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

ARBITRATION

Unfair prejudice—just and equitable winding up

Consolidated Resources Armenia v Global Gold Consolidated Resources Ltd [2015] JCA 061 (JCA: Bennett, Collas, and Bompas JJA)

A Kistler for the plaintiff; JMP Gleeson for the second and third defendants.

The question was raised, *inter alia*, as to whether an unfair prejudice claim and a claim for a just and equitable winding up under the Companies (Jersey) Law 1991 are capable of arbitration.

Held:

(1) **General duty of the court to uphold parties' agreement as to reference to arbitration.** Although s 1 of the Arbitration Act 1996, which includes the general principle that "parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest" is not reflected in the terms of the Arbitration (Jersey) Law 1998, the maxim of Jersey law that "*la convention fait la loi des parties*" had the same effect. There were many good reasons why the shareholders in a company may agree to refer future or present disagreements to arbitration. They may wish to maintain confidentiality to preserve commercial secrets, or to avoid tarnishing the public reputation of the company perhaps to protect the price of the company's shares on a stock exchange. They may wish to have a method of achieving a speedier resolution than would be achievable through the courts. There is no public interest in denying parties the opportunity to do so unless there are third parties rights that

cannot be protected in the arbitration. The duty of the courts is to hold the parties to the agreement they have reached.

(2) ***Fulham FC v Richards* followed.**

(a) In *Fulham FC v Richards*,[1] the English Court of Appeal rejected the contention that a party seeking relief in an arbitration under the Companies Act would be deprived of an inalienable statutory right to apply to the courts for relief, overruling *Exeter City Assoc FC Ltd v Football Conference Ltd*.[2] The present court concurred with the decision in *Fulham*, quoting with approval from the judgment of Patten LJ: the agreement does not arrogate to the arbitrator the question of whether a winding-up order should be made; that remains a matter for the court in any subsequent proceedings; but the arbitrator may decide whether the complaint of unfair prejudice is made out and whether it would be appropriate for winding-up proceedings to take place or whether the complainant should be limited to some lesser remedy; and it is only in circumstances where the arbitrator concludes that winding-up proceedings would be justified that a shareholder would then be entitled to seek a court order for the winding up of the company, with any stay of proceedings being then lifted.

(b) The Court of Appeal concluded that there was no public policy reason for holding that either the unfair prejudice claim or the claim for a just and equitable winding-up were incapable of arbitration. A reference to arbitration in New York under the arbitration clause would not deny the plaintiff the right to apply to the Royal Court for the relief available under the 1991 Law either in respect of unfair prejudice or for a winding up on just and equitable grounds. If the arbitrator, under New York law, were unable to make such an award, he could make an order to the effect of requiring the parties to apply to Jersey courts to obtain whatever relief he found to be appropriate.

CIVIL PROCEDURE

Scope of protection attaching to without prejudice communications

Barclays Wealth Trustees (Guernsey) Ltd v Alpha Development Ltd (GCA: Martin, Calvert-Smith and Anderson JJA) Judgment 19/2015

M Dunster for the appellants; G Bell for the respondents

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[1] [2012] 1 All ER 414.
[2] [2004] 4 All ER 1179.

The appellant defendants had, at first instance, been refused disclosure of certain documents in the context of a dispute arising from cancelled bank loan arrangements. The loans were intended to fund a substantial property development project and the respondents argued that the alleged failures of the appellants had lost them the benefit of the finance which had in turn brought about the loss of the development. The respondents said that alternative finance available to them was unsuitable and that they could not establish such unsuitability without revealing the terms on which the finance was offered. The appellants sought disclosure of documents relating to the settlement or refinancing negotiations between the bank and the respondents. The latter argued that the documents sought were protected from disclosure by without prejudice privilege belonging jointly to them and the bank. Marshall, Lieut Bailiff found that the documents were *prima facie* privileged and that the respondents could not unilaterally waive such privilege. The judge was not satisfied that the *Muller* exception[3] was good general law in England. Nor was she of the view that it was a part of Guernsey law. The arguments in the appeal centred on the scope of protection attaching to without prejudice communications, the *Muller* exception and its current status in England.

