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

COMPANIES

Just and equitable winding up—arbitration agreement

Representation of Shinhan Securities Co Ltd [2022] JRC 293 (Royal Ct: MacRae, Deputy Bailiff, and Jurats Christensen and Le Cornu)

NM Sanders for the representor; J Harvey-Hills for the first respondent; NH MacDonald for the second respondent.

The question was raised as to whether an application by a shareholder for the just and equitable winding up of a fund company under art 155 of the Companies (Jersey) Law 1991 should be stayed on the ground that there was an arbitration agreement between the parties and that the mandatory stay under art 5 of the Arbitration (Jersey) 1998. The law and place of arbitration was Hong Kong and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) applied. In order for there to be a mandatory stay under art 5 it is necessary, amongst other conditions, that the court is satisfied that the arbitration agreement is not "inoperative or incapable of being performed". It was contended for the representor that the agreement was "inoperative" or "incapable of being performed" in the sense that the disputes in question were not arbitrable owing to the fact that representor was seeking the just and equitable winding up of the company.

Held, as to the arbitrability of disputes in which a just and equitable winding up is sought, and staying that application in this case:

(1) **Arbitrability of claims for just and equitable winding up of a company.** The Jersey Court of Appeal held in *Global Gold*

Consolidated Resources Ltd v Consolidated Resources Armenia[1] that claims for winding up on just and equitable grounds are capable of arbitration.

(2) ***La convention fait la loi des parties.*** Further, when interpreting the parties' intentions, an overriding principle of Jersey law is that *la convention fait la loi des parties*. Parties are free to agree as to how their disputes are resolved. There is no reason for the courts not to give effect to their agreements unless the public interest demands that they do so. To do otherwise than to give effect to arbitration agreements would not be giving effect to the New York Convention and would defeat the objective of the Arbitration (Jersey) Law 1996. Different principles may apply in a case where (unlike the present case) the company is insolvent.

(3) **Countervailing points not sufficient.** The fact that an arbitrator cannot determine whether the company should be wound up on the just and equitable basis, which is a matter reserved for the Royal Court, did not mean that the underlying dispute was not arbitrable by reason of public policy. The fact that only shareholders participating in the arbitration will be directly affected by the arbitration also did not mean that the dispute was not arbitrable by reason of public policy. Nor was the fact there would be additional costs, additional delay and possibly further proceedings in Jersey a reason for holding that the dispute between the parties is not arbitrable by reason of public policy. None of these matters overrode the strong public policy of holding parties to their bargains and of giving effect to arbitration agreements in accordance with art 5 of the 1996 Law.

Liquidators—application for directions

In re Eagle Holdings (in compulsory liquidation) [2023]GRC005 (Royal Ct: McMahon, Bailiff)

AC Lyne for the applicants.

This application was brought by the joint liquidators of three companies: Gull Investments Ltd ("Gull"), Kestrel Investments Ltd ("Kestrel") and West Derby Investments Ltd ("West Derby"); and the joint liquidators of Eagle Holdings Ltd ("Eagle").

Eagle was the holding company for a number of entities within a complex group, including Gull, Kestrel and West Derby. The business venture fell into difficulty and the entities within the group became insolvent. Eagle was placed into compulsory liquidation in 2015. Gull,

[1] 2015 (1) JLR 309.

Kestrel and West Derby were placed into voluntary liquidation in 2017 and, for the purposes of the application, could be treated as subsidiaries of Eagle. The structure included limited partnerships which, acting through their general partners, had borrowed under various facility arrangements, including a facility from Barclays Bank plc ("the bank").

A company in the group came into a sum of money. A series of inter-group loans meant that, using the ordinary process for distributions under the 2008 Law, after Eagle paid the moneys to its shareholders, they in turn would ultimately cascade the moneys back to Eagle. This would involve the money passing through limited partnerships which, together with their general partners, had been dissolved.

Instead of this approach, the applicants sought directions from the Royal Court under s 426 of the Companies (Guernsey) Law, 2008 ("the Law") that Gull, West Debry and Kestrel would pay the balance that was available to distribute directly to the group's only external creditor, the bank.

