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 DELEGATION

Scope of delegation

In re D (Capacity) [2021] JRC 070 (Royal Ct: Clyde-Smith, Commr, and Jurats Blampied and Ronge)

PF Byrne on behalf of the Attorney General; D, E and F appeared in person; D Blackmore as *amicus curiae*

Article 24(1) of the Capacity and Self-Determination (Jersey) Law 2016 empowers the court to make declarations as to the capacity of a person to make a single specified decision or multiple decisions on such matters as are described. Under art 24(2), the court can then appoint a delegate to make those decisions on the person's behalf. Under art 24(3), the court must ensure when appointing a delegate that the scope and duration of the appointment are no greater than reasonably necessary having regard to all the circumstances.

An earlier act had determined that D lacked capacity to manage his "extraordinary financial matters" although not smaller day-to-day finances. By the present judgment, the Court appointed E and F as delegates of D and clarified the terms of the earlier Act

Held:

(1) Under art 3(1) of the 2016 Law, a person is assumed to have capacity unless it is shown otherwise. There is no provision in the Law for a person who is assumed to have capacity to be provided with the assistance of a delegate. If the person is shown to lack capacity to make decisions, then a delegate is appointed to make those decisions, not to assist a person who lacks capacity in the making of those decisions.

(2) The imprecise term "extraordinary" had not been defined by the court, and it was necessary for it to be defined, not just for D and the proposed delegates, but also for the bank and any third party dealing with D's assets, so that there was clarity as to what decisions D could or could not make. The court interpreted the act as providing that D had capacity to make decisions about his weekly finances, through his debit card and current account, but not beyond that. The court then elaborated in monetary terms the scope of the delegation and fashioned an order accordingly.

CIVIL PROCEDURE

Pleading of foreign law in claims of conspiracy and in breach of confidence

MB & Services Ltd v United Company Rusal Internationals Public Joint Stock Company [2021] JRC 083 (Royal Ct: Birt, Commr, sitting alone)

WAF Redgrave for the plaintiffs; D Evans for the defendant

The defendant applied pursuant to RCR r 6/13 to strike out the plaintiffs' claim in the order of justice, in whole or in part; alternatively, for an order that the plaintiffs be directed to file an amended order of justice addressing the alleged deficiencies in the current order of justice. The defendant argued in particular that the plaintiff's claims had been inadequately pleaded in that (a) her claim for breach of confidence did not plead under which system of law the claim arose and (b) her claim in the tort of conspiracy did not specify a *lex loci delicti* and set out the principles of that claim so as to show that the requirement for double actionability was satisfied.

Held:

(1) The principles to be applied by the court when considering a strike-out application were well established and were conveniently summarised by Beloff, JA in *Trant v Att Gen*,[1] at paras 22 and 23. It was also well established that if a pleading is defective in setting out or particularising a cause of action, the claim as a whole should not be struck out if the defect is capable of remedy by filing particulars or an amended pleading; for example *Papadimitriou v Quorum Management Ltd.*[2]

(2) Foreign law is treated as a matter of fact; see Dicey, Morris and Collins, *The Conflict of Laws* (15th edn), para 9–001 and, so far as

[1] 2007 JLR 231.
[2] [2004] JRC 142, at paras 15 and 36; 2004 JLR *N* [38].

Jersey law is concerned, *In re Imacu Ltd.*[3] Being a matter of fact, it must normally be pleaded so as to comply with RCR r 6/8.

(3) In an earlier forum judgment, the court reached the provisional conclusion that the breach of confidence claim was governed by Russian law because such a claim was to be categorised for conflict of law purposes as a restitutionary claim for unjust enrichment and the governing law of such a claim is the law of the country which has the closest and most real connection with the claim and, on the basis of the material then before it, Russia was likely to be the country which had the closest and most real connection with the claim and that Russian law would therefore be the governing law of the claim. It would, however, be open to any party to argue in due course that a claim for breach of confidence should be categorised as a claim in tort rather than as a claim to unjust enrichment (see the discussion at para 36–058 of *Dicey*) and/or that the claim had its closest and most real connection with some jurisdiction other than Russia.

(4) As to the claim in conspiracy, the court held in the forum judgment that this was a claim in tort and therefore subject to the double actionability principle. The court went on to reach the provisional conclusion that Russian law was the *lex loci delicti* as Russia was the country where the majority of actions relied upon were likely to have occurred.

(5) The question which then arose was whether the plaintiffs should be directed to plead at this stage what they contended was the governing law of the claims or whether this was something which could be left until after discovery.

