's area of discretion and was disproportionate with regard to the applicant's art 8 Convention rights having regard to his personal and family connections with the Island. The deportation order was accordingly revoked.

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[15] 2012 (1) JLR 291.
[16] [2000] 1 WLR 1855.
[17] [2018]JRC072A.