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

ADMINISTRATIVE LAW

Judicial review—notice pursuant to TIEA

Haskell v Comptroller of Taxes [2017] JRC 088 (Royal Court: WJ Bailhache, Bailiff, sitting alone)

J Harvey-Hills for the applicant; SA Meiklejohn for the respondents

In judicial review proceedings challenging the Comptroller's decision to issue notices pursuant to the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008, the applicant taxpayer sought certain directions. Questions were raised, *inter alia*, as to whether the Comptroller had complied with his duty of candour in judicial review proceedings, whether in particular the letter of request by Sweden as the requesting state, following which the notice had been issued, was disclosable and whether as a matter of fair procedure the applicant should have been given an opportunity in advance of the notices being issued to make representations to the Comptroller.

Held:

(1) Duty of candour in judicial review. As regards the duty of candour, the Bailiff referred to and followed the propositions derived from the English authorities by Beloff, Commr in *Larsen v Comptroller of Taxes*.[1]

(2) Letter of request and other documents not disclosable without special reason; presumption of regularity. The Comptroller is not in law obliged to disclose the letter of request as being required

[1] [2015] JRC 104, at para 17

to dispose of the application, nor to disclose, on the same criteria, any of the other documents in his possession: *Larsen v Volaw Trust*[2] ("*Larsen No 2"*); also *Durant Intl Corp v Att Gen.*[3] That did not mean that the court should not, in a proper case, order disclosure of the letter of request but the default position is that the letter of request is not disclosable. The duty of candour was such that the Comptroller must set out sufficient information as to why it is considered that the request falls within the terms of the TIEA but there is a presumption of regularity on which the Comptroller was entitled to rely and, in the absence of some specific reason that would make such a course appropriate, he was not required to provide the letter of request or other documents within his possession. This was a matter of domestic administrative law, not because there was or may be any international standard to that effect. The Comptroller was also not required to conduct a full audit of the procedures of the requesting state. The purpose of the legislation would be too easily defeated if there were a possibility of litigating in Jersey domestic courts the propriety of the procedures of the requesting state under foreign law. Until there is evidence to the contrary, the Royal Court is entitled to proceed on a presumption of regularity by the competent authority of the requesting state.

(3) Fair procedure—opportunity to make advance representations no longer required. In *Volaw Trust v Comptroller of Taxes*[4] ("*Larsen (No 1)*") the Court of Appeal had made it plain that there was an obligation in some circumstances to give the opportunity for making representations but the Regulations had since been amended in 2012. The amendments were clearly intended to enable a more speedy transmission of tax information when a request was received. Regulation 3(4) of the former regulations required the Comptroller, before giving a notice under that regulation, to allow the person of whom the requirement was to be made a reasonable opportunity to provide to the Comptroller the document or record concerned. The "reasonable opportunity" provisions of reg 3(4), which then existed, provided the necessary introduction for the conclusion that reasonableness required not only making available sufficient time for that provision but also a sufficient explanation as to why the information is required. The fair procedures which could supplement the legislative scheme were not then inconsistent with it. However, the amendments introduced to the Regulations in 2012 carried with them the necessary conclusion that the type of fair procedures which the

[2] [2016] JCA 137.
[3] 2006 JLR 112.
[4] 2013 (2) JLR 499.

Court of Appeal had in mind in *Larsen (No 2)* could not reasonably supplement the legislative scheme, because they would be inconsistent with it. Assuming the Regulations to be *intra vires*, which was the conclusion reached in *Larsen (No 2)* and from which the Royal Court would not depart as a court of equal jurisdiction dealing with directions without very good reason to do so, the Bailiff would proceed on the basis that there was no longer any requirement to provide a reasonable opportunity for the taxpayer or recipient of the notice to provide the information without a notice or, prior to leave being granted, to set out reasons why the notice was issued and assistance given.

ADVOCATES

Duties to client—conflict of interest

Disciplinary proceedings—sanction for professional misconduct

Registrar of La Chambre de Discipline v An Advocate (GRC Judgment 22/2017, Collas, Bailiff, and Jurats Mowbray, Bartie, Snell, Hodgetts, McCathie, Spaargaren, Grut, Morris and Mortimer)

JE Roland for the Registrar; KM Le Cras for the respondent.

