Jersey & Guernsey Law Review – June 2013

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

BANKRUPTCY

Assistance to foreign court

In re Estates & General Development Ltd (Royal Ct: Birt B, and Jurats Le Cornu and Liston) [2013]JRC027

NM Sanders for the representors

A UK company owing immovable property in Jersey fell into financial difficulty and entered into liquidation under English company law. The company was a party to group security arrangements whereby it had granted the security trustee for debenture stock issued by its parent a judicial hypothec over the immovable property in Jersey. The group security documentation envisaged that the trustee could, by way of enforcement, appoint receivers over the charged assets. The trustee accordingly exercised its powers under the charge to appoint joint fixed charge receivers over amongst other assets the Jersey immovable property. The English High Court issued a letter of request to the Royal Court, seeking the Jersey court's assistance under the Bankruptcy (Désastre) (Jersey) Law 1990, art 49 by recognising the receivers and enabling them to manage and sell the property for the benefit of the debenture holders. This was the first application to the Royal Court where UK receivers had sought assistance so as to exercise their powers in relation to Jersey immovable property.

Held—

Fixed charge receivers under English law

The receivers were fixed charge receivers (as opposed to administrative receivers) appointed by the charge holder (and not the

court) pursuant to a fixed charge over specific property, having powers set out in the charge. As a matter of English law, the court accepted that, liquidators having been appointed, the receivers were not agents of the company but nevertheless had power to manage and sell the property charged pursuant to the terms of the charge.

Article 49

The appointment of the receivers had been made by the debenture trustee as a matter of contract. This was therefore not a case where a court had made an order declaring a company bankrupt or insolvent. However it was clear from the evidence that the company (and the group to which it belonged) was hopelessly insolvent and the court had received a letter of request from the English High Court asking the Royal Court to assist in the matter of that insolvency. England was "a relevant country" pursuant to art 49(4) and in the court's judgment the request was one "relating to the insolvency of a person" within the terms of that article.

Position of English receivers in foreign countries

The court found no reason to refuse to recognise the receivers under the principles envisaged by Dicey, Morris and Collins, *Conflict of Laws* (15th ed., 30–134) as being relevant to the recognition of English receivers by the courts of foreign countries.

Normal enforcement of judicial hypothec in Jersey

A creditor under Jersey law having a hypothec over immovables must, in the normal domestic context, follow one of the established remedies such as *désastre* or *dégrèvement*. The court cannot normally confer authority on the holder of a hypothec to sell a company's immovable property. In the present case, however, a *désastre* or *dégrèvement* would be significantly more expensive and time-consuming. A third option would be for the liquidators to seek recognition in Jersey with a view to selling the property but the problem with that in this case was that the property was subject the fixed charge in relation to which the receivers had been appointed and the liquidators therefore had no power under English law to deal with the property.

Power under art 49 to apply English law

The court's first duty had to be to try and keep costs to a minimum so that the maximum amount is recovered for creditors. Article 49(2) was specific in conferring upon the Royal Court authority to exercise powers not only that the Royal Court had but also powers which the requesting court would have. It was clear that under English law the fixed charge receivers had the power to sell the property. The interests of comity suggested that the court should exercise the power conferred under art 49 to accede to the letter of request. It was relevant that the amount secured by judicial hypothec exceeded the value of the

property so that, whatever course was followed, no one would benefit from the property other than the debenture trustee. The court accordingly granted the order requested, subject to (a) making it clear that the receivers were acting as the agents of the company since they were not treated as agents under English law but needed to be regarded as agents of the company for the purposes of Jersey law; and (b) the receivers' undertaking to advertise for local creditors was to be recited in the court order, with liberty to apply to any person affected.

CIVIL PROCEDURE

Appeals—leave for appeal

Warren v Att Gen (Court of Appeal: Beloff, JA sitting as a single judge) [2012]JCA191

H Sharp, QC, Solicitor General for the Attorney General; SM Baker for the applicant.

The question was raised, amongst others, as to the proper test for giving leave to appeal when required by art 13 of the Court of Appeal (Jersey) Law 1961 and in particular whether the *Glazebrook* test required review.

Held, as to the *Glazebrook* test—

"Clear case of something having gone wrong" disjunctive requirement

Beloff, JA repeated the observations which he had made in *Cotterill v Ozannes*[1] in respect of the equivalent provisions of the Court of Appeal (Guernsey) Law 1961. The first alternative limb of the test of grant for leave to appeal in *Glazebrook v Housing Cttee*[2]—namely "there is a clear case of something having gone wrong may require review without it being necessary for the application to demonstrate a prima facie case that an error has been made"—may require review since a "clear (sic) case of something having gone wrong" is, on one interpretation, a reason for allowing an appeal rather than merely granting leave to appeal. Moreover it could be interpreted as setting a higher hurdle than one of establishing only a *prima facie* case of error.

