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

CONFLICT OF LAWS

Restitutionary claims

In re Nedgroup Ltd [2014] JRC 126A (Royal Ct: Clyde-Smith, Commr and Jurats Marett-Crosby and Crill)

MHD Taylor for the representors; A Kistler for the first, second, third and fourth respondents; LKA Richardson appeared for Advocate Robertson

The representors were the Jersey trustees of two English law trusts. They sought rectification of two deeds of appointment that had been under the trusts or, alternatively, the setting aside of the two deeds on the ground of mistake. Contrary to what the court found the intentions of the settlor to be, the deeds purported to be an outright distribution to the family members concerned, terminating the trusts at the expense of the particular family members who were entitled, subject to a wide-ranging power of appointment, to the income under the terms of the trusts. The question was raised, *inter alia*, as to what the appropriate Jersey conflicts of law principles were for determining which law to apply to the application.

Held:

(1) The representors were seeking to invoke the equitable jurisdiction of the court to rectify the deeds of appointment or, alternatively, to set them aside for mistake. These were forms of relief that could be characterised as restitutionary in nature, as they would result in the restoration of the capital benefits or powers (or both) obtained by the family members named at the expense of beneficiaries entitled to the income.

(2) The position had previously been considered in *In re S Trust.*[1] In that case the settlor, who was domiciled in England, had transferred shares in a French company to a Jersey company, which then settled the same on trusts governed by English law but administered in Jersey. The settlor applied to have the transfer set aside for mistake, and the court held that the proper law of the restitutionary obligation was the law of Jersey, where the enrichment occurred. The court referred to Rule 230 of Dicey, Morris & Collins,[2] in which it is said that the obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation and that—

> "(2) The proper law of the obligation is (*semble*) determined as follows: (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract; (b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*); (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."

Bailhache, B held that the claim in *In re S Trust*, not arising in connection with a contract or an immovable property transaction, fell within Rule 230(1)(c). On the facts, the enrichment had occurred in Jersey so that Jersey law was applied. In addition, he noted that it was just and convenient to apply Jersey law as the trustee was a Jersey incorporated company.

(3) In *Dervan v Concept Fiduciaries Ltd*,[3] the Royal Court of Guernsey declined to follow *In re S Trust* (and *CC Ltd v Apex Trust Ltd*[4]). McMahon, DB referred, *inter alia*, to the commentary on Rule 230 in Dicey, Morris and Collins which observes that—

> "Although the obligation to restore an unjust benefit does not arise from a contract, it may, and very frequently does, arise in connection with a contract"

and in cases such as where a party seeks to recover money paid under an ineffective contract—

> "it is submitted that the existence and the scope of the obligation to restore the benefit are in principle governed by the law which

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[1] 2011 JLR 375.
[2] *The Conflict of Laws*, 14th ed. (2006).
[3] 30 November 2012, Judgment 38/2012.
[4] 2012 (1) JLR 314.

> governs the contract, or by what would have been the governing law of the contract, if it had been validly concluded . . . If the parties have expressly chosen the law to govern the contract, it is realistic to suppose that, had they given the matter any thought, they will have expected this law also to deal with the remedial consequences if the contract is ineffective or has failed."

In respect of Rule 230(2)(c), Dicey, Morris and Collins explains that:[5]

> "The rationale for the traditional formulation of clause (2)(c) is that in the absence of a prior relationship between the parties to which reference may be made, or which may contribute to the identification of the proper law of the obligation to make restitution, the law of the place where the enrichment occurred may be expected to be that which has the best claim to be applied to any obligation to restore."

(4) The facts in the present case could be distinguished from those in *In re S Trust* and *Dervan*. In those cases, the courts were concerned with transfers into a trust by persons outwith the jurisdiction; in this case the court was dealing with appointments out of two established settlements, already governed by English law, by means of two deeds of appointments which, by necessary implication, were also governed by English law. The important point in the present case was that there was a prior underlying relationship between the representors and the beneficiaries to whom the appointments were made and this was through the settlements, which were expressly governed by English law. Although the appointments were not contractual in nature, the underlying transactions were governed by English law. Using the "contracts approach" in Rule 230(2)(a), the court therefore determined that English law should be applied to the obligation of the beneficiaries to make restitution in order to apply as far as possible one legal system to all aspects of a unitary situation and in order to retain consistency and harmony in the court's approach. If wrong in this respect, the court noted that applying Rule 230(2)(c) lead to the same outcome.

(5) Applying English law, as ascertained by expert evidence, the court exercised its discretion on the facts to rectify the deeds of appointment in the manner sought. That being the case, the court had no need to go on to consider setting the deeds of appointment aside for mistake.

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[5] At para. 34–030.

COURTS

Orders of justice—signature of judge

In re HG [2014] JRC 121 (Royal Ct: Beloff, Commr, sitting alone)

The question was raised as to the proper function of the judge in signing a pleading in the form of an order of justice. An order of justice pleaded by a litigant in person must be signed by a judge. This is also the case in respect of any order of justice which seeks an interim injunction, *arrêt entre mains* or other judicial act (Rule 20/5, Royal Court Rules 2004).

