Jersey & Guernsey Law Review – October 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

CIVIL PROCEDURE

Costs—protective costs order

Flynn v Reid (Royal Ct: William Bailhache, DB, sitting alone) [2013] JRC 122

C Hall for the plaintiff; JN Heywood for the defendant; HM Solicitor General, H Sharp, convened

The costs order made by the Royal Court in this litigation took into account the fact that the parties were legally aided. In giving leave to appeal that order, Bailhache, DB observed that the relevance of acting on legal aid to orders for costs was a matter of public interest and that it was important that the present parties should not be penalised in relation to the costs of the appeal. He accordingly made a form of "protective costs order" to the effect that the costs of both the plaintiff and the defendant on appeal, including the costs of making the application for leave, would be met out of public funds. That meant that neither party would be seeking an order against the other party for costs on appeal. A cap on those costs at £15,000 per party was imposed, with liberty to apply to a single judge of the Court of Appeal if the cap on costs became unrealistic. Leave to appeal was given on condition that the sum of £15,000 would be the limit of what counsel would charge even as between them and their own client. The present judgment set out the reasons for that order.

Held—

Jurisdiction to make protective costs orders

Statutory jurisdiction to make costs orders in the Royal Court rises out of art 2 of the Civil Proceedings (Jersey) Law 1956 and in the Court of Appeal under art 16 of the Court of Appeal (Jersey) Law 1961. In the present case, which concerned leave to appeal given by a judge in the Royal Court, jurisdiction to make the order arose out of the Court's inherent jurisdiction to add conditions to its order granting leave to appeal.

In England and Wales, protective costs orders (PCO) had been developed to ensure that access to justice in public law cases is secured, the leading authority being *R (Corner House Research) v Secy of State for Trade and Industry*.[1] In Jersey, other than in children cases, there did not appear to be any public law cases in which PCOs had so far been made in advance of the hearing. Nonetheless there was absolutely no reason why, in an appropriate case, they should not be made, and most of the principles in the English jurisdiction had just as much force in Jersey.

B v J,[2] which concerned the legal representation of a child without risk to the parents in costs, provided at least one example in which a PCO could be made by the Royal Court in private law proceedings.

The Court of Appeal can exercise a jurisdiction pursuant to art 16 of the Court of Appeal (Jersey) Law 1961 to make an order that the costs of the respondent be paid out of public funds (*Channel Islands Knitwear Co Ltd v Hotchkiss*[3]) and this would also be the case in relation to the Royal Court's powers to order costs under the Civil Proceedings (Jersey) Law 1956.

Conditions for a PCO

A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (a) the issues raised are of general public importance; (b) the public interest requires that those issues should be resolved; (c) the applicant has no private interest in the outcome of the case; (d) having regard to the financial resources of the applicant and the respondent, and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (e) if the order is not made, the applicant will probably discontinue the proceedings and will be acting

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[1] [2005] EWCA Civ 192.
[2] 2008 JLR *N* [28].
[3] 2001 JLR 570.

reasonably in so doing. Exceptional circumstances are not an additional requirement.

Exercise of court's discretion

It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of these considerations. If those acting for the applicant are doing so pro bono, this would be likely to enhance the merits of the application for PCO.

Capping orders

It is likely that a cost capping order for the claimant's costs will be required in all cases other than those where the claimant's lawyers are acting pro bono and the effect of the PCO is to prescribe in advance that there will be no order as to costs in the substantive proceedings whatever the outcome.

When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe, by way of a capping order, a total amount of the recoverable costs which will be inclusive, so far as a party with the benefit of a conditional fee agreement is concerned, of any additional liability. The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses and, as a balancing factor, the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The overriding purpose of the exercise of this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made.