Alternative interpretation of *Glazebrook*

The present application was approached on another interpretation of *Glazebrook*, which was more favourable to the applicant, namely that he need show only "a properly arguable case" that something had gone wrong. It was also necessary to bear in mind there were alternative

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[1] 2011–12 GLR 1 at para 1.
[2] 2002 JLR *N* [43].

Glazebrook triggers for grant of leave, namely that "there is an issue of general principle which has been decided for the first time and there is an important question of law upon which further argument and a decision of the Court of Appeal would be to public advantage".

CONTRACT

Excessive interest rates ("usury")

Doorstop Ltd v Gillman & Lepervier Holdings Ltd (Royal Ct: W Bailhache, DB and Jurats Clapham and Le Breton) [2012]JRC199

OA Blakeley for the plaintiff; JN Heywood as *amicus curiae*; the first and second defendants did not appear

The question arose, amongst others, as to whether the Royal Court still retained power to interfere with a contractually agreed rate of interest on the ground that the rate is usurious or excessive.

Held, as to the jurisdiction to interfere with contractual interest—

The court's power to interfere with contractual interest

The customary law of Jersey and Normandy originally forbade the charging of any interest on a loan. By the time of Le Geyt and Poingdestre, charging of "moderate" or "reasonable" interest was permitted; interest rates higher than that were considered usurious. The Code of 1771 set the level of permissible interest at 5%. This continued until this provision was repealed by the Code of 1771 (Amendment) (Jersey) Law 1962. The 1962 Law expressly did not affect "any existing law against usury". The court still retained power to interfere with contractual interest which was immoderate and unreasonable, even in undefended cases. Agreement to pay interest at a particular rate is always likely to be a highly significant factor under the principle of *la convention fait la loi des parties* but it is not conclusive.

The standard of moderate and reasonable

What is moderate or reasonable will vary according to the circumstances of each loan, including (but not exclusively): (i) the level of risk for the lender; (ii) the prospect of gain for the borrower; (iii) market rates and practice generally; (iv) the sophistication of the parties to the loan; and (v) the strength of the relative bargaining positions of the parties. All factors will be assessed having regard to the circumstances as they existed at the time of the loan, because the court is looking at whether the agreed interest rate is moderate and reasonable at that time. Market rates are not by themselves determinative of what is moderate and reasonable. But where a contractually agreed interest rate falls outside the spectrum of market rates for that type of lending, and where the lender is unable to justify

the higher agreed rate as being fair in all the circumstances, the interest rate will be at risk of being unenforceable. Inter-institutional lending, although theoretically subject to the same legal rules, is very likely to lead to a reluctance on the part of the court to intervene—on the basis that the parties to such lending are sophisticated business people, operating in a regulated world, where market practice will be a good indicator of what is moderate and reasonable.

Decision on facts

On the specific facts, the court found *inter alia* that a provision for an additional sum payable of £200,000 to be payable on a loan of £390,950 (equating to a return of 51.16% p.a.) rendered a rate of 12% p.a. interest specified on the loan usurious. The contractual claim for interest at 12% pa and any additional sums were therefore on these facts disallowed. A rate of 12% p.a. on a second loan was not itself so excessive or unreasonable that the court ought to interfere with it. However default interest at 2% p.m. specified for the second loan was excessive and a penalty (*HM Viscount v Treanor*[3] applied) and interest awarded at the court's rate of 8% p.a. after the date for repayment was ordered in its place.

Comment [Jean-Marie Renouf]: This judgment comes at a time when the Jersey courts are particularly busy with defaulting borrowers whose loans were sometimes agreed during a more prosperous era. It has for some time been the practice of the court sitting on Friday afternoons to limit the level of interest which could be recovered by lenders seeking judgment (often *en défaut*) with liberty to apply should a greater contractual rate be pressed for. The present case marks the first occasion upon which the issues have been subject to detailed argument and judgment by the Royal Court; the importance of the case being reflected in the appointment of an *amicus curiae*. The "court rate" of interest has for some time been set by practice direction at 2% above the UK base-rate, which itself has wallowed at 0.5% in excess of four years now. Lenders have therefore, in most cases, sought to rely on contractually agreed rates at typically far higher levels. The court's evident desire to protect vulnerable borrowers who may not have enjoyed an equal bargaining position at the point of contracting is undoubtedly a commendable goal, and particularly where there is inadequate legislative protection when compared with some other jurisdictions.[4] The judgment does, however, mark an important inroad into the principle of sanctity of contracts, or in Jersey terms "*la*

[3] 1969 JJ 1243.

