Jersey & Guernsey Law Review – February 2014

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

Duties of directors—remuneration

AI Airports International Ltd & PI Power International Ltd v Pirrwitz [2013] JCA 177 (Court of Appeal: Beloff, Nugee and Martin, JJA)

NM Santos-Costa for the appellants; ML Preston for the respondent

Mr Pirrwitz was a director of two Jersey companies, AI Airports International Ltd and PI Power International Ltd. The companies held substantial investments in the airport and power sectors. Under his written terms of service, he was entitled to certain payments in the event of his being removed from office or resigning on three months' notice. The exit payments were €600,000 and €700,000, respectively. The directors were expected by the hedge fund investors who had procured their appointment to realise the companies' investments and return cash to shareholders as soon as possible. The role was difficult and the board was unsupported by employees. Relations between the directors and the hedge fund investors became strained. Mr Pirrwitz was in due course removed by the investors as a director of both companies. As a result he claimed the two lump sum payments. The companies resisted the claim. They argued that the agreements were invalid and unenforceable because (a) neither company's articles of association contained power to agree to exit payments of this nature; (b) the terms of the payments had not in fact been authorised by the board; and (c) the agreements to make the exit payments had not been in the best interests of the companies and were therefore unenforceable. The Royal Court rejected the companies' defence on

each of these points and gave judgment in favour of Mr Pirrwitz. The companies appealed.

Held, dismissing the appeal—

Power to agree the exit payments. The articles of both companies were materially identical and contained separate powers of remuneration for non-executive and executive directors.

On the proper construction of the companies' articles of association, and upholding the approach of the Royal Court, the Court of Appeal found that the board had specific powers to agree the exit payments, whether Mr Pirrwitz was considered as an executive or non-executive director.

It was unnecessary to decide whether a power to remunerate directors was implicit within the general power to manage the business of the company which was set out in standard terms as art 123 of their articles of association. The general principle is that directors, being fiduciaries, are not entitled to remuneration out of the company's funds, unless authorised by the articles: *Guinness plc v Saunders.*[1] Article 123 merely conferred on the board the power to manage the company's business, without express reference to the remuneration of directors. The court considered that there was "some force" in the submission that what was needed was not just a power to manage the business of the company but a specific release of a director's fiduciary obligations. It was, however, unnecessary to decide the point; it was thus left open whether art 123 would have alone sufficed.

Whether the agreement for the exit payments was authorised in fact by the board. The court noted the limitations on an appellate court, which has not had the advantage of seeing the witnesses, in interfering with a conclusion of fact reached by the trial court. Thus a decision of the trial court based on the trustworthiness of witnesses cannot be interfered with unless the appellate court is convinced that it is wrong, nor can the appellate court ignore facts which the trial court has found on its impression of the credibility of witnesses: *Pell Frischmann v Bow Valley Iran Ltd*[2]; *Powell v Streatham Manor Nursing Home.*[3] This was particularly so under the Jersey legal system, where Jurats act as judges of fact: *Jones, Jones and Bedell Cristin Trustees Ltd v Plane.*[4] These principles made it impossible to overturn a finding of fact by the Royal Court that there had been a consensus at the

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[1] [1990] 2 AC 663.
[2] [2008] JCA 146, 2008 JLR 311.
[3] [1953] AC 243.
[4] 2006 JLR 438.

relevant board meetings to authorise the chairman not only to determine the amount of the exit payments but also to sign Mr Pirrwitz's service contracts on behalf of the companies.

Duty to act with a view to the best interests of a company. Article 74(1) of the Companies (Jersey) Law 1991 provides—

> "(1) A director, in exercising the director's powers and discharging the director's duties, shall—(a) act honestly and in good faith with a view to the best interests of the company; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

It was contended by the companies that the exit payments were not, in fact, in the best interests of the companies and that the service contracts were therefore unenforceable in this respect by Mr Pirrwitz—and that this was so even though the directors honestly believed the agreement to have been in the companies' best interests.