In *Corner House*, the underlying rationale for the system of capping the claimant's costs as a condition precedent for the grant of a PCO was to ensure that claimants did not run up excessive costs and also to ensure some equity as between the interests of the claimant and the interests of the defendant. How this works in practice in the UK differs from Jersey, because there is not the same system of leading and junior counsel, nor in the UK is there a fused profession. There should be no assumption, whether explicit or implicit, that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount; it depends on the circumstances: *R (Buglife) v Thurrock Thames Gateway Dev Corp*.[4]

Issue of public importance

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[4] [2008] EWCA Civ 1209.

It is impossible to define what amounts to an issue of general public importance and the question of importance is therefore left to the judge to evaluate: *R (Compton) v Wiltshire PCT*.[5]

Private interest in outcome no bar

A recent line of English authority in public law cases showed that a personal or private interest in the outcome of the judicial review application is not determinative as to whether a PCO should or should not be made: *R (England) v LB Tower Hamlets*[6] and *R (King's Cross Railway Lands Group) v Camden LBC*[7] and was said to be unsustainable in *R (Eley) v Secy of State for Communities & Local Government*[8].

Decision in the present case

The costs rules are a formidable barrier to access to justice. In the present case, it was appropriate to make the order in the terms described above because there was a public interest in the Court of Appeal giving a reasoned decision on what impact, if any, the fact of legal aid ought to have on the making of a costs order. It was accordingly desirable that the Court of Appeal should hear the appeal, and undesirable that risks as to costs might drive the parties into settlement of the appeal of the costs order, thus resulting in the matter of public interest not being ventilated. It was therefore necessary to make a PCO in relation to the appeal even though this was not a public law case.

Comment: [Timothy Hanson] The initiative for the making of a protective costs order came from the court rather than the legally-aided parties who nonetheless were grateful for an order for costs being made from public funds in relation to the appeal. Given the importance of the decision, The Law Society of Jersey requested the court to hand down its reasons as it had earlier indicated.

This decision was creative and bold given the absence of such orders being made previously in Jersey. Despite the reference to *B v J*[9] there was no previous local authority for the approach taken in this case, and even *B v J* was merely the articulation of general principle to the award of costs under art 75(3) of the Children (Jersey) Law 2002 Law, just as much as *Payne v Pirunico Trustees (Jersey) Ltd*[10] sets out the principles that ordinarily would limit the liability of a guardian *ad*

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[55] [2009] 1 All ER 978.
[6] [2006] EWCA Civ 174.
[7] [2007] EWHC 1515 (Admin).
[8] [2008] EWCA Civ 1632.
[9] 2008 JLR *N* [28].
[10] 2001 JLR 1.

litem to costs. The instant decision was therefore highly innovative and reflected developments in England and Wales rather than building upon any real local foundations.

Despite not sitting as a judge of the Court of Appeal when making the award of costs, the Deputy Bailiff justified his order in relation to the appeal costs under his inherent jurisdiction to add conditions to the grant of leave. While it may be permissible to restrict the parties in the costs they might go on to seek in an appeal—although there was no adversarial argument on this point before the Royal Court which may need to be revisited in the future—it is difficult to see how the Royal Court had the added power to direct who would pay those costs, this being a power vested in the Court of Appeal by virtue of art 16 of the Court of Appeal (Jersey) Law 1961. (Contrast for example *Channel Islands Knitwear Co Ltd v Hotchkiss*[11].)

Litigation funding agreements

Barclays Wealth v Equity Trust (Royal Court: Birt, B, sitting alone) [2013] JRC 094

J Harvey-Hills for the plaintiffs; MLA Pallot for the defendants

The question was raised as to whether a litigation funding agreement with a third party was contrary to the provision of the Code of 1771 that—"*Personne ne pourra contracter pour choses ou matières en litige*" (the "Provision"). The Master refused to strike out or stay the plaintiff's action as an abuse of process on this ground. The defendant appealed to the Royal Court.

