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

ADMINISTRATIVE LAW

Judicial review—amenability to review

Le Poidevin v Civil Contingencies Authority [2021] GRC 051 (Royal Ct: Marshall, Lieutenant-Bailiff)

The applicant appeared in person by videoconference; P Grainge for the respondent.

The applicant sought permission to proceed with a claim for judicial review of the Civil Contingencies (Bailiwick of Guernsey) Law 2012 ("the Law") and the Emergency Powers (Coronavirus) (General Provision) Bailiwick of Guernsey) (No 9) Regulations 2021 ("the Regulations"). The grounds of challenge were not readily apparent on the face of the application but were clarified by Marshall, LB during the hearing.

Held: The requirements for a judicial review application to proceed were that: (1) the applicant had sufficient interest in the subject matter; (2) there had been no undue delay; (3) the defect of process complained of actually made any difference to the relevant decision; and (4) arguable grounds existed, *i.e.*, grounds which had a real, as contrasted with fanciful, prospect of success. The application failed the fourth limb of the test for the below reasons.

(1) **Sufficient emergency to justify the imposition of the Regulations:** It was a valid exercise of the respondent's powers under the terms of the Law to make regulations with regard to averting or coping with a potential or prospective emergency, provided that the regulations were sufficiently proportionate to the prospect of this developing. It was fanciful for the applicant to suggest that she would be able to show that the respondent or the Chief Medical Officer could not reasonably have considered that there was an emergency, actual or potential, which would justify making the Regulations, which came into

force on 13 August 2021. The statistics relied upon by the applicant showed the success of the Regulations and they could not be used in their bare form to justify a contention that there was no true "emergency".

(2) **Improper exercise of powers**

(a) *The general requirement for unvaccinated persons to self-isolate:* There was no real prospect of the applicant succeeding in an argument that that the respondent's decision to make the Regulations, including para 5 ("Requirement to self-isolate on arrival in the Bailiwick"), was disproportionate to its objective, irrational or illogical and as such amenable to judicial review. It was fanciful to suggest that the respondent's decision, in imposing self-isolation requirements on non-vaccinated people, but not on persons who had been vaccinated, and not so strictly on a person who, though not vaccinated, was willing to take a test and tested negative, was a decision which such an authority could not reasonably make. To succeed, the applicant would have to show, not just that there was some evidence in support of her position, but also that such evidence was so overwhelmingly in her favour, that the decision made by the respondent was not a decision to which the respondent could reasonably have come, on the whole general state of scientific evidence at the time.

(b) *Human rights considerations:* It was impossible for the applicant to succeed in arguing that the Regulations as applied in her case were amenable to any declaration of incompatibility with her human rights. There was no interference with the applicant's rights under arts 3 (prohibition of torture and inhumane or degrading treatment), 14 (prohibition of discrimination in enjoyment of substantive human rights) or 17 (prohibition of abuse of rights) of the European of Convention on Human Rights, as incorporated into Guernsey law by the Human Rights (Bailiwick of Guernsey) Law 2000 and any interference with art 8 (right to private and family life) was proportionate. With regards to art 8, the respondent was obliged to take into account not just the effects of its regulations on persons in the applicant's position, but also its view of the effect or potential effects on public health and the rights and freedoms of others. Any possibly disproportionate effect on the applicant was mitigated in the particular case because she was given two specific variations the self-isolation requirements imposed on her by the Regulations and was given a dispensation to attend a family event. This showed that the Regulations operated with a view to effecting only the minimum imposition possible to achieve their objects and was not rigidly "blanket". Finally, the applicant, who lived outside Guernsey, could have avoided coming to the Island to escape the self-isolation requirements.

Permission to proceed with judicial review was refused.

CIVIL PROCEDURE

Disclosure—*Norwich Pharmacal* orders

Sakab Saudi Holding Co v Al Jabri [2021] JRC 187 (Royal Ct: Clyde Smith, Commr, sitting alone).

RS Christie for the plaintiff; MC Seddon for the defendants; OJ Passmore for the parties cited.

The defendants applied for the variation and/or discharge of certain *Norwich Pharmacal* disclosure orders against the parties cited. The application was resisted by the plaintiff. The parties cited rested on the wisdom of the court. The plaintiff and other group companies had also commenced proceedings in the same matter in the Superior Court of Ontario against the defendants (and others) and had been granted *ex parte*, *Mareva* and *Norwich Pharmacal* orders by that court.