The Royal Court found, on the facts, that the payments could properly be considered to be in the best interests of the companies on the ground that they secured the loyalty and independence of the relevant directors. The Court of Appeal agreed with the Royal Court's conclusion but went on to consider the specific terms of art 74(1)(a). On its plain wording, the court said that a director is not in breach of this article if he acts in a way which he or she *bona fide* considers to be in the best interests of the company. The exercise of a power by the directors, properly motivated in accordance with art 74(1)(a), could not amount to a breach of duty under art 74(1)(a) merely because a court later concluded that the directors' acts were not, in its view, in the best interests of the company. The court did not doubt that, as fiduciaries, directors owed other duties going beyond art 74. The companies had not sought to argue that the directors had been acting anything other than *bona fide* with a view to the best interests of the companies. It followed that the directors could not be said to be in breach of art 74(1)(a).

Hogg v Cramphorn Ltd[5] and *Howard Smith v Ampol Petroleum*,[6] cited by counsel for the companies, were authority for a rather different proposition, namely, that that acts of directors are invalid if, however well-intentioned, they are carried out for a purpose which is not the purpose for which the power in question was conferred. It was trite law that any power must be exercised for the purpose for which it is given and not for some foreign or ulterior purpose. In the present case,

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[5] [1967] 1 Ch 254.
[6] [1974] AC 821.

securing the loyalty and independence of the directors was undoubtedly a proper purpose of the power of the board to fix remuneration.

COSTS

Tax information exchange agreements

Volaw Trust & Corporate Servs Ltd & Larsen v Comptroller of Taxes [2013] JRC 148C (Royal Court: Page, Commr, sitting alone)

AD Hoy for Volaw; J Harvey-Hills for Larsen; JD Kelleher for the Comptroller

Following the dismissal of appeals by Volaw and Larsen against the decision of the Deputy Comptroller of Taxes to serve a notice of May 2012 on Volaw under the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008, the Royal Court determined the issue of costs of the proceeding in the Royal Court.

The May 2012 notice was the last of a sequence of notices substantially in respect of the same matter and all but one (which had been withdrawn) formally appealed against by one or both of the Appellants.

Held—

On the facts, it was artificial to treat the relevant previous notices in the same way as would be appropriate in the case of actions launched but subsequently discontinued in ordinary civil litigation.

Article 14(4) of the 2008 Regulations provided that on an appeal against a requirement by the Comptroller for the provision of documents or information, the Royal Court—

> "may confirm, vary or set aside the requirement to which the appeal relates, and may make such order as to the costs of the appeal as it thinks fit."

There was every reason to suppose that the court should apply considerations similar to those applied in relation to the similarly wide jurisdiction to award costs under art 2(1) of the Civil Proceedings (Jersey) Law 1956 (for which see *Watkins v Egglishaw*[7]).

That discretion was amply wide enough to make it appropriate for the court, in awarding costs in relation to the several appeals in question, and there was no justification for cutting down that discretion in a way that obliged the court to treat each appeal as a hermetically

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[7] 2002 JLR 1.

sealed compartment. An award of costs "of and incidental to" proceedings in the Royal Court can properly extend to costs incurred prior to the issue of proceedings: *Société Anonyme Pecheries Osendaises v Merchants' Marine Ins Co*[8]; I*n re Gibson's Settlement Trusts*[9]; *Grindlays Bank plc v Corbett.*[10] Furthermore, the Divisional Court in England in *Roach v Home Office*[11] expressly rejected the proposition that the costs of one set of proceedings could never be recoverable as costs of and incidental to another set of proceedings (except where another court had already ruled on the matter of costs in the earlier proceedings: *Roach*; *Wright v Bennett*[12]) and accepted that costs of representation at an inquest could be recoverable as costs of and incidental to a subsequent civil claim.

It was not the case that, on the modern approach to costs, a discontinuing party must always bear the costs of the other party: see *Jersey Financial Services Commission v AP Black (Jersey) Ltd*[13] and *SGI Trust v Wijsmuller*,[14] in each of which defendants were to some extent denied their costs; *Dick v Dick*[15]and *Cotrel v Christmas*[16] were distinguishable.

