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

ADVOCATES AND SOLICITORS

Disciplinary penalties

Advocate B and C v Law Society of Jersey [2022] JRC 037 (Royal Ct: Le Cocq, Bailiff, and Jurats Blampied and Austin-Vautier).

PD James for Advocate B; OA Blakeley for C; IC Jones for the Law Society of Jersey.

On appeal to the Royal Court against penalties imposed by the Disciplinary Committee of the Law Society of Jersey, the question was raised as to the principles for assessing the appropriate penalty for a breach of the Code of Conduct of the Law Society of Jersey. The lawyers in question had acted in breach of requirements of the Code arising out of a conflict of interest between clients where a firm is acting on both sides of a transaction. There was no suggestion that either of them had behaved in a manner that was dishonest or which demonstrated a want of personal or professional integrity. The Disciplinary Committee imposed a public reprimand in the case of Advocate B and a public reprimand and fine in the case of C.

Held, allowing both appeals:

(1) Agreeing with the approach set out in the *Law Society of Jersey v An Advocate*,[1] following *Fuglers and Berens v Solicitors Regulatory Auth*,[2] incorporating the well-known case of *Bolton v The Law Society*,[3], there were three stages to an approach which should be

[1] [2021] JRC 292.
[2] [2014] EWHC 179 (Admin).
[3] [1994] 1WLR 512.

adopted in determining sanction. The first stage is to assess the seriousness of the misconduct. The second stage is to keep in mind the purpose for sanctions that are imposed by such tribunal. The third stage is to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.

(2) In considering seriousness, the most important factors will be the culpability for the misconduct in question, the harm caused by the misconduct to be measured not wholly, or even primarily by financial loss caused to any individual but also the impact of the misconduct upon the standing and reputation of the profession as a whole. Seriousness may lie in the risk of harm to which the misconduct gives rise whether or not that risk eventuates. The emphasis is on the reputation of the legal profession and the confidence of members of the public in the trustworthiness of members of that profession.

(3) Allowing the appeals on the facts, the court (whilst emphasising the importance of complying with the Code of Conduct) quashed the penalties imposed by the Disciplinary Committee and imposed instead a private rebuke for both lawyers.

Duty of care—wills

Dorey, Mclelland & Dorey v Ashton [2022] GRC063 (Royal Ct: Marshall, Lieutenant-Bailiff)

A Ozanne for the plaintiffs; GSK Dawes for the defendant.

This was the trial of a preliminary issue as to whether an advocate who prepares a will for execution by a testator owes a duty of care to the persons who would benefit on intestacy from the testator's estate if no such will were executed.

The plaintiffs were three of the four children of the late Sir Graham Dorey by his first marriage. The first plaintiff was also the administrator of the estate of Sir Graham. The defendant was an advocate who took instructions from Sir Graham for the preparation and execution of two wills. The effect of the wills was to reduce the inheritance of Sir Graham's four children through the provision made for Sir Graham's second wife. The plaintiffs claimed that the advocate was negligent in and about taking the instructions for the wills and arranging for and assisting in their execution, in circumstances where the testator did not have testamentary capacity.

Held:

(1) **Duty of care.** Applying English and commonwealth authorities, an advocate owed no duty of care to the presumptive former beneficiaries of a testator who wished to make a new will which would adversely affect their expectations.

(2) **Amendment to a pleading after expiration limitation period.** As to whether *Jefcoate v Spread Trustee Co Ltd*[4] ("*Jefcoate*") might have been wrong to hold that there was any jurisdiction, in Guernsey, to permit an amendment which had the effect of circumventing a prescription period, Jefcoate had been followed in at least two Guernsey Royal Court decisions. Its approach had now been embedded in Guernsey law and it was too late to seek to overturn it, at least at first instance.

Obiter: the proper course for an advocate instructed to prepare a will, where there is doubt as to the client's capacity, was to allow the will to be executed whilst taking comprehensive notes on the question of capacity (*Scott v Cousins).*[5]

The plaintiff's personal claims *qua* beneficiaries were accordingly dismissed. The judgment has been appealed.