Held:

(1) The leading authority in Jersey on the *Norwich Pharmacal* jurisdiction was the Court of Appeal decision in *Macdoel Invs Ltd v Federal Republic of Brazil.*[1] When the court is asked to exercise its *Norwich Pharmacal* jurisdiction it must consider: (a) whether it is satisfied that there is a good arguable case that the plaintiff is the victim of wrongdoing; (b) whether it is satisfied that there was a reasonable suspicion that the defendant was mixed up in that wrongdoing; and (c) whether, as a matter of discretion, it is in the interests of justice to order the defendant to make disclosure: *Riba Consultaria Empresarial Ltda v Pinnacle Trustees Ltd.*[2]

(2) As to the third question, namely the exercise of discretion, the court noted in *New Media Holding Co LLC v Capita Fiduciary Group Ltd*[3] that the facts of each case will differ and no comprehensive statement of principle could be made. Nonetheless, it set out some considerations which are liable to be relevant to the exercise of discretion in most, if not all, cases at paras 20–28 as follows: (a) The *Norwich Pharmacal* jurisdiction is an extraordinary jurisdiction, not to be exercised lightly. The focus is on whether it is just to make the order. (b) A review of the authorities tended to suggest that in England and Wales there is a requirement to have regard to whether it is necessary to make the order. If the plaintiff has a straightforward and available means of obtaining the information by some other route, it would probably not be reasonable, in most cases, to exercise the discretion in

[1] 2007 JLR 201.
[2] 2018 (1) JLR 79.
[3] 2010 JLR 272.

his favour. (c) Close regard is to be had to the purposes for which the *Norwich Pharmacal* order is sought. These purposes may be for the identification of potential defendants in litigation, but they may be for other purposes, whether in connection with other litigation which is continuing or for the purpose of taking other lawful steps, albeit not steps in a court of law. (d) There is no requirement that the defendant in *Norwich Pharmacal* proceedings should necessarily have been innocently involved in the wrongdoing of which the plaintiff complains. Where the plaintiff seeks *Norwich Pharmacal* relief against a defendant who is asserted to be a wrongdoer and not innocently involved, that was a factor which would need to be considered very carefully by the court when having regard to the purposes for which the order is sought. Other than the pre-action disclosure which is permitted by statute under the Law Reform (Disclosure and Conduct Before Action) (Jersey) Law 1999, the law of Jersey does not permit pre-action discovery (unlike r 31.16 of the Civil Procedure Rules). If, therefore, the Royal Court were to be satisfied that the primary purpose of the *Norwich Pharmacal* application was to obtain pre-action discovery, it would be very unlikely that the discretion of the court would be exercised in favour of the applicant. (e) In an appropriate case it may be relevant to make a *Norwich Pharmacal* order in order to assist proceedings which are taking place in another court, whether that court is in Jersey or elsewhere.

(3) In *New Media*, the court further observed that that *Norwich Pharmacal* relief is not available as a form of pre-action discovery where one has already identified the potential defendant in advance, nor is it generally a remedy to supplement discovery in aid of existing foreign proceedings; although such relief is available in order to identify a person who might be a defendant in foreign proceedings or to establish the cause of action or a tracing claim for the purposes of foreign proceedings, generally one would otherwise allow the foreign court to exercise its jurisdiction over the disclosure which it required for the purposes of doing justice in the case before it.

(4) More recently, the Supreme Court considered the *Norwich Pharmacal* jurisdiction in the case of *Rugby Football Union v Consolidated Information Servs Ltd*[4] observed that the need to order the disclosure of information would be found to exist only if it were a necessary and proportionate response in all the circumstances and the test of necessity did not require the remedy to be one of last resort; the essential purpose of the remedy was to do justice and this involved the

[4] [2012] 1 WLR 3333.

exercise of a discretion by a careful and fair weighing up of all relevant factors.

(5) As the court said in *New Media*, the *Norwich Pharmacal* jurisdiction is there to identify a person who might be a defendant or to establish a cause of action or to make a tracing claim. In the present case, the defendants to the plaintiff's claims had been identified, the causes of action had been established and extensively pleaded and the information required for a tracing claim had been generally provided. It was for the Ontario court to exercise its jurisdiction over the disclosure it required for the purpose of doing justice in the case before it. That it could do by making orders for discovery against the parties cited, assuming they submitted to its jurisdiction, or by making a request for evidence to be taken here pursuant to the Service of Process and Taking of Evidence Law (Jersey) Law 1960. There was no authority for the proposition that if the wrongdoing alleged is fraud, the scope of the *Norwich Pharmacal* jurisdiction is widened to allow what is in effect discovery of evidence in aid of foreign proceedings. The disputed disclosure was therefore beyond the proper scope of the court's *Norwich Pharmacal* jurisdiction and stood to be discharged save in so far as information was required to assist in asserting a tracing claim.

Disclosure—worldwide disclosure order

Dresser-Rand BV v Al Rushaid Petroleum Investment Co. [2021] JRC 321 (Royal Ct: Clyde-Smith, Commr, and Jurats Crill and Hughes)

RDJ Holden for the plaintiff; J Speck for the defendant; FJ Littler for the second to fourth parties cited.

On the application of the creditor of a foreign arbitral award, the question was raised as to the jurisdiction of the court to order a worldwide disclosure order in support of an application to enforce a foreign judgment or, as in this case, arbitral award against a non-resident defendant.