Under the Guernsey Bar (Bailiwick of Guernsey) Law 2007 ("the 2007 Law") the *Chambre de Discipline* comprises a lay President, four other lay members (five lay members in total), five Guernsey advocates and five senior lawyers from any British jurisdiction but not Guernsey advocates—all appointments being made by an appointments committee comprising the Bailiff, the senior Guernsey Jurat and the *Bâtonnier* of the Guernsey Bar, with all appointments lasting five years. In addition, a Registrar of the *Chambre* is appointed by the Royal Court. Complaints to the *Chambre* are considered first by the President and the *Bâtonnier* who may first invite a respondent to comment in writing and a complainant to comment in writing upon any such comment. Unless the President and *Bâtonnier* consider a complaint to be vexatious, frivolous or not of professional misconduct, it is referred to the Registrar for investigation, with notice being given to the complainant, the respondent and HM Procureur. If a *prima facie* case is disclosed it is referred to the *Chambre*, again on notice. The President then selects a member from each of the three panels of members (lay, advocate and senior lawyer) to hear the matter. The issue of whether there has been professional misconduct is decided by reference to the criminal standard of proof. The *Chambre* is required to give a reasoned decision and has the following powers of disposal: dismissal, private reprimand, public rebuke, fine in a sum not exceeding £2,000, suspension from practice for a period not exceeding three months; it may also refer the matter to the Royal Court for

consideration of a larger fine, longer period of suspension or disbarment.

The complaint against the respondent was that he had purported to give independent legal advice to two spouses proposing to consent to bonds being taken over their homes to secure borrowing by companies of which their respective husbands (who were in each case co-owners of the homes) were beneficial owners. Rule 46 of the Guernsey Bar Rules provided that an advocate or firm of advocates should not accept instructions to act for two or more clients where there is a conflict or significant risk of conflict between the interests of those clients. However, an exception exists where the advocate obtains the informed consent of both parties to his or her acting. The respondent's firm already acted for the lender. The respondent argued before the *Chambre* that there was no conflict of interest between the spouses and the lender because their interests were identical, in that all required independent advice. The argument succeeded, by a majority, in the *Chambre*. The Registrar appealed. The Bailiff ruled that there had been a conflict of interest, that no informed consent had been obtained and that professional misconduct was therefore established. The case was referred for a sanction hearing, which was held in private because one of the possible sanctions was private reprimand.

Held: At the Bailiff's request, HM Procureur, as *amicus curiae*, had produced an advice on the imposition of sanctions which was circulated to counsel and the Jurats prior to the hearing. A large section of the advice identifying the underlying principles was included within the judgment, and those principles adopted and approved by the court—in particular as set out in the case of *Bolton v The Law Society*.[5] Jersey authority was also cited (*Att Gen v Begg*).[6] The Jurats were directed that there were three stages to be followed: the first was to assess the seriousness of the misconduct; the second was to keep in mind the purpose for which sanctions were imposed and the third was to choose the sanction which most appropriately fulfilled that purpose for the seriousness of the conduct in question. Aggravating and mitigating factors were identified by reference to the Solicitors Disciplinary Tribunal Guidance Notes. On the facts of the case it was not possible to assess whether any harm might have been caused by the misconduct or its extent. The incident had to be assessed as a single incident notwithstanding that the respondent had admitted giving similar advice on other occasions. In mitigation it was noted that he had not previously been found to have committed any

[5] [1993] EWCA Civ 32.
[6] [2014] JRC 254.

misconduct. The matter had also been outstanding for three-and-a-half years. In the circumstances, a private reprimand would be ordered. The Jurats took the occasion to remind the Bar of the importance of taking adequate attendance notes to record the advice given to their clients. The Jurats also directed that future complaints of misconduct be dealt with more expeditiously.

CIVIL PROCEDURE

Appeals to the Judicial Committee of Privy Council

Parish of St Helier v Minister for Infrastructure [2017] JCA 076 (Court of Appeal: McNeill, Martin, and Calvert-Smith, JJA)

NAK Williams for the appellant; HM Solicitor General for the respondent

The Court of Appeal considered the test for giving leave to appeal to the Judicial Committee of the Privy Council.

Held:

Botas v Tepe[7] and *Larsen v Comptroller of Income Taxes*[8] were not in conflict with each other. Each treated the JCPC Practice Direction as prescribing the ordinary test. Paragraph 3.3.3(a) of the JCPC Practice Direction provides that permission to appeal (or "leave" as it is in Art 14(a) of the 1961 Law) will only be granted by the Appeal Panel of the Judicial Committee of the Privy Council "in civil cases for applications that . . . raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time".