Held—

Provision prohibits assignment of matter in litigation

The natural and ordinary meaning of the Provision was that it is a prohibition on assignment of title to a matter in litigation. The expression "*contracter pour*" could not be given the wider interpretation contended by the defendants (that it was a prohibition against persons making "a contract in respect of" matters in litigation). The parties accepted that the prohibition only covers litigation which has actually been commended: *In re Valetta Trust*.[12] If it was necessary to look at the background, this was consistent with the interpretation reached without recourse to the background. The intention was to replicate the effect of a similarly worded Ordinance of 1635, albeit that the draftsman took the opportunity to amend slightly and simplify the language. As with the 1635 Ordinance, the provision was intended to

[11] 2001 JLR 570.
[12] 2011 JLR 1, at 34.

avoid champerty and maintenance and it dealt with the matter by prohibiting the *assignment* of matters in litigation.

Effect of breach of the Provision on litigation

There was no breach of the Provision by virtue of the plaintiff entering into the litigation funding agreement. However the court considered *obiter* what the effect of a breach would be on the litigation. It was more likely that infringement was against public policy, and the contract unenforceable, rather than amounting to a criminal offence. The court did not need to decide whether the contract was void, voidable or unenforceable. A person bringing an action is entitled to get his case before the court and there was a strong public interest in persons being able to obtain funding to enable them to bring proceedings to vindicate their rights. Whether litigation brought by way of funding in breach of the Provision would amount to an abuse of the court's process would depend upon the circumstances. The mere fact that a funding agreement is contrary to the Provision did not result by itself in the proceedings thereby becoming an abuse of process: the approach of the Court of Appeal in *Stocznia Gdanska SA v Latreefers Inc*,[13] *Faryab v Smyth*[14] and *Abraham v Thompson*[15] was to be preferred to *Grovewood Holdings PLC v James Capel & Co Ltd.*[16]

Were the present proceedings an abuse of process?

The decision in *In re Valetta Trust*[17] had been reached without adversarial argument. The court had now had the benefit of argument and affirmed its previous decision. The question was not only covered by statute in the form of the Provision but was also governed by customary law. For the reasons given in *Valetta*, the court has power to declare unenforceable agreements which are contrary to public policy on the grounds of champerty or maintenance. In *Valetta*, the court came to the clear conclusion that, given the considerable recent changes in the law of champerty, the features of the agreement in that case would not be regarded as champertous under English law and should not be so regarded under Jersey law. The funding agreement in the present case was similar. The agreement provided that control of the proceedings would remain with the plaintiffs and their lawyers and that the funder would satisfy any adverse costs against the plaintiffs. There was nothing in it which endangered the purity of justice. On the contrary, it facilitated the important objective of access to justice. It would thus not be an abuse of process for the litigation to continue on

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[13] [2000] WL 447
[14] (unreported) 28th August 1998
[15] [1997] 4 All ER 362
[16] [1995] Ch 80
[17] 2011 JLR 1

the basis of this agreement. Accordingly, even if the court had concluded that the agreement was a breach of the Provision, it would not have dismissed or stayed the proceedings.

CRIMINAL LAW

Appeals against conviction. See EVIDENCE (Appeals against conviction—test)

EVIDENCE

Refreshing of memory by witness

Status of defence evidence when not subject to cross-examination

Appeals against conviction—test

Lewis v Att Gen (Court of Appeal: Nutting, Nugee, and Collas, JJA) [2013] JCA 078

OA Blakeley for Lewis; S Chiddicks as *amicus curiae* for Lewis; RJ MacRae for Christmas; R Tremoceiro for Foot; TVR Hanson, assisted by CM Marr, for Cameron; G Baxter as *amicus curiae* for Cameron; MT Jowitt, Crown Advocate

Issues were raised dealing *inter alia* with memory refreshing by witnesses prior to giving evidence, the status of defence evidence when not subjected to cross-examination by the prosecution and the test for appeal against conviction under art 26(1) of the Court of Appeal (Jersey) Law 1961.

Held—

Refreshing of memory by witness

Without being too prescriptive, the Court of Appeal made the following observations concerning the practice that should be followed in Jersey.

