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

Directors—disclosure of conflicting interest

Stock v Pantrust International SA [2016] JRC 053 (Royal Ct: Clyde-Smith, Commr, and Jurats Fisher and Thomas)

SC Thomas for the representor; N-L M Langlois for the first and third respondents; ML Preston for the fourth respondent.

The directors of a Jersey company approved the offer of a loan facility, carrying second-ranking security, by another company. The directors of the company were also directors, and in one case a beneficial owner, of the lender. The question arose as to whether they had adequately disclosed to the company their conflicting interest in accordance with art 75 of the Companies (Jersey) Law 1991 and a corresponding provision of the company's articles of association. The minutes of the board meeting only recorded that the chairman had noted that "no declared interest prevented any of those present from being entitled to vote or from being counted in the quorum".

The existence of the second-ranking security which had been created over the company's property caused difficulty to the owner of the company, which held the shares as trustee and wished to engage in a refinancing of the loan due to the holder of the first-ranking security. As member of the company, the trustee applied to have the second-ranking security (though not the loan itself) set aside under the court's discretionary powers set out in art 76 of the 1991 Law, which arise on a breach of duty of disclosure under art 75. An order under art 76 may be applied for by the company or a member of the company.

Held:

Inadequate disclosure. There was little doubt that the directors were in a position of conflict. Article 75(1) of the 1991 Law required directors to disclose the "nature and extent" of a conflicting interest and under art 75(2B) any disclosure must be "recorded in the minutes of the meeting". The disclosure made by them manifestly did not discharge their duties in this respect.

Doubt as to appropriateness of setting aside only the security created by the transaction, and without an order for account of profits. The failure of the directors adequately to disclose their conflict entitled the member to apply under art 76(1) of the 1991 Law to have the transaction set aside. Article 76 was permissive and, according to its terms, the setting aside of the transaction is required to be in conjunction with a direction that the directors account to the company for any profit or gain realised. The member was not seeking to set aside the facility as a whole, or obtain any profit or gain which the directors may have made, but rather it was seeking only to have set aside the second-ranking security because its existence impeded the administration of the trust and its ability to refinance the first-ranking loan. The court therefore had some doubt, notwithstanding the failure to adequately disclose the conflict, that this was a transaction which the court should, in its discretion, set aside under art 76(1).

Hurdle in art 76(3); burden of proof. Moreover, the member faced the hurdle presented by art 76(3) which stipulates that, without prejudice to the court's power to order that a director account for any profit or gain realised, it will not set aside a transaction unless "(a) the interests of third parties who have acted in good faith thereunder would not thereby be unfairly prejudiced; and (b) the transaction was not reasonable and fair in the interests of the company at the time it was entered into." The burden of satisfying the court in this respect lay on the applicant seeking to have the transaction set aside.

Disposal. On the particular facts, the court was not satisfied that that the interests of third parties who had acted in good faith would not be unfairly prejudiced or that the transaction was not reasonable and fair in the interests of company at the time it was entered into. The court therefore declined to set aside the second-ranking security.

CRIMINAL LAW

Fitness to plead

Att Gen v Sousa [2016] JRC 059 (Royal Ct: Birt, Commr, and Jurats Nicolle and Thomas)

RCP Pedley, Crown Advocate for the Attorney General; C Hall for the defendant.

The court considered whether the defendant was unfit to plead. The question of the burden and standard of proof was raised in circumstances where the expert commissioned by the prosecution concluded that the defendant was fit to plead but the expert commissioned by the court (in the absence of the defendant wishing to commission his own expert) concluded that he was not.

Held:

Test for unfitness to plead. The test for determining fitness to plead was established by Sir Philip Bailhache B in *Att Gen v O'Driscoll*.[1] The Jurats were to be directed that:

> "29 . . . an accused person is so insane as to be unfit to plead to the accusation, or unable to understand the nature of the trial if, as a result of unsoundness of mind or inability to communicate, he or she lacks the capacity to participate effectively in the proceedings. In determining this issue, the Superior Number shall have regard to the ability of the accused—(a) to understand the nature of the proceedings so as to instruct his lawyer and to make a proper defence; (b) to understand the substance of the evidence; (c) to give evidence on his own behalf; and (d) to make rational decisions in relation to his participation in the proceedings (including whether or not to plead guilty), which reflect true and informed choices on his part."

