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

BANKRUPTCY

Assistance to foreign court—disclosure—purpose for which information can be used

Ariel v Halabi [2018] JRC 006A (Royal Ct: Birt, Commr and Jurats Crill and Ramsden)

WAF Redgrave for the representor; J Harvey-Hills for the first respondent; DP Le Maistre for the second respondent

An English trustee in bankruptcy obtained a recognition order in Jersey pursuant to a letter of request from the English High Court and to the court's powers of assistance to foreign insolvency courts under art 49 of the Bankruptcy (Désastre) (Jersey) Law 1990. The recognition order stated that—

> "Save with the leave of this Court, the Representor shall only use the information or documents so produced for the purposes of the administration of the estate in bankruptcy of Mr Halabi, in whichever jurisdiction, under the direction of the High Court."

Pursuant to a consent order, the trustee in bankruptcy had also been joined to proceedings under art 51 of the Trusts (Jersey) Law 1984 brought by the trustees of a Jersey trust. The consent order required the trustees of the trust to provide to the trustee in bankruptcy certain documents used in connection with the proceedings but such provision was subject to the following restriction—

> "Provided always that such disclosure shall not be used for any purpose other than the Representation and shall not be disclosed to any third parties, other than to the parties' legal advisers, and

in particular shall not be disclosed to any of the Defendants in the Actions described in paragraph 4 below."

The trustee in bankruptcy was later made the subject of an information notice issued by HMRC, and approved by First-Tier Tribunal (Tax Chamber), which required him to produce to HMRC all documents and information which he had received pursuant to the Jersey recognition and consent orders. The trustee in bankruptcy, being concerned that compliance would render him in breach of the restrictions in the recognition and compliance orders, sought the court's leave under the recognition order to comply with the information notice and seeking a variation of the consent order to like effect if the court considered that he would otherwise be in breach of either order.

Held:

Jurisdiction to give leave under the recognition order. Although the court could only make an order under art 49 in order to provide assistance to the courts of another country relating to the insolvency of a person, it did not follow that the court could not do by variation what it could not have done originally. The court had clearly envisaged that, with the leave of the court, the material obtained pursuant to the recognition order could be used for a purpose other than the administration of the bankruptcy in question. The fact that this might become necessary and that information might have to be used for some other purpose did not change the fact that the order was made for the purposes of assisting in a bankruptcy. Furthermore, the wording of art 49 was not so restrictive as to deny the court the ability to allow material originally obtained for the purpose of insolvency to be used for some other purpose if that became necessary. An example was *Re AG (Manchester) Ltd (in liquidation)*.[1]

Jurisdiction to vary the consent order. The consent order was not made under art 49. However it was by its nature not a final order. It sought to control onward disclosure of material supplied to a party in art 51 proceedings. The court was ultimately the arbiter of whether material supplied in proceedings may be disclosed elsewhere and always has an ongoing ability to vary an order which it has made about the confidentiality of material produced in proceedings before it, whether held in public or in private. Furthermore, the court specifically gave liberty to apply in connection with the consent order. Accordingly the court had jurisdiction to vary the consent order in the light of changed circumstances.

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[1] [2005] JRC 035D.

Rule against assistance for enforcement of foreign tax. Rule 3 of Dicey Morris and Collins, *The Conflict of Laws* (15th edn), at 5R-019 states—

> "English courts have no jurisdiction to entertain an action . . . for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state."

The rule accurately reflects the position under Jersey law. The question was whether the orders requested by the trustee in bankruptcy would amount to indirect enforcement of a foreign (in this case UK) revenue law. The decision of Royal Court in *Re Tucker*[2] was reached some 30 years before, and before the decision of the House of Lords in *Re State of Norway (Nos 1 & 2)*.[3] The House of Lords held that granting assistance in the form of the examination of a witness in connection with a Norwegian tax assessment did not amount to the indirect enforcement of the revenue laws of the State of Norway. The provisions of the Finance Act 2008, Schedule 36, under which the information notice had been issued, were investigatory powers that enabled HMRC to gather information for the purpose of checking a taxpayer's tax position (*R (Jimenez) v First Tier Tribunal (Tax Chamber)*,[4] distinguished). Accordingly, a variation by the court which recognises the fact that the trustee was on the horns of a dilemma and therefore permitted the trustee to supply material to HMRC for the purposes of their tax investigation, did not amount to indirect enforcement of a foreign tax law.