[4] See further Hanson "Justice in our time: the problem of legislative inaction" (2002) 6 JL Rev 64.

convention fait la loi des parties." As a matter of practicality, it further risks creating uncertainty in the money lending industry which is essential to drive the economy. Lenders may not lend, to the same extent at least, if there are doubts as to whether or not a key component of the agreement may be overridden by the court at the final hurdle.

Notwithstanding the appointment of an *amicus curiae*, representations were not invited from any of the wider class of interested parties, such as might have included the Jersey Chamber of Commerce, the Institute of Directors, the Jersey Consumer Council or the Citizens' Advice Bureau. This might be viewed as reducing the force of the decision and brings to mind the English Court of Appeal in *Simmons v Castle*[5] which had to revise the guidance it had previously given regarding an increase to general damages awards after an application made by the Association of British Insurers who had not been alerted to the issues at stake.

LANDLORD AND TENANT

Measure of damages

Jersey Sports Stadium Ltd v Barclays Private Clients Intl Ltd (Royal Ct: Birt, B, sitting alone) [2012]JRC059

DG Le Sueur for the applicant; DJ Benest for the respondent

The landlord and tenant of Jersey commercial premises entered into arbitration over whether the tenant had breached its obligations to repair and reinstate the premises. The arbitrator found that the obligations had been breached and awarded damages on the basis of the cost of the repair and reinstatement. The arbitrator also awarded costs in favour of the landlord. The landlord sought leave to appeal against the arbitrator's decision concerning the measure of damages, arguing that the proper measure of damages should have been the amount by which the value of the reversion had diminished, rather than the cost of remedial works (which on the facts was lower).

Held, refusing leave to appeal—

Approach of the court to granting leave on an arbitration appeal

The Arbitration (Jersey) Law 1998, art 21 provides that an appeal to the court from a decision of an arbitrator only lies on a question of law and may only be brought with the consent of the parties or (subject to art 23) the leave of the court. Article 21 replicated almost exactly the

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[5] [2012] EWCA Civ 1288.

provisions of the Arbitration Act 1979, s 1. That provision itself introduced a considerable change in the degree to which the courts would interfere with awards made by arbitrators. Jersey law should adopt a similar approach to that enunciated by Lord Diplock in *Pioneer Shipping Ltd v BTP Tioxide Ltd*[6] when considering whether to grant leave to appeal against an arbitration award pursuant to art 21(3). *Le Gros v Housing Cttee*[7]and *Olcott Investment Ltd v Mark Amy Ltd*[8] predated the 1998 Law and should be treated with caution.

Measure of damages

It did not appear that the arbitrator had misdirected himself in law on the question of the proper measure of damages or that his decision was such that no reasonable arbitrator could reach. The court made the following observations—

(a) It was well established that, in matters of remoteness and measure of damages, Jersey law is similar to English law and English cases are likely to be of assistance.

(b) The starting position was that it was trite law that, where a party sustains a loss by reason of a breach of contract, the measure of damages is intended, so far as money can do it, to place the party in the same situation as if the contract had been performed: *Snell v Beadle*.[9] This principle was as applicable to breaches by a tenant of the terms of a lease as to any other breach of contract.

(c) In many cases the loss incurred to a landlord by a breach of covenant to repair will be the cost of repair. But this is not invariably the case. If the landlord has in fact agreed to sell the building, which is to be demolished and redeveloped, he will have suffered no loss and the court can be expected not to award any damages. The principle of *Joyner v Weeks*,[10] under the landlord in such circumstances would nevertheless be entitled to damages had been partially overturned by statute in England and should not be followed in Jersey. The correct test for any breach of covenant under a lease, whether a covenant to repair, reinstate or otherwise, was that damages must be assessed by reference to the loss which the landlord has actually suffered.

(d) It may not be clear-cut whether the true loss is reflected by the cost of repair or the diminution in value. The damages recoverable will in all cases depend on what loss can be said to have been suffered. The

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[6] [1982] AC 724, at 742–744.
[7] 1974 JJ 771.
[8] 1998 JLR 621.
[9] [2006]JCA164.
[10] [1891] 2QB 31.

principal consideration in deciding whether or not it is appropriate to assess damages by reference to the cost of carrying out the works is whether, in all the circumstances, it is reasonable for the landlord to carry them out: Dowding & Reynolds, *Dilapidations; The Modern Law and Practice*, 4th ed, 31–02 – 31–05; *Ruxley Electronics & Construction Ltd v Forsyth*,[11] which set out a test of reasonableness of repair/reinstatement in relation to a building contract but the principles were applicable equally to covenants in leases.