Held: The starting point in any discussion of modern without prejudice protection was the House of Lords decision in *Rush & Tomkins Ltd v Greater London Council*.[4] That case suggested that the question of admissibility of without prejudice evidence had to be looked at broadly and resolved by balancing two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation. The following propositions emerged from *Muller*: (1) insofar as the without prejudice rule was based on public policy, it was directed solely to admissions and did not prevent reference to statements which were relevant otherwise than as admissions, *i.e.* independently of the truth of the facts alleged to have been admitted. This was "the independent relevance rationale"; (2) reliance on the correspondence was not contrary to the underlying public policy interest in encouraging settlements. Although that policy might be thought to be infringed because a party may be inhibited from negotiating if he knew that his communications would be open to examination in order to decide if he had acted reasonably, this was a consequence of the rule that a party entitled to an indemnity must act reasonably to mitigate his loss. It

[3] See the English case of *Muller v Linsley & Mortimer* [1996] PNLR 74 pursuant to which without prejudice correspondence may be admitted as evidence where the court is looking at the reasonableness of the settlement.
[4] [1989] 1 AC 1280.

would be inconsistent to give the indemnifier the benefit of this rule but to deny him the material necessary to make it effective. The balancing exercise between the public interest in promoting settlements and the public interest in full discovery between parties to litigation was referred to as "the balancing rationale"; (3) a party who put in issue against a third party the reasonableness of his own conduct in reaching a compromise would be taken to have waived the without prejudice protection attaching to the communications by which that compromise was reached. This was "the waiver rationale". English law post-*Muller* had developed in such a way that the without prejudice rule was no longer treated as being solely designed to protect a party from use against him of admissions that he had expressly or impliedly made in negotiations. Protection against such use was merely a common instance of the application of the rule. Although the statement in *Muller* (that the public policy rationale is directed solely to admissions) is no longer good law in England, the *Muller* case can still be sustained on the basis of the three rationales above. The respondents were directed to disclose the documents sought and the appeal was dismissed.

Security for costs

Shelton v Barby (GCA: Pleming, Perry and Birt JJA) Judgment 26/2015

The appellant did not appear; GSK Dawes for the respondent

The Bailiff had ordered the plaintiff appellant to provide security for costs in connection with his appeal against a decision dismissing his claim. Rule 12(5) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 provides that the court may, in special circumstances, order security to be given for the costs of an appeal as may be just. The respondent's counsel had identified three categories of special circumstances: (i) the appellant's impecuniosity; (ii) the difficulty or expense in enforcing a further costs order; and (iii) the appellant's prospects of success and the conduct of the action to date. The appellant argued that the Guernsey courts should follow the approach in England under CPR 25.15 whereby the relevant test was materially identical to that applied in the courts below. The appellant was a natural person, meaning that if the CPR 25.15 principles were applied, security for costs could not be ordered against him on the grounds of his impecuniosity alone. The Bailiff rejected this argument and found that there was no scope for adopting any rule other than r 12(5). In making the order, the Bailiff rejected the appellant's submission that impecuniosity was not a ground on which security for costs could be ordered. He gave consideration to the merits of the appeal and the substantial costs orders already made against the appellant who, on his

own admission, was not a wealthy man. He found that the appellant's residence outside the jurisdiction added to the difficulty or expense in enforcing a further costs order to the extent that there would be additional costs of enforcement in the foreign jurisdiction. The appellant applied to discharge the Bailiff's order, arguing before the full court that the Bailiff had been wrong to conclude that the prospects of the appeal were slight and that the appeal deserved to be heard and not stymied by the security for costs order.