In *Botas*, the court observed that, having regard to the JCPC Practice Direction and its equivalence to the Supreme Court Practice Direction and the resulting relevance of *Uprichard v Scottish Ministers*,[9] the Court of Appeal should only grant leave to appeal to the Privy Council if satisfied that the arguable point or points of law which have been identified are of such clear public importance that they merit consideration by the Privy Council now. In approaching the issue in this way, the Court of Appeal was conscious that the phrase used in para 3.3.3(a) is "which ought to be considered by the Judicial Committee at that time". That obviously encompassed a consideration as to the immediacy of the need to address the point of law which can really only be judged by the Appeal Panel of the Privy Council.

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[7] [2016] JCA 199D.
[8] 2016] JCA 176A.
[9] [2013] UKSC 21.

In *Uprichard*, Lord Reed, speaking of appeals to the Supreme Court, said—

> "Appeals against any order or judgment of the Court of Appeal in England and Wales or in Northern Ireland can be brought only with the permission of the Court of Appeal or of this court. In practice, the Court of Appeal normally refuses permission so as to enable an appeal panel of this court to select, from the applications before it for permission to appeal, the cases raising the most important issues."

The result in the present context was that even where it could be said that there may exist an arguable point of law, the Court of Appeal would also need to be sure both as to the existence of that point of law and of its importance, as well of its need for determination at this time, before leave should be granted. That was the result of the practice described by Lord Reed in *Uprichard* and the reasons for which were described by Lord Bingham in *R (Eastawa) v Secy of State for Trade and Industry*.[10] The application of that test would of course depend on the circumstances of the case but in all but the clearest cases it was therefore desirable to follow the practice identified in *Uprichard* and leave the question of leave to the Privy Council itself.

CRIMINAL LAW

Proceeds of crime—*saisie judiciaire*—duties of Viscount

Viscount v Att Gen [2017] JCA 052 (CA: Bailhache, Pleming and Calvert-Smith, JJA)

H Sharp, QC for the appellant; OA Blakeley as *amicus curiae*.

In *Arthur v Att Gen*,[11] the Royal Court made the observation that, in connection with a *saisie judiciare* under the Proceeds of Crime (Jersey) Law 1999 and the duty of the Viscount in selling property when in receipt of a higher offer following the non-binding acceptance of a first offer, the Viscount had assets vested in her which she held for the benefit of others and was in that sense a trustee and that therefore some assistance could be gleaned from trust cases where similar issues had been considered by the court. The Viscount appealed. It was contended for the Viscount *inter alia* that (i) it was an error of law to state that the Viscount is a trustee; (ii) it was an error of law to apply cases decided on the basis of the strict duties of a trustee to a decision the Viscount has to take when managing assets vested in her by a

[10] [2000] 1 WLR 2222.
[11] [2016] JRC 132.

saisie judiciaire; (iii) it was an error of law to apply the trust cases when she is selling property vested in her by a *saisie judiciaire*; and (iv) it was an error of law not to give the Viscount the wide discretion in exercising her functions that the court gives her when managing property *en désastre*.

The substantive litigation commenced in the Royal Court had ceased to be live before the Royal Court's judgment and the outcome would not be affected by the Viscount's appeal. A preliminary question was therefore raised as to whether the Court of Appeal had jurisdiction to hear the appeal under the Court of Appeal (Jersey) Law 1961.

Held:

Jurisdiction. The question whether the Court of Appeal had jurisdiction to hear an appeal when no *lis* remained between the parties and, if it had jurisdiction, whether it should in its discretion hear it, had not previously been raised. The Court of Appeal was a creature of statute, but the language of art 12 of the Court of Appeal (Jersey) Law 1961 ought to be so construed as to enable the court to address issues of public law importance if the circumstances are otherwise right that it should do so. The legislature would not have intended that the Court of Appeal it created could not hear a case where the court itself was satisfied that matters of genuine public importance had arisen even if there was no longer a *lis* between the parties to the appeal. Such appeals would almost certainly not be exercised with a view to reopening decisions of fact in the court below. The jurisdiction under art 12 to hear "any appeal, and the amendment . . . of any judgment or order made thereon . . ." The court further construed that language to be sufficient in principle to give jurisdiction to deal with the present appeal. The word "judgment" was capable of being given a wide meaning and the restrictive approach taken in *Lake v Lake*[12] was unnecessary in a small jurisdiction. Alternatively, the Royal Court's decision in the present case was in the court's view intended to stand as general directions to the Viscount to be applied in all cases including the instant case, and therefore form part of the court's judgment or order in this case.