Held, granting the relief sought:

(1) The existence and availability of discovery in aid of enforcement post-judgment or award has been well recognised in Jersey. Its purpose is to assist a plaintiff in whose favour a judgment or award has been obtained to identify assets against which it might be able to bring enforcement proceedings. Post-judgment or award discovery has a low threshold, because the merits of the obligation have already been adjudicated upon in favour of the plaintiff.

(2) English cases cited were concerned with the exercise of the English court's jurisdiction under s 25 of the Civil Jurisdiction and Judgments Act 1982. The Jersey court, on the other hand, is exercising

its inherent jurisdiction. The court had adopted the principles in *Gidrxslme Shipping Co. Ltd v Tantomar-Transportes Maritimos Lda (The Naftilos).*[5] It is the policy of the law that arbitration awards should be satisfied and executed in the same way as judgments. It makes no difference that leave has not been granted to enforce the award or that it might be subject to proceedings to set it aside (see *Goldtron Ltd v Most Investments Ltd*[6]). It is just and convenient that an award creditor should have all the information needed to execute the award anywhere in the world. There is a firm jurisdictional basis for post-judgment orders that order the disclosure of assets worldwide, which exists independently of the jurisdiction to make freezing orders.

(3) Whilst such orders are particularly applicable where the award debtor is resident in Jersey (as per *Africa Edge Sarl v Incat Equipment Rental Ltd*[7]) such orders may also appropriate where a non-resident award debtor is properly before the court (as per *Dalemont Ltd v Senatorov*.[8] The court did not accept that Dalemount had been wrongly decided.

(4) In the present case the defendant was properly a party before the court. The relief sought was in part for the confirmation of the *arrêt entre mains* over property in Jersey which it beneficially owned. That was a sufficient connecting link to Jersey. Leave to serve out of the jurisdiction had not been challenged by the defendant and it had submitted to the jurisdiction of the court.

(5) Several further factors militated in favour of granting the relief sought in this case: (i) the plaintiff had the benefit of arbitration award to which the New York Convention applied and it was the policy of the law that it should be satisfied and enforced in the same way as a judgment; (ii) no challenge to the award had been made by the defendant before the courts of the United Arab Emirates, the seat of the arbitration; (iii) the plaintiff had been unable to enforce the award in Saudi Arabia, where the defendant was resident and was in the same position as the plaintiff in *Dalemont*; (iv) the defendant was resisting enforcement of the award; (v) the making of a worldwide disclosure order would not interfere with the management of the case in any other court or give rise to disharmony or confusion and/or the risk of conflicting inconsistent or overlapping orders in any other jurisdictions. The court also gave consideration to its ability to enforce a worldwide disclosure order against a non-resident party. The defendant had

[5] [1994] 4 All E.R. 507
[6] 2002 JLR 424, para 28.
[7] [2008] JRC 175 at para 8.
[8] 2012 (1) JLR 108 at para 210.

complied with the orders made by the court to date and, as with the defendant in *Dalemont*, the defendant could not ignore such an order with impunity, as it could be disbarred from defending the current proceedings.

Service out of jurisdiction—stay of proceedings

Talos Investments Ltd v Banoncia Holding Ltd [2022] GRC006 (Royal Ct: Roland, Deputy Bailiff)

R Fullman for the plaintiff; F Warrilow for the defendants.

The defendants sought to set aside an order by the Royal Court granting the plaintiff leave to serve the summons out of the jurisdiction and/or to stay the proceedings. The contracts governing the matters in dispute contained asymmetrical jurisdiction clauses, which provided that the defendants were limited to commencing proceedings in Guernsey, but the plaintiff could commence proceedings in other jurisdictions to the extent permitted by the law in that jurisdiction.

Held:

(1) The appropriate legal test for leave to serve out of the jurisdiction was not in dispute. The burden was on the plaintiff to satisfy the court that leave should be granted. The parties accepted that the starting point was r 8 of the Royal Court Civil Rules ("RCCR"). Although leave to serve out of Guernsey was dealt with in a number of judgments, the leading Guernsey authority was the Court of Appeal's decision in *Tchenguiz v Hamedani*,[9] which summarised the four stage test with reference to the earlier decisions of *Carlyle Capital Corp Ltd v Conway*[10] and *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*.[11]

(2) On the issue of the third limb of the test—whether Guernsey was, in the circumstances of the case, clearly and distinctly the appropriate forum—the principles as set out in *Spiliada Martime Corp v Consulex Ltd*[12] ("*Spiliada*") should be considered. The appropriate forum was the one which Goff, LJ described as the one in which the case "may most suitably tried for the interests of all the parties and the ends of justice".[13] A balancing exercise of the various factors must be carried out, and the starting point was the jurisdiction clauses in the relevant contracts.