As regards the question of costs against a public body performing a public function, there was nothing in *R (Perinpanathan) v City of Westminster Magistrates' Court*[17] (in which the English Court of Appeal considered the conflicting decisions in *Bradford Metropolitan District Council v Booth*,[18] *Baxendale-Walker v Law Society*[19]and *Southbourne Sheet Metal Co Ltd*[20]) that called for a revision of the approach that had been adumbrated in the Jersey context by Page, Commr in *AP Black*. There is no prima facie rule that a public body acting in furtherance of public interest functions cannot have costs awarded against it; but nor is it the case that the body is in the same position as any other litigant; the public function is, however, a relevant

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[8] [1928] 1 KB 750, at pp 762, 763.
[9] [1981] 1 Ch 179.
[10] 1987–88 JLR *N*2b.
[11] [2009] EWHC 312.
[12] [1948] 1 KB.
[13] 2007 JLR 1.
[14] [2008] JRC 078.
[15] 1990 JLR *N*2c.
[16] [2013] JRC 101.
[17] [2010] 1 WLR 1508.
[18] (2001) 3 LGLR 8.
[19] [2006] EWHC 643 (Admin).
[20] [1993] 1 WLR 244.

factor in the exercise of the court's discretion as to costs: *per* Page, Commr in *AP Black.*

On the facts, the appellants were ordered jointly and severally to pay 90% of the Comptroller's costs on the standard basis.

Comment [A Bridgeford]: The Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 has since been amended by the Taxation (Miscellaneous Provisions) (Jersey) Regulations 2012 and the Taxation (Exchange of Information with Third Countries) (Amendment No 7) (Jersey) Regulations 2013. The appeal provisions have been removed, leaving a restricted right to pursue a judicial review. The jurisdiction to award costs in such proceedings would fall under art 2(1) of the Civil Proceedings (Jersey) Law 1956.

LAND LAW

Public of the Island of Jersey

Treasurer of the States v Pearce (Royal Ct: Thompson, Master) [2013] JRC 206

GGP White for the plaintiff; D Pearce appeared in person on his own behalf

The question was raised, *inter alia*, as to the meaning of expression "the Public of the Island of Jersey" when used in contracts of immovable property. The defendant argued that the holding of land including the Market by "the Public" was a purpose beneficial to the whole community and was therefore a charity and as such was exempt by reason of para 5 of Schedule 5 of the Goods and Services Tax (Jersey) Law 2007 (the "GST Law").

Held, as to the meaning of "the Public"—

Agreeing with *dicta* of Le Marquand, Greffier, in *Bene Ltd v Hanson*,[21] the origin of contracting in the name of the Public of the Island of Jersey was shrouded in mystery; but the likely rationale was to draw a distinction between the Crown and the States of Jersey on behalf of the general public. The Public of the Island of Jersey had no mind or will independent of that of the States of Jersey and it was very difficult to distinguish between them when dealing with immovable property.

It was not clear whether the Public of the Island of Jersey was a corporate body or other legal entity or whether it is a legal convention

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[21] 1995 JLR 323.

or custom which reflected how property is held for the States of Jersey as distinct from the Crown. However, this did not matter for the purposes of the case. Even if the Public was a "corporate body" or a legal entity, the Public was not a corporation, association or trust established for a purpose beneficial to the whole community within the meaning of a "charity" in para 5 of Schedule 5 of the GST Law. At best it held property for the States and this was neither a trust nor an incorporated association. Alternatively, if holding property in the name of the Public was a legal convention pursuant to which property is held for the States of Jersey then such a convention did not bring the Public of the Island of Jersey within the definition of the word "charity" in para 5 of Schedule 5 of the GST Law.

TAXATION

Taxation information exchange agreements—rights of appeal

Volaw Trust & Corp Servs Ltd & Larsen v Comptroller of Taxes (Court of Appeal: Beloff, Nutting and Bennett, JJA)

AD Hoy for the first appellant; J Harvey-Hills for the second appellant; JD Kelleher for the respondent

Volaw and Mr B. Larsen, a Norwegian taxpayer, appealed against the decision of the Royal Court to uphold the decision of the Comptroller of Taxes to issue a notice under reg 3(2) (Provision by other persons of tax information about taxpayer) of the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 (as then in force) and the Taxation Information Exchange Agreement between Jersey and Norway (the "J/N TIEA").

Held—

Relation between 2008 Regulations and specific TIEAs. The 2008 Regulations do not purport to give direct effect to the J/N (or any other) TIEA but as their clear purpose, so sourced in the Taxation Implementation (Jersey) Law 2004, was to provide, in Jersey domestic law, a procedure for, *inter alia*, obtaining information of the relevant kind if a request from the competent Norwegian authority falling within the parameters of the J/N TIEA is received, with a view to that information being passed on to that authority.