(e) Most cases envisaged a situation where the cost of repair exceeds the diminution in value. The present situation was the reverse. The diminution in value was said to exceed the costs of repair. What here is the true loss suffered by the landlord? The starting point had to be that the landlord's true loss is the cost of repair. If he carries out the repairs, the property will then be in the condition which it would have been if the tenant had complied with this obligation and he will have suffered no loss; there would be no continuing loss to the value of the reversion. However if damages were awarded by reference to the diminution in value and the landlord then carried out the repairs at a lesser cost, he would profit. In *Ruxley*, Lord Lloyd observed in relation to building contracts, at 282, that: "Where the cost of reinstatement is less than the difference in value, the measure of damages will invariably be the cost of reinstatement . . .". This should equally apply in the case of a claim for breach of a covenant under a lease (although the court did not rule out the theoretical possibility of damages being awarded in an appropriate case on the basis of a diminution in value higher than the costs of works).

In the present case there was no reasonable prospect of the landlord succeeding in showing that damages should be awarded by reference to the diminution in value, notwithstanding that that sum exceeded the cost of the remedial work.

Possession order—jurisdiction of Royal Court

Charles House Ltd v Primal Properties Ltd (Royal Ct: Birt B, and Jurats Clapham and Liston) [2012]JRC230

CM Fogarty for the plaintiff; SJ Habin for the first and second defendants

A landlord obtained judgment in the Royal Court for cancellation of the lease, arrears of rent, interest and costs. By a subsequent summons in the Royal Court, the landlord sought a possession order. The tenant argued that since the Royal Court had not made a possession order

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[11] [1995] 3 All ER 268.

when it cancelled the lease, it had no jurisdiction under the Royal Court (Possession Orders) (Jersey) Law 1998 to do so by a separate summons; and that such an order could now only be made by the Petty Debts Courts.

Held, declining to make the possession order—

Statutory jurisdiction of the Royal Court to make a possession order

Under the Loi (1946) concernant l'expulsion des locataires réfractaires, only the Petty Debts Court had jurisdiction to make an expulsion order (possession order): *Forster v Harbours & Airports Cttee*.[12] Following recommendations made in the Second Interim Report of the Jersey Judicial and Legal Services Review Committee under the chairmanship of Sir Godfray Le Quesne (RC24/90), the Royal Court (Possession Orders) (Jersey) Law 1998 was enacted. Any jurisdiction of the Royal Court to make a possession order was accordingly statutory and to be found in the 1998 Law. Article 1 of the 1998 Law provides:

> "(1) Notwithstanding the provisions of the Loi (1946) concernant l'expulsion des locataires réfractaires, . . ., where the Royal Court:
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> (a) is exercising its jurisdiction in proceedings for the cancellation (résolution) of a contract of lease of an immovable; and
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> (b) orders the cancellation of that lease, it shall have the power to make an order for possession of the immovable".

Application for possession order must be made in same proceedings

The possession order had to be sought in the Petty Debts Court. The natural meaning of art 1 of the 1998 Law was that the power to grant a possession order can only be exercised by the Royal Court in the same proceedings as those in which the court makes the cancellation order. It could not be exercised in separate proceedings. Thus, when a plaintiff brings proceedings by Order of Justice seeking cancellation of a lease in the Royal Court, practitioners need to ensure that the prayer asks not only for a cancellation order but also for a possession order with accompanying authority for the Viscount to evict the tenant. The question of possession could be adjourned and still form part of the same proceedings but that was not the case here.

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[12] 1990 JLR 1.

In the present case the summons for possession constituted separate proceeding to the Order of Justice, which had been specific in the orders it sought and had not included a prayer for a possession order. The application was accordingly refused. The possession order had to be sought in the Petty Debts Court.

TRUSTS

Constructive trust—tracing action

Brazil (Federal Republic) v Durant Intl Ltd (Court of Appeal: McNeill, Crow and Calvert-Smith JJA) [2013]JCA071

DS Steenson for the applicants; EL Jordan for the respondents.