---

[9] 2015 GLR 154, at paras 66–70.
[10] 2011–12 GLR 371.
[11] [2011] UKPC 7.
[12] [1987] AC 460.
[13] *Ibid*, at 480G.

(3) Whilst asymmetric jurisdiction clauses were enforceable under English law, they were not *prima facie* enforceable in France. The respondents' advocate submitted that the Royal Court should find that French law was persuasive in this case and find the jurisdiction clauses unenforceable due to principles of *équité* (fairness). Where a customary law principle had been incorporated into the Code Civil and remained part of modern French law, it was appropriate to look, not only at the customary authorities, but also at modern French authorities, to see how the customary principles had evolved and were to be applied in modern Jersey law: *Fogarty v St Martin's Cottage Ltd.*[14] However, it was not appropriate to do so in this context and find the jurisdiction clauses unenforceable, where the Guernsey Court of Appeal decision of *Winnetka Trading Corp v Bank Julius Baer & Co Ltd*[15] ("*Winnetka*") was binding on the Royal Court and indicated that it was to English common law that Guernsey should look for authority on jurisdiction clauses.

(4) As to whether there were strong reasons to depart from the exclusive element of the jurisdiction clauses, it was not enough for the defendants simply to state that there were other fora notionally available to the plaintiff. In these circumstances the usual discussion of *Spiliada* factors were all far less powerful than they would be without the agreement as to jurisdiction.

(5) Considering the factors put forward by the defendants, many of which had not been adequately evidenced, the defendants had not established strong reasons to depart from the selection of Guernsey as the forum in the jurisdiction clauses.

Application dismissed.

Comment [Iona Mitchell]: English law relating to the interpretation of exclusive jurisdiction clauses has moved on since *Winnetka* but not in an area relevant to the issues in the present case.

COMPANIES

Liquidators—appointment

Highbridge Investments LP Inc v King, Chapman and Hunter [2021] GRC 062 (Royal Ct: McMahon, Bailiff)

A Davidson for the applicant; G Bell for the respondents.

---

[14] 2016 (2) JLR 246, *per* Sir Richard Collas, then Bailiff of Guernsey, sitting in the Jersey Court of Appeal.
[15] 2009–10 GLR 260.

The liquidator of an English company in voluntary liquidation in England and Wales and an associated Guernsey limited partnership applied to the Royal Court to issue a letter of request to the High Court of Justice to recognise his appointment as liquidator of the Guernsey limited partnership, relying upon the terms of s 426 to confer on him powers available under the Insolvency Act 1986. The purpose was to enable him to bring claims relating to fraudulent trading against the Guernsey-based directors of the limited partnership's now dissolved general partner. The respondents (the former directors) opposed the application.

Held:

(1) **Test re whether to issue a letter of request:**

(a) These types of application usually proceeded *ex parte* and as a result, there was limited authority as to the approach. The starting premise was that issuing the letter of request was appropriate if there was a reason to do so. The court should be prepared to contemplate issuing a letter of request if it was in the interests of creditors or debtors or if it was in the public interest: *Re REO (Powerstation) Ltd*.[16]

(b) English authority on s 426(5) of the Insolvency Act 1986 provided that if recognition were to be sought and granted, the gaps in the powers in either jurisdiction's domestic law could be filled, or expanded, by reference to the powers available in the other jurisdiction.

(c) The test was not that the application would only be refused if it was futile, *i.e.*, if it asked for something that was impossible for the receiving court to grant. Instead, the requesting court should take a realistic view as to the prospects of success and, in doing so, have regard to what might be argued against the letter of request in the receiving court and also have regard to which side appeared to have the better of the argument before deciding whether to grant the application. In the present case, the balance lay in favour of granting the application.

(2) **Exercise of discretion:** Whether to grant the application to issue a letter of request was always a matter for the court's discretion. Although there was another route available to the liquidator to pursue the claims, this was not in itself a reason to refuse the application, nor was the liquidator's delay in making the application.

Application granted (subject to minor amendments to the proposed letter of request).

---

[16] [2011] JRC 232A, 2012 (1) JLR *N* [13].

Minority shareholders—unfair prejudice

Financial Technology Ventures II (Q) LP v ETFS Capital Ltd [2021] JCA 176 (CA: Crow, Anderson and Perry, JJA)

NAK Williams for the appellants; SJ Alexander for the first respondent; RAB Gardner for the second respondent.

On an appeal from the judgment of the Royal Court making a finding under art 141 of the Companies (Jersey) Law 1991 that the affairs of the company in question had been conducted in a manner which was unfairly prejudicial to the interests of the plaintiffs and ordering buy-out by the defendant of the plaintiff's shares, the Court of Appeal set out the approach to be applied in relation to the statutory wording, examined the use of the labels 'quasi-partnership' and 'legitimate expectations' in this context, considered the parameters of its appellate jurisdiction in this area, and set out the principles to be applied by a trial court in determining whether, in fashioning a buy-out order, a minority discount or pro rata valuation is appropriate and the appropriate date of valuation of a plaintiff's shares for this purpose.