The applicants also sought an increase in the amount of costs that had been estimated as involved in conducting that liquidation under the terms of Practice Direction No 3 of 2015 and the appointment of a Commissioner pursuant to s 417 of the Law.

Held,

(1) The court would exercise its discretion under s 426 and allow the joint liquidators to make the distribution as proposed

(2) The court also agreed to the applicants' proposed increase in the estimated costs of the liquidation and the Bailiff, who had had to consider the matters in detail, would appoint himself as the Commissioner as a cost-effective solution.

(3) The costs of the application to be taken from the estate of Eagle, rather being taken from each of the four companies, in appropriate amounts.

COURTS

Court of Appeal— academic appeal

Camilla de Bourbon des Deux Siciles v Zedra Jersey Trust Corp Ltd (formerly BNP Paribas Jersey Trust Corp Ltd) [2023] JCA 018 (CA: Bompas, Bailhache and Wolffe JJA).

HB Mistry for the appellant; WAF. Redgrave for the respondent.

The question was raised as to whether the Court of Appeal could hear an appeal even though the point in issue had become academic.

Held:

(1) **The Court of Appeal may dismiss academic appeal.** The Court of Appeal may dismiss an appeal on the basis that the appeal is, or has become, academic, in the sense that the outcome of the appeal can have no practical consequences for the parties to the appeal: *In re Tantular*.[2]

(2) **Circumstances in which academic appeal may nevertheless be heard.**

(a) The Court of Appeal nevertheless has power to hear and determine an appeal which is otherwise academic if both (i) there is good reason to do so in the public interest (ii) the court is satisfied that both sides of the arguments will be fully and properly ventilated (*Viscount v Att Gen*[3]).

(b) Even if these conditions are satisfied, the discretion to hear such an appeal should still be exercised with caution. In *Hutcheson v Popdog Ltd*,[4] Lord Neuberger of Abbotsbury MR stated that it will generally not be appropriate to determine an appeal which has become academic between the parties unless the respondent agrees to the appeal proceeding or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced. The Court of Appeal agreed with this further observation, at least where the litigation is between private parties.

Appeal from Master to Royal Court—approach on appeal—admission of fresh evidence

David Hick Antiques Ltd v HSBC Bank Plc [2022] JRC 072 (Royal Ct: Sir William Bailhache, Commissioner, sitting as a single judge).

WAF Redgrave for the appellants; KL Hooper for the respondent.

On an appeal from a decision of the Master that the appellants' counterclaim was prescribed and giving summary judgment for the respondent, the appellant the admission of further evidence going to whether there had been an *empêchement de fait*. The question arose as to the principles applicable to the Royal Court's appellate jurisdiction and the admission of fresh evidence.

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[2] 2019 (2) JLR 325, at paragraphs 23 and 29
[3] 2017 1 JLR 133
[4] [2012] 1 WLR 782, at para 15.

Held:

(1) ***Downes v Marshall* test—appeals from Family Registrar.** In *Downes v Marshall*[5] the court (Sir Philip Bailhache, Commissioner, and Jurats Liddiard and Marett-Crosby) held that appeal should only be allowed from a decision of the Family Registrar pursuant to the Matrimonial Causes (Jersey) Law 1949 where evidence has been heard and a discretion has been exercised, if there has been a procedural irregularity, or if, in exercising discretion, the Family Registrar has taken into account irrelevant matters, or ignored relevant matters, or has otherwise arrived at a conclusion which the court believes to be wrong. That test, which is not the same test as the test applied on an appeal from the Royal Court to the Court of Appeal, reserved a wider discretion for the Royal Court to intervene but it nonetheless placed greater weight on the Registrar's exercise of discretion.

(2) ***Murphy v Collins* test of more general application.** Both the Master and the Family Registrar are strictly Greffier Substitutes. However, the comments of the Court in *Downes v Marshall* were expressly limited to cases on appeal from the Family Registrar. In other appeals from the decisions of the Judicial Greffier/Master, the old rule as summarised by the Royal Court in *Murphy v Collins*[6]continues to apply: the long-standing approach in relation to appeals from the Judicial Greffier/Master is that the Royal Court's discretion is unfettered, subject always to giving proper weight to the views expressed by the judge below.