COMPANIES

Creditors' winding up—private international law

Representation of HWA 555 Owners, LLC re Redox PLC S.A. [2022] JRC 181 (Royal Ct: Clyde-Smith, Commr, and Jurats Ramsden and Le Heuzé).

JM Dann for the representor; JMP Gleeson for the second respondent.

In an application by a creditor for a creditors' winding up under the provisions introduced by the Companies (Amendment No 8) (Jersey) Regulations 2022, the court examined (1) the requirement that the applicant creditor has a liquidated claim, and (2) the court's discretion to order a creditors' winding up. In this case, there was an existing and ongoing bankruptcy of the company in Luxembourg, commenced pursuant to a letter of request to the Luxembourg Court made by the Royal Court, and, unusually, the company was both Jersey-incorporated and also registered in Luxembourg (a so-called "dual-hatted" company).

Held, declining the application for a creditors' winding up:

(1) **Requirement for a liquidated sum**

(a) The ability of a creditor to apply for an order to commence a creditors' winding up of a company was introduced into the Companies (Jersey) Law 1991 on 1 March 2022. Article 157A provides *inter alia* that the creditor making the

[4] [2013] GLR 220.
[5] [2001] OJ 19 at para 70

application must have a claim against the company for not less than the prescribed minimum liquidated sum. Pursuant to art 9 of the Companies (General Provisions) (Jersey) Order 2002, the prescribed minimum liquidated sum is £3,000.

(b) There was well-settled Jersey case law as to the meaning of a "liquidated sum". It must be certain in amount and certainly due or at least be promptly and summarily provable: *Dyson v Godfray*[6] applying Pothier, *Traité des Obligations*, para 628. There must be no reasonably arguable defence, so that if proceedings were issued it could form the basis for an immediate application for summary judgment, although a judgment is not necessary: *Representation of Harbour*;[7] *Re Baltic Partners Ltd.*[8] In this case the creditor had an outstanding costs judgment from a Californian court in its favour in excess of the prescribed minimum and therefore had a claim that was both liquidated claim and sufficient for this purpose.

(2) **Court's discretion**

(a) Though the creditor may have standing to bring the application the Court has a discretion whether or not to order a creditors' winding up. In international insolvency cases, the common law and the principles of private international law all emphasise the importance and primacy of the place of the company's incorporation. The importance to have proper regard to the primacy of the law of the place of the relevant company's incorporation was emphasised in *Singularis Holdings Ltd v PriceWaterhouse-Coopers.*[9] The place of a company's incorporation is prima facie the principal forum in which the company should be wound up—see *Re BCCI SA*[10] *per* Browne Wilkinson, VC at para 91 and *Kam Leung Sui Kwan v Kam Kwan Lai.*[11] This is so notwithstanding the existence of antecedent parallel foreign winding up proceedings in another country: *North Australian Territory*

[6] [1884] App Cas 726.
[7] [2016] JRC 171.
[8] [1996] JCA 075.
[9] [2014] UKPC 36.
[10] [1972] BCC 83.
[11] [2015] HKCFAR 501.

Co Ltd v Goldsbrough;[12] *Re Philadelphia Alternative Asset Fund*.[13]

(b) It may be that these well-established principles require some modification when a company is "dual hatted", namely incorporated in two jurisdictions. The court had not been given any authority as to how the principles of international insolvency should apply in the case of dual hatted companies, but it is the case that this court was persuaded that it was in the interests of the creditors for bankruptcy proceedings to be conducted in Luxembourg, which it was accepted was the company's centre of main interest.

(c) This was not a case of this court deferring to the Luxembourg court, but a positive decision that, having acceded to the application for a letter of request on the basis that it was in the interests of the creditors that bankruptcy proceedings should be commenced in Luxembourg (*Representation of Regus PLC*[14]), and with bankruptcy proceedings well advanced in Luxembourg, the starting point had to be for the court to act in a manner which was consistent with that decision, for so long as it remained in the interests of the creditors as a whole for it to do so. On the facts this continued to be the case.

