MISCELLANY

Standard of proof in rectification cases

1 Some interesting points were raised in the Royal Court of Jersey's recent judgment in *Re Maria Trust*,[1] but one in particular seems worthy of comment. The settlor, who had resided outside the UK, had died and was not party to the proceedings. The representation of the trustee for rectification of the trust deed was supported by the settlor's sons, one of whom was the only beneficiary of the trust. The Jersey discretionary trust had been established with the aim of shielding the trust property (a house in England) from inheritance tax. HMRC had been notified of the application but had not sought to be joined in the proceedings. The problem arose because the settlor had not been expressly included within the category of "excluded persons" under the trust definitions. It had therefore been possible for the trustee to have included the settlor as a beneficiary. The mistake happened because the tax adviser had not appreciated that there was a difference between Jersey and English law in this respect. There was clear evidence that there was never any intention that the settlor should become a beneficiary. On the death of the settlor, however, HMRC took the view that there had been a reservation of benefit and that the property within the trust was liable to inheritance tax.

2 The court referred to the familiar three-stage test for rectification[2] articulated by Birt, Deputy Bailiff (as he then was), of which the first is that "the court must be satisfied by sufficient evidence that a genuine mistake has been made so that the document does not carry out the true intention of the party(ies)".[3] It was clear in *Sesemann* that "sufficient evidence" meant that the court must be satisfied to the civil standard. This test was considered by the Jersey Court of Appeal in *B v Virtue Trustees (Switzerland) AG*[4] where Martin, JA stated that there was no difference between the laws of Jersey and England in relation to rectification, but that he preferred the formulation of the test in *Lewin on Trusts*[5] to the first stage test set out in *Sesemann*. *Lewin* states—

---

[1] [2022] JRC 164 (MacRae, Deputy Bailiff and Jurats Christensen and Le Heuzé).
[2] *In re R.E.Sesemann Will Trust* 2005 JLR 421.
[3] *Ibid*, at para 12.
[4] 2018 (2) JLR 372, at para. 23 (McNeill, Martin and Collas, JJA).
[5] 19th ed (2015).

"The conditions which must be satisfied in order for the court to order rectification of a voluntary settlement are as follows:

(1) There must be convincing proof to counteract the evidence of a different intention represented by the document itself;

(2) There must be a flaw (that is an operative mistake) in the written document such that it does not give effect to the settlor's intention;

(3) The specific intention of the settlor must be shown; it is not sufficient to show that the settlor did *not* intend what was recorded; it must also be shown what he did intend;

(4) …"[6]

3 The Deputy Bailiff was not persuaded that this *dictum* of Martin, JA had overruled the test in *Sesemann* because it had not been expressly argued.[7] It is arguable, however, that both tests amount to much the same thing and that the problem is evanescent. That was certainly the view taken in Guernsey by Sir Richard Collas, Bailiff, in *A v Nerine Trust Co Ltd.*[8] The Bailiff referred to the Guernsey test established in *OSM Provident Fund*[9] (in very similar terms to *Re Sesemann*) and stated of the principles from *Lewin on Trusts* quoted above—"I see no substantive difference between the two different expressions of the legal test. The test expressed by the Jersey Court of Appeal [in *B and C v Virtue Trustees (Switzerland) AG*] elaborates somewhat on the test expressed in Guernsey but it is not fundamentally different".[10] It is true that Roland, Deputy Bailiff, in *W Trust Co Ltd v Z*,[11] seemed more willing to accept the phraseology of the Jersey Court of Appeal.

4 The civil standard is, however, the balance of probabilities, *i.e.* what is more likely than not. The real problem is that, when seeking to rectify a written document, often signed by the parties, one starts from the position that there is already strong evidence of what they intended. If one is going to be satisfied on a balance of probabilities that the document wrongly records the parties' intentions, pretty strong evidence is needed the other way. English cases have used phrases such as "strong, irrefragable evidence" and "convincing proof". But all the cases are saying is that there is a high practical hurdle to be overcome.

---

[6] *Ibid* at para 4–140 *et seq.*
[7] [2022] JRC 164, at para 42.
[8] [2019] GRC 074.
[9] [2018] GRC 33.
[10] [2019] GRC 074, at para 16
[11] [2022] GRC 001.

It needs convincing proof to show that there is sufficient evidence of a genuine mistake to justify the rectification of a written document.