Held:

The role of the putative signatory under Rule 20/5 was authoritatively analysed by William Bailhache, Deputy Bailiff, in the case of *In re Syvret*[6] from which the following principles could be developed and derived—

(1) The signature of the Bailiff, Deputy Bailiff or authorised alternate, of an order of justice is a judicial, and not an administrative, act.

(2) An order of justice should not be signed if it is on its face irredeemably malicious, vexatious or an abuse of the process of the court.

(3) Vexatious in legal parlance describes, *inter alia*, an unsustainable cause of action.

(4) The putative signatory must give latitude to a document which may merely be inadequately pleaded or where the alleged cause of action is inadequately particularised when he seeks to determine whether it does or does not fall foul of the triple criteria or any of them. A defendant to such a claim always has the opportunity to apply to strike the order of justice out on the conventional grounds.

(5) There must therefore be some space between the approach taken when contemplating refusal of a signature to a proposed order of justice and that taken when contemplating a strike-out of an order once issued. The threshold must be higher in the former than in the latter case.

(6) It must be borne in mind that a person is not lightly to be denied access to justice either as a matter of Jersey customary law or by reason of art 6 of the European Convention on Human Rights

[6] [2013] JRC 263.

now incorporated into Jersey law—however, that right is not absolute: *Golder v UK*.[7]

CRIMINAL LAW

Sentencing guidelines—firearms

Granger v Law Officers GCA 33/2014 (CA: Nutting, Pleming and Bennett, JJA)

CM Fooks for the appellant; G McKerrell for the Crown

The appellant appealed a decision of Judge Finch in the Royal Court sentencing him to three years in prison in relation to two charges alleging an assault on two police officers while they were acting in the execution of their duty. Each count alleged that at the material time the appellant had in his possession an imitation firearm, contrary to s 18(2) of the Firearms (Guernsey) Law 1998. The appellant pleaded guilty to those charges. On the evening of the incident which led to his arrest, a woman with whom the appellant was involved, and with whom he had a son, had terminated their relationship. He found this difficult to accept and the woman reported to the police that he had been harassing her by telephone, threatening to take an overdose and that he had access to a BB gun, which, for the purposes of the firearms legislation, constituted an imitation fire arm. Two unarmed police officers arrived at the appellant's address at different times during the evening and he pointed his gun at both of them for a period of at least half an hour. The appellant's mother and sister later arrived on the scene and his sister reported to the police that the appellant had purchased a BB gun in her presence. She eventually persuaded the appellant to surrender the weapon and he was arrested.

Held:

There were no relevant sentencing authorities in the Bailiwick of Guernsey to assist the court since gun crime, whether it involved real or imitation fire arms, was rare. Sentencing in Guernsey was a matter for the Guernsey courts which should resolutely guard their independence as a separate sentencing jurisdiction. It was open to the Guernsey courts to impose heavier sentences for offences of violence than are imposed in England and Wales simply because of the desire to maintain the particular and relative safety of Guernsey.[8] The court derived considerable assistance from the considerations and *dicta*, and

[7] [1975] ECHR 524, para 38.
[8] *Wicks v Law Officers*, 2011–12 GLR 482, referred to.

in particular the questions posed by Lord Bingham in *R v Avis*,[9] where his Lordship said that the appropriate level of sentence for a firearms offence will depend on all the facts and circumstances relevant to the offence and the offender. In *Wicks*, Lord Bingham found that it will usually be appropriate for the sentencing court to ask itself a series of questions: (i) what sort of weapon is involved? (ii) what (if any) use has been made of the firearm? (iii) with what intention (if any) did the defendant possess or use the firearm? and (iv) what is the defendant's record?

The courts of Guernsey must strive to prevent the curse of firearms, real or imitation, becoming a feature of life of this Island community. The Court of Appeal would uphold severe sentences, including sentences with a significant element of deterrence, to avoid such a lamentable situation developing here. What was said in *Wicks* concerning this jurisdiction in relation to the need and efficacy of deterrent sentences for the offence of making indecent images of children applied with equal force to offences involving the use of real or imitation firearms. The aggravating features of this case included an element of preparation and premeditation, the fact that the incident occurred at night and in a public street, the passage of time before the appellant voluntarily surrendered the weapon, the justified fear felt by the officers in respect of death or serious injury, and the fact that the appellant clearly intended that the two officers confronting him should believe that he intended seriously to threaten them, thereby inducing them to shoot him. The sentence passed was well within the sentencing parameters available to the Royal Court in all the circumstances of the case. The court would have arrived at the same sentence as Judge Finch, albeit by a different route.

Comment [Natasha Newell]: This case demonstrates that Channel Islands courts possess the autonomy to set their own sentencing guidelines. They are not bound by sentencing guidelines emanating from other jurisdictions. The Royal Courts of Guernsey and Jersey are entitled to set their own tariffs even in matters in which English guidelines exist, as this case clearly shows. This case also represents the first sentencing case on gun crime to come before a Guernsey Court. Gun crime includes possessing an imitation firearm. The court's desire to ensure that severe sentences are imposed in this area as a deterrent and to ensure and protect the relative safety enjoyed in Guernsey is also a striking feature of this case.