Held: The court was required to interpret and apply r 12(5) so as to ensure it was compatible with art 6(1) of the European Convention on Human Rights, which guaranteed access to a fair and public hearing. If an appellant was shown to be impecunious, and without the means to raise sufficient funds to satisfy the order, there would then be a very real risk that he would be unable to prosecute his appeal and it would inevitably follow that the appeal would be dismissed. This raised a general concern as to the existence of impecuniosity as a category of special circumstance for the purposes of r 12(5) without breaching an appellant's right to access to justice. To allow a meritorious appeal to be stifled through lack of means would be to impair the very essence of the right of access to the courts. The correct approach was to look at the case in the round to see if there were special circumstances and whether or not it was right to make the order. Impecuniosity may be particularly relevant when the appellant seeks to establish that his appeal would be stymied. In the Court of Appeal, the starting point for the exercise of discretion to impose security for costs was different—the existence of full access to the first instance court had been recognised as significant; at the appeal stage, it was far easier for the court to form a view on the merits. If there were a test to be applied, it ought to move towards a position whereby security would not be ordered unless there were a weak case on appeal, perhaps even with little or no realistic prospects of success. There had to be a balancing exercise between the appellant's right of access to the court and the respondent's right not to be subjected to expensive court proceedings where, even if he won, it would be at his expense. The discretion to order security for costs in special circumstances had to be exercised with a considerable degree of caution and only when there were truly special circumstances. However, where an appeal had no reasonable prospects of success, it would not be a breach of the appellant's common law and art 6 rights for the court to seek to protect the respondent from having to resist such an unmeritorious appeal by the imposition of a security for costs order, even in the knowledge that the appellant was impecunious and unable to pay the costs so that he would not be able to proceed with his appeal. The appellant had little, if any, chance of succeeding in his appeal and was not in a position to seek sympathy from the court when considering the balancing

exercise, the overall justice of the case and that the appellant had been unwilling or unable to show, as a matter of fact, that complying with the security for costs order would indeed prevent him from prosecuting his appeal. The application would be dismissed; there were special circumstances justifying the making of an order for security and no countervailing circumstances to justify not making the order. The Bailiff's decision was proportionate and the interference with the appellant's access to the courts was justified.

Service out of the jurisdiction/Contempt of court

Tchenguiz v Akers and Hamedani (GCA: Bennett, Bompas and Birt JJA) Judgment 33/2015)

AM Davidson for the appellant; P Richardson for the respondent and JP Greenfield for the intervener

The appellant, Hossein Hamedani, appealed against an order of Talbot, Lieut Bailiff dismissing his application to set aside an order for service out of the jurisdiction of an application of the respondent to have the appellant committed to prison for contempt of court. The committal application concerned an allegation by respondent that the appellant had aided and abetted in the disclosure of material covered by confidentiality provisions contained in a previous order (the Protocol Order). In the appeal, the appellant argued that (i) the committal application failed to disclose any reasonable case against him, even assuming that the matter was properly justiciable before the Royal Court (the factual ground); and (ii) the Royal Court had no jurisdiction to punish a foreigner for contempt of court consisting of aiding and abetting of a breach of an order not addressed to the foreigner, where the foreigner was abroad and had not submitted to the court's jurisdiction and the acts said to amount to contempt were wholly committed abroad (the jurisdiction ground).

Held, allowing the appeal:

It was first necessary to consider the law governing the discretion to allow service of an application out of the jurisdiction, pursuant to s 8 of the Royal Court Civil Rules, 2007. *Carlyle Capital Corporate Ltd v Conway*[5] set out the criteria to be considered in a case such as this. Applying that criteria, to allow service out the court must have been satisfied that: (i) there was a serious issue to be tried on the facts, such an issue being one as to which there was a real prospect of success; (ii) the cause was properly justiciable (the court could draw assistance from neighbouring jurisdictions in relation to the available "gateways"

[5] Judgment 29/2011.

prescribed by their rules of court for service out); (iii) Guernsey was clearly and distinctly the appropriate forum; and (iv) in the circumstances the court should exercise its discretion under rule 8(1) to allow service out. In relation to the factual ground, the information disclosed by the appellant was not disclosed "pursuant to" the Protocol Order and was therefore not covered by that order's confidentiality provisions. Accordingly, the committal application did not contain the necessary statement of facts which, if true, would have given rise to an arguable case that there had been a contempt of court by the appellant. Since the case sought to be made against the appellant in the committal application had not raised a seriously arguable case that he was guilty of contempt, the appeal would be allowed in relation to this ground. As regards the jurisdiction ground, following Lord Donaldson MR's statement of principle in *Derby & Co Ltd v Weldon (Nos 3 & 4)*,[6] Talbot, Lieut Bailiff had been wrong to conclude that the conditions in r 8(2) of the Royal Court Civil Rules, 2007 gave him jurisdiction to allow service of the committal application on the appellant, who was a non-resident who was out of the jurisdiction for things done by him out of the jurisdiction. It was therefore inappropriate for the Royal Court to have asserted an extra-territorial jurisdiction. The law relating to contempt of court was entirely Guernsey customary law which was similar to the common law of contempt in England and guidance was to be found in the English authorities.