Substantive appeal—Viscount's duties under 1999 Law not akin to a trustee. The role of the Viscount is many faceted. The nature of the duty imposed upon her in relation to each of those functions is likely to be affected by such particular statutory provisions as have been adopted for governing their exercise. It may well be that there are

[12] [1955] All ER 538.

some common themes which can be applied across the different functions but in the case of every function it is necessary to look at the relevant statutory provisions which apply to her exercise of that function. It is not necessarily appropriate to conclude that because the Viscount has a particular duty in relation to the administration of the *désastre*, it follows that the same duty necessarily applies in relation to the administration of a *saisie judiciaire*.

The role of the Viscount holding assets under the 1999 Law was to be distinguished from that of a trustee. Article 59(1) of the Trusts Law provides that nothing in that Law affects the powers, responsibilities or duties of the Viscount. The structure of the 1999 Law did not point to the *saisie judiciaire* provisions creating a trustee obligation on the Viscount. The obligations and duties of the Viscount, whatever they were, fell to be construed in accordance with the structure of the statutory regime. The exclusion of liability save for negligence on the Viscount's part contained at art 23 made it plain that even if the property should turn out not to be realisable property, the Viscount is not liable in respect of loss or damage except such as is caused by her negligence. It followed that in terms of the management of the property restrained by the order of the *saisie judiciaire*, the Viscount is at risk only to the extent that she acts negligently, and she does not carry a potential liability as a trustee. Similar reasoning carried through to the potential liability of the Viscount in relation to the realisation of property.

This did not mean that the Viscount is entitled to act in any cavalier fashion in the management or realisation of property subject to a *saisie judiciaire*. The exclusion of liability except in negligence in effect generally established that the Viscount does owe a duty of care to those who might be adversely affected by her actions. That duty is to act fairly and reasonably having regard to the overall purposes for which the 1999 Law was passed, and in particular the relevant provisions in relation to the confiscation of assets. Once the confiscation order has been made, the primary duty of the Viscount under art 17 is to ensure that the assets are realised in such a manner as enables that confiscation order to be paid. It is not her duty to conduct the realisation in such a way as maximises the value of the assets realised. The court did not take the view that the Viscount might be obliged in some circumstances to gazump. Indeed it would be odd to reach the conclusion that the duty of fairness on the part of the Viscount operated so as to require her to ignore the ethical consideration of completing a transaction which she had agreed to complete on the terms which had been settled and instead give primacy to a contingent obligation owed to a convicted criminal whose assets were being removed from him so as to ensure that he did not benefit from his crimes. If the criminal ended up suffering a greater loss then

that would just be the way the cards fell and he would only be in that position in the first place as a result of the offending.

CONTRACT

Misrepresentation

Hong Kong Foods v Gibbons [2017] JRC 050 (Royal Court: Birt, Commr with Jurats Nicolle and Thomas)

The second plaintiff appeared in person and as director of the first plaintiff; C Hall for the first and second defendants.

In a counterclaim for an action in breach of contract, the defendants alleged *inter alia* that the plaintiffs were guilty of a pre-contractual misrepresentation. The question was raised as to the effect of such misrepresentation under Jersey law.

Held:

Misrepresentation as a *vice du consentement* rendering the contract void. Until fairly recently, it appeared from cases such as *McIlroy v Hustler*[13], *Channel Hotel and Properties Ltd v Rice*,[14] *Kwanza Hotels Ltd v Sogeo Co Ltd*[15] and *Newman v Marks*[16] that Jersey law recognised an ability to rescind a contract or award damages in lieu in the case of misrepresentation inducing the contract. In other words, a contract induced by misrepresentation (at least if not fraudulent) rendered a contract voidable rather than void. However, in *Steelux Holdings Ltd v Edmonstone*,[17] the Royal Court indicated at para 10 that an innocent misrepresentation which induces a contract amounts to a *vice du consentement*. A fraudulent misrepresentation would amount to *dol* and would therefore be a *vice du consentement* but an innocent misrepresentation might also amount to a defect of consent which allows the injured party to treat the contract as void. This approach was followed by the Royal Court in *Sutton v Insurance Corp of the Channel Islands Ltd*.[18] It was clear that the court in *Sutton* was differentiating Jersey law from modern French law. Under French law an innocent misrepresentation which induces a contract can only constitute a *vice du consentement* if it amounts to an *erreur sur la substance*, which in many cases it will not. Thus the court in *Sutton*