Held, on these issues:

(1) The general principles had been considered in Jersey in *Robertson v Slous*[17] and *Re Grafters Ltd*[18] and a wealth of English case-law, running chronologically from *Scottish Co-operative Wholesale Society Ltd v Meyer*,[19] via *O'Neill v. Phillips*[20] to *Re Stratos Club Ltd*,[21] together with a substantial amount of professional commentary.

(2) The three constituent elements of a claim under art 141 are to be found in the legislation itself, namely: (a) The complaint must be directed at the conduct of the company's affairs or an actual or proposed act or omission of the company. The question whether any particular act has been performed is self-evidently one of fact. The capacity in which any given act is performed will be one of mixed fact and law. (b) The plaintiff must establish that the matters complained of are prejudicial to his interests as a member of the company. Prejudice in some other capacity is not relevant. The question whether there has been any prejudice is one of fact. The capacity in which it is suffered (*i.e.*, whether as a member or otherwise) is one of mixed fact and law. (c) The prejudice must be unfair. That is an evaluative judgment,

[17] 2002 JLR 361.
[18] 2015 (1) JLR 144.
[19] [1959] AC 324.
[20] [1999] 1 WLR 1092.
[21] [2020] EWHC 3485 (Ch).

involving both issues of fact and law. The Court of Appeal further analysed each of these elements.

(3) The expressions 'quasi-partnerships' and 'legitimate expectations' have some relevance both to the anterior question whether there has been any unfair prejudice and, if so, to the subsequent assessment by a court of the appropriate remedy. The term 'quasi-partnership' owes its origin to the landmark ruling in *Ebrahimi v Westbourne Galleries.*[22] The valuable observation in Lord Wilberforce's speech[23] was that, in deciding whether to exercise its discretionary power to wind up a company on the just and equitable ground, a court is entitled to look at the reality of the human and business relationships which lie behind the legal personality of the company. Similar principles have naturally been transposed to the court's assessment of whether any particular conduct does, or does not, constitute unfair prejudice. The court's willingness to take into account non-binding understandings reflects the fact that the statutory remedy is available in respect of 'unfair' prejudice, and not just 'unlawful' prejudice. The term 'quasi-partnership' is a convenient short-hand, but like many other such labels it disguises as much as it reveals. Most importantly, it should be recognised that the expression 'quasi-partnership' is not a term of art. It does not identify a single category of company with an exhaustive list of qualities. Rather, it is a broad, descriptive term which embraces a range of different factual situations, as Lord Wilberforce's speech expressly recognised. Nor should a trial court even be thinking in terms of different categories of company when it is applying the test of unfair prejudice under art 141. The test is open-textured and fact specific, and the court should resist any temptation to adopt a formulaic approach.

(4) In *Re Saul D Harrison & Sons plc*,[24] Hoffmann, J tried to capture the concept by referring to 'legitimate expectations' (an expression borrowed from public law). The word 'expectation' reflected the fact that the court was willing to take into account understandings and arrangements that were not independently legally binding as contracts. The word 'legitimate' reflected the fact that, in exercise of its power in relation to unfair prejudice, the court would not take into account all and any hopes and aspirations a member might harbour. It was equally dangerous to think in terms of a specific category of supposed 'legitimate expectations'. That expression may provide a useful generic label which describes the wide range of understandings and

[22] [1973] AC 360.
[23] *Ibid*, at 379A–G.
[24] [1994] BCC 475.

arrangements which are not legally binding as contracts, but which the court is nevertheless prepared to take into account in assessing whether there has been unfair prejudice in any given case. But the descriptive label should not be allowed to replace the true content of the underlying test. The underlying test is supplied, and supplied only, by the statutory wording. Lord Hoffmann did not say in *O'Neill v Phillips* that the concept of 'legitimate expectations' was unhelpful but, rather, he simply expressed[25] regret at having borrowed that particular *label* to describe the broad range of equitable considerations which the court is fully entitled (indeed, required) to take into account when deciding whether conduct which is strictly lawful may nevertheless be unfairly prejudicial. Furthermore, the mere fact that a company is not a quasi-partnership did not mean that equitable considerations are inapplicable.

(5) The Royal Court was exercising a discretion in deciding whether to order a buy-out in the first place, and it was also exercising an evaluative judgment (which might conveniently be described as a 'discretion') when fixing the price at which any such buy-out should be effected. In one sense it is potentially misleading to talk about the 'valuation' of a plaintiff's shares in the context of art 143, because the court's task under this provision is not a purely objective or scientific one. Rather, its function is essentially remedial and evaluative, and various elements in the exercise (principally, the appropriate date for the valuation, and the question whether any, and if so what, discount should be applied) are matters of judgment which depend on the court's assessment of the fairness of the case. That being the nature of the Royal Court's function, the plaintiffs, in seeking to persuade the Court of Appeal to substitute a pro rata valuation rather than a discounted one, needed to show that the Royal Court took into account irrelevant considerations, ignored relevant ones, or otherwise reached a decision which no reasonable court properly directing itself on the law could have reached. The second respondent faced the same hurdle in his cross-appeal in seeking to persuade the Court of Appeal to increase the rate of discount.