CRIMINAL PROCEDURE

Proceeds of criminal conduct—"informal freeze"—forfeiture of assets order—right to a fair trial—legal representation

Useni v Att Gen [2022] JCA 197 (Court of Appeal: Montgomery, President, Crow and Wolffe, JJ.A).

HB Mistry for the appellant; Crown Advocate SC Brown for the first respondent; J Harvey-Hills for the second respondent.

The appellant, a foreign PEP from a high-risk jurisdiction, brought appeals against a forfeiture order made under the Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018 and two interlocutory decisions, by which the Royal Court refused applications for release of funds from the affected bank accounts to pay the appellant's legal expenses. The arguments focused on the Royal Court's refusal to order the release of funds for the purpose of legal representation. The appeal against the

[12] [1899] 61 LT 717.
[13] Unreported 22 February 2006, and noted at 2006 CILR *N* [7].
[14] [2020] JRC 226A.

forfeiture order was predicated on the alleged inability of the appellant to secure a fair trial as a result of the funding order and raised no separate issues.

The bank accounts had effectively been blocked pursuant to disclosure made by the bank to the police under art 32 of the Proceeds of Crime (Jersey) Law 1999 and the absence of consent for the operation of the accounts by the police. The Royal Court in *States Police v Minwalla*[15] and the Guernsey Court of Appeal in *Chief Officer v Garnet Invs Ltd*[16] identified two remedies which are available to a banking customer in these circumstances—(i) judicial review the decision of the police not to consent to any payment or (ii) an ordinary action against the bank seeking to show that there is no money-laundering reason why the account should not be operated in accordance with the mandate. It was contended for the appellant that the court below erred when it found that these were the only two options for relief available to the appellant in seeking release of funds for legal expenses on the facts of the case. The appellant argued that where it is necessary to secure the respondent's right to a fair trial under art 6 of the European Convention on Human Rights, having the force of law by virtue of the Human Rights (Jersey) Law 2000, the court can and should order or authorise release of such funds from the account as are necessary to meet the account holder's legal expenses; and that the Court should have made such an order in this case.

Held:

(1) **Inability to fund legal representation and necessity of legal representation not shown in this case**. The question of whether the court had power to make such an order would only arise as a practical question if such an order was necessary, in the circumstances of the case, to secure the appellant's right to a fair trial under Article 6 of the Convention.

(a) This depended firstly on whether the appellant could successfully impugn the Royal Court's rejection of the appellant's argument that he had no other means of funding legal representation. On this, the Court of Appeal concluded that the Royal Court had been entitled, on the information before it, to reject the appellant's contention.

(b) Secondly, it had to be shown that the appellant required legal representation in order to obtain a fair trial. In *Steel v UK*[17]

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[15] 2007 JLR 409.
[16] GCA 19/2011.
[17] Application No 68416/01, 15 May 2005, para 59.

> the European Court of Human Rights observed that the right to a fair trial holds a "prominent place … in a democratic society". The right to a fair trial was firmly embedded in the domestic legal traditions of the United Kingdom and of the Channel Islands. The question was whether the appellant required legal representation in this case. Although the present case did not concern the provision of legal aid, it was implicit in the approach of the ECtHR in *Steel* and *McVicar v UK*[18] that in proceedings involving the determination of civil rights and obligations, the absence of, or inability to fund, legal representation does not necessarily deprive a litigant of a fair trial. The question depends on the particular facts and circumstances of the case and fell to be addressed in particular by reference to the factors identified by the European Court of Human Rights at para 61 of *Steel*, that is to say, *inter alia*, the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively. Applying those principles, the Court of Appeal concluded that, on the particular facts of the present case and the narrow issues raised, legal representation would not be necessary in order for the appellant to secure a fair trial.

(2) **Whether the court had power to order the release of funds**. Given the above findings, it was not necessary for the Court of Appeal to determine whether the Royal Court did have power to make the order sought. However, the court made the following observations.

(a) Although the appellant's appeal was rejected in this instance, it remained the case that, in other circumstances, the inability of a respondent in forfeiture proceedings to secure legal representation could result in an unfair trial.