EVIDENCE

Admissibility—expert evidence—lie detector test

In re Freddie and Arthur [2015] JRC 101 (JRC: Birt Commr, sitting alone)

CRG Davies for the applicant; ATH English for the first respondent; AD Field for the second respondent; NSH Benest for the third respondents; CG Hillier for the fourth and fifth respondents.

In care proceedings in which allegations and counter-allegations of a sexual nature had been made, the mother sought the appointment of a joint expert be appointed whose expertise lay in the use of the polygraph (lie detector apparatus). The court considered for the first time the admissibility in evidence of the results of a lie detector test and of expert evidence as to the interpretation of such results.

Held:

[6] [1990] Ch 65, at 82.

(1) **Lack of authoritative guidance for Jersey courts.** No authoritative guidance could be found. In *Leonard v State of Texas*,[7] the Court of Criminal Appeals of Texas stated that it had repeatedly held that the results of polygraph examinations were not admissible, where objected to, because the tests were unreliable. Such English and Commonwealth authority as there was tended to suggest that expert evidence based upon the results of polygraph testing is not admissible, although this remained to be tested before the English Court of Appeal.[8]

(2) **Return to first principles as to admissibility of expert evidence.** It was necessary to return to first principles. Evidence of opinion is in general inadmissible. By way of exception, experts may give their opinion on matters falling within their area of expertise. However expert evidence is only admissible on a subject calling for expertise.[9] The rule is identical in criminal and civil cases. The present case was a classic one in which the Jurats would have to decide whether they preferred the evidence of one side or another. The Jurats could undoubtedly form their own opinion without the assistance of an expert as to the credibility of the various witnesses, as it was a matter within their own experience and knowledge. If the court were to hold that expert evidence were admissible in this case to assist in determining the credibility of the witnesses, it was hard to see why such evidence would not also be admissible in any other case which turned on the credibility of the witnesses. Such evidence might be admissible in special cases (e.g. where the witness whose credibility is being assessed is suffering from some mental disorder) but that was not relied upon in the present case.

(3) **Polygraph tests inadmissible.** It would also not be right to allow evidence of polygraph testing itself. Such authority as there was suggested that it should not be admitted.[10]

Tracing—backwards tracing—lowest intermediate balance

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[7] [2012] PD-0551-10

[8] Grubin and Stockdale, "The Admissibility of Polygraph Evidence in English Criminal Proceedings", 76 (3) *Journal of Criminal Law*, 232–253.

[9] 28 *Halsbury's Laws of England* 601; *Blackstone's Criminal Practice* (2011 ed), F10.5.

[10] *R v Beland and Philips* (1987) 43 DLR (4th) at 641; *Bernal v R*; 28 *Halsbury's* at para 606; *Archbold* (2014 ed) at 10–58; *Phipson on Evidence* (17th ed) at 33–13.

Federal Republic of Brazil v Durant Intl Corp [2015] UKPC 35 (JPC: Lord Neuberger PSC, Lord Mance, Lord Carnwath, Lord Toulson, Lord Hodge JJSC)

D Lord QC and P Nicholls of the Jersey Bar for the appellants; C Dougherty QC and E Jordan of the Jersey Bar for the respondents.

On appeal by the defendants from the Jersey Court of Appeal, the question was raised before the Privy Council whether, under Jersey law of tracing, (a) it is possible for a claimant to trace "backwards" into an asset that was acquired before the defendant's receipt of the claimant's property, and (b) whether the so-called "lowest intermediate balance rule" provides an insurmountable obstacle to tracing. The Board also considered whether a claimant can trace backwards into property acquired by the defendant where the claimant's funds have been used by the defendant to repay an overdraft or other debt.