(a) In relation to the claim in the tort of conspiracy, the Court approved the approach in *University of Glasgow v The Economist*[4] as implicitly approved in *Kuwait Oil Tanker Co v Al Bader*.[5] Where the question of double actionability applied, and the plaintiff must assert that the tort is actionable in the foreign country and therefore in which country the relevant acts took place, the *lex loci delicti*. The Order of Justice did not presently comply with this and needed to be amended. A plaintiff needed either simply to assert that the tort was actionable under that system of law or, if the plaintiff so wishes, set out

[3] 1989 JLR 17, at 23.
[4] [1990] Lexis citation 2430; [1997] EMLR 495.
[5] [2000] EWCA Civ 160.

what the law of that foreign country is in order to support that assertion.

(b) In relation to the claim for breach of confidence, this is normally regarded as akin to a claim to one in unjust enrichment and therefore the governing law is ascertained by determining the country which has the most substantial and real connection with the claim. It was not consistent with the purpose of pleadings as summarised by Page, Commr in *Federal Republic of Brazil v Durant International Corp*[6] (that is, to know the other side's case to be met, to identify the real issue in dispute and to ensure orderly progress to trial) that there should be uncertainty, in a case where most if not all the relevant facts occurred outside Jersey, as to which system of law is said by a plaintiff to govern the claim. Nor was that consistent with *Dicey*, at para 9–003. This required the plaintiffs in this case to plead which system of law they say governed the claim in breach of confidence and to specify (concisely) the essential elements of the applicable foreign law and the facts and matters relied upon to show that, on their case, they fulfil the requirements of a successful claim under that law.

(c) Although in this case discovery had not yet taken place, much was already known by the plaintiffs and set out in the order of justice and for the reasons set out in the *Republic of Brazil* case, the plaintiffs should set out their stall with clarity. It would of course always be open to them to seek leave to amend if later required.

(6) This was clearly a case where any defect in the pleading fells within RCR r 6/13(1)(c) and could be cured by amendment. The order of justice was not liable to be stuck out in its entirety under RCR r 6/13(1)(a) as disclosing no reasonable cause of action.

CONTRACT LAW

Interpretation of documents

O'Hare v Burgher [2021] JRC 065 (Royal Ct: Bailhache, Commr, and Jurats Thomas and Hughes)

H Sharp, QC for the plaintiff; CJ Swart for the defendant

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[6] 2011 JLR *N* [19].

A question of construction of a settlement agreement arose on an application for summary judgment.

Held:

(1) In *Trico Ltd v Buckingham*[7] the Court of Appeal had proceeded on the basis that, as accepted by both parties in that case, English principles governing the interpretation of contracts as laid down by the English courts were followed in Jersey. However, courts rely upon counsel to put forward all relevant authorities before them. This is a particularly important obligation in circumstances where submissions are made to the Court of Appeal or the Privy Council, neither of which might be expected to be aware of all Jersey authorities, and this is particularly relevant in contract cases where the underlying law of contract is not the same as it is in the different countries of the United Kingdom.

(2) As the Court of Appeal noted In *Energy Investments Global Ltd v Albion Energy Ltd*,[8] the courts of Jersey regularly refer in contract cases to the works of Pothier, who the Royal Court on numbers of occasions has described as providing a surer guide to the Law of Jersey than that of cases decided in England and Wales—at one stage regarded as authoritative in England and held in similar respect is held in Scots Law—and in that case the court also had regard to the commentaries of Pothier, *Oeuvres Complètes* (Tome Premier, *Traité des Obligations*) Part 1, Ch 1, at art VII where twelve rules of construction are to be found.

(3) The view set out by English and Scottish judges in relation to the construction of contracts were undoubtedly helpful but one must be careful with any extrapolation of those rules in cases where the objective/subjective question comes to be considered in the identification of the contract which the parties made. In this case, however, that did not arise because neither side contended that the agreement in question had not been made, nor that there was any fundamental problem in meeting the requirements of a valid contract as set down in *Selby v Romeril.*[9]

(4) The Commissioner observed in particular that the comments of Lord Hodge in *Wood v Capita Insurance Services Ltd*[10] between paras 10 and 13 (cited at para 56 of the Court of Appeal judgment in *Trico Ltd v Buckingham*) regarding the relation between textualism

[7] [2020] JCA 067.
[8] 2020 (2) JLR 421.
[9] 1996 JLR 210.
[10] [2017] AC 1173.

and contextualism were of assistance: these were not conflicting paradigms; rather, lawyer and judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. 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.

CRIMINAL LAW

Sentencing—breach of anti-money laundering rules

Att Gen v LGL Trustees Ltd [2021] JRC 053/059 (Royal Ct: Clyde-Smith, Commr, and Jurats Ronge and Hughes)

The Solicitor General for the Attorney General; W Grace for the defendant

LGL Trustees Ltd pleaded guilty to offences of (Count 1) failure to comply with the requirements of art 11(1)(f) of the Money Laundering (Jersey) Order 2008 ("failure to maintain appropriate and consistent policies and procedures relating to . . . (f) Risk assessment and management") and (Count 2) failure to comply with the requirements of arts 3 and 13 of the Money Laundering (Jersey) Order 2008 (failure to identify and verify the identity of a controller of one of its customers and to keep that information up-to-date), each being contrary to art 37(4) of the Proceeds of Crime (Jersey) Law 1999.