There had since been one change. As a result of the Criminal Justice (Insane Persons) (Amendment) (Jersey) Law 2015, issues of fitness to plead can now be heard before the Inferior Number rather than, as previously, before the Superior Number. In *O'Driscoll*, the Bailiff further elaborated that it will not be sufficient in itself to justify a finding of unfitness to plead that an accused person is someone of limited intellect or someone who, for other reasons, might find the criminal process puzzling or difficult to follow. Evidence of a clinically recognized condition leading to incapacity would be required before a finding of unfitness could be made. The test was substantively the same as that which applied under English law.

Burden and standard of proof. In the present case an expert report commissioned by the prosecution concluded that the defendant was fit to plead whereas the report commissioned by the court (the defendant not wishing to commission his own expert report) concluded that he

[1] 2003 JLR 390.

was not. The question then arose as to the applicable standard of proof and where the burden lay. The case lay in the uncertain territory envisaged by *Archbold* (2015 edn) at para 4–236, being territory where the issue is raised by the judge. The only satisfactory way of approaching this situation is that the court must determine on the balance of probabilities whether the defendant is fit to plead. If the court considered it more probable than not that he is fit to plead, it should so rule and vice versa. The court appreciated that this said nothing about the burden of proof, but where it is the court-appointed expert who is asserting unfitness to plead, questions of the burden of proof were not necessarily apposite.

Disposal. On the facts, the court found that the defendant was unfit and made an order pursuant to art 1(3) of the Criminal Justice (Insane Persons) (Jersey) Law 1964 that he be detained during Her Majesty's pleasure.

CRIMINAL PROCEDURE

Institution of proceedings

Arthur v Att Gen [2016] JCA 098A (CA: Calvert-Smith., Logan Martin and Anderson JJA)

DJ Hopwood, Crown Advocate; DS Steenson for the applicant

The applicant faced charges of fraud, fraudulent conversion and false accounting. The case was expected to proceed by way of committal in the Magistrate's Court but the Attorney General decided to indict the applicant directly to the Royal Court. The applicant challenged this decision in the Royal Court. Clyde-Smith Commr accepted that the Royal Court had jurisdiction to review and, if so minded, to reverse the Attorney General's decision on principles expounded by the Royal Court in *Att Gen v X*.[2] Although he criticised the grounds put forward by the Solicitor General in a number of respects, he concluded that the balance of justice came down in favour of the proceedings continuing in the Royal Court. The applicant sought to appeal this decision to the Court of Appeal.

Held:

Appeal to the Royal Court against decision to indict direct. The power of the Attorney General to indict a case directly to the Royal Court was a power under customary law which was unique, as far as the court was aware, to Jersey. It was clear that the Jersey common law as set out by William Bailhache DB, as he then was, in *Att Gen v X*

[2] 2014 (1) JLR 293.

allows the defendant to appeal such a decision to the Royal Court and that the standard set by that court in determining such an appeal is lower for an affected defendant than that required, for instance, for an applicant for judicial review.

No further appeal to the Court of Appeal. There was, however, no appeal from such a decision to the Court of Appeal. The Court of Appeal's ordinary jurisdiction in criminal cases is limited to that set out in Part 3 of Court of Appeal (Jersey) Law 1961. The Court of Appeal has an additional jurisdiction to hear interlocutory appeals in criminal cases in which the Royal Court has made an order under Part 10 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 bringing the case within the preparatory hearings regime provided for in that Law. The categories of case in which the accused can mount an appeal to the Court of Appeal were therefore clearly defined and limited. It was impossible to bring the decision now appealed within those Laws. In particular, the general power of the Court of Appeal set out in art 30 of the Court of Appeal (Jersey) Law 1961 can only come into play if and when a case falling within the relevant provisions of the 1961 Law or the 2003 Law comes before the Court of Appeal.