[13] 1969 JJ 1181.
[14] 1977 JJ 111.
[15] 1981 JJ 59.
[16] 1985–86 JLR 338.
[17] 2005 JLR 152.
[18] 2011 JLR 8.

held that Jersey law should recognise an additional category of *vice du consentement* in addition to *erreur* and *dol*.

Problems with that approach. Bringing misrepresentation under the rubric of *vice du consentement* leads to difficulties in connection with remedies. The consequence of holding that a *vice du consentement* exists is that the contract has to be considered as *nul* and is therefore void *ab initio*. Whether the *vice* led to *nullité relative* or *nullité absolue*, the contract was void: Nicholas, *French Law of Contract*, 2nd edn, at 77 (1992) quoted with approval by Bailhache, Bailiff, in *Selby v Romeril*;[19] *Marett v Marett.*[20] There were two problems with this approach: (a) unless one were to introduce for the very first time into Jersey law an exception which modern French law had apparently introduced in connection with movable goods, the consequence of a contract being void is that a purchaser cannot transfer title because he does not have any title himself; (b) a purchaser's option of seeking damages, which may be preferred, rather than having the contract rescinded, was not open if the contract were void *ab initio*.

Misrepresentation not to be regarded as a *vice de consentement.* The court should, so far as consistent with legal principle and precedent, develop the Jersey law of contract so as to be suitable for the requirements of commercial life in the 21st century and to be as easily ascertainable and understandable as possible. The position following *Steelux* and *Sutton* was both undesirable and not required by precedent. The preferable solution was to revert to the position envisaged by the Royal Court and the Court of Appeal in the earlier misrepresentation cases and to hold that a contract induced by innocent misrepresentation is voidable rather than void. This protected the position of *bona fide* third parties and also gave the court and the plaintiff flexibility as to whether rescission and/or damages was the appropriate remedy. That could be achieved by continuing to regard misrepresentation as a principle of Jersey contract law which stands alone rather than seeking to shoehorn it into the structure of a *vice du consentement*. This approach was preferable as a matter of policy but also to be more in accordance with precedent and principle. The court specifically did not address the position where there is a fraudulent misrepresentation (which may be said to amount to *dol*) and left that open for consideration when the point arises.

FAMILY LAW

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[19] 1996 JLR 210, at 219/220.
[20] 2008 JLR 384.

Pre-nuptial agreements

L v M [2016] JRC 184A; [2017] JRC 062A (Royal Court: Canavan, Registrar, Family Division)

FC Binet and HJ Heath for the petitioner; BJ Corbett for the respondent.

The question arose as to the effect of a pre-nuptial agreement on the exercise of the court's powers to make financial provision on divorce. In this case the petitioner argued that she had been given no time to consider the agreement and had not been separately advised and accordingly sought an order of the court that no weight should be attached to it.

Held:

Duty of the Court to have regard to all circumstances. Article 29(1) of the Matrimonial Causes (Jersey) Law 1949 provides that prior to making financial provision for a party to a marriage in cases of divorce, the court shall have—

> "regard to all the circumstances of the case including the conduct of the parties to the marriage insofar as it may be inequitable to disregard it and to their actual and potential financial circumstances."

Howarth v McBride[21] confirmed that when considering all the circumstances of the case, it is legitimate for the Royal Court to have regard to the factors listed in s 25 of the Matrimonial Causes Act 1973.