(6) There was a considerable body of case law from England and other jurisdictions as when a minority discount should be applied in fashioning a buy-out order. A number of principles could be distilled. (a) There are no inflexible rules as to whether a minority discount should be applied in any given case. It is always a matter of judgment in light of all the relevant circumstances. (b) If a buy-out order is being made in relation to a quasi-partnership company, that is capable of being regarded as a powerful factor in favour of a pro rata valuation:

---

[25] [1999] 1 WLR at 1102B–F.

but it will only constitute one relevant factor, and the existence of other factors may lead a court to apply a discount even if the company can properly be described as a quasi-partnership. (c) If the plaintiff was entitled to participate in the ownership and management of a company, and he would have preferred to continue participating in ownership and management, but he has been excluded involuntarily and he is only seeking a buy-out order reluctantly, that is also capable of being regarded as a relevant factor in favour of a pro rata valuation, irrespective of whether the company can properly be classified as a quasi-partnership. (d) The question whether a plaintiff's shares were acquired as a pure investment (rather than as part of a joint venture, a family business or a quasi-partnership in which he was participating in management) is also capable of being relevant in deciding whether they should subsequently be bought out at a discount, particularly if the shares were originally purchased at a discount. (e) The court is entitled to take into account the question whether the majority shareholder has deliberately used his control for the purpose of forcing the minority to sell their shares at a disadvantageous price. The court concluded that a trial court should not start with any presumption one way or the other. Under art 143, the court is required to make such order as it thinks fit for giving relief in respect of the matters complained of in the particular context of the case in hand. Each case will need to be decided on its own facts, by reference to a combination of factors which is likely to be unique to that case.

(7) As to the valuation date, as the court had observed in *Robertson v Slous*, there will be numerous options to choose from, including the date of the unfair prejudice, the date when the proceedings were issued, the date of trial, the date when the valuation is conducted, or the date of any order. Again, there are no fixed rules. In every case, there will be competing considerations. In *Re London School of Electronics*,[26] Nourse, J suggested that an interest in a going concern ought *prima facie* to be valued at the date on which it is ordered to be purchased. That was approved as a starting point, and also as reflecting the general trend of authority since 1986, by the English Court of Appeal in *Profinance Trust SA v Gladstone*.[27] In saying so, the court there expressly recognised that in many cases fairness (to one side or the other) will require the court to choose another date, and also warned that a successful plaintiff was not entitled to demand whichever valuation date happened to give him the best exit price. That final observation is important. The concept of fairness requires a balance to be struck. The bare fact that the court has found unfair prejudice does

[26] [1986] Ch 211, at 224.
[27] [2002] 1 WLR 1024.

not lead to the conclusion that all considerations of fairness to a defendant must then be wholly disregarded, or that the valuation date (or any other disputed issue on valuation) must be resolved on the most preferential terms in favour of the plaintiff.

CONFLICT OF LAWS

Recognition of foreign proceedings—enforcement of foreign arbitral award

See CIVIL PROCEDURE (Disclosure—worldwide disclosure order)

COURTS

Royal Court—emergency sittings

F v Minister for Children and Education [2021] JRC 280 (Royal Ct: Bailhache, Commissioner, and Jurats Ramsden and Austin-Vautier).

DC Robinson for the plaintiffs; CRG Davies for the first defendant; SA Meiklejohn for the second defendant.

A question arose as to the ability of litigants to convene a hearing of the Royal Court for an emergency hearing.

Held:

(1) The Royal Court will sit at any hour on any day if it is urgent that it does so. The Bailiff's judicial secretary and one of her colleagues are available through a mobile telephone number on which they can be contacted at any time out of hours. Furthermore, there is a duty Jurat scheme in place whereby the police have the contact details of a duty Jurat who could always be contacted in a case of emergency; and the duty Jurat would be able to contact either the Bailiff or one of the other judges of the Royal Court in order to ensure that a court was convened should it be necessary.

(2) However, it was recognised that there is at present no published procedure for convening a court out of hours. The court would draw this to the attention of the Bailiff in order that consideration might be given to whether it would be desirable for such a procedure to be formally prepared and published in order that there can be no doubt about the matter in the future.