Doléance. The only other route to appeal—not to the Court of Appeal but to the Superior Number—in a criminal matter was by way of the customary law petition of *doléance*. That remedy was available very rarely, not least because the accused must demonstrate that he has suffered a "grave injustice" and, importantly, that no other remedy is available: *Warren v Att Gen.*[3] In this case, the remedy of an ordinary appeal under Part 3 of the 1961 Law would be available in the event of a conviction.

Short code or protocol on relevant factors would be useful. The factors which may incline the Attorney General to adopt one course or another were far from clear. It might be that a short code or protocol would summarise the considerations which may provoke a decision to indict direct would help to guide individual advocates, and indeed the Royal Court, if such a decision were to be contested in the future.

Disposal. For the above reasons, the Court of Appeal did not currently have a "case before it", merely an application for leave to appeal. Accordingly, this application had to be refused.

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[3] [2008] JCA 135.

EVIDENCE

Assistance to foreign court—trust information

J v K [2016] JRC 110 (Royal Ct: Bailhache, Bailiff, and Jurats Olsen and Ramsden)

JMP Gleeson for the plaintiff/respondent; A Kistler for the appellant trustee.

A request was made by a divorce court in Missouri for the examination on oath of a Jersey trust company and certain of its personnel, and for the production of certain documents, concerning a Jersey trust of which the husband appeared to be a beneficiary. The request was not "transmitted to the Royal Court by Her Majesty's Secretary of State for the Home Department" as envisaged by r 2 of the Service of Process Rules 1994 but had been addressed by the US court to the Senior Master of the Royal Courts of Justice in England. This appeared consistent with art 3 of the Hague Convention of 1965 on the Service Abroad of Judicial and Extra-Judicial Documents. Although thus addressed, it appeared to have been sent to the Jersey Attorney General who then transmitted it to the Judicial Greffier. The Greffier considered that he had jurisdiction and proceeded to make the orders requested under art 3 of the Service of Process and Taking of Evidence (Jersey) Law 1960. The appellants appealed on the ground that the Greffier lacked jurisdiction to make the orders or alternatively on the ground that discretion should not be exercised in favour of granting the orders requested, having regard to issues of confidentiality and the firewall provisions of art 9 of the Trusts (Jersey) Law 1984.

Held:

International conventions. It was settled constitutional practice that where the United Kingdom ratifies a treaty or convention, it does so on behalf of the United Kingdom of Great Britain and Northern Ireland and if any of the Crown Dependencies and its overseas territories wish the treaty or the convention to apply to them, to do so on their behalf as well. This practice has been acquiesced in by other States and is regarded by the Secretary General of the United Nations as establishing "a different intention" for the purposes of art 29 of the Vienna Convention. In this case no document had been produced to show the United Kingdom's ratification of that Convention has been extended to Jersey. Where reliance is being placed on a convention or treaty which is said to have application to Jersey, counsel should provide to the court a copy of the UK's instrument of ratification which confirms that the convention or treaty does have application to the Island.

Comity. However, whether or not the Hague Convention of 1965 had been ratified on the Island's behalf by the UK, there was no doubt that the Royal Court had a settled practice of responding in comity to the requesting court of other states, unless there was some particular reason not to do so.

Jurisdiction. Although the procedure adopted in transmitting the request of the US court to the Royal Court was unsatisfactory, it did not deprive the Royal Court of jurisdiction to deal with it. Procedural rules are the court's servant, not its master. If the result of the procedure adopted were to cause unfairness, that would be a different matter because the court had an obligation to deliver a fair trial or hearing in any civil or criminal cause both as a matter of our own longstanding domestic law and practice and of course under the Human Rights (Jersey) Law 2000 and art 6 of the European Convention of Human Rights. The Service of Process Rules did, however, need attention so as to bring clarity to the process. Although the request had not been made in accordance with art 3 of the 1960 Law, it could not be said that no "application" had been made for the purposes of art 3 of the Law. There had been an application, and the Judicial Greffier had made an order. The request essentially was being made to the Royal Court by the requesting court and the onus lay on the requesting court to satisfy itself that the jurisdiction of the foreign court is not being engaged purposelessly or inappropriately. One could assume that the St Louis court was satisfied that these questions ought to be delivered and the documents ought to be requested. That did not mean that the Royal Court could not itself review, against issues of trustee confidentiality or indeed on any other basis, the request for assistance, but it did mean that the threshold for making the order in the first place has been passed.