(3) **Admission of fresh evidence.** The *Ladd v Marshall*[7] principles for the admission of fresh evidence on an appeal, which were regularly applied in the Court of Appeal on appeals from the Royal Court, were not directly applicable to appeals to the Royal Court from the Judicial Greffier/Master. To adopt those principles would be inconsistent with the long-standing approach to such appeals. Nonetheless, there was much to be said for the practice referred to in the Supreme Court Practice 1999, to the effect that the Royal Court, like the judge in chambers, may well not permit new evidence to be admitted if the party making that application has taken his stand on the evidence as it was below; or indeed if the evidence which he sought to have admitted on appeal was contradicted by the evidence which had been submitted below and which he had not criticised there.

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[5] 2010 JLR 265
[6] 2000 JLR 276.
[7] [1954] 1 WLR 1489.

(4) **Disposal.** In this case an explanation had been given, with medical evidence, as to why the evidence has not been produced to the Master. The question was what was necessary to do justice. There was no doubt in this case that the appellants should be granted leave to file the fresh evidence.

CRIMINAL LAW

Evidence—admission of statements under Police Procedures and Criminal Evidence (Jersey) Law 2003, art 67A

Att Gen v Wildes [2022] JRC 140 (Royal Ct: RJ MacRae, Deputy Bailiff, sitting alone)

RCL Morley-Kirk for HM Attorney General; AM Harrison for the defendant.

The defendant was charged on an indictment containing one count of common assault, one count of sexual touching without consent and a count of sexual penetration without consent. The court considered an application by the Crown under art. 67A (other previous statements of witnesses) of the Police Procedures and Criminal Evidence (Jersey) Law 2003. The complainant's (C) recorded 999 call was admissible under the *res gestae* principles which were preserved under the customary law provisions by art 64A. The Crown wished also to adduce conversations that C had with her sister during the evening and after the alleged assault.

Held:

(1) **Timeliness goes to weight.** There is no need in order for a statement to be admissible under art 67A for it to be made soon after the incident. Timeliness goes to the weight of the evidence after its admission.

(2) Admissibility of more than one statement. The English Court of Appeal in the case of *R v O*[8] held that the English provisions equivalent to art 67 allowed the admission of more than one hearsay statement as to the complaint by the alleged victim of a crime. However, the Court of Appeal added that it had to be remembered that such evidence is admissible to prove the truth of the matter stated and not merely to demonstrate consistency of the complainant's account, as under the previous law.

(3) **Overriding power to exclude.** A complaint which satisfies all six conditions under art 67A may nevertheless still be excluded as a

[8] [2006] 2 Cr App R 27.

matter of discretion in order to ensure that a defendant's trial is fair. Such an exclusionary power arises, *inter alia*, under the provisions of art 76 of the 2003 Law. In *R v Athwal*,[9] referred to extensively by the Court in *Att Gen v Freitas*,[10] emphasised that the touchstone for admissibility is whether the evidence may fairly assist the jury in ascertaining where the truth lies. It is for the trial judge to preserve the balance of fairness and to ensure that unjustified excursions into self-corroboration are not permitted, whether the witness was called by the prosecution or the defence.

(4) **Disposal.** It was held that the Crown was entitled pursuant to art 67A to adduce evidence through C's sister that she had a conversation with C in which she said that she had been sexually assaulted the previous evening, to adduce evidence as to C's demeanour and to adopt similar approach to the evidence arising from a visit by the sister to C. But on neither occasion should C's detailed account be adduced. To adopt any alternative approach would give too much weight to the complaints to third parties given by C, particularly in the context of the detailed 999 call.

Mode of trial—mixed indictment of statutory and customary law offences

Att Gen v Akhonya [2022] JRC 176 (Royal Ct: Sir William Bailhache, Commissioner, sitting alone).

LB Hallam, Crown Advocate; MP Boothman for the defendant.