Discretion. Consistent with its general approach of seeking to ensure that Jersey is a responsible member of the international community, the States had passed legislation which enabled confidential information in Jersey to be obtained both to assist in overseas insolvencies and for the purpose of preventing tax evasion in other jurisdictions. However, the States has provided two very different routes. For insolvency matters, art 49 of the Bankruptcy Law was the relevant route. For tax matters, a completely different route had been established by the legislature under Tax Information Exchange Agreements and the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008. Where two distinct routes have been established by the legislature, it would, as a matter of general principle, be wrong for the court to mix them up.

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[2] 1987 JLR 473.
[3] [1990] 1 AC 723.
[4] [2017] EWHC 2585 (Admin).

However, on occasions, persons in receipt of material subject to a restriction as to its use may find themselves the subject of obligatory measures requiring its disclosure. In *Bank of Crete SA v Koskotas (No 2)*,[5] a case regarding third party disclosure in litigation, Millett, J held that, while it would not normally be right to authorise the plaintiff voluntarily to make use of the material disclosed for any other purpose, the court, in the exercise of its discretion, ought not to place the plaintiff in the position of having either to infringe its undertakings to the court or to find itself in breach of its duties under foreign law. In the present case, the terms of the relevant TIEA did not permit material prior to 2010 to be obtained. HMRC required information going back to the early 1990s. The court had to determine whether to consent to the trustee in bankruptcy complying with the information notice in circumstances where, if it were to refuse and the trustee were subsequently to refuse to comply, either he would be penalised, (possibly on a daily basis) or HMRC would be denied access to material situated within the UK to which it was entitled under English law, where an independent judicial monitor had found its request for the information to be reasonable and where there is no alternative route available under the TIEA. In these particular circumstances, bearing in mind the considerations mentioned by Millett, J in the *Bank of Crete* case, the court concluded that the right course was to grant consent under the recognition order and also to vary the consent order so as to permit the trustee in bankruptcy to comply with the information notice.

CIVIL PROCEDURE

Disclosure—*Norwich Pharmacal* order

Riba Consultaria Empresarial Ltd v Pinnacle Trustees Ltd [2018] JRC 33A (Royal Ct: Birt, Commr and Jurats Nicolle and Crill)

JN Heywood for the plaintiff; EB Drummond for the defendant

The question was raised as to the required standard of proof in determining, for the purposes of a *Norwich Pharmacal* application, whether a third party has become mixed up in wrongdoing.

Held: The test as to whether a third party, from whom information is sought under a *Norwich Pharmacal* order, has become mixed up in alleged wrongdoing is whether there is a reasonable suspicion that that third party is in that situation: *Macdoel Invs Ltd v Brazil (Federal Republic)*,[6] a decision of the Jersey Court of Appeal.

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[5] [1992] 1 WLR 919.
[6] 2007 JLR 201

A "reasonable suspicion" is lower than "*prima facie* evidence" but a "good arguable case" is higher than "*prima facie* evidence". With this in mind the court preferred to reformulate the second test as set out in the later decision of the Royal Court in *New Media Holding Co LLC v Capita Fiduciary Group Ltd*[7] so that it refers to "reasonable suspicion" and therefore reads as follows—

> "(i) Are we satisfied there is a good arguable case that the plaintiff is the victim of wrongdoing? (ii) Are we satisfied that there is a reasonable suspicion that the defendant has been mixed up in the wrongdoing? (iii) As a matter of discretion, do we consider it to be in the interests of justice to order the defendant to make disclosure?"

Applying those tests on the facts, the court granted the relief sought.

COMPANIES

Winding up—failure to provide accounts to company member

In re Canargo Ltd Guernsey Judgment 13/2018 (Royal Ct: Collas, Bailiff and Jurats Jones, Ferbrache and Robilliard)

MC Newman for the applicant

An application (the first of its kind) came before the Royal Court to place a company into liquidation for having failed to provide company accounts to a member. The application was effectively a member versus member dispute. The applicant, Canargo Cayman Ltd, a Guernsey registered company, owned 25% of the issued share capital of Canargo Ltd ("the company"). The company's primary business was as a participant in a joint venture agreement concerning oil and gas exploration in Georgia. The company was beneficially owned by Mr Isaak, who was a director until he was removed against his will at an extraordinary general meeting on 18 November 2016. Mr Ramsay, the sole director of the company, owned the other 75% of the share capital. The application before the court was part of an ongoing dispute between Mr Ramsay and Mr Isaak. Mr Ramsay had failed to comply with an order, made at an initial hearing, granting him an adjournment to file and serve evidence in response to the application. He had since also failed to provide his advocate with instructions. Accordingly, there was no evidence before the court from Mr Ramsay and he was not represented. The applicant alleged failure of the obligation in s 251(1) of the Companies (Guernsey) Law, 2008 as amended ("the Companies Law"), which imposed a mandatory