Exercise of the court's discretion. It was necessary to distinguish between an application under art 51 of the Trusts (Jersey) Law 1984 and a request for assistance from a foreign court. The tests to be applied by the Royal Court will not be the same because the application to the court is conceptually quite different.

In the case of an art 51 application, the applicant—often the trustee—puts all its material before the court and seeks the court's guidance in accordance with the established rules. The customary law jurisdiction for what is now a statutory jurisdiction was based on the rationale that the court must be able to administer the trust in the absence of a trustee, and in the presence of the trustee had the jurisdiction to give directions in relation to the various trust powers which existed. That is the explanation for many of the Royal Court's decisions on trust matters prior to the enactment of the Trusts (Jersey) Law 1984.

In the case of letters of request received from a foreign court, the statutory jurisdiction is based upon acting in comity with a foreign court and indeed upon the principles contained in the Hague Convention (whether or not that has been formally ratified for the Island. Balancing the obligation to act in comity with the foreign court with the need to protect confidentiality or privilege in the context of domestic law occasionally presents challenges. But the question is not equivalent of an art 51 jurisdiction.

Where a trust is governed by Jersey law, the Royal Court exercises jurisdiction over any variations of trust or over whether directions should be given to the trustee in relation to the exercise of the trustee's powers and the creation of an exorbitant jurisdiction by legislation effected outside the Island, which might suggest that a foreign court could exercise any such power, would not be effective in Jersey. That was not the issue in this case, at least not at present. Jersey courts respected letters of request made to them by a foreign court and do act in comity with that court and the Jersey courts would correspondingly expect the foreign court to respect the trust jurisdiction of the Royal Court.

In the context of a dispute about matrimonial assets in a foreign court, that the existence or otherwise of a beneficial interest in a Jersey trust may be relevant to how the other matrimonial assets should be allocated, even if the foreign court recognises that its order cannot extend to whatever interests it may consider are established by the Jersey trust. If the matrimonial proceedings were taking place within Jersey, there would be no question about where the public interest lay—information about the trust documents would be provided. The purpose of ensuring that such information was provided in such a case is to ensure that the matrimonial court can do justice to the parties before it. As a matter of trust law, the Royal Court may not permit a foreign court to make orders varying the terms of the trust, but that did not mean that the court should not assist in ensuring that a matrimonial court had all the relevant information available to it to make such order as the matrimonial court thinks is relevant for the issues which it has to determine.

Disposal. In the present matrimonial case, the court considered that the public interest in giving effect to the foreign letter of request outweighed the public interest in maintaining confidentiality of trust documents and in substance (there was one change of wording) the court upheld the orders made by the Greffier.

FINANCIAL SERVICES

Appeal against financial penalty

Guernsey Financial Servs Commn v Merrien Guernsey Judgment 24/2016 (GCA: McNeill, Calvert-Smith and Doyle JJA)

P Nicol Gent for the appellant; the respondent appeared in person.