The defendant was charged with two offences, namely knowingly providing false information for the purposes of intended marriage, contrary to art 76(1) of the Marriage and Civil Status (Jersey) Law 2001 and bigamy, a customary law offence. He pleaded not guilty. The question arose, for the first time now under the provisions of the Criminal Procedure (Jersey) Law 2018, as to the mode of trial where a defendant is charged with both a customary law and a statutory offence. Both the prosecution and the defence contended that a jury trial was the appropriate method of trial.

Held:

(1) **Previous position.** The previous position under the *Loi (1864) réglant la procédure criminelle* was that where a defendant was charged with a customary law offence, the defendant had the right to claim a trial by the Inferior Number if they did not wish to be tried by a jury.

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[9] [2009] EWCA Crim 789.
[10] [2022] JRC 042.

Neither the Crown nor the Court had any jurisdiction to deny a defendant that right to select his mode of trial, where a customary law offence was charged. By contrast, the position where a defendant was charged with a statutory law offence (or in the old terminology, a "contravention"), the mode of trial was always before the Inferior Number of the Royal Court, sitting without a jury.

(2) **Current position—defendant's choice removed in mixed indictment; discretion of court.** The position was now governed by art 48 of the 2018 Law. Paragraph (1) provides for the alternative methods of trial—the Royal Court sitting with a jury, or the Inferior Number of the Royal Court sitting without a jury. Paragraph (2) confers on a defendant charged with an offence under the customary law a right to choose whether to be tried by jury or by the Inferior Number. Paragraphs (3) and (4) make it plain that where paragraph (3) applies, namely where the defendant fails to make his choice or alternatively where the indictment charges both customary and statutory offences, the Royal Court has to decide the mode of trial. In reaching that decision the court is to have regard to "the nature and gravity of the offence" and is required to hear submissions from the defence and the prosecution. Paragraph (5) then provides that where a defendant is charged on indictment only with statutory offences, the mode of trial is by the Inferior Number sitting without a jury.

(3) **Duty of Crown and defence at earliest opportunity.** Where art 48(3) applies it is the duty of the Crown and the defence to draw that to the attention of the court at the earliest opportunity in order that the court can give directions as to how the case should proceed. This followed from art 4 of the 2018 Law (Duties of the participants in criminal proceedings).

(4) **Nature and gravity of offence not only consideration.** Where art 48(3) applies, the Royal Court has to decide the mode of trial. This involves an exercise of discretion. On the face of it, the legislative provision refers only to the nature and gravity of the offence; but it would be unnecessarily restrictive to construe that language as meaning that the court has no discretion to consider other factors. This view is confirmed by the terms of arts 2, 3 and 5 of the 2018 Law (which set and deal with the overriding objective under the 2018 Law).

(5) **Meaning of the nature and gravity of offence.** The expression "nature and gravity of the offence" prompted a number of questions. The Court held:

(a) The fact that the overriding objective also falls to be considered means that the court must have regard to the whole case when considering the nature of the offence—who the witnesses are, where they live, how the evidence

will be presented, how much is in genuine dispute, how long the trial is expected to take, how complex it is and other similar factors.

(b) The "nature" of the was intended to include a consideration not just of the seriousness of the offence but of the allegations in the round which are to be proved. It may be that the facts of the particular case are such that the court decides that a trial by the Inferior Number would be more likely to provide justice—for the Crown and for the defendant—than a trial by jury, perhaps by the reason of the complexity of the issues, the nature of the evidence or the length of the trial.

(c) This was absolutely not to say that juries are less capable of handling complex trials than the Inferior Number; it is only to say that there are some complex trials which are more suitable for the particular skills of the Jurats. In all these considerations it is vital to recall that the jury and Inferior Number trials are equally capable of providing justice. One is not intrinsically more just than the other. They provide different modalities for achieving justice and both are consistent with the Island's history and traditions.

(d) The effect of an order under art 48(4), that the defendant is to be tried by the Inferior Number on a mixed indictment, is that the defendant's choice (which existed previously under the 1864 Law and is restated under art 48(2) in relation to customary law offences) has been removed. Bearing in mind the overriding objective and its implementation under Part 2 of the 2018 Law, that was not a factor which fell to be taken into account of itself.