[9] [1998] 1 Cr App R 420.

FAMILY LAW

Appeal against Community Parenting Order

In re K (a minor) [2014] GRC unreported (Royal Ct: Collas, B)

PM Grainge for the first and second appellants; KE Hill-Tout for the first respondent; SJ Bailey for the second respondent

The Juvenile Court granted a Community Parenting Order (CPO) under s 49 of the Children (Guernsey and Alderney) Law 2008 ("the 2008 Law"), supported by a child's plan which recommended that a child (K) be placed for adoption. K's parents appealed the decision on various issues and challenged a number of the court's factual findings. They contended that the court had insufficient regard their recent progress in addressing their use of illegal and non-prescribed drugs; that the court was wrong in finding that unless protective measures were put in place, K was likely to suffer significant impairment to his health and development; that they were deprived a further chance to demonstrate that they could safely parent K and provide adequate care, protection, guidance and control for him; and that K's plan was inappropriate and paid insufficient regard to the risks of breaking the relationship between K and his natural birth family. The judge in the Juvenile Court had criticised the parents' credibility and had not believed all of their evidence. The court reminded itself of the relevant legal provisions under the 2008 Law, the child welfare principles and checklist, the concept of parental responsibility, and the question of whether and when compulsory intervention may be needed in respect of a child (the threshold criteria).

Held:

The proper approach for the Royal Court when sitting as an appeal court in civil cases was that adopted by the Court of Appeal, that is to say, it should not interfere with findings of fact made by a Magistrate unless it was satisfied that there was no evidence before it on which the Magistrate could reasonably have arrived at those findings, or that for any other reason the finding of fact of the Magistrate was perverse.[10] Except in relation to the Juvenile Court's findings of fact, the Royal Court would only interfere with a finding of the Juvenile Court that the threshold was crossed (and that an order should be made) or a decision as to the disposal of the case if the court's decision was wrong. This was not such a case. There was evidence on which the judge could have reasonably reached her findings and the judge's failure to make a specific finding in relation to cannabis usage did not

[10] *Domaille v Harris, Requetes* 14.1.88; GLJ No 6 para 164.

amount to a misdirection. It was apparent that the judge was more concerned about the parents' general approach to the misuse of drugs and the deceit that inevitably accompanied such misuse. There was nothing to suggest that any part of the judge's decision was perverse; the judge had correctly applied the law and the appeal was therefore dismissed.

Comment [Natasha Newell]: This was the first time an appeal on the threshold criteria reached the Royal Court. It was also the first time the court had considered the standard of proof required to show the likelihood of future impairment of a child's health and development and the date at which the facts needed to be established within the context of s 35(2) of the 2008 Law.

LAND LAW

Construction of grant of servitude

Poulding v Elliot GRC 35/2014 (Royal Court: McMahon, DB)

TAT Crawford for the plaintiffs; MGA Dunster for the defendants

The plaintiffs placed a ramp on their defendant neighbours' strip of land (a driveway) over which the plaintiffs benefitted from a right of passage. The grant of servitude emanated from a clause in a conveyance registered in 1964. The plaintiffs purchased their property in 2007 and the defendants purchased theirs in 2001. Both conveyances referred to the right of way.

The bottom of the driveway adjoined a shallow gully on a road owned by the States of Guernsey. The gradient of the slope from the gully over the servient land before reaching the dominant land caused the second plaintiff, when passing in her vehicle, to scrape the underside of it across the ground. The ramp, placed partly over the defendants' land and partly over the gully, served to reduce the angle where the driveway joined the gully; thereby enabling the second plaintiff to drive her vehicle over the right of way without difficulty. The defendants objected to the ramp and a dispute arose as to whether the plaintiffs were legally entitled to place the ramp on the driveway. The plaintiffs argued that Guernsey law implies into the express grant of a right of way an ancillary right to enter upon the defendants' land to do all such works to it as were necessary to use and preserve the right of way and render it fully effective in accordance with the purpose for which it was granted. Such a right, they argued, extended to placing and using a ramp over the defendants' land. The defendants also relied on the principle that there is a presumption in favour of freedom of land from the excessive burden of servitudes. Determination of the respective rights conferred on the parties was taken as a preliminary issue. The defendants argued that the plaintiffs

must take the land over which the servitude exists as they found it, that is with the attendant potential problems caused by the steepness of the driveway. They opposed the plaintiffs' suggestion that the servitude granted encompassed the right to place the ramp where it has been placed. The defendants relied on art 697 of the French *Code Civil*, which they said was a codification of the customary law position and formed part of the law of Guernsey. Article 697 said, in essence, that a person to whom servitude had been granted was entitled to do such works as were necessary to enjoy and preserve the right. However, they argued that the right was inevitably limited and that the English law concept of making the right of way "fully effective" had to be viewed in the light of the principle that such works as were envisaged were predicated on necessity. Customary authority was cited extensively.