The Guernsey Financial Service Commission (GFSC), appealed against the Deputy Bailiff's decision to remit to it for reconsideration its decision under s 11D of the Financial Services Commission (Bailiwick of Guernsey) Law 1987 (the FSC Law) to impose a financial penalty of the statutory maximum of £200,000 against the respondent. The Deputy Bailiff found that the GFSC had misdirected itself as to the correct approach to the appropriate financial penalty, and had erred in having regard to penalties imposed in recent cases of a similar nature in other jurisdictions, notwithstanding that the law of such jurisdictions did not necessarily impose a statutory cap. The judge held that the matters set out in s 11D(2) of the FSC Law provided an exhaustive list of what could be taken into account and there was no general clause permitting the GFSC to take into consideration any other matter. Further, the GFSC's approach appeared to overlook the requirement to deal with the respondent's case in a manner that did not create any disparity with penalties imposed on other persons being dealt with in the same case. The penalty appeared disproportionate. The judge went on to say that, having aired the difficult financial circumstances in which the respondent had found himself, it was incumbent upon the GFSC to spell out that the financial penalty imposed was capable of being satisfied by him. If it was not, the penalty was wrong in principle. The appellant submitted that in deciding whether to impose a penalty under s 11D(1) of the FSC Law, s 11D(2) did not exhaustively list the factors to be taken into account. Section 11D(2)(e) did not require the GFSC to be satisfied that the person concerned was in a position to pay the penalty either at all, or within a reasonable period of time. It submitted that s 11D(2) had to be read in conjunction with the suite of regulatory laws which conferred the powers and discretion that the GFSC is permitted to exercise in the discharge of its functions.

Held:

Section 11D(2)(b) were sufficiently wide to direct the GFSC to take into consideration the seriousness of the contravention or non-fulfilment in its impact on the public interest and the reputation of the Bailiwick as a financial centre. In appraising the seriousness of contravention or non-fulfilment, it was appropriate for the GFSC to look to other jurisdictions for guidance. As a matter of statutory construction, all matters to be taken into account in deciding whether

or not to impose a penalty under s 11D were set out in s 11D(2). In deciding whether or not to impose a penalty and, if so, the amount of any such penalty, the GFSC was required under s 11D(2)(e) to take into consideration "the potential financial consequences to the person concerned, and to third parties including customers and creditors of that person, of imposing a penalty". On a proper approach, the Deputy Bailiff went too far in finding that a penalty would be wrong in principle if it was not capable of being satisfied by the appellant. Whilst the circumstances were likely to be very rare indeed, a proper reading showed that the potential financial consequences to the person concerned and relevant third parties was merely one of a number of specified factors which the GFSC "must take into consideration". There might be an occasional case where the seriousness of the contravention or non-fulfilment was of such an order that the weight to be given to it outweighed the obvious additional detriment to the person concerned. The approach set out in criminal authorities as to the ability to pay a fine being a determining feature may not be appropriate in regulatory matters: as here, the statute made the potential financial consequences merely one of a number of factors. This approach was consistent with the Jersey cases. In applying its mind to the factors set out in s 11D(2), the GFSC must take into consideration all the identified factors, insofar as they exist. In doing so, the fact that a financial penalty under consideration is not capable of being satisfied by the appellant will be a relevant factor and the clearest of reasoning will be required in order to show that another factor such as the seriousness of the contravention or non-fulfilment is of such magnitude as to provide a satisfactory basis for a determination that the potential of insolvency is warranted. The Deputy Bailiff had made a finding of possible disproportionality as between the penalty imposed on the respondent and that imposed on others involved in the case. As that finding was not a finding embracing a matter of law, it was not open to challenge by the GFSC on appeal and, accordingly, the decision would have been remitted to the GFSC in any event. The decision as to the appropriate level of financial penalty to impose on the respondent (and consequential changes to the public statement to be made about the sanctions imposed on the respondent) fell to be remitted to the GFSC.

Comment [Natasha Newell]: This emphasis in this case is on the need for GFSC decision makers to respect the statutory cap imposed by the FSC Law when making decisions regarding the imposition of financial penalties on licence holders thereunder. It highlights that the GFSC must take into account only those factors set out in s 11D(2). The judgment makes clear that in doing so, proper regard must be had to the potential financial consequences to those affected by the

decision and their ability to pay whatever financial penalty is imposed within a reasonable period of time.

Rules governing imposition of fines

Bordeaux Services (Guernsey) Ltd and 3 others v Guernsey Financial Servs Commn GRC Judgment 18/2016 (Royal Ct: McMahon DB)

CH Edwards for the appellants; J Hill for the respondent.