As a general rule before giving evidence a witness has a right to refresh his memory from any statement or note relating to the events in question, whenever made: *Lau Pak Ngam v R*[18] preferred to *R v Stephen Westwell.*[19]

The witnesses should be advised by the prosecution of the right in a timely fashion before they give evidence.

Care should be taken by the prosecuting authority that the circumstances in which the statement or note is provided to the witness to refresh his memory does not allow the witness to collude, *qua* the document, with another witness giving evidence about the same events.

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[18] (1966) Crim LR 443.
[19] (1976) 62 Cr App R 251.

The defence, having been served with all such documents, should assume that any witness for the prosecution has been told of his right to refresh his memory from such documents.

If the defence wish to know in advance of the trial whether a particular witness has exercised that right, they should make enquiries of the prosecution.

In any case where the prosecution have reason to believe that the witness will, or may, not give evidence at trial in conformity with a previous statement or note, and if, notwithstanding these matters, the prosecution still intend to call the witness, the prosecuting advocate should inform the defence to enable the defence to object to the witness reading any such document before giving evidence.

If the defence wish to object to a prosecution witness reading any such document, for any reason, they should notify the prosecution so that, if necessary, the prosecution, having refrained from showing the document to the witness, can obtain a ruling on the matter from the trial judge.

Status of defence evidence when not subject to cross-examination

There was no rule of law which compelled a tribunal to accept evidence as truthful merely because the prosecution forbore to cross-examine. Anything said by a defendant in favour of a co-defendant will be looked at with caution by a fair-minded tribunal of fact. It was important not to confuse the duties of prosecution and defence advocates. Defending advocates are obliged generally to put their cases to the prosecution witnesses. The obligations of prosecuting advocates are different. By the time of cross-examination, the issues are or should be clearer. The prosecuting advocate has a discretion, particularly in long and complicated trials, as to which topics to take issue with; otherwise the trial is likely to become tedious or interminable.

Appeals against conviction—test

Article 26(1) of the Court of Appeal (Jersey) Law 1961 conferred the right only to "a limited appeal which precludes the court from reviewing the evidence and making its own evaluation thereof": *Aladesuru v R*,[20] construing a statute in similar terms; see *Att Gen v O'Brien*;[21] questions relating to the credibility of witnesses were for the Jurats; "it is not the function of the Court of Appeal to say that the evidence of the accused should have been accepted": *per* Lord

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[20] [1956] AC 49 (PC).
[21] 2006 JLR 133 (PC).

Hoffmann in *O'Brien*; followed in *Styles v Att Gen*[22] and *Hamilton v Att Gen.*[23]

In *O'Brien*, Lord Hoffmann opened the door to a change of Jersey law so that the test in the Bailiwick ("a miscarriage of justice") could, by means of more liberal interpretation of the statutory language, become more closely aligned to the appellate situation which subsequently obtained in England and Wales ("unsafe" or "unsatisfactory"). However this invitation had already been rejected by the Court of Appeal in Jersey: *Bhojwani v Att Gen.*[24]

In *Taylor v Law Officers*,[25] Beloff, JA set out the following propositions and principles concerning appeals against conviction under the equivalent Guernsey legislation, which applied equally in Jersey:

> "(i) The jurisdiction of this court is defined by the 1961 Law . . . (ii) The powers of this court are therefore more limited than those enjoyed by the Court of Appeal (Criminal Division) in England and Wales which incorporates the concept of an 'unsafe' verdict, and, by judicial gloss, that of a lurking doubt; (iii) Where an appeal is from the verdict of Jurats, who are not 'speaking,' *i.e.* do not disclose the reasons upon which the verdict is based, 'if the summing up is sound the court may well not be able to interfere unless the verdict is obviously wrong' (*Guest* v *Law Officers*; 2003–2004 GLR *N* [7] . . . (vii) In assessing the rightness or wrongness of the verdict, the Court of Appeal must at all times bear in mind that the function of fact finding has been left to the lower court and that, particularly where credibility is in issue, the lower court, notoriously, has the advantage, denied to the Court of Appeal, of seeing and hearing the witnesses including, most importantly, the defendant."