[7] 2010 JLR 272.

obligation to send accounts to members within 12 months of the end of the financial year. There was also an alleged breach of the duty in s 251(2) of the Companies Law, namely, to send the most recent accounts to a member within seven days of a request to do so unless that member had made a similar request within the financial year. Affidavit evidence of non-compliance stated that the company had failed to send the applicant a copy of the accounts for the period ended 31 December 2015 and that letters to Mr Ramsay containing requests for financial information regarding the company had gone unanswered. Mr Ramsay's former advocate had accepted, in a letter to the applicant's counsel, that the accounts were not produced; the Bailiff remarked that if there were good and valid reasons for the failure to supply the accounts, set out in the letter or otherwise, the court would have taken those reasons into account in the exercise of its discretion. However, no such evidence was before the court. The Bailiff directed the Jurats that they had wide discretionary powers, both under s 251(6) and under s 406 where the expression is that the court "may" order a winding up.

Held: The application for the company to be wound up would be granted. Where there has been a failure to provide a member with company accounts, the court will first consider whether to order that the accounts be sent within a reasonable period of time as envisaged in s 252(6)(b). The decisive facts considered by the Jurats in the present case were that the request had been outstanding for some time; the proceedings had been issued more than two months prior to the hearing; the company had had the opportunity to comply with its statutory obligations and had failed to do so notwithstanding that Mr Ramsay's former advocate said, at the first hearing, that the court would be made aware of all the relevant factors; and there was no evidence before the court to explain the company's failures. The Jurats had no reason to believe that accounts would be produced or that anything would be achieved if they were to allow the company a further period within which to comply by issuing a direction in that regard under s 251(6). They recognised that the liquidators would have difficulties in discharging their duties in the absence of any accounts. However that could not prevent the court granting the application to wind up the company.

COMPETITION LAW

Abuse of dominant position—appeals

ATF Overseas Holdings Ltd v Jersey Competition Regulatory Authority [2018] JRC 004 (Royal Ct: Sir William Bailhache, Bailiff and Jurats Crill and Ramsden)

JD Kelleher for the appellant; NM Sanders for the respondent

The appellant appealed against the decision of the Jersey Competition and Regulatory Authority ("JCRA") that it, having taken over a business of fuel supply at Jersey Airport, had abused a dominant position in the supply of aviation fuel contrary to the Competition (Jersey) Law 2005 ("the Law") by (i) refusing to supply aviation fuel to Aviation Beauport Ltd ("ABP") for the purposes of re-sale by ABP at Jersey Airport; and (ii) charging prices to ABP that were higher than those paid by customers purchasing similar volumes and were therefore discriminatory. Article 53 of the Law provides for the appeal to the Royal Court and is in the form of a "may appeal" provision without specifying the nature or grounds of appeal.

Held, allowing the appeal:

Nature of appeal under the Competition (Jersey) Law 2005. A full discussion of the nature of an appeal against a decision of the JCRA was to be found in *JT (Jersey) v JCRA*.[8] That case considered the right of appeal contained in art 12 of the Telecommunications (Jersey) Law 2002, but the conclusions of the court in that case could be read across to an appeal under art 53 of the Law, that article being drawn in very substantially similar terms.

The court (i) will consider whether the decision was one which the JCRA was empowered to make, i.e. was the decision *ultra vires*? (ii) will look at the correctness and fairness of the procedure in order to decide whether the proceedings of the JCRA were in general sufficient and satisfactory; and (iii) will look at the merits of the decision (as well of course as considering matters such as whether the JCRA took into account any irrelevant factors or failed to have regard to relevant factors) and decide whether the appellant has satisfied it that the decision was wrong. In reaching its conclusion, it will give due weight to the decision of the JCRA bearing in mind its expertise and experience.

Where an appeal is allowed because of procedural errors or unfairness of sufficient gravity, the likely remedy will be that the decision is quashed and the matter remitted to the JCRA for reconsideration. Where, on the other hand, the appeal is allowed because the court considers the decision to be wrong, it will make such order as it thinks fit. This may be to remit the matter to the JCRA for a new decision to be taken or it may be that the court will, in accordance with art 12(5)(c) make a decision itself as to the exercise of the specified regulatory function.