Pre-nuptial agreement does not oust court's jurisdiction. It is not possible for a pre-nuptial agreement to oust or fetter the jurisdiction of the court: *.Le Geyt v Mallett*;[22] *Sharland v Sharland.*[23] But the court must give due weight to the agreement: *Radmacher (formerly Granatino) v Granatino.*[24]

Weight to be attached to pre-nuptial agreement. Although Thorpe, LJ said in *F v F*[25] that such agreements were of very limited significance, the approach had moved on by the time of the decision in *Crossley v Crossley*[26] where Thorpe, LJ noted that—

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[21] 1984 JJ 1.
[22] 1993 JLR 103.
[23] [2015] 2 FLR 1367.
[24] [2010] UKSC 42, [2010] 2 FLR 1900.
[25] [1995] 2 FLR 45.
[26] [2007] EWCA Civ 1491, [2008] 1 FLR 1467

> "prenuptial contracts are gaining in importance in a particularly fraught area that confronts so many parties separating and divorcing."

In *Radmacher*, the oft quoted passage from the wide ranging speech of the majority was that—

> "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

Radmacher held that there are three factors for a court to consider when asked to uphold the terms of a pre-nuptial agreement: (i) Were there circumstances attending the making of the agreement that detract from the weight that should be accorded to it? (ii) Were there circumstances attending the making of the agreement that enhance the weight that should be accorded to it: the foreign element? (iii) Did the circumstances prevailing when the court's order was made make it fair or just to depart from the agreement?

Disposal. No foreign element arose and this was a case where there were limited resources available for distribution and the "needs" of the parties became an important factor. At para 81 of *Radmacher*, the majority said—

> "The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event . . . of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement."

The leading authority on appropriate division in a "needs" case came from the House of Lords in *Miller/McFarlane*[27]. Lord Nicholls at paras 10–12 of the judgment summarised the position as follows—

> "[10] The statute provides that first consideration shall be given to the welfare of the children of the marriage. In the present context nothing further need be said about this primary consideration. Beyond this several elements, or strands, are readily discernible. The first is financial needs. This is one of the matters listed in s 25(2), in para (b . . . In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs."

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[27] [2006] UKHL 24

In all the circumstances of this case, the Registrar held that it would not be fair to apply the effect of the pre-nuptial agreement because this would inevitably lead to the petitioner being left in a predicament of real need. Having reached this conclusion there was no need to consider further the background and effect of the prenuptial agreement.

TRUSTS

Resulting trust—constructive trust

Al Tamimi v Al Charmaa [2017] JRC 033 (Royal Court: WJ Bailhache, Bailiff and Jurats Nicolle and Ramsden)

R Gardner and JW Angus for the plaintiff; OA Blakeley for the defendant

The question arose between two ex-spouses as to the ownership of two Jersey companies, whose shares were held in the name of the defendant. The plaintiff argued *inter alia* that the shares were beneficially owned by him either on a resulting trust or on a constructive trust or was entitled to an equitable remedy as a result of the defendant being unjustly enriched at his expense by the ownership of the shares. The companies held two London immovable properties and the defendant had not funded the companies.

The defendant, on the other hand, argued that the companies had been incorporated with her as both legal and beneficial owner because she and the plaintiff had been suffering matrimonial difficulties and she had agreed to remain with the plaintiff only if given some financial security.

The defendant further argued that even if the court were to find that the shares were held by her on behalf of the plaintiff, the court should not give effect to that conclusion because of the doctrine of illegality or the equivalent known as the "clean hands" equitable principle since the plaintiff had knowingly made through his agents a false representation to banks, trustees, lawyers, company administrators and government authorities that the defendant was the beneficial owner. It was argued that that false representation involved the commission of multiple crimes both in the United Kingdom and in Jersey, and that the court should not give assistance to a plaintiff in those circumstances because to do so would be harmful to the integrity of the legal system.

Held:

Whether there was a resulting trust. In *Z v Y*,[28] the court adopted the reasoning of the English Court of Appeal in *Re Vandervell's Trust (No 2)*,[29] which upheld a decision of McGarry, J at first instance. McGarry, J said: "Before any doctrine of resulting trust can come into play, there must at least be some effective transaction which transfers or creates some interest in property". Here the plaintiff had not transferred or created any legal interest in the shares of the respective companies on behalf of the defendant; they had been incorporated with her as the beneficial owner. McGarry, J then referred to types of case in which a resulting trust arises: (a) where the transfer is made without valuable consideration there is a rebuttable presumption that the transferee holds on resulting trust for the transferor; and (b) where a transfer of property leaves some or all of the beneficial interest undisposed of. In this case, the plaintiff did not transfer the shares to the defendant and in any event even if it could be said that the property in the shares had been transferred to the defendant, the relationship between husband and wife was such that there was a presumption of advancement, as a result of which the wife acquired the property for herself. As was said in *Z v Y* at para 108—

> "Where there is an ostensibly valid legal transfer, there would need to be some special reason why the Court would determine to set it aside and hold that the property was subject to a resulting trust in favour of the transferor."