5 The words of Lord Hoffmann (formerly a judge of the Jersey and Guernsey Courts of Appeal) in *Home Secy v Rehman*,[12] even though not a rectification case, are helpful—

> "By way of preliminary I feel bound to say that a 'high civil balance of probabilities' is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *Re H (Sexual Abuse: Standard of Proof) (Minors)* [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

6 Thus, where a document has been signed by the parties, it takes more to overcome the inherent probabilities of the situation. In the case of the Maria Trust, of course, it was a declaration of trust executed only by the trustee. On balance, and in line with the conclusion of MacRae, Deputy Bailiff in *Re Maria Trust*, it is suggested that sufficient clarity as to the relevant standard of proof in rectification cases is contained in the tests set out in the Jersey case of *Re Seseman* and the Guernsey case of *OSM Provident Fund*. Importation of the colourful phrases used in English cases does not enhance that clarity.

[12] [2003] 1 AC 153, at para 55.

The relationship of the Jersey and Guernsey courts with the UK Sentencing Council

1 Jersey, like Guernsey, has its own criminal law, and its own courts and modalities, particularly sentencing modalities. The Jersey Court of Appeal has always been defensive about that and protective of the Royal Court's right to set its own sentencing course. *Pagett v Att Gen*[1] was the first case to make the point, expressed in characteristically forthright terms by Sir Patrick Neill, QC (as he then was)—

> "[I]t is apparent that there are very important differences in the way sentencing is approached in Jersey and the way it is dealt with on the mainland. We will mention three obvious points. First, in Jersey, it is the practice for the Crown to move for specific sentences. By long tradition, it is the accepted role of Crown counsel to give guidance and help on this matter and to represent the public interest. There is nothing comparable in England. Secondly, the sentence in this case was arrived at by the learned Deputy Bailiff sitting with ten Jurats. To this extent the sentence reflects a much broader spectrum of judicial opinion than a sentence imposed by a single judge in England. Thirdly, Jersey has no system of parole for sentenced men. These and many other features indicate that the systems have different traditions and different modalities. Over and beyond this is the point that the Royal Court sitting in Jersey will be aware of current attitudes here to sentencing and will know, in particular, what sort of crimes are prevalent and for what crimes it is desirable to retain a severe deterrent sentence."

2 Sir Patrick continued—

> "For these reasons, we are not convinced that it would be right to alter a sentence which is right for Jersey but which would, by recent change of policy, be thought wrong for England."[2]

3 The stance has been reiterated on many occasions.[3] The Guernsey Court of Appeal has adopted the same policy, notably in the case of

---

[1] 1984 JJ at 64.

[2] *Ibid*, at 65.

[3] See, *e.g.*, *Clarkin v Att Gen* (CA) 1991 JLR 213; *Att Gen v Sampson* 1965 JJ 495—restrictions of Criminal Justice Act 1961 not binding in Jersey; *Campbell v Att Gen* (CA) 1995 JLR 136—"Jersey is a separate jurisdiction and entitled to fix its own proper sentencing levels."

Wicks v Law Officers, a decision of a seven-judge Court composed of judges from Guernsey, Jersey, England, and Scotland.[4]

4 The emergence of a Sentencing Code written by Professor David Ormerod, QC for the Sentencing Council in England has, however, created a new dimension. The Code is a substantial guide to English judges and magistrates on the appropriate approach to sentencing. The Act itself is a comprehensive piece of legislation running to 420 sections and 29 schedules. The Sentencing Council is an independent public body with a statutory duty to consult with Parliament and criminal justice professionals and the public. The Council comprises eight members of the judiciary and six non-judicial members, all with expertise in the criminal justice system. The Council is chaired by a judge of the Court of Appeal. Clearly—even allowing for societal, political, and other differences—there is a wealth of experience and insight there which is not available in the Channel Islands. English courts are placed under a duty by s.50 of the Act to follow the guidelines unless they are satisfied that it would be contrary to the interests of justice to do so. On the other hand, most of the reasons given by Sir Patrick Neill for distinguishing sentencing practice in England from that of the Channel Islands still stand. It is arguable that a single judge in England now has a body of experience behind him when he passes sentence, but conversely he has far less discretion to deal equitably with an individual offender than is the case in Jersey and Guernsey.

5 The question therefore arises—is it desirable for Jersey to access the experience available in the Sentencing Council and can it do so while at the same time preserving the Royal Court's independence of action and discretion? The question was considered by the Superior Number of the Royal Court in sentencing a defendant for rape in *Att Gen v Vieira* and, with qualifications, effectively answered in the affirmative.[5] Macrae, Deputy Bailiff emphasized that the adoption of the English guidelines "as a whole" would not be appropriate. He continued, however, that—

> "in order for the courts of Jersey to understand the extent to which, on particular facts, a sentence proposed may differ from that which would be passed in England and Wales, it will inevitably be necessary to have regard to the sentence applicable in England and Wales in accordance with the Guidelines."[6]

---

[4] See 2011–12 GLR 482, esp. at para 15, and the comments in para 11 below.
[5] [2021] JRC 293 (MacRae, Deputy Bailiff, and five Jurats).
[6] *Vieira* must now be read in the light of the Court of Appeal's judgment in *W v Att Gen* (see below)

6 This is a novel approach and difficult to reconcile with the guidance given the Court of Appeal in *K v Att Gen*.[7] Why is it "inevitable" to have regard to the sentence applicable in England and Wales? Is the same proposition true of Scotland, or France? Why does it matter that the Crown's conclusions differ from the sentence which might have been passed if the Royal Courts were situate in England?