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[8] [2013] JRC 238.

This approach was very similar to the approach which is described in *British Sky Broadcasting Ltd v Office of Communications*.[9]

Decision. Article 16(2) of the Law provides examples of what might constitute abuse of a dominant position but it is a matter of judgment for the JCRA or, on appeal, the court to determine whether there has been an abuse. Article 16 is very similar to art 102 of the Treaty on the Functioning of the European Union and the court accordingly considered case law relating to that treaty. The distinction between conduct on the part of a dominant firm which is permissible and conduct which is prohibited as abusive is often a difficult one, and the assessment of the actions of the dominant firm in any particular case will be a question of fact and degree. Richards LJ noted in *National Grid plc v Gas & Electricity Markets Authority*[10] that the text set out a number of considerations including—

> "(v) how far the conduct in question is normal industry practice or, on the contrary, is exceptional and plainly restrictive of competition . . . (ix) whether the adverse impact of the conduct is 'proportionate' to any legitimate commercial interest or public policy objective which may be identified as an 'objective justification' for such conduct."

It is a strong thing to require that entity to share facilities which it has created with a trade competitor: *Oscar Bronner GmbH v Mediaprint Zeitungs-und Zeitschfriftenvelag GmbH*.[11] On the particular facts, the court was satisfied that the appellant had not abused its dominant position by refusing to sell aviation fuel to ABP for onward re-sale. Although the effect was to reduce competition, this did not necessarily mean that ATF had abused its dominant position and on the particular facts its conduct has not been unfair. ATF had assumed a risk in making substantial investments in the business. There was in fact no price penalty to APB's customers; ATF was entitled so to arrange its business in a way that kept its own risks under its own control; and to require ATF to operate in the same way as its predecessors in business would be anti-competitive. Furthermore, behaviour that would normally be regarded as abusive is permissible if a business can demonstrate an objective justification for it. In this case, the court also accepted the appellant's contention that it was objectively justified in refusing to supply ABP because that company had no permit or licence from Ports of Jersey Ltd to act as a re-seller of the fuel at wing-tip. Accordingly, even if the refusal to supply aviation fuel to ABP fell to

[9] [2012] CAT 20.
[10] [2010] EWCA Civ 114.
[11] EU Court of Justice, Case C7/97.

be treated as an abuse of the dominant position on other grounds, there would be an objective justification for it as ABP had no licence to act as re-seller. On the facts there had also been no unlawful price discrimination against APB.

CONFLICT OF LAWS

Trusts—proper law of trust—application of Sharia law

Dubai Islamic Bank PJSC v Ridley [2017] JRC 204 (Royal Ct: Le Cocq, DB, sitting alone)

JC Turnbull for the defendant/appellant; DR Wilson for the plaintiff/respondent.

The defendant/appellant appealed against a decision of the Master striking out parts his answer. By its Order of Justice, the plaintiff/respondent (the bank) claimed assets worth approximately US$7m which, it alleged, had been contributed to a Jersey trust known by the defendant and represented monies obtained by him as a result of a fraud on the bank. The claim was proprietary, the bank claiming that it could trace monies into the trust. The alleged fraud was perpetrated according to the bank through certain agreements (the agency agreements) which were expressed to be governed by English law (or in one case German law) in so far as not inconsistent with Sharia law. In his answer, the defendant claimed that in any event he had defences available to him under Sharia law because the bank's claim had in effect been discharged when the bank took possession of certain property used as security. In striking out parts of the answer, the Master held *inter alia* that the appropriate conflict of law rules for determining the proper law of the agency agreements and the proprietary claims arising out of them were those of England and Germany.

Held, as regards the conflicts of law issues:

Principles on strikeout. The court should only strike out pleadings in plain and obvious cases: *In re Esteem Settlement*.[12] In that case the court also recognised that such a cautious approach to striking out is even more applicable in "an uncertain and developing field of law".

Application of conflicts of law of *lex fori.* It had been common ground between the parties before the Master that that it was a "a rule of general application which is universally admitted" (see *Dicey, Morris and Collins, Conflicts of Law*, 15th edn) that it is the private international law rules of the *lex fori* which must be applied in

[12] 2000 JLR 119.

determining proper law, whether or not the question is identified as being one of the proper law of the agency agreements as contracts or the proper law of restitutionary and/or proprietary claims arising from the agency agreements. The Master, however, applied English conflict of law rules to these questions (and took German law to be the same as English law) on the basis that the above principle derived from cases relating to ascertaining the law of a contract whereas the question in the present case was the law which underpinned the plaintiff's claim to require the defendant to account for property. Applying English conflicts rules, the Master held that English law recognised that the bank had the right to trace and ignored Sharia law.