The proceedings concerned the attempt by the Municipality of São Paulo to recover certain corrupt payments made to a former mayor by tracing into, and asserting a proprietary claim over, money held in Jersey by two companies associated with the former mayor as constructive trustees for the Municipality. The Municipality was successful in the Royal Court[11] and in the Jersey Court of Appeal.[12] The companies, as the present appellants, argued that the courts below had been wrong to allow the Municipality to trace into certain funds in their hands to the extent that this could only be done by tracing backwards, it being argued that there is no sound doctrinal basis for backwards tracing, or in breach of the lowest intermediate balance rule.

Held: agreeing with the decisions below—

(1) **Backwards tracing and lowest intermediate balance rule.** Conceptually, the appellants' argument was both coherent and supported by a good deal of authority. Claims were held to be limited to the lowest intermediate balance in a mixed fund in *James Roscoe (Bolton) Ltd v Winder*[13] and *In re Goldcorp Exchange Ltd*.[14] The lowest intermediate balance rule was that, where a claimant's money is mixed with other money and drawings are made on the account which reduce the balance at any time to less than the amount which can be

[11] *Federal Republic of Brazil v Durant Intl Corp* 2012 (2) JLR 356 (Page Commr and Jurats Kerley and Marett-Crosby).
[12] *Durant Intl Corp v Federal Republic of Brazil* 2013 (1) JLR 273 (McNeill, Crow and Calvert-Smith JJA).
[13] [1915] 1 Ch 62.
[14] [1995] 1 AC 74.

said to represent the claimant's money, the amount which the claimant can thereafter recover is limited to the maximum that can be regarded as representing his money. The Court of Appeal in *Bishopsgate Inv Management Ltd (in liquidation) v Homan*[15] was divided on the question of whether backwards tracing was possible. In *Foskett v McKeown*[16] Scott V-C considered *obiter* that backwards tracing was likely to be possible but Hobhouse LJ and Morritt LJ considered that backwards tracing was impossible. Backwards tracing and the lowest intermediate balance rule were in a sense two sides of the same coin.

(2) **Backwards tracing allowed on policy grounds.** Whether the law should allow backwards tracing was ultimately a matter of policy. The Privy Council considered that the development of increasingly sophisticated and elaborate methods of money laundering often involving a web of credits and debits between intermediaries made it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry. The Privy Council therefore rejected the argument that there could never be backwards tracing. Agreeing with Scott V-C in *Foskett v McKeown*, the availability of equitable remedies ought to depend on the substance of the transaction in question and not the strict order in which the associated events occurred.

(3) **Tracing through a repaid overdraft.** Similarly, the Board rejected any contention that a claimant could never trace the value of an asset backwards through money paid into an overdrawn account or otherwise used to repay a debt. Although the Board rejected the contention that money used to pay a debt could in principle be traced into whatever had been acquired in return for the debt, there could nevertheless be cases where there is a "close causal and transactional link" between the incurring of the debt and the use of the claimant's funds to discharge it such that tracing was to be available: *Agricultural Credit Corp of Saskatchewan v Pettyjohn*[17] (Saskatchewan Court of Appeal) followed.

(4) **Nature of required link.** What a claimant has to establish is—

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[15] [1995] Ch 21.
[16] [1998] Ch 265.
[17] (1991) 79 DLR (4th) 22.

> "a coordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired to the misuse of the trust fund."

This, the Board said, was likely to depend on inference from the proved facts, particularly since in many cases the testimony of the trustee, if available, will be of little value.

(5) **Disposal.** In the present case, the Jersey Court of Appeal had been right to conclude that the necessary link between the bribes and funds which the claimant had sought to trace, having regard in particular to admissions made by the defendants in their pleadings as to the link, had been made out. The Board did not doubt the correctness of *James Roscoe* and *Goldcorp* on their facts but in neither case was there evidence of an overall transaction embracing the coordinated outward and inward movement of assets.

LAND LAW

Encroachment—remedies

Fogarty v St Martin's Cottage Ltd [2015] JRC 068 (JRC: Bailhache B, and Jurats Fisher and Marett-Crosby)

DJ Benest for the plaintiff; C Hall and RA Falle for the defendant.