7 A rather similar approach was followed, however, by the Royal Court at first instance in *Att Gen v W*,[8] where the court did not apply the English guidelines in so far as levels of sentence or starting points were concerned but merely "as a useful cross-check and recognizing this court was quite entitled to impose sentences that were outside those that might be imposed in England and Wales".[9]

8 The relevance of the English guidelines has since, however, been definitively assessed by the Jersey Court of Appeal on appeal from that last decision in *W v Att Gen*.[10] The appellant was appealing his sentence for offences of indecent assault. A single judge of the Court of Appeal gave leave so that the full court could consider the approach taken by the sentencing court towards the English guidelines.

9 The Court of Appeal referred first to the guidance it had given in *K v Att Gen*[11] where Sir William Bailhache, Bailiff, approved the following propositions adopted by the Royal Court at first instance in relation to what were then the Guidelines of the English Sentencing Council—

> "(i) Jersey is a separate jurisdiction and the courts are entitled to fix [their] own sentencing levels. The Royal Court is not in any sense bound by the guidelines.
>
> (ii) The analysis of aggravating and mitigating factors which is frequently set out in the guidelines often, perhaps even usually, provides a convincing rationale for the assessment of the seriousness of the offending which can conveniently be adopted in Jersey.
>
> . . .

---

[7] 2016 (2) JLR 487 (Sir William Bailhache, Bailiff, and Montgomery and Anderson, JJA).
[8] [2021] JRC 329 (Clyde-Smith, Commr, and Jurats Ramsden, Christensen and Austin-Vautier).
[9] *Ibid*, at para 8.
[10] [2022] JCA 117 (Bompas, Anderson and Williams, JJA).
[11] 2016 (2) JLR 487.

> (iv) The court should decide on the appropriate sentence for the offence before it in every case, and it did not follow that because the guidelines were helpful in the case of K, they would always be helpful to enable the court to arrive at the correct level of sentence for that particular offence in the jurisdiction of Jersey."[12]

10 It was clear, therefore, that the sentencing court might, if it thought it appropriate, have regard to the different factors identified in the English guidelines as being relevant to the sentencing approach in that case, *viz*. indicators of degree of harm, culpability and mitigation.

11 The Court of Appeal also endorsed the approach of the Guernsey Court of Appeal in *Wicks v Law Officers*[13] where that court stated—

> "[T]here is no need for there to be a significant difference in social or other conditions for the Guernsey courts to take a different approach from England and Wales and adopt a different level of sentencing. The Guernsey courts may simply consider that the sentencing levels in England are either too high or too low and should not be followed. They are perfectly free to do so. It is wrong to start from the position that sentencing levels in England are correct and that there must be some specific reason to depart from them. Rather, the position from which it is right to start is 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 and Wales or in any other jurisdiction."[14]

12 The Court of Appeal considered that the Royal Court in *W v Att Gen* had indeed followed the guidance given in *K v Att Gen*. Anderson, JA stated that—

> "there may be value in comparing the English sentencing levels for different categories of offence, so as to inform, test or confirm the opinion of Jurats as to the relative seriousness of those different types … We find a degree of artificiality in drawing a rigid distinction between having regard to aggravating and mitigating factors on the one hand and sentencing levels on the other, and we decline to do so."[15]

---

[12] *Ibid*, at para 27.
[13] 2011–12 GLR 482.
[14] *Ibid*, at para 18.
[15] [2022] JCA 117 at para 50.

13 The Court of Appeal was clear, however, that a sentencing court should not be tempted to say to itself—the English sentencing guidelines would lead to a sentence of x; we do not disagree, and the sentence is therefore x. The duty of a sentencing court in Jersey or Guernsey is to determine what is right for their jurisdiction, and that may, or may not, be consistent with the guidelines applicable in England.[16] There is no general presumption that sentencing levels envisaged by the English guidelines are appropriate.[17] To that extent, therefore, it is clear that the Royal Court's approach in *Vieira* is not in accordance with the judgments of the Court of Appeal in *K v Att Gen* and *W v Att Gen*.

