# CASE SUMMARIES

The following key indicates the court to which the case reference refers:

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| 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 |

## ADVOCATES AND SOLICITORS

### Disciplinary proceedings—sanctions

*Att Gen v Harrigan* [2022] JRC 064 (Royal Ct: Le Cocq, Bailiff, and Jurats Ronge, Averty and Hughes).

The Attorney General; RCL Morley-Kirk for the respondent.

The court acceded to an application by the Attorney General for an order that a solicitor be struck from the roll of solicitors of the court. The solicitor had appropriated £28,250 for her own purposes from the account of a vulnerable lady who she was looking after as a client of the firm and in respect of whom she had been appointed the curator. She was serving a sentence of imprisonment having pleaded guilty to one count of fraudulent conversion.

**Held,** striking off the solicitor:

(1) **Seriousness of case.** It was difficult for the court to identify a more egregious breach of fiduciary duty and trust than a breach not only of the oath of office of solicitor of the court but of the oath of curator.

(2) **Need for complete trust in legal profession.** Members of the public must be able to trust members of the legal profession totally to act with honesty and probity. In *Att Gen v Michel*,[1] the court adopted, in explaining its approach to striking off, the decision in the case of *Bolton v The Law Society*.[2] The Master of the Rolls, Lord Bingham, gave a full explanation as to the importance of trust in the legal

[1] 2012 (1) JLR 415.
[2] [1994] 1WLR at 518.

profession. The most fundamental purpose of disciplinary sanctions was

> "to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission.

This was echoed in the case of the *Att Gen v Manning.*[3]

## BANKRUPTCY

### Appeals against decision of Viscount—assignment of claims

*Booth v Viscount* [2022] JRC 062 (Royal Ct: JA Clyde-Smith, Commr, and Jurats Blampied and Austin-Vautier).

DR Wilson for the first defendant; SA Hurry for the second defendant.

The appellant, now discharged from his *désastre* bankruptcy, sought a reassignment by the Viscount of a claim in negligence that he considered he had against a firm of surveyors. The Viscount had declined to pursue this claim during the bankruptcy and now declined to re-assign the benefit to him. He appealed against the decision.

**Held:**

(1) **Test for appeal of decision of Viscount.** The test on an appeal against a decision of a public authority vested with discretion, such as the Viscount, had been refined in an earlier 2016 judgment in relation to the appellant's désastre (*Booth v Viscount*[4]):

(a) A decision is open to appeal: (i) if it does not fall within the range of reasonable responses open to the decision-maker; (ii) if the decision maker has acted illegally in that the decision is beyond the limits of their power; (iii) if the decision maker has acted illegally in taking account of irrelevant considerations or failing to take account of relevant ones; (iv) if there has been procedural impropriety.

(b) In addition, where a public authority is exercising a discretion to which the Human Rights (Jersey) Law 2000 applies, a rationality review is likely to be insufficient. While the standard of scrutiny will depend on the circumstances, the

[3] [2019] JRC 171.
[4] 2016 (2) JLR 473.

> law generally speaking requires an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

(2) **Assignment back to debtor of alleged cause of action not pursued.** The role of the Viscount in a *désastre* is similar to that the Official Receiver in England. The Official Receiver Guidance advises that, while a cause of action may be re-assigned if the Official Receiver has decided not to pursue it, this is not automatic. The rights of the potential defendant also come into play if, for example, they would be exposed to vexatious litigation. This was consistent with English case law.

(3) **Merits of the claim were a relevant factor in this case.** The Royal Court distinguished the Court of Appeal's view in *Booth v Viscount*[5] that the merits of a claim purported to be held by the bankrupt are irrelevant to a decision of the Viscount whether or not to assign the claim back to the bankrupt in the event that it is not pursued by the Viscount for the benefit of creditors. The circumstances of the present claim were now different, and in particular it could not be right for the Viscount, as an executive officer of the court, to agree to assign back to a former bankrupt a cause of action that was frivolous in the sense of being hopeless, futile or misconceived.

(4) **Decision.** In the court's view the alleged claim against the form of surveyors was indeed hopeless or futile. The decision of the Viscount accordingly fell within the range of reasonable responses and the appeal was accordingly dismissed.