(b) Nevertheless, the Court of Appeal agreed with the Attorney General that the Royal Court has no power to make an order for the release of funds by the bank in the context of forfeiture proceedings under arts 10 and 11 of the 2018 Law even in a case where such an order would be the only way to ensure that the respondent could receive a fair trial. Whilst the Royal Court is obliged, so far as possible, to construe and give effect to the 2018 Law, and indeed its other powers, in a manner which respects Convention rights, there was no provision which gave the Royal Court power to make such

[18] Application No 46311/99.

an order in relation to such proceedings. Indeed, such an order would require the bank to deal with funds in a manner which might be criminal under the 1999 Law.

(c) The court was not, however, convinced that the remedies referred to in *Minwalla* and *Garnet* provided an answer to the difficulty which could arise from the absence of any statutory power to make an order enabling funds to be used to meet legal expenses. A respondent who genuinely cannot fund legal representation in Jersey, and who cannot participate effectively in forfeiture proceedings without such representation, is liable to face difficulties in pursuing those other remedies as well. Should a case come before the courts in which the issue arises sharply a number of consequential issues would require to be addressed. It would be better for those to be considered in a case where they are live issues and have been fully ventilated.

LAND LAW

Contract of sale—rectification—registration of power and authority of attorney

Representation of Chapman and So [2022] JRC 138 (Royal Court: Sir William Bailhache, Commr, and Jurats Ronge and Hughes).

C Austin for the representors.

In two separate representations, the representors sought orders from the Court confirming retrospectively contracts which had been passed before the Royal Court in each case by an attorney lacking formal authority to act in the manner in which they did.

Held:

(1) **Power of attorney not registered before passing of contract**.

(a) The chain of title to the first property included a purchase in 1992 by a vendor (Mrs Le Blancq). Mrs Le Blancq was represented for the purpose of passing contract by her attorney. The attorney had been appointed prior the passing of the contract but the power of attorney had not been registered until after.

(b) By custom and tradition, no contracts are passed in court other than by those who are *transigeants* unless they have granted a power of attorney to another person, registered in the Public Registry, to pass the contract on their behalf. Such a power of attorney can be either a general power or a special power. The integrity of the Public Registry and thus the

system of conveyancing in Jersey relies upon the accuracy of the deeds which are passed and recorded in the registry. In the absence of any argument to the contrary, the court proceeded for the purposes of the present question, on the assumption, reflected by years of practice, that if a power of attorney is not registered in the Public Registry, there has been no proper authority for the attorney to take the oath on behalf of his or her constituent.

(c) The position could not be rectified by an email from Mrs Le Blancq confirming the 1992 sale, which was presented in evidence, as this would amount to a conveyance by email which was not possible. It is the act of taking that oath which completes the transaction in real estate and the court then has the original contracts enrolled in the Public Registry where they are available for inspection by everyone: *Fogarty v St Martin's Cottage Ltd.*[19]

(d) As regards parties to the intervening contracts since 1992, whilst no party can acquire a better title than that which was available to the vendor, it would not lie in the mouth of any intervening parties in the chain of title to assert that they had not sold what they bought. The oath which they each took before the Royal Court was that they would not act against the deed in question. The court could also cited the doctrine that one cannot reject that which one has approved, conveniently summarised in the Latin maxim *reprobo non approbo*. It was therefore not necessary to convene all the intervening parties.

(e) The position of Mrs Le Blancq was different. The court proposed two solutions. (a) She should be convened to the representation in order that, albeit belatedly, she can either personally or by an attorney complete the transaction which is reflected in the 1992 deed of sale or challenge it, in which case further directions would have to be given. (b) Alternatively, if she were to be joined into the proposed deed of sale of the property by the representors in the first representation (which had given rise to the present difficulties) in order to take the oath which was ineffectively taken on her behalf by the attorney in 1992, that would achieve the same result and the present proceedings could then be withdrawn.

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[19] 2015 (1) JLR 356.