Requirement that a person has "reasonable grounds for believing". Regulation 3(1) (as then in force) required the Comptroller to have "reasonable grounds for believing" the actual or potential underlying foreign tax default. The wording of reg 3(2) (as then in force) was in essence to the same effect.

Each provision required the Comptroller to make a rational assessment on the material before him. Reasonable grounds for a

belief involve having a state of mind below certainty but above suspicion, and is an objective, not just a subjective, test: *Registrar of Restrictive Trading Agreements v WH Smith*.[22] Because of that objective element, the appellate process exposed the Comptroller's decision to judicial scrutiny, and the court's task was facilitated by the requirement for a written summary of his reasons in reg 3(4) (as then in force).

Valuable insight into tests of this character was given by Neuberger, J (as he then was) in *A v Secy of State for Home Department (No 2)*[23] (cited by Silber, J in *Secy of State for the Home Department v AY.*[24]

How far beyond the information contained in a tax information request should the Comptroller go? Both *Acturus Properties v Att Gen*[25] and *Re Kaplan*[26] emphasised that the decision-maker under analogous statutory provisions (in *Acturus* the Attorney General, in *Kaplan* the court) must consider whether there are reasonable grounds for the belief required. It is not, however, for a decision-maker to question the correctness of the material provided to it from outside the jurisdiction, as long as it is properly evaluated after some probing for the purposes of clarification. This was the default position but it was also necessary to consider whether it was altered by public law principles of fairness or by the ECHR. Elementary fairness *prima facie* required the Comptroller to give the person concerned the chance to make representations so as to avoid entering into the terrain of notices and the possibility of penal sanctions for non-compliance. However, the Comptroller's decision-making process did not need to amount to a mini-trial. The Comptroller had neither the power nor the facility to provide one. As long as he had "reasonable grounds" for his belief or opinion on the material, before him, he was empowered to act on that belief or opinion.

The Court of Appeal further set out certain procedures and case management principles with regard to the issuance of tax information notices and appeals to the Royal Court which were consistent with the 2008 Regulations (as then in force) and legal principle.

Nature and scope of appeal to the Royal Court. Regulation 14 (as then in force) of the 2008 Regulations provided for a right of appeal from the Comptroller's decision to the Royal Court, without describing

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[22] [1969] 1 WLR 1460, at p 1468.
[23] [2005] 1 WLR 414, at para 370.
[24] [2012] EWHC 2054 (Admin), at para 22.
[25] 2001 JLR 43.
[26] 2009 JLR 88.

the nature or scope of that appeal. In the Court of Appeal's opinion, reg 14 (as then in force) entitled the Royal Court to consider afresh whether the notice was properly issued (and not merely to review the decision of the Comptroller on well-known public law grounds).

This was for the following reasons: (i) the natural meaning of an appeal is a re-examination of the facts and conclusions of law of the person or body against whose decision the appeal is brought, and the substitution of the appellate body's own findings of fact and conclusions of law for those of the decision maker, if it disagrees with the decision; (ii) nothing in reg 14 identified or, more importantly, restricted the grounds upon which such an appeal may be brought; (iii) absent provision for an appeal, the Comptroller's decision would, as an administrative decision made under statute have been amenable to judicial review, and it would have been otiose to provide for an appeal which was no more than judicial review by another name; (iv) given what was in issue in the making of such a notice (an invasion of the individuals' commercial confidentiality) it was unsurprising that such an unfettered appeal was provided for. The court was, further, not required to give a degree of deference to the Comptroller's decision; it had to stand or fall on its own merits.

However, the fact that the Royal Court exercised an appellate jurisdiction did not of itself identify what kind of appeal has been provided for and, accordingly, the extent of the material to which it can have regard. At the end of the spectrum are appeals *stricto sensu* in which the question for consideration is whether the decision subject to appeal was right on the material which the decision-making body had before it. In such an appeal fresh evidence cannot be called. At the other end are appeals *de novo* in which there is a fresh hearing with the parties being able to call fresh evidence: *Quilter v Mapleson*.[27]

An appeal under reg 14 (as then in force) of the 2008 Regulations as to whether the Comptroller had reasonable grounds for the required belief was, on its proper construction, to be construed as restricting the appeal to an assessment of whether the material that he had before him provided, objectively, reasonable grounds for his belief. This was not inconsistent with Convention rights to a fair and public hearing under art 6 (which did not inevitably require an unrestricted appeal from the decisions of an administrative body based on findings of fact and the exercise of judgment—indeed judicial review could in appropriate circumstances suffice) and to a private and family life

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[27] [1882] 9 QBD 672, at p 676.

under art 8 (the 2008 Regulations contained important limitations and adequate safeguards as in *B Larsen Holdings v Norway*[28]).