(e) The "gravity" of the offence is not to be measured by the potential sentence to which a defendant is theoretically liable by reason of the offence charged being a customary (in which case the sentence is at large) or statutory offence. In assessing gravity the court must have regard to the facts alleged by the Crown and, if necessary, to the defences asserted by the defendant. One also had to question why the legislature has provided that the gravity of the offence is relevant to the mode of trial, bearing in mind that many modern statutory infractions can result in substantial terms of imprisonment for the convicted defendant. However, the statute requires the court to take the gravity into account. The learned Commissioner left open for argument in a contested case the significance of this factor having regard to the overriding objective.

(f) It was not appropriate in a case where there was no contest as to the outcome to lay down firm guidelines as to other relevant factors. It would nevertheless seem essential for the court to consider the nature of the evidence which is to be adduced in respect of the different charges. Where there is a similarity of evidence relevant to both statutory and customary law charges, it may well be that a defendant's right under art 48(2) will have more relevance: but this is subject to the qualification that the overriding objective, including the availability of courts, was a relevant—perhaps the most relevant—consideration.

(6) **Disposal.** In this case, both the prosecution and the defence contended that a jury trial is the appropriate method of trial. That was a factor to be taken into account but it was not conclusive. In this case the court held that it was appropriate that the defendant be tried by the court sitting with a jury.

Sentencing—murder—determination of minimum period of imprisonment

Att Gen v Tregaskis [2022] JCA 267 (CA: Montgomery, Bailhache, and McMahon JJA)

RCL Morley-Kirk for appellant; MT Jowit, Solicitor General, for the respondent.

After conviction at a jury trial on one count of murder and one count of attempted murder, the applicant/appellant was sentenced by the Royal Court to life imprisonment for murder and 15 years concurrent for attempted murder. The Royal Court (Sir John Saunders, Commissioner, sitting with Jurats Ramsden, Pitman, Christensen, Dulake, Austin-Vautier, Averty, Hughes and Le Heuze) noted that sentence for murder was a mandatory life imprisonment sentence, and determined pursuant to the Criminal Justice (Life Sentences) (Jersey) Law 2014 that the minimum period that the appellant must serve before becoming eligible to apply for parole was one of twenty years, less time spent on remand.

The appellant appealed against sentence. It was contended on appeal that the offence took place in 1990 and that the starting point should have been calculated in accordance with the regime which was in place at that time and that this would have resulted in a lower figure. It was in particular contended that the Convention right in the second sentence of art 7.1 of the Schedule 1 to the Human Rights (Jersey) Law 2000 was engaged and infringed:

"**Article 7.**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

Held, dismissing the appeal against sentence:

(1) **Legislation in question had retrospective effect.** The Royal Court had been correct in taking the view that the Criminal Justice (Mandatory Minimum Periods of Actual Imprisonment) (Jersey) Law 2005 and subsequently art 23 of the 2014 Law had unequivocal retrospective effect.

(2) **No direct historical comparator.** On analysis there was no direct comparator between the minimum term under the 2014 Law and the position in 1990. That being so, it was not possible to say that the minimum term imposed by the Royal Court in this case would have been more severe than that which would have been recommended in 1990. It was not legitimate to have regard either to the approach taken by judges in England and Wales under the different legislation in force there or to the guidance of Lord Bingham in 1997 as indicating what the sentencing regime would have been in Jersey in 1990. The evidence and material relied on by the appellant was not capable of establishing that the penalty that was imposed by the Royal Court was heavier than the range of penalties that would have been imposed in 1990. That would be necessary in order to trigger any reading down of art 23 of the 2014 Law on the basis of the Convention right.

(3) **Correct to assess sentence under the 2014 Law.** Accordingly, although the reasons differed from those provided by the Royal Court, the Court of Appeal concluded that the learned Commissioner below had been correct to direct that the appellant should be sentenced in accordance with the regime established by the 2014 Law.

EMPLOYMENT

Restraint of competition—appeal against GCRA

Medical Specialist Group LLP v Guernsey Competition and Regulatory Authority [2023]GRC006 (Royal Ct: McMahon, Bailiff)

ER Gray for the appellant; MG Ferbrache for the respondent.