Held:

The plaintiffs did not enjoy the right they had asserted and their action in placing the ramp on the defendants' land was a breach of the servitude from which their land benefitted. The tenor of the authorities pointed towards works being carried out from necessity rather than personal convenience. The starting point for the determination of the extent of the ancillary rights associated with a grant of passage was always going to be the express words of the grant itself. The true intention of the parties contracting at the time needed to be identified. Owing to the gradient of the slope, there would always (since the servitude was first granted in 1964) have been some vehicles for which it would have been impossible to drive over the right of way. The parties to the original grant did not intend to extend the grant to encompass every possible vehicle that might be used. There was a difference between carrying out repairs to bring the right of way back into its former state, or other necessary works to make it reasonably fit for the purpose for which it was granted, and works to make it more convenient to use. It was clear that the right of way over the defendants' land continued to be capable of being used by vehicles, albeit not every vehicle. The fact that some vehicles had difficulties driving over the strip of land from the road where the gully was situated was something that has always existed. The dominant land owner was unable to insist on carrying out works on the servient land to achieve what it wished unless it genuinely was necessary to be able to enjoy each aspect of the right conferred. As soon as it was conceded that the right to come and go over the driveway with vehicles was capable of being exercised and so the right of way granted enjoyed, necessity had been displaced. Personal preference as to the vehicle of choice for the plaintiffs, and for their successors in title, or their visitors did not equate to necessity. The section of ramp placed on the servient land against the wishes of the defendants detracted from the

usability of the land for the defendants and so offended the legal principle that the dominant land owners will exercise the servitude in a way which minimises the inconvenience to the defendants.

Meaning of "Public of the Island of Jersey"

Pearce v Treasurer of the States [2014] JRC 139B (Royal Ct: Bailhache, DB and Jurats Clapham and Blampied)

C Hall for the appellant; GGP White for the respondent

The appellant appealed from the decision of the Master to strike out his answer and enter judgment in favour of the States Treasurer for the sum of £268.20, representing GST on the rental due by the appellant in respect of certain premises in the Central Market. The lease had been granted in 2005 by the Environment and Public Services Committee of the States of Jersey "for and on behalf of the public of the Island of Jersey". The appellant contended that the Master had been wrong to find that the lease did not fall within an exemption to GST, namely the exemption under art 5(1) of Schedule 5 (to which art 48 refers) of the Goods and Services Tax (Jersey) 2007 in respect of a supply of goods or services by a "charity". Article 5(2) of Schedule 5 defines "charity" as—

> "a corporation, association, or trust, the income from the property of which is exempt from income tax by virtue of Article 115(a), (aa) or (ab) of the Income Tax (Jersey) Law 1961."

Article 115(a)(D) of the 1961 Law exempts from income tax any income derived from the property of "a corporation, association or trust established in Jersey for . . . (D) A purpose beneficial to a whole community . . ." The appellant argued that income from a holding of property held for the public of the Island of Jersey fell within this exemption because the words "Public of the Island of Jersey" referred to an entity that was a corporation established in Jersey for a purpose beneficial to the whole community.

Held:

(1) An historical examination of contracts from 1799 onwards showed that the distinction between lands owned by the Crown and lands owned by the people of Jersey was one that had existed for a long time. The nature of ownership by the Public does not change when one Jersey resident dies and another one is born. No member of the public has any form of personal ownership interest in the land which is owned on behalf of the Public, nor in the asserted corporation named "the Public" such that makes that interest capable of alienation. There was thus no individual interest in the land or in "the Public" which can be disposed of by will, sale or gift, or be the subject of

licitation. It was also not the case that any member of the public can act on behalf of the Public in relation to land which is owned by the Public. At the end of the 18th century, an Act of the States was required in order to authorise the Crown Officers to pass a contract on behalf of the States or on behalf of the Public. The different approaches taken to conveyancing expressions at about that time showed that "the States" and "the Public" were interchangeable. Today, the Attorney General and Greffier of the States pass contract "for and on behalf of the Public of the Island" only because they are so authorised by the States by virtue of Standing Order 168(5).

(2) It was important to distinguish between the rights of the administering authorities and the rights of the owner. The expression "*pour et au nom du Public de cette ile*" or "for and on behalf of the Public of this Island" was merely descriptive of the obligations which attach to the States by virtue of their ownership of immovable property.

(3) It was not right to describe that arrangement as a form of trust in the modern sense. "The Public" is not an identifiable class of beneficiaries in the sense that all of them might get together and bring the trust to an end on the adoption of the principles in *Saunders v Vautier*,[11] which enabled the *cestui que trust* to achieve that objective. On the contrary, "the Public" in this context is a concept and not a class of beneficiaries. The States own the land for public benefit because the States represent the democratically elected government of this Island, which exists for the benefit of all. At the time that the conveyancing expression was developed, it was possible that the concept of the States having a corporate status in law, at least for these purposes, had not been routinely identified as such; but that is what the States now have, as do the parishes. There are numerous examples, such as art 3 of the Roads Administration (Jersey) Law 1960 which sets out the circumstances in which "it shall be lawful for the States to acquire such land by compulsory purchase on behalf of the public".