(2) **Omission in power of attorney to give authority to sell as flying freehold parking space as well as apartment.**

(a) The second representors purportedly acquired shares by way of flying giving title to both an apartment and parking space. For the purposes of the contract of sale in 2007 of a predecessor in title (Mr and Mrs Harper) the vendor had been represented by an attorney under a power of attorney duly registered in the Public Registry. It gave authority to sell the apartment but omitted the power to sell the parking space. The oath that was taken by the attorney was correct but the power of attorney had been inadequate for its purpose.

(b) Rectification of the power of attorney was not possible because the court did not have Mr and Mrs Harper before it. The court took the step of ordering Mr and Mrs Harper to be convened.

(c) However, this would not prevent Mr and Mrs Harper being joined into a sale of the apartment and parking space by the representors of the second representation in order to confirm the sale of the parking space in 2007.

(d) It was also not necessary to convene intervening owners for the same reason as in the first representation.

MONEY

Loans—jointly and severally liable

Kingfisher Aviation Ltd v Otium Event GMBH (as General Partner of Otium Event GMBH & Co. Offshore Ausrustungen KG) [2022] GRC038 (Royal Ct: Roland, Deputy Bailiff)

TW McGuffin for the plaintiffs; B de Verneuil-Smith for the defendants.

This was a claim for a sum payable under a loan agreement and seeking an order that the defendants were jointly and severally liable for that sum.

Held:

(1) Dismissing the defendants' various challenges to the claim, they were jointly and severally liable to the plaintiffs for the amount of the loan together with contractual interest at a rate of 5% per annum until 31 May 2012.

(2) In directing the Jurats, Deputy-Bailiff Roland made the following observations as to Guernsey contract law:

(a) When interpreting the terms of a contract, the starting point was to give the words used their ordinary and natural meaning. The modern view of admitting extrinsic evidence (see *St Margaret's Lodge v Peres* (Guernsey Royal Ct, unreported judgment, 44/2015) ("St Martin's Lodge")) is permissible to assist but this does not mean that the court can rewrite the language used by the parties where it is clear and unambiguous. The negotiations of the parties were not admissible as evidence of the terms for which each party was contending.

(b) The Guernsey courts had adopted the English principles of construction of contracts (see the summary of *Arnold v Britton*[20] in *Midland Resources Holding Ltd v Prodefin Trading Ltd*[21] and the judgment of Anderson JA at para 14).

(c) Post-contractual conduct was admissible in deciding what terms the parties agreed, as opposed to its meaning, where the contract was not contained wholly in writing.

(d) When considering as a matter of fact the terms which the defendants said should be implied, which must be clear, precise, and capable of expression, the Jurats should use the directions of the Privy Council in *Ali v Petroleum Co of Trinidad and Tobago*,[22] which *Chitty* referred to as a helpful summary.

(e) Although it was possible to establish a form of collateral agreement to vary the express terms of a written agreement or to agree not to enforce its terms strictly, this would be difficult (see *St Margaret's Lodge*).

(f) When interpreting contractual provisions, the meaning was to be gleaned from the language of the provisions, save in a very unusual case where commercial common sense and the surrounding circumstances should be invoked (*Arnold v Britton*).[23]

[20] [2015] AC 1619; [2015] UKSC 36
[21] 2017 GLR 304 (CA)
[22] [2017] UKPC 2 at para 7
[23] [2015] AC 1619 at para 17

PRESCRIPTION

Alderney—personal actions—prescription period

Leopard v NFU Mutual Ins Socy Ltd [2022] GCA063 (CA: Crow, Le Cocq and Wolffe, JJA)

NJ Barnes for the appellant; SR Geall for the respondent.

This was an appeal from a decision of the Royal Court, in turn on appeal from the Court of Alderney, concerning a preliminary issue on prescription

The proceedings concerned the appellant's claims in relation to an insurance claim in respect of damage to his property in Alderney. The appellant brought proceedings more than 11 years after notifying the claim to the respondent. The questions on appeal were whether the Royal Court was correct in finding that (1) in Alderney personal actions were prescribed by the lapse of six years, not thirty years; and (2) the proceedings had been brought after the expiry of the prescription period.