This was an appeal by the Medical Specialist Group ("the MSG") against decisions of the Guernsey Competition and Regulatory Authority (GCRA) relating to non-compete restrictions imposed on ex-

consultants (18 months for employed associates and two years for partners). This was the first appeal under the Competition (Guernsey) Ordinance, 2012 ("the Ordinance").

The decisions appealed were:

(1) GCRA's decision that the MSG had infringed the prohibition contained in s 5(1) of the Ordinance through entering into agreements with other undertakings which had the object or effect of preventing competition within markets in Guernsey for the provision of services; and

(2) GCRA's decision to impose a penalty of £1,532,590 on the MSG.

In addition, GCRA had directed the MSG to remove the non-compete provisions and this was also considered in the appeal.

Held:

(1) Even if the finding of an infringement of s 5(1) of the 2012 Ordinance were to be upheld, the GRCA's blanket direction to remove the non-compete provisions (rather than give a direction that the period be reduced) was a disproportionate response to any finding of infringement and/or an unreasonable exercise of the GCRA's powers. The appeal would have been allowed on this basis alone.

(2) Some of the reasons the GCRA had given in its decision for its finding that there had been a contravention of s 5(1) were unreasonable and/or based on material errors as to the facts. Accordingly the appeal the GRCA's decision that there was a contravention of s 5(1) was allowed.

(3) The appeal against the financial penalty was allowed.

(4) The matter was remitted to the GCRA to consider, in light of the comments in the judgment: (1) whether it still found there was a contravention, (2) substituting a different direction, and (3) the level of any financial penalty.

(5) The following observations were relevant to regulatory appeals more widely:

(a) The grounds of appeal under s 46(2) of the 2012 Ordinance (which appear in similar terms in other modern legislation conferring a right of appeal, such as the supervisory and enforcement laws conferring rights of appeal against decisions of the Guernsey Financial Services Commission) were wider than conventional judicial review and, accordingly, judgments dealing with judicial review were not of direct assistance.

(b) Although the Royal Court's powers did not go so far as enabling it to re-take the decision, it was an appeal to a court with "full jurisdiction" within the meaning of the European Court of Human Rights jurisprudence concerning art 6 (*Y v Guernsey Fin Servs Commn*).[11]

(c) The court could take into account material produced after the decision being appealed.

SUCCESSION

Wills—testamentary capacity

Dorey v Ashton [2023]GCA008 (CA: McMahon, Bailiff, Bompas and Lord Anderson of Ipswich, JJ.A.).

The appellant claimants were three of the four adult children of a former Bailiff of Guernsey, Sir Graham Dorey. The respondent advocate made wills of personalty and realty for Sir Graham in 2004 when it was known that Sir Graham had dementia, but a consultant psychiatrist had found that he retained testamentary capacity. The claimants challenged the circumstances in which the wills had been made. But for the wills, the children would have received 100% of Sir Graham's estate on intestacy, there being a pre-nuptial agreement between Sir Graham and his second wife, the children's stepmother, which included a disclaimer of any interest in the estate, but permitted the making of wills. By the wills, a proportion of Sir Graham's estate was to be given to his second wife. Sir Graham died in 2015. The four children challenged the wills in proceedings against their stepmother. The proceedings were settled for payment of a sum of money to their stepmother, with each side bearing their own costs. The three children then brought proceedings against the respondent advocate to recover their outlay, alleging breach of a direct duty owed to them "to take proper steps to ascertain and satisfy himself of Sir Graham's capacity" and that, but for his alleged negligence, "the wills would not have been drafted or … executed".

The question of whether the respondent advocate owed any duty of care to the claimants was taken as a preliminary issue and decided at first instance in favour of the respondent advocate.

Held, appeal dismissed:

(1) An advocate owed no duty of care to existing beneficiaries when making new wills for a testator of uncertain capacity.[12]

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[11] Judgment 47/2018, Royal Ct, November 29th, 2018, unreported, followed.
[12] *Worby v Rossiter* [2000] PNLR 140 applied; *Ross v Caunters* [1980] Ch 297; *White v Jones* [1995] 2 AC 207 distinguished.