Here there would be no such special reason, given the presumption of advancement between husband and wife.

Whether there was a constructive trust. The plaintiff claimed in the alternative that the defendant held the shares on constructive trust for him. It was asserted that it was unconscionable for her to retain such assets and that in addition she had made no contribution whatever in respect of the purchase, maintenance or expenses of the assets of the companies. Furthermore she had made no significant payments, whether to bankers, insurers or tax authorities, even after the present dispute as to beneficial ownership had commenced. The requirements for the establishment of a constructive trust are those largely prevailing in England and Wales: *Fiduciary Management Ltd v Sheridan*.[30] Although this summary made it plain that the limits had not been settled, it was clear that constructive trusts traditionally fall into two categories of case. The first was that contemplated by art 33 of the Trusts (Jersey) Law 1984, where the constructive trustee makes or

[28] [2014] JRC 170.
[29] [1974] Ch 269.
[30] 2002 JLR *N* [11].

receives a profit gain or advantage from a breach of trust and is deemed to be a trustee of that profit, gain or advantage. The second class of case is that class where, as Collins, Commr put it in *Fiduciary Management Ltd v Sheridan*, there is an equity which ought to operate on the conscience of the owner of the legal interest to require him to carry out the purposes which the law imposes on him by reason of this unconscionable conduct. In the present case, there was no suggestion of any breach of trust giving rise to a profit gain or advantage of which the defendant ought to be a trustee. If the claim was maintainable at all in constructive trust, it could only be because there is an equity which the court ought to find should operate on the conscience of the defendant requiring her to carry out the purposes which the law imposes on her by reason of her unconscionable conduct. Such an argument fell, on the facts, for very similar reasons to those which applied to the claim in resulting trust and indeed more generally.

Unjust enrichment. In *Flynn v Reid*,[31] the court adopted the approach taken in the Scottish case of *McKenzie v Nutter*[32] where Sheriff Principal Lockhart took this approach—

> "On the basis of the law which I have set out it is clear that the Court may allow an equitable remedy in circumstances where one party has been unjustly enriched at the expense of another party. I propose to deal with this matter under four headings: (a) Has the appellant been enriched at the expense of the respondent and what is the nature of that enrichment? (b) If so, was that enrichment unjust? (c) If so, what remedy, in the particular circumstances of this case, is open to the respondent? (d) Is that remedy equitable?"

That approach was adopted by the court on the basis that it provided a modern statement of the approach currently adopted by French courts to questions of *enrichissement sans cause*. In the present case, such enrichment as had taken place at the expense of the plaintiff was not unjust. The court found that the defendant's explanation as to how the transfer of assets came about was credible and in those circumstances, it was impossible to conclude that the enrichment was unjust.

Illegality or immorality. In *Patel v Mirza*[33] the Supreme Court held that the general rule was that a person who satisfied the ordinary requirements of a claim in unjust enrichment should be entitled to the return of his money or property given away, notwithstanding that the

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[31] [2012] JRC 100.
[32] [2007] SLT 17.
[33] [2016] 3 WLR 399.

consideration had failed in whole or in part was an unlawful consideration. Lord Toulson and Lord Neuberger concluded that the policy reasons for the common law doctrine of illegality as a defence to a civil claim were based upon the principle that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system, or possibly certain aspects of public morality. It was therefore necessary to assess whether the public interest would be harmed by enforcement of the illegal agreement. That required the court to consider the underlying purposes of the prohibition which has been broken, and whether those purposes would be enhanced by a denial of the claim, together with any other relevant public policy on which the denial of the claim might have an impact. In the present case there was a public interest—a very strong public interest—in the Island being able to demonstrate that it has the ability to identify the beneficial owners of companies, or the beneficiaries under trusts. The Royal Court should not recognise any arrangement which detracts from the ability of regulators or law enforcement authorities to do so, and, even if it had been satisfied that the shares were held as a nominee or on trust for the plaintiff, or that the defendant had been unjustly enriched at the expense of the plaintiff, the court would not have been prepared to grant relief in the exercise of equitable discretion.