Held:

(1) **Prescription period in Alderney.** The Royal Court had been correct to find that the prescription period for personal actions in Alderney was six years. The thirty-year prescription period under the customary law of Alderney was reduced to ten years by an Order in Council dated 19 June 1844 and subsequently to six years by a further Order in Council made on 22 July 1847. In the context, the expression "the Island of Guernsey" used to describe the Orders' geographical extent meant "the Bailiwick of Guernsey". *(Obiter):* The Royal Court's finding that the customary law in Alderney had developed so that the relevant prescription period was now in any event six years was correct.

(2) **Had the proceedings been brought within six years of accrual of the cause(s) of action?**

(a) If the respondent had exercised the option to repair the property, it was under an implied term to do so within a reasonable time.[24] The appellant had not identified, in the cause, what he contended would have been a reasonable time for completion of the works and, as such, the claim was defective. The panel was therefore not able to conclude whether the claim was prescribed. Accordingly, it allowed

[24] *Brown v Royal Ins Co* (1859) 120 ER 1131, *Maher v Lumbermen's Mutual Casualty Co* [1932] 2 DLR 593 and *Davidson v Guardian Royal Exchange Assur* 1979 SC 192.

the appeal on that basis and remitted the case back to the Court of Alderney with the suggestion that the appellant be required to plead explicitly that the respondent had opted to repair the property and what the appellant's case was as regards the reasonable time to complete the works of repair.

(b) If the respondent had opted to pay the costs of repair, the cause of action arose when the damage to the property occurred and the appellant made a claim under the policy. This was over six years ago and accordingly this cause of action had prescribed.

(c) The respondent's obligation under the terms of the relevant policy to pay the costs of repairs was not subject to an implied term to pay the claim within a reasonable time. This was not required for business efficacy. (*Obiter):* Nor would it be justified with reference to the mutual obligations of good faith that parties to an insurance contract governed by Guernsey law owe to each other.

(d) The appellant's claim against the respondent for loss of rent under the additional insurance policy was a continuing obligation and accordingly it, or a portion of it, may not have prescribed. It was not possible to determine this matter on the current pleadings. If it was determined in due course by the Court of Alderney that the respondent did not opt to repair the property, this claim would need to be addressed.

SUCCESSION

Wills—advocate's duty of care. See **ADVOCATES (Duty of care—wills)**

Wills—revocation

Representation of del Amo [2022] JRC190 (Royal Ct: Le Cocq, Bailiff, and Jurats Ramsden and Hughes).

CB Austin for the representor.

The question was raised as to whether the deceased had manifested an intention to revoke his wills of movable and immovable estate by instructing a solicitor to make certain important changes but having passed away before executing new draft wills which had been prepared for him. The solicitor's notes of his meeting with the deceased record, "codicil wants to change his will". The solicitor elected to prepare wills as opposed to preparing codicils as being the most cost-effective way of dealing with the changes requested. The effect of the revocation in the absence of the new will being executed would be that the deceased would be intestate. All interested parties supported the application to

have the wills declared revoked. They had reached agreement as to the division of the estate but it was expressly dependent on the court declaring the wills as having been revoked.

Held, declining the application:

(1) Article 30 of the *Loi* (1851) *sur les Testaments d'Immeubles* provides that the laws and customs of the island concerning wills of movable property provided that they are not contrary to the provisions of the statute are applicable also to wills of immoveable property. This was confirmed in effect in the case of *Re Will of Beaugié*[25] in which it was held that the method of revocation is the same for wills of either type. Revocation requires an act of revocation, accompanied by the intention to revoke (*amius revocandi*).

(2) Thus, *prima facie*, any act evidencing an intention to revoke is sufficient, for example, the destruction of a will with the intention of revoking it, a simple declaration that the will is revoked, and the making of a subsequent testamentary instrument, the provisions of which are wholly or in part inconsistent with the provisions of the earlier instrument. Intention to revoke is not proved by mere accidental words or by inference or by the form of the testamentary document or by implication where the circumstances to not accord with such an intention*: Re Vickers.*[26]

(3) The court's obligation was to seek anxiously for the testamentary intention of the deceased. It was clear that had the deceased been in a position to execute the new wills prepared in draft for him then he would have revoked the earlier wills. Would the testator have preferred to be intestate rather than allow his original wills to survive in the event that he had pre-deceased as he did, the execution of the new wills? It was impossible to say that he would and indeed the evidence pointed to the very strong likelihood that he would not.