Comment [A Bridgeford]: The principal provisions of the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 which were construed and were operative on the facts of this case have since been amended by the Taxation (Miscellaneous Provisions) (Jersey) Regulations 2012 and the Taxation (Exchange of Information with Third Countries) (Amendment No 7) (Jersey) Regulations 2013. The thrust of the changes is to make it more difficult to challenge a decision of the Comptroller to issue a notice under reg 2 or 3 of the 2008 Regulations. The Comptroller, once in receipt of a notice from a relevant foreign tax authority, is no longer expressly required to have a "reasonable belief" that there is an actual or potential foreign tax default and the appeal provisions in reg 14 have been removed, leaving only a restricted right to pursue a judicial review of the Comptroller's decision. Nevertheless the Court of Appeal's observations remain of considerable interest in relation to similarly worded statutory provisions. The scope and nature of a statutory right of appeal to the Royal Court against an administrative decision, where the relevant statute simply provides that a person may appeal, without more, had not been subject to a detailed review by the Court of Appeal until this case. Simultaneously, this point was being considered by Birt, B in *JT (Jersey) Ltd v JCRA*,[29] who adopted a similar approach to the Court of Appeal, albeit that the outcome on the construction of the relevant legislation was different.

TRUSTS

Constructive trusts—bribes

Lloyds Trust Co v Fragoso [2013] JRC 211 (Royal Court: Clyde-Smith, Commr, and Jurats Le Cornu and Morgan)

DR Wilson for the representor; AD Hoy in person; GS Robinson for the seventh respondent; MT Jowitt for the eighth respondent.

The first respondent established a Jersey law discretionary trust in 1999. He told his trustee that the settled assets represented fees paid to him as a civil engineer. He did not reveal that he was not, in fact, a civil engineer but a high-ranking official employed by the Government of Mozambique. In 2010 it came to the attention of the trustee that the settlor's name had been mentioned as a recipient of bribes at the trial in England of an English company called Mabey & Johnson, which

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[28] [2013] ECHR 24117/08.
[29] [2013] JRC 238.

was in due course convicted of offences relating to corruption. The trustee filed a Suspicious Activity Report and asked the first respondent for evidence showing the innocent origin of the funds. This he was unable to do. The trustee and the Government of Mozambique therefore applied to the Royal Court for a declaration that the trust fund was held as constructive trustee for the Government of Mozambique on the basis that the entirety of it represented bribes paid to the first respondent in his capacity as an employee of that Government. The question was thus raised as to whether the Government of Mozambique should have a proprietary claim over the proceeds of the bribes paid to one of its officials.

There was documentary evidence in this case that Mabey & Johnson had paid the first respondent a bribe but this alone did not account for the whole of the trust fund. Part of the bribe had also initially been paid into a Swiss bank account before being moved to Jersey, and a second tranche paid by Mabey & Johnson was not actually paid by them into the first respondent's Swiss account paid until after the Jersey trust had been funded. Neither the first respondent nor his family, who were named beneficiaries under the trust, chose to contest the application, though he denied taking bribes in correspondence with the court.

Held, granting the application—

Whole of trust fund represented proceeds of bribes. Although there was no direct evidence relating to the whole of the trust fund, it was an established feature of litigation both in Jersey and England that inferences of fact could be drawn from positive evidence of other facts (as opposed to silence): *Federal Republic of Brazil v Durant International*.[30] On the balance of probabilities, the court found that all of the funds in the trust represented bribes received by the first respondent in his role as a public officer for Mozambique, whether through contracts with Mabey & Johnson or with other companies. It was relevant that (i) the first respondent had lied to his trustee both as to his occupation and the source of the funds when the trust was established; (ii) there was clear documentary evidence of bribes being paid by Mabey & Johnson to the first respondent and of those bribes being settled into the trust; (iii) the first respondent had attempted to stop his family being informed of the existence of the trust, but when they were informed, they denied any knowledge of it and have not asserted any interest in it; (iv) he had lied in his correspondence with the court by denying any receipt of bribes from Mabey & Johnson; (v) he had failed to produce any evidence as to the source of the funds;

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[30] [2012] JRC 211.

and (vi) his only legitimate source of income during the material period was his salary of €1500 per month.