In relation to Count 1, the most serious offence, LGL failed to recognise and respond to the risks that a structure it set up and administered in Jersey from 2010 onwards might be used to embezzle funds from the public purse of a "high risk" country, namely Angola, for the benefit of its then ruling family. There were numerous "red flags". In relation to Count 2, LGL failed to identify and verify the controllers of one of its customers. Having failed to obtain the information at the outset of the business relationship as they were required to, they then failed to remedy this for another six years. There was no suggestion that the funds provided by Angola were of suspicious origin; they were public funds. Nor was there any suggestion that the investments into which the funds were placed were themselves suspicious; they were high quality property investments. The money laundering risk related to the possibility of corrupt misuse of funds diverted from the Jersey investment structure that LGL was administering.

Held:

(1) At the heart of anti-money-laundering regulation is the requirement that financial services businesses must have in place, and

must follow, effective procedures to ensure that they avoid being mixed up in money laundering.

(2) The court accepted that the failings in this case were not systemic but did not accept that this could be regarded as a one-off mistake in 2010 that has effectively been carried forward. Due diligence is an ongoing process. The court was concerned here with failings, albeit relating to this one structure, that were ongoing over a period of some six years.

(3) The facts of this case were more serious than those in *Att Gen v Abu Dhabi Commercial Bank PJSC Jersey Branch*[11] and that case, therefore, provided a baseline for ascertaining the appropriate level of fine. An increase in the starting point in the Abu Dhabi case of 50% to £1.2m was not disproportionate in that it properly reflected the seriousness of the conduct in this case, deprived LGL of its profit, allowed for the aggravating features and reflected the importance of deterrence.

(4) It was not appropriate to take into account the differing means of LGL as compared to the Abu Dhabi Bank. The court in the Abu Dhabi case focused on the conduct of the Abu Dhabi Bank as opposed to its means. This is consistent with the approach of the court in health and safety cases. But as in health and safety cases the fine must be large enough to bring home the message, the need to achieve a safe working environment, where the defendant is a company not only to the managers but also to the shareholders.

(5) From the starting point of £1.2m, a full one-third discount was justified because the guilty plea was of value. By way of further mitigation was LGL's clean record and cooperation; a change of ownership of this relatively small company that had occurred since the events in question; and the impact of a fine having regard to LGL's adjusted net liquid asset ratio to its expenditure under regulatory requirements. On Count 1, the sentence was £550,000. No further penalty was imposed for Count 2. The court further ordered LGL to make a contribution to the costs of the prosecution of £50,000. The total amount was £600,000, with three months to pay.

Sentencing—disparity of sentence with co-defendant

Thurban v Att Gen [2021] JCA 097 (CA: McNeill, Bompas, and Bailhache JJA)

[11] [2020] JRC 059; 2020 (1) JLR *N* [9].

ML Preston for the first applicant; the second applicant, Brown, represented himself

On an application for leave to appeal against sentence, the question was raised as to when an appeal might lie on the ground of unjustified disparity with the sentence of a co-defendant.

Held, dismissing the appeal:

(1) In *Rae v Att Gen*[12] the Court of Appeal referred to *Bevan v Att Gen*[13] and accepted the proposition that where the principal participant in the offence was being sentenced alongside someone who was merely on the periphery and is involved to a far lesser extent, the court should interfere if there was a disparity in sentence which led to a justified sense of grievance. In *Fawcett*,[14] the court said that the approach of the court was to ask to whether the right-thinking members of the public, with full knowledge of the relevant facts and circumstances, would consider that something had gone wrong in the administration of justice. An appellant had to show a justified sense of grievance.

(2) Since the decision in *Bevan*, provision had been made by the legislature in 2008 for the Attorney General to appeal sentences which are unduly lenient. That change was introduced in England and Wales in 1988 after the decisions in *Rugg*[15] and *Fawcett*. In other words, if the decision in respect of a co-defendant was too lenient, there is now a remedy for that.

(3) The real question is whether the starting point adopted and final sentence imposed by the Royal Court on the current applicant was right. If it was, then it followed that, unless there is an excessive disparity, to change the sentence would be to make it wrong. Accordingly, the fact that the decision in the case of the co-defendant was wrong is, absent some very special reasons, neither here nor there. To allow an appeal on that basis is simply to make both sentences wrong. In addition, in a multi-handed case such as the present, to reduce a sentence on the grounds of disparity with one other sentence imposed would involve engaging the attention of the court in relation to all the others, whether there were appeals or not.