14 The message that the English sentencing guidelines should be treated with great care was underlined by the Royal Court of Jersey in *Att Gen v dos Santos*, the first case to consider the applicability of the English guidelines after *W v Att Gen.*[18] The Crown Advocate was criticized for referring in his conclusions to the English sentencing guidelines in relation to crimes under the Offences against the Person Act 1861 which had "no direct read-across to the offence of grave and criminal assault".[19] The court emphasized the different practical and policy reasons taken into consideration by the Sentencing Council and why, in cases of offences against the person (including murder and manslaughter), the guidelines were not helpful. A cross-check was not useful if the check was conducted against something that was not relevant.[20] The court went on, without reference to the guidelines, to apply the approach recommended by the Court of Appeal in *Harrison v Att Gen.*[21]

15 It is interesting to note, *en passant*, that the English sentencing guidelines have occupied the attention of the Manx court and legislature as well. In *McDougall v HM Att Gen*[22] the appellant sought leave to appeal to the Privy Council against sentence for being concerned in the production of a Class A drug. His counsel conceded that the English sentencing guidelines were not binding but submitted that they were of persuasive authority. The Staff of

---

[16] *Ibid*, at paras 43–44.
[17] *Att Gen v Dobrin* [2019] JRC 097 at paras 17–18.
[18] [2022] JRC 161 (Sir William Bailhache, Commr and Jurats Crill, Ramsden, Pitman, Cornish, and Le Heuzé).
[19] *Ibid*, at para 14.
[20] *Ibid*, at para 17.
[21] 2004 JLR 111 (Birt, Deputy Bailiff and Southwell, Nutting, Smith and Vaughan, JJA).
[22] Isle of Man unreported judgment of 22 December 2020.

Government Division of the High Court (the Manx court of appeal) disagreed and stated that they were relevant only in the absence of appropriate authority from the Isle of Man. It agreed with a differently constituted Staff of Government Division that Manx courts should "formulate [their] own law in a way which is considered most appropriate for the needs, requirements and interests of the inhabitants of the Island."[23] Leave to appeal was refused, the court finding that the English Sentencing Council had regard to a number of factors which did not apply in the Isle of Man. It concluded forcefully that "To surrender the jurisdiction of the Isle of Man courts to a regime that is fixed by those who are not accountable to the people of the Isle of Man would in our judgment be a surprising decision, which might only be justified in the most extreme circumstances." Unsurprisingly, in the aftermath of that judgment, the Manx Government abandoned a Justice Reform Bill 2020 of Tynwald which had proposed applying to the Isle of Man, as part of the law of the Island, "any sentencing guidelines issued under section 120 of the Coroners and Justice Act 2009 (of Parliament) from time to time …"

16 It seems, on all the authorities, that the proper approach to English sentencing guidelines for the Royal Courts in Jersey or Guernsey may be summarized as follows—

(1) The Royal Courts are constitutionally separate judicial tribunals,[24] are entitled to fix their own sentencing levels[25] and are not in any way bound to follow the English sentencing guidelines;[26] there is no need to identify any social or other conditions differentiating England from the Islands, nor to justify a sentencing level that is different.[27]

(2) The primary source of guidance for the Royal Courts are guideline judgments of the Courts of Appeal of Jersey and Guernsey respectively; courts are not expected to follow the English sentencing guidelines, nor to give reasons should they choose to depart from them.[28]

---

[23] *Lombard Manx Ltd v Spirit of Montpelier Ltd* 2015 MLR 250, at para 62.
[24] *Wicks v Law Officers*, 2011–12 GLR 482, at para 16.
[25] *Campbell v Att Gen* 1995 JLR at 141 (a five-judge panel of the CA); *Burton v Law Officers* 2011–12 GLR 438, at paras 28–37 (a five-judge panel of the CA).
[26] *Pagett v Att Gen* 1984 JJ 84 (CA), *Wicks v Law Officers* 2011–12 GLR 482 (CA); *K v Att Gen* 2016 (2) JLR 487 (CA).
[27] *Wicks v Law Officers* 2011–12 GLR 482 (CA).
[28] *W v Att Gen* [2022] JCA 117 (CA).

(3) English sentencing guidelines may nonetheless, but only if helpful in a particular case,[29] be referred to both for the analysis of aggravating and mitigating factors contained in them and for the recommended levels of sentence for particular offences.[30] It would be inconsistent with the guidance set out in *K v Att Gen*, however, for the courts to slide into a position where the starting point in every case was what would have been done in England.[31] The rigidity of the English guidelines, and the occasionally severe outcomes for defendants, do not conform with the individualized discretionary approach of the Channel Island courts.[32]

[29] In *Att Gen v dos Santos* [2022] JRC 161 the Royal Court did not consider it helpful or appropriate to refer to the English guidelines in a case involving grave and criminal assault.
[30] *W v Att Gen* [2022] JCA 117, at para 44 (CA).
[31] 2016 (2) JLR 487, at para 32.
[32] *W v Att Gen* [2022] JCA 117, at paras 45–46.