## CIVIL PROCEDURE

### Order of justice—amendment—leave to amend—requirements for pleading fraud

*Cook v Clapham* [2022] JRC 091 (Clarke, Judicial Greffier)

The plaintiff appeared for himself; D Evans for the first and second defendant; A Kistler for the third defendant; DP Le Maistre as *amicus curiae*

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[5] 2016 (2) JLR 473.

The plaintiff, acting in person, sought leave to amend his order of justice, including the addition of an allegation of fraud.

**Held,** refusing leave to amend:

(1) **Approach of court.** Whether to grant leave to amend is a matter of discretion guided by where justice lies (*Blenheim Trust Co Ltd v Morgan*[6]). The purpose of pleadings is to give a party fair notice of the case it has to meet and to clarify the issues (*In re Esteem Settlement*[7]). An allegation of fraud must be distinctly and sufficiently particularised (*Makarenko v CIS Emerging Growth Ltd*[8]).

(2) **Pleading fraud.** As regards the circumstances and manner in which fraud may be pleaded, the Judicial Greffer referred further to *Brakspear v Nedbank Trust (Jersey) Ltd*[9] in which the court quoted with approval from the judgment of Flaux, J in *JSC Bank of Moscow v Kekhman*:[10]

> (a) The claimant does not have to plead primary facts which are consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence.
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> (b) At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea of fraud is justified, the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge.

This did not diminish the fundamental principles that an allegation of fraud must be distinctly and sufficiently particularised (so that the defendants may know exactly what it is that they are accused of doing fraudulently) and that it will not be sufficiently particularised where the facts are consistent with innocence.

(3) **Disposal.** In the present case, the plaintiff had failed to satisfy these principles and leave to amend was refused.

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[6] 2003 JLR 598.
[7] 2000 JLR 119.
[8] 2001 JLR 348.
[9] [2018] JRC 121.
[10] [2015] EWHC 3073 (Comm).

## CRIMINAL LAW

### Drugs—importation—sentence

*Barras v Law Officers* [2021] GCA045 (GCA: Perry, Crow and Storey, JJA)

C Tee for the first appellant; S Steel for the second and third appellants; C Dunford for the Law Officers.

The appellants sought leave to appeal their drug trafficking sentences. All had been sentenced to periods of imprisonment. In each case the appellants raised a point of principle, namely that the sentencing guidelines set out in the decision of the Court of Appeal in *Richards* v *Law Officers*[11] ("the *Richards* guidelines") were out of date, resulted in manifestly excessive sentences and needed to be reviewed, at least in cases where the amount of drugs imported was very small and were intended for personal consumption. The appellants also contended that the sentences imposed in their respective cases should be reviewed on certain other grounds (which were not of wider interest).

**Held:** leave to appeal refused.

(1) For the following reasons, the decision in *Richards* was not out of date, did not need to be revised, and did not lead to sentences that were generally manifestly excessive.

(a) There was no good reason to justify a relaxation of the policy which in 2002 motivated the Court of Appeal to formulate the *Richards* guidelines. At that time, the president's preliminary conclusion was that the level of drug trafficking had not abated and there were signs of a growth in activity. In the present case, the appellants did not dispute that drug trafficking remained a serious problem in Guernsey and to the contrary sought to rely on increased importation activity since 2002. Relying upon a report detailing the marketplace in Guernsey, the panel did not accept that the current levels of sentencing were ineffective as a deterrent nor that lowering sentencing levels would not increase offending.

(b) The *Richards* guidelines contained sufficient flexibility to accommodate mitigating circumstances such that it was not appropriate to set a lower starting point for very small quantities of drugs nor to have an exception applicable to drugs imported solely for personal use.

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[11] 2000–02 GLR 247.

(c) Evidence in relation to the sentencing regimes in other jurisdictions was not of assistance on the point of principle. The starting point was that the Guernsey courts must determine the appropriate sentencing levels for offences committed in Guernsey and that, in doing so, they may or may not derive assistance from what is done in England & Wales or in any other jurisdiction (*Wicks* v *Law Officers*[12]).

(d) There are some offences where the social conditions in the Bailiwick call for a different approach to that taken in England & Wales, and a well-established example is drug importation, which has for many years been visited with much heavier sentences in this jurisdiction than in England (*Forno* v *Att Gen*[13]).