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[12] 2017 (2) JLR 214.
[13] [2003] JCA 014; 2003 JLR *N* [4].
[14] [1983] 5 Cr App R (S) 158.
[15] [1977] 2 Cr App R 350.

DAMAGES

Periodical payments order

Zac (Minor) v Estate of A (deceased) (Capacity) [2021] JRC 100 (Royal Court: MacRae, Deputy Bailiff, and Jurats Ronge and Dulake)

SC Thomas for the plaintiff; LA Ingram for the defendant

This was the first periodical payments order which the court has made under the provisions of art 4 of the Damages (Jersey) Law 2019 in favour of the plaintiff who had suffered traumatic long-term brain injury and other related conditions as a result of a car accident. A settlement of the claim had already been blessed by the court on the application of the plaintiff's delegate. In this separate judgment the court considered its discretion to make a periodical payment order as part of the consent order and the requirements that it be satisfied, as required by art 4 of the 2019 Law, that the payments were reasonably secure.

Held:

(1) The Damages (Jersey) Law 2019 had brought welcome clarity the court's power to make periodical payment orders with or without the consent of the parties and the method by which the discount rate should be calculated in personal injury cases. These issues having been identified by Scriven, Commr in *X Children v Minister for Health and Social Services.*[16]

(2) The questions for the present court were whether it should in its discretion under art 4 make an order for periodical payments and whether or not the court was satisfied that the continuity of payment under such an order was reasonably secure as required by art 4.

(3) Most personal injury cases are compromised by way of a lump sum. This is convenient, cost effective and appropriate to both plaintiff and defendant. The only principle of law is that the claimant should receive full compensation for the loss which was suffered as a result of the defendant's tort, not a penny more but not a penny less: *per* Baroness Hale in *Simon v Helmot*,[17] an appeal to the Privy Council from a decision of the Court of Appeal in Guernsey. In the case of a substantial injury with life long and possibly uncertain consequences, such an object is more likely to be achieved, in many cases, by the making of a periodical payments order as opposed to a lump sum order: *X Children* case at para 13.

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[16] [2018] JRC 226.
[17] 2011–12 GLR 517.

(4) Having regard to the circumstances of this case and the terms of the proposed periodical payments order, the court had no doubt that such an order was appropriate and that it was reasonably secure, having regard to the financial standing, status, backing and regulation of the Lloyds syndicate behind the defendant's insurer.

(5) Under the terms of the consent order, both the plaintiff, the defendant and the defence insurer would have permission to apply to the court for the purposes of both enforcing the settlement agreement and applying to vary the periodical payment order contained therein pursuant to art 4(8) of the Law. The equivalent legislation in England and Wales restricts the grounds upon which a variation may be ordered to "only one application" in respect of "each specified disease or type of deterioration or improvement". The terms of art 4(8) of the 2019 Law gave the court a much wider discretion, providing for variation on the grounds of any material change in circumstance, which could extend to both economic as well as medical changes so far as they are "material" which in the court's view meant "significant". It had been observed that these provisions provide a much fairer mechanism to ensure that a plaintiff's compensation could, if necessary, be varied so that it was no more and no less than that which was required to meet their needs.

TRUSTS

Costs—trustee's rights indemnity and exoneration out of trust fund

B v Erinvale PTC Ltd [2021] JRC 021 (Royal Ct: Clyde-Smith, Commr, sitting alone)

PC Sinel for the representor; BJ Lincoln for the first respondent; PD James for the second respondent; SA Franckel for the intervenors

The question arose as to the circumstances in which a trustee will be deprived of its right of indemnity from the trust fund either in respect of its own costs or, in litigation, in respect of an order to pay the costs of other parties to the action. Article 26(2) of the Trusts (Jersey) Law 1984 allows a trustee to reimburse itself for expenses "reasonably incurred" in connection with the trust.

Held, as regards the applicable principles:

(1) Dishonesty or fraud may be a sufficient basis but is not a necessary basis for refusing the right of indemnity; mere negligence or honest mistake is not enough; and refusal to allow costs out of the fund does not necessarily entail the court fixing the trustee with

liability to pay other parties' costs but the court may penalise the trustee in both ways: *MacKinnon v MacKinnon.*[18]

(2) The court does not wish to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty or even if they have committed an innocent breach of trust: *In re JP Morgan (1998) Employee Trust.*[19]

(3) The mere fact that a trustee has been found to be in breach of trust does not necessarily mean that he should be deprived of the right of indemnity; it is a matter of fact and degree in every case: *In re Piedmont Trust.*[20]

[18] 2010 JLR 508.
[19] 2013 (2) JLR 239.
[20] 2016 (1) JLR 14.