(2) Where there was a claim in tort for negligence purely for economic damage in a context in which there was not yet an established duty of care it was not sufficient that the loss was foreseeable as a result of the actions or inaction of the person said to owe the duty. Foreseeability did not amount to proximity as a touchstone. More was needed, typically that the person said to owe the duty was found to have assumed responsibility to the injured party to use reasonable care to avoid harm.[13]

Comment [Gordon Dawes]: The case is an important decision in the context of duties owed by those facilitating the making of wills and also made important statements of general application for tort law liability and novel duties of care. It is likely to be cited in equivalent circumstances throughout the common law world.

TRUSTS

Blessing of proposed decision—foreign tax claim—reimbursement in respect of foreign tax paid

Equiom Trust (CI) Ltd v Mattas [2022] JRC (Royal Ct: Birt, Commissioner, and Jurats Averty and Le Cornu)

SJ Williams for the representor; RDJ Holden for the first respondent; P Ali-Noor for the second respondent; SJ Alexander for the third respondent; SA Meiklejohn for the fourth respondent; the fifth respondents were excused attendance.

The representor, as trustee of a will trust, sought *inter alia* the blessing of two decisions which it had taken in connection with the potential French tax liability, namely to challenge the imposition of the French tax levy and to grant security in connection with that challenge to the French tax authority ("FTA"), thereby releasing security given by one of the beneficiaries over his home in France.

Held:

(1) **Whether a beneficiary's claim for re-imbursement of foreign tax paid would be enforceable.**

(a) The primary liability for payment of the French tax rested with the trustee, with the beneficiaries being jointly and severally liable if the trustee did not pay. As a beneficiary was resident in France and had given security over his home, any enforcement would no doubt be against him with the result that he would ultimately pay the levy. The

[13] *JP SPCB4 v Royal Bank of Scotland Intl Ltd* [2022] 3 WLR 261, at para 83.

trustee was advised that, in those circumstances, the beneficiary would probably have a right of recovery against the trustee for any sums which he paid.

(b) The issue of whether any claim to reimbursement by that beneficiary would be enforceable in Jersey or whether the court should approve a decision of the trustee to reimburse the beneficiary might arise in due course, but the answer was not straightforward and there were arguments both ways. On the one hand, the revenue rule (see Rule 20 of *Dicey, Morris and Collins, The Conflict of Laws*, 16th ed, at 8R–001) which prevents indirect as well as direct enforcement of foreign revenue claims was a well-established rule of private international law which was applied in Jersey (for example, *Re Walmsley*[14]). On the other hand, courts have already recognised some circumstances in which a trustee may properly pay a foreign tax liability: see *Lewin on Trusts*, 20th ed, at 19–026.

(c) In those circumstances, it was not appropriate at this stage to resolve the arguments over the effect of the revenue rule on the particular facts of this case when those facts remained undetermined.

(2) **Decision to challenge the French tax levy blessed.** The trustee's decision to challenge the imposition of the levy was entirely reasonable and should be approved for the following reasons:

(a) The principal liability to the levy rested with the trustee. It was reasonable therefore for the trustee to take the lead on challenging the levy so as to be in control of such challenge.

(b) The French tax advice was that, if the trustee did not pay the levy, liability fell upon all the beneficiaries. Whilst it was true that, because of the residence of some beneficiaries, it might be difficult for the FTA to enforce that liability, the fact remained that they would have this liability. In those circumstances, it would be in their interests as well as the interests of those beneficiaries resident in France for the levy to be successfully challenged.

[14] 1983 JJ 35.

(c) There was no downside to the trustee challenging the levy other than the costs of doing so.

(d) The trustee advised that there were reasonable prospects of removing or reducing the levy.

(e) The trustee had been advised that the costs of challenging the levy would be comparatively modest.

(3) **Decision to provide replacement security not blessed.** The court fully understood the additional wish of the trustee to assist the beneficiary by providing alternative security to the FTA in his stead. However, the trustee's duty was to act in the best interests of the beneficiaries as a whole and, on the present facts, the court could not accept that this proposal fell within bounds of a reasonable decision and accordingly declined to bless the trustee's proposed decision in this regard.