The Federal Republic of Brazil and the Municipality of Sao Paulo sought to recover approximately US$10.5m held in Jersey. These funds were alleged to represent the proceeds of bribes received by a former Mayor of Sao Paulo, Paulo Maluf and his son Flavio. The funds were said to have found their way to Jersey via a bank account in New York, which was owned and controlled by the Malufs, and thence to bank accounts in Jersey held by two BVI companies, also owned and controlled by the Malufs. The plaintiffs sought the proprietary recovery of these funds from the BVI companies on three separate bases: that the companies were constructive trustees, having knowledge of the tainted origin of the money; that the companies had been unjustly enriched by the funds; and that the plaintiffs had proprietary interest in the funds. The claim had been allowed in full in the Royal Court.[13] The defendants appealed on the ground *inter alia* that the plaintiffs were not entitled to trace into the funds held in Jersey, either at all or to the full amount claimed. The question was raised as to principles of tracing to be applied in Jersey law and in particular whether Jersey applied the lowest intermediate balance rule and the availability of backwards tracing.

Held, as to the issues of tracing—

Unitary concept of tracing

Jersey law recognises tracing as a unitary concept, unburdened by the historic complications in England which are caused by the different rules for equitable and common law tracing: approach in *In re Esteem* approved[14].

Evaluative judgment involved—"sufficient link" between assets

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[13] [2012]JRC211 (Page, Commr).
[14] 2002 JLR 53.

In a tracing claim, the court is being asked to identify an asset which, though it is not the claimant's original property, is something which the law is prepared to treat as a substitute for it. This involves an evaluative judgment, rather the application of hard-edged rules. The question is whether there is a "sufficient connexion" (*Bishops-gate Investment Management Ltd v Horman*[15]) between the two items of property. The judge in a tracing claim is thus called upon to make a policy choice as to "whether the law is prepared to recognise one asset as representing another, or as a substitute for, another on the particular facts of the case in hand".

Means of vindicating property rights but availability does not depend on hard-edged rules

Commenting on *dicta* of Lord Millet in the English case of *Foskett v McKeown*,[16] the court noted that a proprietary claim is not a discretionary remedy and that property law depends on fixed rules. Tracing, however, was a means of vindicating property rights in relation to a particular asset and its availability in any particular case was not dictated by hard-edged rules. It was in this context that Lord Millet's statement that tracing was branch of property law, and that property law depended on fixed rules, needed to be understood. In practice, the court will be concerned more with questions of evidence, on a case by case basis, than with questions of principle.

Evidential burden

The question whether a claimant has discharged the evidential burden on him depended on an assessment by the trial court of the primary evidential material and any inferences that could properly be drawn from it. In *Borden UK Ltd v Scottish Timber Products Ltd*[17] Buckley, LJ had referred to it being necessary to identify the property claimed "at every stage of its journey through life". This was not to be interpreted too formalistically; in an appropriate case the necessary link could be inferred from the circumstances.

Lowest intermediate balance rule

The courts of England have adopted a rule known as the 'lowest intermediate balance rule'. The effect of the rule is that where trust funds are paid into a mixed account and the balance on the account fluctuates over time, a plaintiff will be entitled only to trace a sum equivalent to the lowest intermediate balance on the account, even if funds from another source have replenished the account. The Court of Appeal declined to adopt this approach as a fixed rule of law. The

[15] [1995] Ch 211.
[16] [2001] 1 AC 102.
[17] [1981] Ch 25.

question was whether a plaintiff had, on the particular facts, established a sufficient link between his original property and the full amount of the balance standing to the credit of the mixed bank account. The court commented, however, that such a plaintiff would face considerable, but not necessarily insuperable, difficulties in establishing the required link.

Backwards tracing

Similarly, there was no need to decide as a matter of doctrine whether Jersey should allow "backwards tracing", a form of tracing that was not yet settled in English law. The paradigm example of backwards tracing arises where an asset is acquired using a loan, and the purchaser intends to and does subsequently repay the loan using traceable funds; backwards tracing would allow a claimant to trace into the asset so purchased. The court noted that a claimant who sought to trace into an asset which had been acquired by means of a payment from a specific account, before the account had received trust property, would face considerable (but not necessarily insuperable) difficulty. But the matter should again turn on whether a sufficient link had, on the facts of the particular case, been established between the original property and the property sought to be traced. Where, as in this case, an asset is acquired by making a transfer out of an account before money subject to a trust is paid in, the question for the court remained whether the plaintiff could establish a sufficient link between the trust money and the asset acquired. That link could be established by demonstrating (either from direct evidence or through inference) that the defendant's intention had, in effect, been to use the trust money to acquire the asset by replenishing with trust money the source out of which the asset had already been acquired. But showing that a defendant had this subjective intention was merely one of the means by which the necessary link could be demonstrated and not a formal precondition.

Decision on facts

Applying the above principles to the facts of the case, the Court of Appeal upheld the decision below of Page, Commr allowing the respondents to trace into the funds to the full amount of the claim.