FOUNDATIONS

Court's jurisdiction to give directions

A Ltd v B Ltd (Royal Court: Clyde-Smith, Commr, and Jurats Le Cornu and Olsen) [2013] JRC 075

PG Nicholls for the representor

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[22] [2006] JCA 095.
[23] [2010] JCA 136A.
[24] [2011] JCA 034.
[25] 2007–08 GLR 207.

The representor was the qualified member of the council of a Jersey Foundation. It sought the directions of the Court under art 46 of the Foundations (Jersey) Law 2009 in relation to certain proceedings which had been brought against the Foundation and others in Jersey. The Representor wished the foundation to change its active position in the litigation and adopt a neutral stance. This was the first occasion on which the Court has considered its power to give directions under art 46.

Held—

Jersey foundations compared with companies and trusts

Jersey foundations have an inheritance from both trust law and company law. Foundations in common law jurisdictions share some of the essential characteristics of the traditional civil law foundation, to a greater or lesser degree, but are governed by specific domestic legislation. Clyde-Smith, Commr referred to the following features by way of comparison with trusts and companies: (a) Jersey foundations are creatures of statute and equity has no role in the formation of a foundation; (b) like a trust, there is no requirement for an initial endowment of assets (art 7(1)); (c) a foundation's assets are owned both beneficially and legally by itself and it has no shareholders or capital; (d) a beneficiary has no interest in a foundation's assets as such but may become entitled to a benefit enforceable as a debt or by specific performance as a result of the foundation's regulations or a decision made by the foundation – art 25(2) provides an enforcement mechanism; (e) a beneficiary is not owed a duty analogous to a fiduciary duty by the foundation or persons appointed under the foundation's regulations (art 25(1)); the duties of such a person are owed to the foundation itself, similar to the position of directors and their company; and (f) there is no general requirement that a foundation provide a beneficiary with information (art 26).

Court's supervisory jurisdiction

The court had wide supervisory roles which may be invoked by a "person with standing" (within the meaning of that expression as defined in art 1(1)), specifically supervisory roles under arts 44–46 (under which the court may give directions on specified matters), arts 47–49 and 50. Given these extensive and detailed provisions, the legislature intended that this should be a live and readily exercisable jurisdiction. The Court highlighted a number of points:

(a) the *sui generis* nature of these statutory creations had to be recognised—analogous reasoning from other legal relationships and entities should be carefully deployed;

(b) there are significant differences between a foundation and a trust—a foundation owes no duties analogous to fiduciary duties to

beneficiaries but the court left it open whether a duty of care might nevertheless be owed;

(c) the council members owe duties to the foundation itself, as in the case of directors to their company, and their fiduciary duty of loyalty and duty of care, diligence and skill (art 22(2)) were analogous to those company directors; but the court noted that it would be a question for another day whether the duty under art 22(2) to act "with a view to the best interests of the foundation" meant the best interests of the beneficiaries as whole (analogous to company law) and how that would be assessed where the objects of the foundation contained a mixture of purposes and human beneficiaries with conflicting interests; and

(d) it was clear that the supervisory regime was radically different to that applying to companies—directors and shareholders have no power to seek directions from the court requiring specified actions by the company or board or orders for the suspension or reformation of articles of association.

Disposal

The representor, as qualified council member, was a "person with standing" within the meaning of the Law and the court's jurisdiction to give directions under art 46 had been properly invoked. A change of position of the foundation in the Jersey proceedings to a neutral stance was a momentous decision justifying the invoking the court's supervisory jurisdiction. The representor was seeking to act responsibly in the matter and had received little or no help from its fellow council members, beyond one-line emails indicating support for the present application. The representor was in need of assistance and this was best given by a direction that it use its reasonable endeavours as a council member to procure that the foundation adopt a neutral role in the Jersey proceedings. If the other council members did not cooperate the representor would at least be protected by the court's direction.