The first appellant (Bordeaux) was a licensee under the Regulation of Fiduciaries *etc*. (Bailiwick of Guernsey) Law 2000 (the Fiduciaries Law) and the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (the POI Law). Bordeaux appealed against a decision of the Guernsey Financial Services Commission (the GFSC) to impose a £150,000 fine in relation to issues arising from the administration of a Guernsey company connected to the Arch Cru investment fund. The other three appellants ("the Bordeaux Directors") appealed against the making of prohibition orders against each of them under the full suite of regulatory Laws (the POI Law, the Fiduciaries Law, and others) which they asked the court to set aside. The Bordeaux Directors alleged that the GFSC senior decision maker (who was English Queen's Counsel appointed by the GFSC in accordance with its decision-making process) had erred in law by misdirecting himself as to the correct criteria to apply to determine whether it was appropriate to make a prohibition order. They further argued that the prohibition orders were disproportionate and/or unreasonable on account of: (i) there being no dishonesty or market abuse; (ii) the sanctions being too severe; (iii) the GFSC having failed to show that the conduct of the Bordeaux Directors demonstrably caused any loss to customers, or the public generally; (iv) the level of seriousness of their failings; (v) the GFSC's practice in other past cases; and (vi) the lack of evidence to support several key findings in the decision. The appellants argued that the prohibition orders were imposed in circumstances that could not be regarded as the most serious category of misconduct for which a prohibition order should be reserved.

Held:

The GFSC was entitled as a matter of law to impose prohibition orders on the Bordeaux Directors and it had not acted *ultra vires* or under other error of law. It was apparent that the GFSC had had regard to Schedule 4 to the POI Law as it was obliged to do. Given that the findings made related to non-fulfilment of the criteria set out therein, each of the Bordeaux Directors could potentially be regarded as not fit and proper to perform functions in relation to controlled investment business. The three Bordeaux Directors had demonstrated a consistent and serious lack of appropriate competence, judgment and diligence,

as a result of which the reputation of the Bailiwick of Guernsey as a financial centre, as well as the interests of investors, had been jeopardised. Prohibition orders were not confined to circumstances in which there had been a finding as to lack of integrity (or dishonesty). They could be imposed where the combination of the failings identified led to a risk to the public. The senior decision maker had not, however, explained how he took into consideration the penalties imposed in other cases. Accordingly £150,000 was too high, bore the hallmark of a quasi-criminal process, and fell outside the range of responses open to the GFSC. Bordeaux's appeal in respect of the fine would be allowed and the financial penalty remitted to the GFSC, with full reasoning to be given as to why the penalty was to be fixed at a certain level. The GFSC's delegation of its functions to learned counsel in another jurisdiction meant that the decision could be expected to bear the hallmarks of a judicial tribunal, and could properly be subjected to a level of review that would not otherwise be appropriate for a more obviously lay administrative decision. The appeals of the Bordeaux Directors under the other Laws would all be allowed because there was no reasoning linking the failings to the relevant criteria under those Laws. All the findings made related only to the POI Law and the Fiduciaries Law. The decisions to make prohibition orders under those Laws would be set aside. The appeals of two directors under the POI Law and the Fiduciaries Law were dismissed. The appeal of the third director under the POI Law and the Fiduciaries Law would be allowed to the extent of requiring the GFSC to re-visit the appropriate length of the prohibition orders made.

Comment [Natasha Newell]: In this case, the Royal Court made useful findings on how senior decision makers of the GFSC should arrive at their findings and what matters should be set out in their decisions. It is interesting to note that the judge was influenced by the changes between the minded to notice and the final decision, which reflected the decision maker accepting some of the arguments made by the advocate for the appellants at first instance but which did not impact upon the length of the prohibition order made against the third director. The court's comments that cases involving discretionary sanctions in the form of financial penalties were subject to a quasi-criminal process is interesting. Equally, it is noteworthy that the court found that the GFSC's decision to use Queen's Counsel as decision makers meant that their decisions were accordingly expected to disclose a higher level of reasoning at or approaching that of a judicial tribunal.