(4) It followed that "the Public" is not a charity for the purposes of art 5 of Schedule 5 of the Law. It is not a corporation, association or a trust: see the decision of Le Marquand, Judicial Greffier, in *Bené Ltd v Hanson (t/a VAR Hanson & Partners)*[12] accordingly affirmed. It is not even the owner of the property in question, and it has no income. Accordingly, the supply of the service—the lease in question in this case—was not a supply by a charity. It was a supply by the States, the owners of the land, which, in their capacity as owner, authorised

[11] (1841) 4 Beav 115.
[12] 1995 JLR 323.

particular members or officers to transact in the land on their behalf. The decision of the Master was accordingly affirmed.

TRUSTS

Constructive trust—*Quistclose* trust—dishonest assistance

Nolan v Minerva Trust Ltd. [2014] JRC 078A (Royal Ct: Hunt, Commr and Jurats Clapham and Olsen)

NM Santos-Costa for the plaintiffs; ML Preston for the defendants

Between March 2005 and September 2006 an Irish family (the Nolans, together with their relevant family companies, "the plaintiffs") had, individually and through companies, paid money on various occasions to an investment adviser for the purpose of investment in schemes proposed by him. The money was to a large extent dissipated by Mr Walsh on unrelated expenditure, including personal expenditure. The court found that by 2005 at the latest Mr Walsh "was, or had become, a fraudster". Efforts to recover money from Mr Walsh personally proved fruitless. Mr Walsh had conducted his business through a group of Jersey companies held by an Isle of Man trust, with an Isle of Man trustee, of which he was the settlor and a beneficiary. The Jersey companies were provided with administrative services and directors by a Jersey trust company. Minerva Trust ("Minerva") had, as a result of a merger, assumed the liabilities of the trust company in question. The plaintiffs sought to recover their losses (which they valued at over £5m and €8m) from Minerva on the basis that Minerva was vicariously liable for the dishonest assistance provided by the trust company's employees or directors to Mr Walsh in breach of trusts arising from their investments by complying with Mr Walsh's instructions to pay away the money transferred by the Nolans to Mr Walsh's companies on unrelated expenditure.

Held:

(1) **Requirements for claim for dishonest assistance.** For the claim for dishonest assistance to proceed, the plaintiffs had to establish: (a) the existence of a trust in their favour; (b) a breach of that trust; (c) that the trust company had assisted in that breach of trust; and (d) that in rendering that assistance the trust company had acted dishonestly.

(2) **Existence of trust—applicable principles**. On the facts as found by the court, the plaintiffs could argue that a trust of the money paid over had arisen in their favour in two alternative ways: (a) a

constructive trust or (b) a *Quistclose* trust, which derived its name from *Barclays Bank Ltd v Quistclose Invs Ltd.*[13]

(3) **Constructive trust**. There were two theoretical possibilities for finding a constructive trust. Following the position in English law, a contract that it is itself a vehicle to defraud is void and any money transferred to the fraudster under it is immediately held by the fraudster on a constructive trust. The court referred to this kind of trust as a *Halley* trust (after *Halley v The Law Society*[14]). Where the contract is a valid contract in itself, but has been induced by means of a fraudulent misrepresentation, the innocent party may rescind the contract and a constructive trust arises only on that rescission becoming effective. The court referred to this a non-*Halley* trust. The particularities of the Jersey law of contract do not affect the application of the principle that, in order for a non-*Halley* trust to arise, the contract has to be rescinded by the innocent party. There was no suggestion that the Nolans had ever rescinded the contracts. Accordingly, the court found that they were only able to argue that a constructive trust of their money had arisen on the basis of a *Halley* trust. The key question under the *Halley* trust route was whether the arrangement entered into with the fraudster had been "the instrument of fraud, and nothing else" (quoting Carnworth, LJ in *Halley*). Two Australian cases also provided valuable guidance on the principles applicable for the establishment of a *Halley* trust: *Orix Australia Corp Ltd v Moody Kiddell*[15] and *Barrett & Sinclair v McCormack.*[16]

(4) ***Quistclose* trust**. As regards a possible *Quistclose* trust, the House of Lords held in that case that money advanced for a specific purpose (such as the payment of a particular debt) is impressed with a trust for that purpose and does not become part of the debtor's estate. The trust continues to subsist until the moneys are applied in accordance with the purpose for which they were lent. The necessary conditions for the imposition of a *Quistclose* trust had been summarised by Patten, LJ in *Bieber v Teathers Ltd*[17], following *Twinsectra Ltd v Yardley.*[18]

(5) **Dishonesty**. As to the dishonesty required by the law of dishonest assistance:

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[13] [1970] AC 567.
[14] [2003] EWCA Civ 97.
[15] [2005] NSWSC 1209.
[16] [1999] VUCA 11.
[17] [2012] EWCA Civ 1466.
[18] [2002] 2 AC 164.

(a) The starting point was *Cunningham v Cunningham*,[19] following *Royal Brunei Airlines Sdn Bhd v Tan*[20] and *Twinsectra*. A defendant's knowledge of a transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. There was no requirement that he should have had reflections about what those normally acceptable standards were; the test was objective.