The question was raised as to the whether the court has a discretion to award damages in lieu of an order for demolition where the defendant's building encroaches on the plaintiff's land. The plaintiff in this case contended that, as a result of the Royal Court's decision in *Felard Invs v Church of our Lady &c (Trustees) (No 2)*[18] (where the building in question had been erected in breach of a restrictive covenant), the appropriate order was one for the removal of the encroachment and that the court had no power to award damages in lieu.

Held: on the question of remedies for an encroachment—

(1) **Remedies available for encroachment or breach of restrictive building covenant.** Although *Felard (No 2)* could be distinguished because in the present case there was no *servitude réel*, the court would depart from *Felard (No 2)* in any event. The starting point for any court is that it has a discretion as to the remedy which ought to be granted to a plaintiff and, indeed, whether to grant remedy

[18] 1979 JJ 19.

at all. The job of the court is to do justice. If a breach were trivial, it would take some very strong reasoning for the court to conclude that it had no jurisdiction to deal with it by an award of damages. Differing from the court's reasoning in *Felard Invs Ltd v Church of Our Lady &c (Trustees)*[19] and *Felard (No 2)*, the court observed that the effect of preventing a plaintiff permanently from enforcing a building restriction in relation to a particular building did not extinguish the restriction which in principle continued. Nor did an award of damages amount to consideration for extinguishing the restriction; it would be compensation for its breach. The court therefore had a discretion to award damages in an appropriate case for an encroachment.

(2) **Relevant factors in the court's discretion as to remedy.** The starting point was that an order which has the effect of reinstating rights would be the appropriate choice of remedy. This was also consistent with the fact that these property rights were generally created to run with the land by the landowners taking the customary oath before the court. However, the court will always be able to look at the situation in the round and make its own assessment of the impact of the breach of proprietary rights in respect of which compensation would be ordered. That impact can be considered both in terms of diminution in the value of the property in respect of which the rights have been breached as well as the personal impact of the breach of rights on the land owner in question. Both those assessments went to the equity in selecting a remedy other than an order for the reinstatement of the properties by removing the encroachment which amounts to the breach of property rights. The court will also have regard to how the breach came about and whether, as was of concern in *Felard (No 2)*, the effect of giving damages would be to ignore a real property right which had been deliberately or recklessly disregarded or to create such a right contrary to the wishes of the owner of the servient land.

(3) **Disposal.** On the particular facts, an order for demolition was neither fair nor proportionate and the appropriate remedy was an award of damages. The level of damages would be established at a further hearing.

TRUSTS

Court's sanction of momentous decision

In re Otto Poon Trust [2015] JCA 109 (JCA: Bennett, Bompas and Doyle JJA)

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[19] 1978 JJ 1.

A Morley-Kirk for the appellant; A Kistler for the representor; SA Franckel appeared in person; the first and third respondents did not appear and were not represented

The Court of Appeal considered the approach to be adopted where a trustee seeks the court's sanction for a momentous decision.

Held: upholding the decision below—

(1) **Test for the court's blessing of momentous decision.** The legal test to be applied where a trustee has made a momentous decision (a decision of real importance for the trust) and seeks the court's approval for the decision was well established in Jersey. As explained in *Re S Settlement*,[20] the court must satisfy itself (i) that the trustee's decision has been formed in good faith, (ii) that the decision is one which a reasonable trustee properly instructed could have reached, and (iii) that the decision has not been vitiated by any actual or potential conflict of interest. A similar approach is taken in England: see *Public Trustee v Cooper*.[21]

(2) **Required degree of detail as to trustee's reasoning.** The Court of Appeal further observed:

(a) It was incorrect to say that English case law[22] had recently developed an additional requirement, namely that the trustee must also prove in detail that it has given proper consideration to the matter under scrutiny, setting out in detail the steps taken by the trustee and the considerations which informed the trustee's decision.

(b) The court needs to be satisfied as to the rationality of the trustee's decision. The lengths to which the court must go in examining the process by which the trustee arrived at the decision depend on the particular decision. In some cases the decision may be a difficult and doubtful one, requiring fine judgment in the face of competing considerations; in others the decision may be obvious. In the former cases, the quality of the decision-making process will be more important than in the latter.