Whether trust fund held on constructive trust for Mozambique. The trustee and the Government of Mozambique sought a declaration that the trust fund was held by the trustee on constructive trust for the Mozambique government. The claim was therefore proprietary. In this respect, the court was faced with conflicting authorities:

(a) The trustee and Mozambique relied on the case of *Att Gen (Hong Kong) v Reid*,[31] which was a decision of the Privy Council on an appeal from New Zealand. It was held in that case that when a bribe is accepted by a fiduciary in breach of his duty, he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value, the fiduciary must pay the difference because he should not have accepted the bribe or incurred the risk of loss. If, however, the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty.

(b) However, in *Sinclair Invs (UK) Ltd v Versailles Trade Fin Ltd*,[32] the English Court of Appeal declined to follow *Reid* and instead applied the much earlier Court of Appeal decision in *Lister v Stubbs*.[33] This involves a categorisation of different types of case, which, depending on the type of case, may or may not give rise to a constructive trust. Difficulty arises where the facts fall on borderlines between the categories: *FHR European Ventures LLP v Ramsey Neil Mankarious*.[34]

Status of Privy Council decisions on appeals from other jurisdictions. The court noted that, although the Privy Council is the highest appellate court from Jersey, the Royal Court is not bound by decisions of the Privy Council when it is sitting on appeals from other jurisdictions, such as New Zealand. Nevertheless, such decisions are persuasive in Jersey. The degree of persuasiveness depended on the similarity of the point at issue in Jersey and on social and policy considerations in Jersey: *State of Qatar v Al Thani.*[35]

***Reid* followed in preference to *Sinclair*.** The Royal Court followed the Privy Council decision in Reid in preference to Sinclair. The

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[31] [1993] UKPC 2.
[32] [2011] EWCA Civ 347.
[33] [1890] 45 Ch 1.
[34] [2013] EWCA Civ 17.
[35] 1999 JLR 118.

decision in *Reid*, unconstrained by precedent and in particular *Lister*, was highly persuasive and should be accorded greater weight than a decision of the English Court of Appeal. There were also important reasons of policy to follow *Reid*: the need to deter fraud and corruption and to have the ability to strip fiduciaries who have channelled their illicit funds through Jersey of all benefits.

Comment [A Bridgeford]: This civil judgment—finding that the employer of a bribe-taker has a proprietary right to the bribe (or its traceable proceeds)—is certainly consistent with the strong policy against corruption shown by both the criminal and regulatory law in Jersey. The court's preference for *Reid* over *Sinclair*, a conclusion presaged *obiter* by Page, Commr in *Federal Republic of Brazil v Durant International*,[36] makes the ownership of bribes clear without the need for fine analysis such as was carried out by the English Court of Appeal in *FHR European Ventures LLP v Ramsey Neil Mankarious*.[37] Nevertheless, the present case was not contested and it is unlikely to be the last word on the matter. A future judgment of the UK Supreme Court relating to the conflict between *Reid* and *Sinclair* will undoubtedly remain of considerable interest. *Reid* has its critics as well as supporters. Professor Goode, in particular, has argued that *Reid* was "conceptually flawed and indefensible as a matter of policy".[38] The question of principle is not whether the employer/principal has a claim against the bribe-taker but whether that claim should be proprietary in nature. If the outcome is proprietary, and the bribe-taker is insolvent, the employer will enjoy (amongst other advantages) the windfall of priority over other creditors in respect of assets to which it had no original claim, which were not destined for it in the first place and which have no necessary relation to the loss, if any, that it has suffered. There was no insolvency in the present case, but in other circumstances *Reid* could cause injustice to the general body of creditors. In the Jersey context, such claims are also likely to give rise to issues of conflicts of law which, in this case, the Royal Court was not called upon to resolve: see, for example, the analysis of the Singapore Court of Appeal in *Ratna v PT Pertambangan Minyak dan Gas Bumi Negara,*[39] applying r 203(2)(c) of *Dicey, Morris & Collins* (12th edition) and *Reid*.