(e) The appellants' criticisms of the *Richards* guidelines were overstated for a number of reasons, including that sentencing is always a matter of the court's discretion and the starting points in the *Richards* guidelines are just the beginning of the sentencing exercise. The constitutional role played by the Jurats in the sentencing process reflected and gave expression to the values of the wider Guernsey community. Also, unlike in England & Wales, in Guernsey one court (the Royal Court) dealt with sentencing of serious offences which was conducive to consistency of approach and fairness.

(2) The appellants' sentences were not excessive on the various other grounds they put forward.

## CRIMINAL PROCEDURE

### Fitness to plead—applicable test

*Att Gen v Taylor* [2022] JRC 334 (Royal Ct: Clyde-Smith, Commr, and Jurats Christensen and Cornish)

SC Brown, Crown Advocate for the Attorney General; RCL Morley-Kirk for the defendant.

The defendant was charged with indecent assault. The question was raised as to whether the defendant had capacity to participate effectively in the proceedings.

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[12] 2011–12 GLR 482, at para 20.
[13] [2011] JCA 22, at para 38.

**Held:**

(1) **Fitness to plead.** The issue of a defendant's capacity to participate effectively in the proceedings is governed by the Mental Health (Jersey) 2016 and in particular arts 55 and 57. Article 57 enshrines the principles enunciated by the Royal Court in *Att Gen v O'Driscoll.*[14] They differ from those which apply in England (derived from *R v Pritchard*[15]) in requiring that the defendant should have been capable of making rational decisions in relation to his participation in the proceedings. But as the Court of Appeal said in *Harding v Att Gen*,[16] the test under Jersey law is not any different in principle from that which applies in England.

(2) **Relevant English decisions followed.** In *R v Marcantonio*,[17] the English Court of Appeal set out definitively how the test under English law is to be applied in a 21st century medico-legal context. Assistance in applying the Jersey test could be found in part of the judgment of Lloyd Jones, LJ:

(a) The court is required to undertake an assessment of the defendant's capabilities in context. This should be addressed not in the abstract but in the context of the particular case.

(b) The degree of complexity of different legal proceedings may vary considerably. Thus the court should consider, for example, the nature and complexity of the issues arising, the likely duration of the proceedings and the number of parties.

(c) It is in the interests of all concerned that the criminal process should proceed in the normal way where this is possible without injustice to the defendant.

(d) Moreover, such an approach is essential, given the emphasis which is now placed on the necessity of considering the special measures that may assist an accused at trial; see *R v Walls*[18]; and in Jersey, art 57(4) of the 2016 Law.

**Presumption of capacity; disposal.** As stated in *O'Driscoll*, there is a presumption of sanity or capacity. Neither party in the present case sought to displace that presumption nor did either expert advise to the contrary. The presumption therefore remained in place. In any event,

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[14] 2003 JLR 390.
[15] [1836] 7 C & P 303.
[16] [2010] JCA 091.
[17] [2016] EWCA Crim 14.
[18] [2011] EWCA Crim 443; [2011] 2 Cr App R 6.

the court found on the balance of probabilities that the defendant was capable of participating effectively in the proceedings.

## EVIDENCE

### Character—previous conduct of accused

*Att Gen v Baska* [2022] JRC 059 (Royal Ct: MacRae, Deputy Bailiff, sitting alone)

RCL Morley-Kirk for the Attorney General; DA Corbel for the defendant.

The court considered in particular the position where the admission of bad character evidence is agreed by the prosecution and defence.

**Held:**

(1) **Agreed bad character evidence.** Bad character evidence can be admitted by way of agreement between the parties. Bearing in mind the similarity of the relevant legislation in England and Jersey it is appropriate, and frequently essential, to consider English practice and procedure in relation to the statutory provisions.

(b) **Role of court.** The Crown Court Compendium notes that caution is required in admitting evidence on this basis. Adopting this approach:

(a) It is wise for the judge to seek clarification from the advocates as to what is agreed, and for what purpose, so that the judge can consider how best to direct the jury or Jurats.

(b) It is therefore essential in every case that advocates draw to the attention of the judge before trial any agreed bad character evidence. The court has a duty in relation to admissions in relation to bad character (and, indeed, all admissions) to ensure that only relevant evidence goes to the jury or Jurats and that such evidence is presented in the shortest and clearest way.

(c) If the parties have agreed that bad character evidence should be adduced which is not relevant then the judge should direct that the draft admissions be amended before they are placed before the jury or Jurats.