Trustees—disclosure of trust documents—privilege

Fort Trustees Ltd v ITG Ltd [2022] GCA 092 (CA: Montgomery, Bompas and Wolffe JJA)

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

The context was the long-running litigation between the former and present trustees of the Tchenguiz Discretionary Trust ("the TDT"), a Jersey trust. The respondents were the original trustees of the TDT ("the original trustees") until they were removed in 2010.

The applicants ("the current trustees") applied to the Royal Court under s 68 and s 69 of the Trusts (Guernsey) Law, 2007 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.

This was an appeal of the Bailiff's decision that: (1) 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; and (3) no order would be 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, which would be dealt with in other proceedings, at the time ongoing, concerning the priority of creditors of the TDT.

Held, appeal dismissed: the Bailiff was entitled to reach the above conclusions.

(1) Whilst a claim to privilege may be supported by evidence from any appropriate witness, it is highly desirable that, where the claim to privilege is disputed or challenged, a supporting affidavit should be sworn by a qualified lawyer who is in a position to vouch for the exercise which has been carried out. In the absence of contrary information, the court is unlikely to "look behind" the claim to privilege asserted by the lawyer in their affidavit. The court considered the observations of Beatson J in *West London Pipeline & Storage Ltd v Total UK Ltd*[15] as to the level of detail required in such an affidavit.

(2) As to whether the court or a third party should review a sample of the documents, the principles set out in *WH Holding Ltd v E20 Stadium LLP*,[16] which held that the power to inspect a document is a matter of general discretion, applied to the power which the Royal Court may exercise to direct a party to produce to it for inspection a document for which privilege is claimed under r.76 of the Royal Court Civil Rules, or where the court was regulating the disclosure of documents by a former trustee to a present trustee under s 68 and s 69 of the Trusts (Guernsey) Law, 2007, or in the exercise of its inherent powers. Nevertheless, it was not a power which should be exercised lightly and the court must be cautious about exercising this jurisdiction.

Trustees—leave to appeal against order for interim payment

ITG Ltd v Glenalla Properties Ltd [2022] GCA 091 (CA: Crow; Storey; Wolffe JJA)

J Wessels for the plaintiffs; NJ Robison for the intervening parties; P Richardson for the proposed intervening parties.

This was another judgment in the TDT litigation (see above). The context was the long-running litigation between the former and present trustees of the Tchenguiz Discretionary Trust ("the TDT"), a Jersey trust. This was an application for leave to appeal against an order for interim payment in the sum of £5m. on account of the former trustees' claim to an indemnity out of the assets of the TDT, and an application for leave to intervene in that appeal.

Held, leave to appeal granted but on limited grounds; joinder application granted:

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[15] [2008] EWHC 1729 (Comm); [2008] 2 CLC 258, at para. 53.
[16] [2018] EWCA Civ 2652.

(1) With regards to the test for leave to appeal, the court should not grant leave unless it was at least satisfied that:

(a) the appeal had a real prospect of success; or

(b) even though the case had no real prospect of success, there was an issue which, in the public interest, should be examined by the Court of Appeal.

(2) Cases in the second category—which would be exceptional—may arise, in particular, where a question of general principle fell to be decided for the first time, or where there was an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage. A case might conceivably, on other grounds, raise "questions of great public interest" consistent with the absence of any express statutory constraint or limit on the power to grant leave.

(3) Further, even if one of the two conditions identified above was met, other factors may, depending on the circumstances of the particular case, justify refusing leave.

(4) In *Crociani v Crociani*,[17] the Jersey Court of Appeal had aligned the approach in Jersey with Guernsey at that time. It was accordingly well-settled in Jersey that the appellant must show:

(a) the appeal had a real prospect of success;

(b) a question of general principle fell to be decided for the first time; or

(c) there was an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage.

It would be for the Jersey Court of Appeal to consider whether it agreed with the caveat expressed in the present case as to whether heads (b) and (c) of this test were necessarily exhaustive of circumstances in which the public interest might justify leave being granted.

[17] 2014 (1) JLR 426.