(b) Carelessness is not dishonesty; but deliberately closing one's eyes and ears and proceeding without asking questions can be dishonest. It is impossible to be specific about the degree to which risk may be taken without dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee (in this case Mr Walsh's company) or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. Circumstances dictate the possible courses to be taken by an honest person. He might, for instance, decline to become involved; ask further questions; seek advice, or insist on further advice being obtained; advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct. The courts will look at all the circumstances, including the personal attributes (such as intelligence and qualifications) of the person sought to be made liable: *per* Lord Nicholls in *Royal Brunei*.

(c) It is not necessary that the person should have appreciated that he was acting dishonestly; it is sufficient that he was. Neither an honest motive nor an innocent state of mind will save a defendant whose conduct is "objectively dishonest": *per* Lord Millett in *Twinsectra*.

(d) A dishonest state of mind is a subjective mental state, but the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the

[19] 2009 JLR 227.
[20] [1995] 2 AC 378.

defendant judges by different standards: *per* Lord Hoffman in *Barlow Clowes Intl Ltd v Eurotrust Intl Ltd.*[21]

(e) The relevant circumstances in which the personnel of the trust company were placed included the terms of the client services agreement with the trust company's client and the legal and regulatory obligations imposed on them.

(f) An allegation of dishonesty does not call for a higher degree of probability; but the court will bear in mind that the more serious the allegation, the less likely it is to have occurred (*In re H (Minors)*[22]) and that professional men and public officials are very unlikely to be dishonest in way which entails great risk to them unless there is some incentive to do so (*Three Rivers DC v Bank of England*[23]); the more improbable the act in question, the more compelling the evidence needed (*Aktieselskabet Dansk Skibsfinansiering v Brothers*[24]).

(g) The facts from which dishonesty is inferred need to be consistent with dishonesty and not merely with negligence. As a general proposition, beneficiaries cannot reasonably expect that all the world dealing with their trustees should owe them a duty to take care lest the trustees are behaving dishonestly: *Royal Brunei*.

(6) **Decision on dishonest assistance on the facts**. The plaintiffs had made eight different investments which they transferred to Mr Walsh's Jersey companies. In each case the court found on the facts that (a) there was a *Quistclose* trust, but not (save in respect of one of the investments) a *Halley* trust, under which Mr Walsh's company held the money transferred by the plaintiffs to that company on trust for the relevant plaintiffs; (b) there was a breach of that trust by Mr Walsh's company; (c) the trust company assisted in that breach of trust by reason of its personnel effecting the relevant payments out of Mr Walsh's companies on his instructions; and (d) that assistance had been dishonest.

Trustee's liability to a third party should be governed by the law of the trust

Investec Trust (Guernsey) Ltd v Glenella Properties Ltd (in liquidation) GCA 28/2014 (CA: McNeil, Martin, Logan Martin, JJA)

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[21] [2006] 1 WLR 1476.
[22] [1996] AC 563.
[23] [2003] 2 AC 1.
[24] [2001] 2 BCLC 324.

J Wessels for the plaintiffs; JP Greenfield for the first to fourth Defendant; IC Swan for the fifth defendant

The appellants, Investec Trust (Guernsey) Ltd and Bayeux Trustees Ltd (together "the Former Trustees") were the Guernsey-based trustees of the Tchenguiz Discretionary Trust (TDT), a trust governed by Jersey law. The Former Trustees recorded that they had entered into a number of loan arrangements with several BVI Companies ("the BVI Companies") which formed part of the trust structure and which had since gone into liquidation. Joint liquidators sought repayment of the loans and the amounts claimed exceeded the value of the trust assets. Within the context of a complex, lengthy, multi-party dispute, the issue arose as to whether, if monies were due and owing under the loans, the amounts claimed were limited to the value of the trust fund or whether the Former Trustees were personally liable. It was common ground that they were acting *qua* trustees. The trustees applied to the Guernsey Court for declarations that under art 32 of the Trusts (Jersey) Law 1984, they had no personal liability in relation to the loans, claims in respect of which extended only to the trust property; alternatively, that they were only liable as trustees to the extent of the trust assets. Section 65 of the Trusts (Guernsey) Law 2007 provided that a foreign trust was governed by and should be interpreted in accordance with its proper law. It was argued that the proper law of the debts was that of Jersey and that accordingly they were protected from personal liability. The judge at first instance held that art 32 did not apply and that he was not required to decide which law governed the loan transactions. On his analysis, it was enough that the transactions were not covered by Jersey law. Section 65 of the Guernsey Law was restricted to the enforcement of the foreign trusts in question, which was not a feature of the instant case, and could not be employed to enable art 32 to apply. The judge held that the debt claim was not a trust claim as the BVI companies were strangers to the trust. The Former Trustees appealed, arguing that on a proper construction of the loan arrangements no personal liability was imposed or alternatively that a term to that effect should be implied.