(d) In every case, the advocates should draw to the attention of the trial judge the admissions that it is proposed to be adduced well before they are read to the jury or Jurats or placed in the jury's or Jurat's bundle.

**Character—previous conduct of non-defendant**

*Att Gen v PMB* [2022] JRC 335 (Royal Ct: MacRae, Deputy Bailiff, sitting alone)

EL Hollywood for the Crown; L Sette for the defendant.

The court considered the principles for the admission of bad character evidence regarding a non-defendant, in this case two prosecution witnesses. Article 82J(1) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 provides:

> "(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—
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> (a) it is important explanatory evidence;
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> (b) it has substantial probative value in relation to a matter which—
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> (i) is a matter in issue in the proceedings, and
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> (ii) is of substantial importance in the context of the case as a whole; or
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> (c) all parties to the proceedings agree to the evidence being admissible."

**Held,** as to the legal principles:

(1) **Test for admission of bad character evidence of non-defendant.** The test under art 82E for admissibility of evidence of a defendant's bad character is quite different from the test for admission under art 82J of a non-defendant's bad character. The circumstances in which a defendant's bad character may be admitted as evidence under art 82E are wider in scope than the circumstances in which the character of a non-defendant may be admitted.

(2) **Approach of court.** The relevant provision in the Jersey legislation is identical (although differently ordered) to the provision in the Criminal Justice Act 2003. It is therefore appropriate to have regard to the English authorities, albeit that they are not binding. The court referred with approval to the current approach in England and Wales in cases where the equivalent to art 82J(1)(b) is relevant. This was settled by the English Court of Appeal in *R v Brewster*[19]:

(a) The trial judge's task is to evaluate the evidence of bad character in order to decide whether it is reasonably capable of assisting a fair-minded jury to reach a view whether the

[19] [2010] 2 Cr App R 20.

witness's evidence is, or is not, worthy of belief. Only then can it properly be said that the evidence is of substantial probative value on the issue of creditworthiness. The question is then whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole. This is a significant hurdle. If this is shown, the next question is whether the bad character relied upon is of substantial probative value in relation to that issue. This will depend principally on the nature, number and age, of the convictions.

(b) A conviction need not, in order to qualify for admission in evidence, demonstrate any tendency towards dishonesty or untruthfulness. The question is whether a fair-minded tribunal would regard the conviction as affecting the worth of the witness' evidence.

(c) There is no residual additional discretion (except in the exercise of case management) to refuse the admission of the evidence. Such discretion as there is will be exercised, for example, in the manner of presentation of the evidence and the restriction of cross-examination to relevant matters.

## LIMITATION OF ACTIONS

### Prescription—personal action

*Leopard v NFU Mutual Insurance Socy Ltd* [2022] GRC 014 (Royal Ct: Roland, Deputy Bailiff)

N Barnes for the appellant; S Geall for the first respondent.

This was an appeal of the Court of Alderney's decision concerning two preliminary issues, that: (1) the prescription period in Alderney for personal actions was six years not thirty years; and (2) applying the six year period, the claim by the appellant had prescribed against the first respondent.

**Held:** appeal dismissed.

(1) The prescription period in Alderney for personal actions was six years, by virtue of the Order in Council entitled *Loi relatif aux Prescriptions of 1889* which reduced the period from ten years to six years (an earlier Order in Council having reduced the customary law period of thirty years to ten years). Contrary to the appellant's suggestion, the Orders in Council applied in Alderney even though they did not specifically state that the Island was included in their

geographical extent and *Laughton v Main*[20] was not wrongly decided to the extent that it proceeded on the basis that the law on prescription for personal claims in Alderney and Guernsey were the same.

(2) The appellant had failed to demonstrate that the Court of Alderney was wrong in law to conclude that his claim was prescribed. The implied term as argued for by the appellant that the insurer would "settle any [insurance] claim within a reasonable time" was clearly not recognised at common law in England & Wales (citing *MacGillivray on Insurance Law*,[21] *Callaghan v Dominion Ins Co*,[22] and *Sprung v Royal Ins (UK) Ltd*[23]) and there was no reason why this approach would not apply in this jurisdiction. There was no proper basis to imply such a term into the insurance contract and the appellant had failed to make out why the contract required the term in order to give the contract business efficacy.