FAMILY LAW

Children—emergency protection order

See COURTS (Royal Court—emergency sittings)

INSURANCE

Insurance companies—transfer of business

Representation of the Prudential Assurance Co Ltd and Rothesay Life PLC [2022] JRC 001 (Royal Ct: Clyde-Smith, Commr, and Jurats Crill and Austin-Vautier)

SM Huelin for the first representors

Pursuant to art 27 and Schedule 2 of the Insurance Business (Jersey) Law 1996, the court sanctioned a scheme for the transfer of certain long-term insurance business (annuities) carried in or from within Jersey by the Prudential Assurance Co Ltd to Rothesay Life PLC. The proposed transfer involved a similar transfer in the United Kingdom, which had been considered by the English Court of Appeal in *Re Prudential Assurance Co Ltd*,[28] and in Guernsey. The English Court of Appeal had in particular set out a modified approach to such applications.

Held, as regards the new principles:

(1) The previous approach in Jersey, based on earlier English cases, had been set out in *Norwich Union Life Insurance Socy v Norwich Union Annuity Ltd*[29] and *In re of Royal London 360 Ltd and Royal London 360 Insurance Co Ltd.*[30]

(2) The English Court of Appeal in *Re Prudential Assurance Co Ltd* had not wholly repudiated the previous approach taken to considering the sanction of schemes by the High Court. The approach had nevertheless now evolved. It was appropriate for the Royal Court to take that into account in its own approach to such transfers.

(3) In the context of the present case, this meant: (i) the court had to identify the nature of the business being transferred and the underlying circumstances giving rise to the Jersey scheme; (ii) taking the nature of the transferring business and underlying circumstances into account, the court should assess whether: (a) the transfer will have a material adverse effect on receipt of payments due by relevant parties; (b) the transfer will have a material adverse effect on service standards; and (c) any other factors that require further consideration; (iii) in making its assessment as to material adverse effect, the court needed to consider: (a) the independent actuary's report; (b) the confirmation of no objection from the Jersey Financial Services Commission; (c) evidence

---

[28] [2020] EWCA Civ 1626
[29] 25 April 1997, Jersey unreported 81/97.
[30] [2011] JRC 192.

of any person permitted to be heard in relation to the application to sanction the Jersey scheme, including any objecting policyholders, and in making such assessment, the court should accord full weight to the independent actuary's report and non-objection from the JFSC, so that the court would not depart from them without significant and appropriate reasons for doing so; and (iv) finally, having undertaken its evaluation of the above, the court must decide whether or not to sanction the Jersey scheme.

TRUSTS

Creation—intention of donor—mistake

A v B; In the Matter of the E Settlement [2022] JRC 052 (Royal Ct: Bailhache, Commr, and Jurats Ramsden and Cornish)

RJ McNulty for the representor; the respondents did not appear.

The representor, as economic settlor, applied under art 11 (and/or art 47E) of the Trusts (Jersey) Law 1984 to have a declaration of trust constituting the E Settlement set aside on the grounds of mistake and/or a declaration that any funds transferred and/or settled into the trust are held on bare trust by trustee on behalf of the representor and have been so held at all times, with further relief. The representor argued that he had made a mistake in failing to recognise that HMRC might be able to reopen the question of his domicile. It remained uncertain whether HMRC might successfully contend that the representor was UK-domiciled but if they did a substantial inheritance tax liability would fall on the representor or the trust.

Held:

(1) The court's approach was well settled. The court considers the facts of the case against three questions: (a) Was there a mistake on the part of the representor in relation to the establishment of the trust or the transfers of assets into trust? (b) Would the trust or transfers into trust not have been made but for the mistake? (c) Was the mistake of so serious a character as to render it just for the court to make declaration?

(2) Although the law of domicile was not always straightforward, the court considered that a person in the position of the settlor would generally be expected to have a form grasp of the headline issues. Further, as had been said in some of the earlier cases, there was something fundamentally unattractive about the court being asked to come to the rescue of those who have made arrangements with a view to saving themselves large amounts of tax, only to find later that for other reasons those arrangements were not as successful as had been contemplated. There is all the difference in the world between a settlor taking a calculated risk in making particular arrangements and a settlor

who is genuinely mistaken about the risks which he is undertaking. In the former case, there should be no sympathy for such a settlor. He gambled and lost. In the latter case, the court, as demonstrated by the authorities, looks with more sympathy on such a settlor because although his motivation—saving tax—remains the same, he carries no personal culpability, albeit his professional advisers probably do. The approach which the court had taken on many occasions has been to relieve the settlor in the latter case from having to engage in risky litigation alleging negligence against professional advisers, with all the difficulties which may be incurred either with prescription, liability, or remoteness of damage. Often, settlors in that position do not have deep pockets with which to fund such litigation, whereas the defendants or their insurers do, and there is frequently, perhaps almost invariably, the substantial stress of litigation often in the twilight years of the settlor's lifetime.