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[36] [2012] JRC 211.
[37] [2013] EWCA Civ 17.
[38] Goode "Proprietary liability for secret profits—a reply" (2011) 127 LQR 493. The contrary position is put by Hayton, J, "Proprietary liability for secret profits" (2011) 127 LQR 487, supporting *Reid* and criticising *Sinclair*.
[39] [1994] 3 SLR(R) 312.

Hastings-Bass application

In re Onorati Settlement [2013] JRC 18 (Royal Court: Birt, B, and Jurats Kerley and Milner)

AJN Dessain and ROB Gardner for the representors; MH Temple for the respondent

Beneficiaries of a Jersey trust applied under the *Hastings-Bass* principle for a declaration that an appointment made by the respondent trustee to them was voidable and that it be set aside. The particular ground of the application was that, in breach of duty, the trustee had failed to take into account the fact that the appointment had serious adverse UK tax consequences for the beneficiaries.

Held, granting the application—

Law in England post-*Pitt v Holt*. Birt, B summarised the development of the so-called *Hastings-Bass* principle in England and the manner in which the law has now been reformulated in England by the Supreme Court in *Pitt v Holt, Futter v Futter.*[40] Key aspects of the resulting position in England were that (a) in the case of an "inadequate deliberation" by a trustee, this must be of sufficient seriousness so as to constitute a breach of fiduciary duty in order for the court to intervene—thus, for example, following apparently reliable professional tax advice, even though it turns out to be incorrect, would not amount to a breach of duty by the trustee and cannot be set aside under *Hastings-Bass* following *Pitt v Holt*; and (b) an application under the principle to set aside the exercise of a discretionary power by a trustee should normally be brought by a beneficiary, rather than the trustee.

Hastings Bass in Jersey. Birt, B then referred to the development of Jersey law which had hitherto applied the law as it was understood to have been in England prior to *Pitt* and encapsulated in *Sieff v Fox.*[41] In particular, in *Leumi Overseas Trust Corp Ltd v Howe*,[42] the court (Clyde-Smith, Commr) held that it was not necessary for there to be a breach of duty on the part of the trustees before the principle could be brought into play.

On facts, application could be granted even applying the current English principles. On the present facts, it was unnecessary to decide whether Jersey law should be modified by the courts in order to accord with the current state of English law. The application had

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[40] [2011] 2 All ER 450.
[41] [2005] 3 All ER 693.
[42] 2007 JLR 660.

been brought by beneficiaries. It was also clear that the trustee had been in breach of fiduciary duty in its failure to take professional advice on the tax consequences of the propose appointments. It followed that, even if Jersey law were to follow the post-*Pitt* position in England, the *Hastings-Bass* principle could be applied so as to set aside the appointments.

Tax advice and breach of fiduciary duty. As regards the question of breach of fiduciary duty in relation to tax advice, Birt, B observed that—

> "In some circumstances, provision of written advice obtained by a beneficiary will be sufficient for a trustee to act on the basis of that advice. But the trustee will always need to see the advice in order to satisfy itself that the advice is appropriate and is based upon a correct understanding of the facts . . . It is wholly insufficient and is a breach of duty for a trustee to rely on oral confirmation from a beneficiary that he or she has received appropriate tax advice."

Exercise of power voidable, not void. The court further noted that *Pitt* confirmed that an exercise of a trustee's discretionary power which is in breach of duty is voidable, not void, and therefore its setting aside was subject to the court's discretion and any equitable defences. On the facts the court exercised its discretion to set aside the appointments. The beneficiaries bore no responsibility for what had occurred and obliging them to litigate against trustee or advisors was not an attractive alternative; there was, further, no reason not to exercise the discretion in favour of setting aside the appointments.

Effect of Royal Court's decision on English tax position. HMRC had been notified of the application and by letter reserved the right to contend that, so far as the UK tax position was concerned, a decision in Jersey setting aside the appointments should not be recognised. However Birt, B observed that under the proper law of trust—Jersey law—the effect of the decision was that the deed of appointment had never existed and that this was entirely consistent with English law: see the remarks of Lord Walker in *Pitt v Holt* at paras 129 and 130; and the remarks of Mostyn, J in *AC v DC*.[43]

Comment [A Bridgeford]: Since this case was decided, the position in Jersey has been settled by statute. The Trusts (Amendment No 6) (Jersey) Law 2013 essentially confirms the pre-*Pitt* position both as regards *Hastings-Bass* applications and those in equity relating to mistake.

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[43] [2013] 15 ITELR 811, at para 31.