Held:

The judge had erred in determining the impact of s 65 on litigation in Guernsey. In the statute, what is referred to as a "trust" is a dynamic linear relationship between a trustee and either a beneficiary or persons with an interest in a purpose, the relationship being governed both by identified trusts purposes and the general law. It is that relationship which is valid and enforceable in Guernsey. Section 65 simply provided that a foreign trust shall be determined by its proper law. The Royal Court was given jurisdiction in respect of a Guernsey trust and any other trust where the trustee is resident, or the trust property is

administered, in Guernsey. One had to consider the ambit of the jurisdiction conferred upon the Royal Court as a whole and the ambit of its powers. There was no conflict of laws provision in the Trusts (Guernsey) Law 2007. It was therefore unnecessary to look to Guernsey trust law for a direction in relation to how to resolve an issue which may be properly characterised as a conflict of laws issue. The appropriate conflict rule had to be considered. It did not follow that the law governing the loan arrangements governed the extent of the Former Trustee's liability. The court drew assistance from what it considered to be a generally accepted rule of private international law regarding companies and partnerships, whereby the law of the place of incorporation determines, amongst other things, the extent of an individual member's liability for the debts and liabilities of their respective company or partnership. On that basis, it was accepted that, where the law of one jurisdiction made provision regarding the potential liability of persons holding a particular status, those provisions, if of a substantive nature, would be recognised by the courts of the forum of the dispute. There was no distinctive element in the character of trusteeship which should lead to the application of a different rule regarding the extent of a trustee's liability where that trusteeship was recognised by a jurisdiction of which the other party to the transaction had been made aware than was the case in relation to corporate entities or partnerships with separate legal personality. Article 32 of the Jersey Law only bit where the third party knew that the trustee was acting as a trustee rather than in a personal capacity. Contracting parties were thereby put on notice that the person with whom they were contracting was doing so as a trustee. It was sufficiently clear that the trustees were not intending to incur any liability beyond the value of the trust assets. Guernsey courts should recognise the applicability of art 32 when determining such a dispute before them. The provisions of s 42 of the Trusts (Guernsey) Law 2007, whilst expressed in slightly different terms, had the same effect as art 32 of the Jersey Law. The Royal Court had given too narrow an interpretation to s 65 (and Parts III and IV) of the Guernsey Law, which provided for the enforceability of foreign trusts in Guernsey. A foreign trust should be governed and interpreted in accordance with its proper law, including the effect of the trust under its proper law, to include whether by virtue of that law there was a restriction on liability. The provisions of art 32 ought to be applied in considering the liability of the Former Trustees who should bear no personal liability in respect of the loans extending beyond the assets of the trust.

Comment [Natasha Newell]: This decision is a welcome development regarding the protection of Channel Island trustees' personal liability to third parties. It will also be of some comfort to trustees in other jurisdictions with similar limitation of liability

provisions in their trust legislation. Where contracts are entered into with a third party and the latter knows it is contracting with a trustee *qua* trustee, trustees are entitled to rely on liability limitation provisions of the applicable foreign law governing the trust.

Unit trusts—trustees and managers

Barclays Wealth Trustees (Jersey) Ltd v Equity Trust (Jersey) Ltd [2014] JRC 102D (Royal Ct: Herbert, Commr, sitting alone)

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

The plaintiffs, as current trustee and manager respectively of three Jersey unit trusts, brought proceedings against the defendants, respectively the former trustee and manager of those unit trusts, alleging breaches of duty in contract, trust and other equitable duties which were argued to be owed to the unit holders and enforceable by the current trustee and manager. The trust instrument of each trust vested virtually all the trustee-like functions in the manager rather than the trustee. In their Order of Justice the plaintiffs contended, in particular, that that the former manager was in substance a co-trustee of the funds and that it owed the duties of a trustee to the unit holders, which were capable of enforcement by a successor trustee. Alternatively, it was contended that the former manager had been a fiduciary office holder owing fiduciary duties to the unit holders as well as equitable duties of care and skill. The defendants sought an order striking out most of the claims made by the plaintiffs. The case, albeit a "striking out" application, thus raised important questions about the nature of unit trusts, the legal status of managers and trustees of unit trusts, and the juridical basis of claims against them by a successor trustee and successor manager.

Held: declining to strike out any part of the plaintiffs' Order of Justice—

(1) **General nature of unit trust**. The basic question for the court was the degree to which a unit trust is contractual or fiduciary in regard to the obligations imposed on the trustee and manager. There was little judicial authority on the exact nature of the relationships created by a unit trust. The court referred to textbook and academic authority.[25] Some preliminary conclusions could be drawn. As a matter of pure generality, a unit trust can be expected to establish a triangular relationship between the manager, the trustee and the unit holders. All

[25] In particular, Underhill & Hayton, *Law of Trusts and Trustees* (18th ed), Kam Fan Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, 1997, reprinted 2007), and Thomas & Hudson, *The Law of Trusts* (2nd ed).

three writers emphasised the contractual origins of that relationship, but all of them also recognised that the unit trust operates as a trust. Agreeing with the broad thrust of Sin's approach, a unit trust was essentially contractual but with a trust relationship created by the contractual nexus and with the manager having fiduciary obligations owed to the unit holders; but, in contrast to Sin, it was at least arguable that a unit trust manager was a trustee. In the present case, the contractual and trust features of the triangular relationship were spelt out in formal language in the trust instruments. The trustee and the manager owed trustee-like or fiduciary duties and obligations to the unit holders. The original manager and trustee had agreed to owe contractual obligations to each other. They were parties to formal instruments containing those obligations, and it can be taken that each company knew and consented to the contents of those instruments and intended to be bound by them.