## TRUSTS

### Beneficiaries—impounding beneficial interest

*Patel v JTC Trust Co Ltd* [2022] JRC 089 (Thompson, Master of the Royal Court)

The plaintiffs were not convened and did not appear; JP Speck for the defendant; D Evans for the first third party and the sixth to twelfth third parties; PG Nicholls for the second to fifth third parties.

Members of a family entered into an agreement regarding the restructuring of certain discretionary trusts. The plaintiffs were beneficiaries but had not been parties to the agreement. Instead, they executed certain deeds of disclaimer. They sought to set aside the deeds of disclaimer as against the defendant trustee on the basis that the disclaimers had been procured in the absence of informed consent or alternatively were void by virtue of them being procured by mistake and/or under duress and/or undue influence. The trustee joined the other beneficiaries of the discretionary trusts as third parties, claiming relief from them if it is held liable. The trustee claimed *inter alia* that all or part of the interest of the third parties should be impounded by way of indemnity pursuant to art 46(1) of the Trusts (Jersey) Law 1984.

Article 46 provides:

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[20] 20 October 1994, unreported.
[21] 14th edn, 2018, at para 21–055.
[22] [1997] 2 Lloyds Rep 541.
[23] [1999] Lloyd's Rep IR 111.

> "(1) Where a trustee commits a breach of trust at the instigation or at the request or with the consent of a beneficiary, the court may by order impound all or part of the interest of the beneficiary by way of indemnity to the trustee or any person claiming through the trustee.
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> (2) Paragraph (1) applies whether or not such beneficiary is a minor or an interdict."

**Held,** declining to grant relief under art 46(1):

(1) **No impounding of interest of discretionary beneficiary.** All the beneficiaries were discretionary beneficiaries. The court does not possess the power under art 46 to impound the interest of a discretionary beneficiary. A discretionary beneficiary has no right to trust assets unless or until the trustees decide in their discretion to make an appointment to him and he then becomes beneficially entitled only to such assets as are appointed to him; the beneficiary's only right is to be considered for the exercise of the trustee's discretion and to compel due administration of the trustee's duties: *In re Tantular*[24]; *Crociani v Crociani*[25]; *Kea Invs v Watson.*[26] Accordingly, there was nothing that could be impounded under article 46.

(2) **Separate equitable power to direct that beneficiary instigating or acquiescing in breach of trust does not benefit.** The court has a separate equitable power to direct that distributions are not made to a beneficiary who has instigated or acquiesced in a breach of trust by a trustee which has been ordered to reconstitute the trust fund: *Crociani*. If the defendant in this case were after trial required to reconstitute any trust, it could seek directions as to who might benefit from that trust. However, if the defendant wished to seek such relief, that relief should be pleaded and what order the defendant is asking the court to make should be set out and the reasons why.

**Costs—allocation of costs**

*In re J and K Trusts* [2022] GRC0013 (GRC: Collas, Lieut. Bailiff)

A Lyne for the trustee; J Le Tissier for beneficiary A; A Davidson for beneficiary B; M Jones for the unborn and unascertained beneficiaries; J Greenfield for the protectors

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[24] 2014 (2) JLR 25.
[25] [2017] JRC 146.
[26] [2021] JRC 009.

This case concerned two related family trusts the subject of the Court of Appeal decision in *In re K Trust*[27] concerning the construction of the declaration of trust for the K Trust.

The trusts each had the same settlor and trustee ("the trustee"). Following the Court of Appeal decision, the advocates for the principal beneficiary of the J Trust ("beneficiary A") requested the resignation of the trustee on several grounds, including conflicts of interest. Acting on advice from leading counsel, and its Guernsey advocates, the trustee sought a declaration and orders that the trustee did not have an unauthorised conflict of interest and/or the conflict was authorised by the trust instruments or alternatively, proposing methods for managing any conflicts. In response beneficiary A lodged a removal application. The trustee later resigned and accordingly the applications became otiose, but the costs of the applications remained to be decided. Beneficiary A's advocate relied upon the decision in *In re E Trust*[28] as authority for the proposition that, where a trustee was faced with a plain and obvious conflict of interest and failed to resign but applied to the court seeking directions, it could not be remunerated and was not entitled to an indemnity from the trust fund.