Disagreeing with that approach, the Deputy Bailiff said that application of English conflict rules was not obviously the case. Conflict of law questions, including the proper law, are in essence procedural matters and it was at least arguable that the applicable law remedy is the private international law of Jersey as the *lex fori*. Furthermore, a determination of Jersey private international law on this issue was not a matter for a strikeout application. Unless it was clear that the court should not apply the private international law of Jersey to the issue, then insofar as it related to the Master's orders for striking out issues of Sharia law, that part of the appeal should be allowed. It was more than simply arguable that all matters of remedy, including the bank's claims for relief in the present proceedings, are matters for the *lex fori*, namely Jersey law, and it may be necessary for a determination to be made at trial as to the effect of the Sharia law qualifications in the agency agreements.

Incorporation of Sharia law. The Master also went on to consider the question as to whether the references in the agency agreement to the principles of Sharia law were sufficient to incorporate Sharia law into the contract. He rejected that argument, relying substantially on the judgment of the English Court of Appeal in *Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC*.[13] In the subsequent case of *Halpern v Halpern*,[14] the judgment of Potter LJ in *Beximco* was clarified by Waller LJ in which he said that an "English law, subject to Sharia law" clause could not be interpreted so as to potentially defeat the commercial aim of the contract and did not incorporate sufficiently certain black-letter provisions. However, without in any way deciding this point definitively, it was possible to argue that the Sharia law provisions did not in this particular case defeat the commercial purposes of the contract. Indeed, in one sense, it

[13] [2004] 1 WLR 1784.
[14] [2008] QB 195.

is one of the bases of the agency agreements. It was arguable that they went to the fundamental nature of the agreements themselves although that was an argument to be resolved if necessary at trial. Nor was it clear that Sharia law was incapable on the relevant points of being expressed with sufficient certainty or clarity as to what that law might provide. It was therefore not possible to conclude with certainty that Sharia law could not be incorporated by reference into the agency agreements so as to justify striking out any pleading to that effect. It may be that Sharia law was not certain enough but there would need to be evidence about it before the court to reach that conclusion. There was no sufficient evidence before the Master or indeed before the court relating to the certainty, clarity or ambit of Sharia law in this context. Accordingly, it was not possible to determine at this stage, and without further information, whether Sharia law was capable of incorporation.

COURTS

Judicial Committee of Privy Council—leave to appeal

Seneschal's Court—jurisdiction

A v R [2018] UKPC 4 (Lady Hale, Lord Mance, Lord Wilson, Lord Hodge and Lady Black)

V Wakefield for the appellant; C Gallagher QC for the respondent

The parties, both German nationals, were the parents of a minor child, "C". They had never been married to one another. They lived together in Sark at the time of C's birth in 2009. In February 2012, the respondent (C's mother) and C moved away from Sark. In May 2012, the relationship between the parties broke down. They were unable to reach an agreement as to joint care, custody and maintenance of C. In January 2013, the respondent returned to Sark with C and issued an application against the appellant (C's father) in the Seneschal's Court for a maintenance order and a sole care and control order in respect of C. The Seneschal's Court made an interim award against the appellant to pay maintenance for C to the respondent. Orders for payment of arrears of maintenance and a maintenance order were subsequently made by the Court on 9 February, 5 March and 9 July 2015. The appellant appealed those orders to the Royal Court of Guernsey and the Guernsey Court of Appeal. The Court of Appeal refused him leave to appeal to the Judicial Committee of Privy Council on 13 July 2017. He then sought special leave to appeal from the Board. The application raised an important question as to the circumstances in which an applicant needed permission to appeal to the Board from a judgment of the Guernsey Court of Appeal. It also raised questions about (a) the

extent of the jurisdiction of the Seneschal of Sark; and (b) the scope for judicial development of the common law or customary law in Sark.