(c) That was not to suggest that the court should take a lax approach or that it should approve any trustee's applications without due consideration. There is a threshold that must be crossed: the court

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[20] 2001 JLR *N* [37].
[21] [2001] WTLR 901.
[22] *Tamlin v Edgar* [2011] EWHC 3949; *Brudenell Bruce v Moore & Cotton* [2014] EWCA Civ 1312; *National Westminster Bank Plc v Lucas* [2014] EWCA Civ 1632.

is required to scrutinise properly the proposed exercise of the trustees' power on the evidence.

(d) The result of the court giving its approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust, or to set it aside as flawed.[23] When trustees are seeking approval for a decision they have already reached, the beneficiaries are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in proceedings to challenge the exercise of the power once made. For that reason, the trustees should put before the court all relevant considerations (supported by evidence) and they should explain their reasons for reaching the decision, even though they are not otherwise obliged to make such disclosure to the beneficiaries. But the process by which the trustees satisfy the court that the legal test has been met should not be confused with the substance of the test itself.

(e) Each case will need to be decided on its own facts, and the degree of detail that is required from a trustee cannot be uniform in all circumstances. In some cases, a trustee's decision may come out of the blue, and if so it may require both the beneficiaries and the court to be given the background and the context in considerable detail: in other cases, a trustee's decision may emerge from a situation that is well known to the interested parties and that is likely to have an impact on the degree of detail required from the trustee by the court.

Rectification of trust—aggressive tax avoidance

Re K2 Contractor Solutions Trust [2015] JRC 160 (JRC: Bailhache B, and Jurats Fisher and Olsen)

HE Brown for the representor.

In an application for rectification of trust the question was raised, *obiter*, by the court of whether the fact that the trust was an "aggressive" tax avoidance scheme was a relevant factor for the court to consider in exercising its discretion.

Held: allowing rectification on the facts—

(1) **Test for rectification.** The test for rectification was well-established and had been considered by the Royal Court on a number

[23] *In re Y Trust* 2011 JLR 464, citing with approval *Lewin on Trusts* (18th ed) at para 29–299; similarly, *Re Trusts (Guernsey) Law 2007 and [AAA] Children's Trust* Guernsey Royal Ct, 8 January 2014, [2015] WTLR 683.

of occasions (for example, *In re Exeter Settlement*[24]): (i) the court must be satisfied that, as a result of a genuine mistake, the trust deed does not carry out the true intentions of the parties and the settlor in particular; (ii) there must be full and frank disclosure; and (iii) there should be no other practical remedy.

(2) ***Obiter,* exercise of court's discretion as to whether aggressive tax avoidance.** In the present case, the court expressed an initial concern, on the information available to it, that this particular scheme might fall into the category of aggressive tax avoidance and, if that were so, that this could be a relevant factor leading to the court's refusal to grant the discretionary remedy of rectification in favour of the applicant. There were strong ethical arguments as to why tax payers should recognise their obligations to the state in which they live. On the other hand, it had long been the case that, as a matter of law, a citizen is entitled to retain his property unless, by appropriate legislation, the state takes it away or makes it chargeable to tax. That was the basis of the distinction between tax evasion, which is unlawful, and tax avoidance, which is not. To organise one's affairs so as to minimise tax has often been seen as a fundamental freedom, enabling the individual to live his life in accordance with the rules which the state sets down, of which taxation is but one. It might be said that there would be great uncertainty if citizens did not know what they could or could not lawfully do to minimise tax. Historically, the courts had always applied the principles of law rather than what are perhaps inchoate and uncertain ethical considerations in this area. What seemed open to argument was whether, in an area which involved the exercise of a judicial discretion in cases where the court's assistance is being sought for a mistake which has been made, there is room for the argument that the discretion ought not to be exercised if, on the facts of a particular case, the scheme in question is lawful but appears to be so contrived and artificial that it leaves the court with distaste if, in effect, it is required to endorse it.

(3) **Disposal.** In the event these considerations did not apply in the present case since the court accepted counsel's submission in argument that this scheme was a DOTAS scheme—the regime allowing HMRC to keep up to date with what types of tax avoidance schemes are in circulation. It was, however, more appropriate for this information to be provided on affidavit. There therefore had been full and frank disclosure. The remedy of rectification was granted on the facts.

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[24] 2010 JLR 169.