**Held**:

(1) Nothing put forward by beneficiary A justified depriving the trustee of its costs. Observed that the key aspects of the nature of a fiduciary duty identified by Millett, LJ in *Bristol & West Bldg Socy v Mothew*[29] and applied to Jersey in *In re E Trust* were equally applicable in Guernsey

(2) As to the allocation of costs between the two trusts, the costs were to be borne out of the J Trust as the applications were advanced for the benefit of beneficiary A and the J Trust (*Re Buckto* [30]).

**Trust assets—mistake by settlor/donor**

*Representation of A, re the E Settlement* [2022] JRC 052 (Royal Ct: W 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, with

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[27] 2020 GLR 312.
[28] 2008 JLR 360.
[29] [1996] 4 All ER 698.
[30] [1907] 2 Ch 406, applied.

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) **Test under art 11.** The court noted that its approach under art 11 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) **Issues of domicile.** 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 firm grasp of the headline issues.

(3) **Mistaken tax-based decisions and mistake as to risks.** As had been said in 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. It was important to emphasise that there was 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. He gambled and lost. In the latter case, the court 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 has taken on many occasions in the past 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.

(4) **Court needs to see all relevant documents.** 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.

Proceeding in this way in theory allows too much latitude to a representor to make a partial disclosure of the true position in circumstances where experience shows the court will not have the benefit of contested argument. It was essential that representors seeking relief of the kind requested should provide all relevant correspondence and file notes for the court's consideration. This was 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.

(5) **Application of test on particular facts.** As to the three questions, the court was in this case nevertheless satisfied on balance on the facts that this was an appropriate case to grant relief on the facts under art 11.

(6) **Jurisdiction to make consequential orders in relation to art 11.** Where a trust is set aside, certain supplemental orders are invariably needed. The power to make any necessary supplemental orders is specific and statutory in relation to applications under art 47E and related provisions (art 47I). There is no specific power in relation to art 11. The court confirmed that it had jurisdiction both under art 51 (its general power to make orders concerning administration of a trust) and under its inherent jurisdiction to make supplemental orders in a case where a trust is set aside under art 11. Accordingly the court made the common supplemental orders protecting the trustee's reasonable remuneration and rights of reimbursement for expenses and relieving it from any past liability for its administration of the trust arising only as a result the fact that the trust had been void from the start and the assets strictly held on a bare trust for the settlor.

**Costs—trustee indemnity**

**Powers of court—disclosure of trust documents**

*Fort Trustees Ltd and Balchan Management Ltd v ITG Ltd and Bayeux Ltd* [2022] GRC 015 (Royal Ct: McMahon, Bailiff)

P Richardson for the applicants; J Wessels for the respondents.

This was a judgment in the long-running litigation concerning the Tchenguiz Discretionary Trust ("the TDT"). The respondents were the original trustees of the TDT ("the original trustees) until they were removed in 2010. Since that time, there had been a considerable amount of litigation arising from this and subsequent changes of office-holders and other issues arising from the administration of the TDT.

The applicants ("the current trustees") applied for an order that the original trustees file copies of documents that had been withheld by them on the basis of privilege, so that the court could determine whether each claim to privilege was justified and an order that any document

where the claim to privilege was found to be unjustified be disclosed to the applicant.

The application for disclosure was made under ss 68 and 69 of the Trusts (Guernsey) Law 2007, however the court had regard to the Royal Court Civil Rules 2007 in deciding what type of information would need to be provided in relation to documents withheld.

The parties agreed that the burden was on the person asserting privilege to establish it. It was also common ground that a new trustee is entitled to require the former trustee to deliver up all records, books and other papers belonging to the trust and the Royal Court has a wide discretion in making an order for disclosure under ss 68 and 69 of the Trusts (Guernsey) Law 2007.

**Held:**

(1) Based on a review of the lists of documents provided by the original trustees, the original trustees had ultimately complied with the terms of the order for disclosure meaning that there was no basis for the court or a third party to conduct a review of the documents.

(2) Certain documents did not fall within the terms of the disclosure order because they were advice obtained personally by the original trustees, which did not belong to the trust.

(3) No order was made concerning the question of whether the current trustees should be deprived of their indemnity for their costs of the proceedings concerning disclosure of the documents (as submitted by the original trustees). This would be dealt with in other proceedings, currently ongoing, concerning the priority of creditors of the TDT.