(4) The agreement between the interested parties was expressly subject to the Royal Court declaring the existing wills to have been revoked. For the above reasons the court was not able to do this. It was also not satisfactory that the court was not addressed on the principles of *Saunders v Vautier*.[27] All of the parties being in agreement, there was no reason why the estate of the deceased could not be disposed of and divided in accordance with their agreement but the draft agreement before the court was expressly subject to the wills being declared revoked.

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[25] 1970 JJ 1579.
[26] 2001 JLR 712.
[27] [1841] EWHC J82.

TRUSTS

Trustees—indemnity—successor trustees

Equity Trust (Jersey) Ltd v Halabi (as Executor of the Estate of the late Madam Intisar Nouri) (Jersey) and *ITG Ltd v Fort Trustees Ltd* (Guernsey) [2022] UKPC 36 (JPC & GPC: Lords Reed, Briggs, Stephens and Richards; Ladies Arden and Rose; Sir Nicholas Patten)

S Warnock-Smith, KC, C Stanley, KC, D James and S Hurry for the appellant; E Jordan; J Goodwin for the respondent (Jersey).

J Machell, KC and N Robison for the appellants; S Taube, KC, J Wessels, J Brightwell and T Fletcher for the respondents (Guernsey).

This case concerned two factually unconnected appeals with a commonality of issues, from the Jersey Court of Appeal ("the Equity Trust case") and Guernsey Court of Appeal ("the TDT case"), which were heard together.

The appeals concerned the rights of indemnity of successive trustees against the assets of trusts where they have become insolvent, in the sense that the trust assets are inadequate to meet in full the liabilities incurred by the trustees in their capacities as trustees. The applicable law in both appeals was the law of Jersey which, as the board held, was the same in all relevant respects as English law.

References in brackets below are to paragraph numbers in the judgment.

Held:

(1) **Trustee's indemnity—proprietary or possessory?**

(a) The right of indemnity confers on the trustee a proprietary (rather than merely possessory) interest in the trust assets (unanimous) [4], [105], [238], [279].

(b) A trustee's right of indemnity is an equitable lien which is not dependent upon possession but arises by operation of law [94].

(c) A trustee's equitable lien is compatible with the general reluctance of Jersey customary law to recognise non-possessory security over movables because the trustee's lien is not a form of security for debt. There is no personal obligation to secure. Rather, a trustee's lien is the proprietary interest in trust assets which the right of indemnity gives to the trustee [215–216].

(2) **Does the trustee's interest survive transfer of the trust assets to a successor trustee?**

(a) The proprietary interest of a trustee survives the transfer of the trust assets to a successor trustee (unanimous) [4], [166], [238], [279].

(b) As the indemnity creates a proprietary interest in the trust assets, it would be contrary to ordinary equitable principles if it automatically ceased to exist when the trustee parted with legal title to and/or possession of the trust property [106]–[115].

(c) **Ranking of trustees' interests**

(a) Successive trustees' proprietary interest in the trust assets rank *pari passu* where those assets are insufficient to meet all the claims on them made by or through the trustees pursuant to their indemnities [238]–[278]. This overturned the Jersey Court of Appeal decision in the Equity Trust case and the Guernsey Court of Appeal decision in the TDT case that had followed it.

(b) It might be appropriate to depart from *pari passu* in this context in very exceptional circumstances, though not by disrupting the *pari passu* scheme as such, but by disallowing certain claims to trust assets.

(d) **Does a trustee's indemnity / lien extend to the costs of proving its claim?**

(a) A trustee's indemnity/lien extends to the costs of proving the trustee's claim against the trust assets if the trust is "insolvent" (unanimous) [4], [235]–[237], [238], [279], including such costs incurred after a trustee's retirement [235].