(3) The representor's affidavit exhibited an amount of correspondence between the settlor and his lawyers at the relevant time but he did not waive privilege. This was not a satisfactory approach. It is essential that representors seeking such relief should provide all relevant correspondence and file notes for the court's consideration. This is likely to be essential in enabling the court to make a proper assessment as to the merits of the settlor's claim that he or she has made a mistake.

(4) As to the three questions: (a) as to whether the representor had made a mistake, with some hesitation the court concluded on the balance of probabilities that the representor did make a mistake in 2008 as to the possibility that HMRC would challenge his assertion that his domicile of choice in Australia might have been lost. (b) As to whether he would not have created the trust but for the mistake, the potential inheritance tax charges, if the representor was domiciled in England at the date the trust was set up, equated to approximately one-third of the value of the trust. The court did not have difficulty in accepting that the representor would not have contemplated making the trust had he been aware that potential liabilities of this scale might await him or the trust. (c) The court was also satisfied that the mistake was of so serious a character as to render it unjust on the part of the donee to retain the property. Because the tax was assessable in this case on the trust as well as on the representor, there was no need to distinguish between measuring justice by reference to the position of the donee or the donor as discussed *In re S Trust and T Trust.*[31] The amount of tax due would be very substantial, and potentially catastrophic for the representor and his

[31] [2015] JRC 259.

family and given that he was over eighty years old this would undoubtedly be extremely stressful. Similarly, to embark on litigation with his English legal advisers in 2008, notwithstanding the apparently negligent advice which was given, could be long drawn out and equally stressful. The statutory provisions and case law provided the court with a discretion to be exercised and this was an appropriate case in which to exercise it.

(5) Although the trust was established by a declaration of trust rather than by a settlement deed, it was constituted by payment of £10,000 made by the representor, as economic settlor, to the original trustees. Furthermore, it was right to examine the circumstances in the round, and there was no doubt that the declaration of trust was directly linked to the tax advantages contemplated in the context of the immediate sale of the land in the UK. Although relief could be justified under art 47E, the better course was to look at the establishment of the trust itself and to make the declaration under art 11 that the trust is void *ab initio* on the grounds of mistake. The court accordingly declared that any funds or any other assets transferred and/or settled into the trust were held on bare trust by the trustee on behalf of the representor, and had been so held at all times.

(6) Accordingly, the trust was declared void under art 11 and not art 47E. Article 47I(3) goes on to confer a jurisdiction on the court to make ancillary orders consequent upon a declaration that transfers into trust or the exercise of powers in relation to a trust or trust property were made by mistake. Article 51 confers power on the court to make orders concerning the execution or the administration of any trust; and this was to be taken as including the execution or the administration of a bare trust. In addition, the court retained its inherent jurisdiction to provide appropriate remedies consequent upon the exercise of its jurisdiction to grant relief and that it therefore followed that although art 11 does not of itself confer a jurisdiction to make ancillary orders similar to that contained in art 47I(3), the court nonetheless has jurisdiction to do so. The court therefore made additional orders allowing the trustee to retain and charge reasonable remuneration and reimbursements and protecting it from liability to the extent of the terms ordered.

Powers and duties of trustees—application for directions

Erinvale PTC Ltd v B [2021] JRC 241 (Royal Ct: Clyde-Smith, Commr, and Jurats Crill and Christensen)

BJ Lincoln for the representor; PD James for the first respondent; PC Sinel for the second respondent; SA Franckel for the third respondent; D Evans for the minor beneficiaries and unborn beneficiaries.

The representor, a private trust company, sought the directions of the court as to whether it would be in the best interests of the beneficiaries for it to remain as trustee, and whether its directors should resign.

Held:

(1) The question whether the court, exercising its supervisory jurisdiction over trusts, has jurisdiction over the directors of the trustee was novel issue in Jersey. It had, however, been considered recently by the Supreme Court of Bermuda in the case of *In re X Trusts*,[32] where the trustees, private trust companies, sought the directions of the court as to whether they should remain in office or retire, on which they adopted a neutral position, or whether the directors should resign. The directors had offered to resign if the court thought it appropriate. In that case, Kawaley, CJ concluded that the Bermudan court—

> 'has no jurisdiction to direct the removal of one or more of the directors. The court does possess the inherent jurisdiction in supervising a Bermudian trust to signify that rather than removing the corporate trustees it would be desirable if one or more of the directors resign.'

(2) The issue of requiring the directors to resign did not arise in the present case because the directors, although not convened, had agreed to resign if the court signified that they should. The court, however, agreed with Kawaley, CJ in *X Trusts*. The power to remove directors vested in the shareholders. For the same reasons as put by Kawaley, CJ, however, the court had inherent jurisdiction in supervising the trust to signify that it would desirable if one or more of the directors of the trustee were to resign.

(3) On the particular facts, there were powerful practical reasons for maintaining the status quo and accordingly the court directed the trustee to remain as trustee and considered that its directors should remain in office.

---

[32] [2018] SC (Bda) 56 Civ.