TRUSTS

Rectification—appointment of trustee

In re Z Trust [2016] JRC 048 (Royal Ct: Clyde-Smith, Commr and Jurats Ramsden and Morgan)

GC Staal for the fourth respondent; LKA Richardson for the representor and the first respondent; A Kistler for the second respondent.

Having set aside the defective appointment of trustees, the question arose as to what powers the court had to ratify the acts and omissions of the defectively appointed trustees during the period when in good faith they had believed that they validly held office as trustees.

Held:

Three forms of ratification or confirmation. The court took the opportunity to review and refine the position regarding the ratification of past acts and omissions of purported trustees. The court had found in *In re BB*[4] that there was an inherent jurisdiction, supplemented by art 51 of the Trusts (Jersey) Law 1984, to make appropriate orders to secure the competent administration of the trust depending on the facts of the case and that this could be used in order to avoid the havoc of having to unscramble the actions of defectively appointed trustees. The court did not, however, ratify the past acts and omissions of the defectively appointed trustees in general terms (as it had done in *In re BB*). Rather, a distinction was to be drawn (following an opinion provided by Lynton Tucker, senior editor of *Lewin on Trusts*, 19th edn) between three forms of ratification or confirmation, all of which may have the same practical result, but which are conceptually distinct: (i) confirmation by perfection of an imperfect act or transaction; (ii) confirmation by replacement of a tainted or doubtful act or transaction by an effective one with a similar effect; and (iii) confirmation by non-intervention in acts or omissions which were not or may not have been authorised but have nevertheless actually been acted upon, so that these acts or omissions remain undisturbed and the trusts are accordingly administered on the same footing as if those acts or omissions had been done or omitted by or with the authority of duly constituted trustees.

Guiding principle is welfare of beneficiaries. The appropriate method of intervention, and appropriate form of order, necessarily depended on the circumstances of the case. In many cases the intervention or order will take the form of a direction to the trustees,

[4] 2011 JLR 672.

but that is not the only kind of intervention possible. The guiding principle had to be that the form of intervention or order is such as best serves the welfare of the beneficiaries and the competent administration of the trust in the circumstances of the case. If validation of an invalid act or transaction is in the circumstances suitable then there was no reason why the court should not be able to make such an order.

Validation of dispositive powers exercised by a defectively appointed trustee. It was not an objection to a ratification order that the court is doing something that the trustees do not themselves have the power to do, at least as regards administrative powers. The validation of invalid exercise of dispositive, as opposed to administrative, powers stood on a different footing, since this may involve a change in the beneficial trusts. The court had, under the principles of *Chapman v Chapman*[5] (followed in *In re IMK Family Trusts*[6]), no power to do that save in accordance with statutory authority (which in Jersey is conferred by art 47(1) of the Trusts Law) or in the context of compromise of a genuine dispute concerning a trust. This did not mean that nothing could be done to confirm invalid exercises of dispositive powers. The second form of confirmation will usually be available and the third form may also be available. The kind of case which causes difficulty is where the power which was originally sought to be exercised has lapsed by the time that the defective appointment of trustees is discovered, or can no longer be exercised in the manner originally intended, and no distributions have been made to give effect to the invalid exercise of power. That was the position in *Jasmine Trustees Ltd v Wells & Hind*,[7] and perhaps in such a case the only way of resolving matters is a variation of trust in accordance with art 47(1) of the Trusts Law, or (as happened in the *Jasmine* case) a claim against the professional advisers involved.

Disposal. On the facts of the present case, the objective of ratification was best achieved by orders with much the same effect as ratification but in essence based on the second and third forms of confirmation, that is based on confirmation by replacement and confirmation by non-intervention in the interests of the beneficiaries as a whole and the competent administration of the trust.

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[5] [1954] AC 429.
[6] 2008 JLR 250.
[7] [2008] Ch 194.