(2) **Issues in the present case**. Relevant to the present application, remained three important questions. (a) What is the extent of the duties and obligations owed by the trustee? (b) What is the nature (contractual or fiduciary or both) of any duties owed by the manager to the unit holders? (c) Can any such duties and obligations be legally enforced by the successor manager and trustee, or by either of them? Given the lack of judicial authority on such questions, and given the difference in emphasis between the only academic or textbook writers whose views the court was asked to consider, it might be thought, with justification, that it was inappropriate to reach definitive views in the course of an application to strike out pleadings. But the court was prepared to deal with the application on its merits.

(3) **Claims in contract**. The order of justice contained claims in contract against the former trustee and manager. To the extent that it pleaded a contract between the former trustee and the unit holders, the current manager and trustee were not, in the absence of assignments in their favour, in a position to pursue claims based solely on contracts between the unit holders and the defendant companies. However, so far as the claims were based on a contract between the former trustee and the former manager, the trust instruments created contractual obligations enforceable between themselves, and cl 4 of each trust instrument ("The terms and conditions of this Instrument shall enure for the benefit of and be binding on each Unit holder and all persons claiming through or under him . . .") showed that these obligations were made for the benefit of the unit holders. This probably meant that the plaintiff companies did have locus to enforce those obligations against the defendant companies, and accordingly the Commissioner was not prepared to strike out those paragraphs. Moreover, to the extent that the former manager or trustee was a trustee, the Trusts (Jersey) Law 1984, art 21(1) imposes the statutory duty of diligence.

This was not free-standing but it was overriding. Article 21 applies only to trustees but, even if the former manager was not strictly a trustee, it was at least arguable that a duty undertaken for the benefit of others (having regard to cl 4 of the trust instruments) carried an implied duty of diligence to the same or similar effect.

(4) **Trust claim against the former trustee**. The trusts contained clauses protecting the trustee from liability where it has followed "Proper Instructions" (as defined therein) without any duty to enquire into their genuineness or authenticity. The Commissioner was not prepared to strike out a claim alleging a residual duty on the part of a trustee to challenge unauthorised instructions to the manager where the trustee had actual knowledge of the facts and also where it would have had that knowledge had it complied with a trustee's statutory duty of diligence.

(5) **Trust or other equitable claims against the former manager**. It could be said with confidence that (i) the manager owed fiduciary obligations to the unit holders in regard to its duties and responsibilities as manager, and (ii) breach of those duties and responsibilities would give rise to enforceable claims either to replace assets which had been paid away without authority or to make reparation. It might therefore make little difference whether the manager was a trustee or not. But it was possible that it does make a difference, partly by reason that art 21 of the 1984 Law applies only to a trustee, and the implied duties owed by a non-trustee fiduciary may be different from those imposed by statute.

(6) It was at least arguable that the manager of a unit trust is liable as a trustee. The court will not regard itself as bound by the titles and descriptions which the parties have chosen and agreed to give to themselves and each other. It will analyse the substance of the situation and use that analysis to determine the remedies available. In the present case, the example of investment management was an important one: all the relevant duties and powers are exercisable by the manager, and the nominate trustee must obey the manager's directions. Virtually all the trustee-like functions were allocated to the manager, virtually none to the trustee. It would be stultifying for the court not to hold the manager responsible for the way in which it executes its duties and exercises its powers. Questions of licensing and insurance were red herrings.

(7) Even if the manager is not a trustee, its duties and obligations are to be carried out for the benefit of the unit holders, not for the personal benefit of the manager or that of the trustee. The plaintiffs might be able to show that there is a sufficient relationship of trust and confidence between the unit holders and the manager. If so, that would

give the unit holders the right to enforce the manager's obligations and to claim equitable remedies in respect of their breach.

(8) In the present case, the unit holders were not parties to the proceedings; these had been brought by the current trustee and manager. The defendants argued that the plaintiffs had no locus to bring the proceedings. However a trustee has standing to sue a former trustee for any breach of duty (not limited to breaches of fiduciary duty in a narrow sense). Earlier editions of *Lewin on Trusts* (including the 16th) stated that a trustee cannot sue a former trustee for a breach which sounds in damages. This was based on a misreading of *In re Forest of Dean Coal Mining Co.*[26] Following analysis in the Australian case of *Young v Murphy*,[27] the position is corrected in the current edition of *Lewin* where it is said that "It is the duty of a new trustee to obtain satisfaction for past breaches of trust". The present claims against the former manager—which related to (1) unauthorized payments by companies comprised (indirectly) in the trust funds, and (2) breaches of a duty of care owed to the beneficiaries of the trust—were claims which a successor trustee may legitimately make.

(9) The present manager was also a plaintiff. The defendants objected to it being a plaintiff if it was not a trustee. However it was at least arguable that it was a trustee and, even if it were not, the nominate trustee was required to act on the directions of the manager and it would be absurd to insist on the trustee being the sole plaintiff in circumstances where the actual decisions about the litigation were being taken by the manager.

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[26] (1878) 10 Ch D 450.
[27] Victoria Court of Appeal, [1996] 1 VR 279.