Held: Special leave to appeal the issue of applicable law would be refused. Alternatively, the appellant would be granted special leave to appeal and there would be a recommendation to Her Majesty in Council that the appeal be dismissed. Section 16 of the Court of Appeal (Guernsey) Law 1961 excluded the need for special leave of Her Majesty in Council or leave of the Court of Appeal when the monetary value of the claim was or exceeded £500. The Guernsey Court of Appeal had sought to reform this outdated provision by refusing to grant permission unless the appeal raised an arguable point of law of general public importance. However, s 16 of the 1961 Law provided for an appeal as of right when the monetary value of the claim was or exceeded £500. It was beyond the power of the courts to contradict that legislation. The appellant's appeal as of right did not mean that the Court of Appeal had no control over the appeal. The Court of Appeal indeed had the power to refuse an appeal where the applicant had an appeal as of right but the appeal was an abuse of process. Moreover, the Board had a limited discretion to refuse special leave in a case where there was an appeal as of right if that appeal were devoid of merit and had no prospect of success and/or if the appeal was an abuse of process. An Order in Council dated 24 April 1583 gave the jurats of Sark jurisdiction over all civil causes (excluding ecclesiastical causes). In 1676, the Seneschal's Court inherited the jurisdiction of the former judges and jurats. The modern statement of the jurisdiction of the Seneschal of Sark came from a 1922 Order in Council and an ordinance of the Royal Court of Guernsey dated 5 October 1931. Later, the Reform (Sark) Law 1951 and the Reform (Sark) Law 2008 preserved the pre-existing jurisdiction of the court and stated that it shall be the sole court of justice in Sark. The court had the right to hear and adjudicate every action, whether in movables or in immovables. However, legislation may give exclusive jurisdiction over a specified matter to the Royal Court of Guernsey. The Seneschal's Court had unlimited jurisdiction in civil matters. Its jurisdiction was not limited, as suggested by the appellant, to ordering the payment of liquidated sums due as debts and making orders in relation to immovable property.

Each of the Channel Islands had two principal sources of domestic law: legislation and customary law (sometimes described as common law). The Channel Islands gained their customary laws initially from the unwritten customs of the Duchy of Normandy. Local customs also developed within the Islands. On 27 July 1579, a Royal Commission was appointed to ascertain the extent to which the laws and customs of Normandy applied in Guernsey. A statement of the law of the Bailiwick of Guernsey known as "*L'Approbation*" was ratified by an

Order in Council on 27 October 1583. However, *L'Approbation* was not a complete statement of the customary laws of the Bailiwick, which continued to develop. *L'Approbation* had not prevented the judicial development of the common law of Guernsey. While the status of *L'Approbation* as legislation prevented direct abrogation of its provisions by judicial decision, the scope for judicial development of the law around and in addition to its provisions should not suffer the constraints which more modern statutory provisions would impose. There was no reason to believe that *L'Approbation* was intended to prevent the further development of the common law of Guernsey. The position is no different in Sark. The Order in Council of 24 April 1583 re-established the laws of Guernsey as Sark's customary law. *L'Approbation* stated that a father had a duty to maintain his children until they were married or had reached the age of 20 years. The Children (Sark) Law 2016 created, for the first time, a statutory regime for parental responsibility. The Affiliation Proceedings (Sark) Law 2017 created a statutory right of an unmarried woman to obtain a court order against the putative father to pay towards the maintenance of his child. However, the absence of a statutory regime in this area did not mean that the common law had not developed since 1583, nor did it mean that *L'Approbation* encompassed the whole law on the maintenance of children. The Court of Appeal was correct to hold that there has long existed an action in maintenance at common law in Sark. The Board was satisfied that Sark had an action for enforcement of the obligation to maintain a child, which the parent caring for the child could raise when the child was not of an age at which he or she could assert the right to maintenance himself or herself. The Board dismissed the appellant's argument that (i) it had no power to make an interim order, and (ii) the enforcement of a maintenance obligation did not comply with article 1 of Protocol 1 to the European Convention on Human Rights. The common law of Sark empowered the Seneschal's Court to make the orders challenged. The appellant's ground of appeal relating to the applicable law had not been raised in either party's pleadings. Nor had it been adjudicated upon by the fact-finding court. In the circumstances, an appeal on this ground was an abuse of process.

CRIMINAL LAW

Rape—evidence—credibility

W v Att Gen [2017] JCA 196 (CA: Pleming, Perry and Doyle JJA)

CMM Yates, Crown Advocate; MJ Haines for the appellant

The appellant appealed against conviction in relation to 11 offences of a sexual nature, committed over a period of six years between 1997 and 2003 against two complainants who, at the time of the offending,

were young girls. The essential issue on appeal was whether the appellant was wrongly denied the opportunity to cross-examine a complainant in relation to an allegation of rape she had made against another man, F, in August 2009. The appellant contended that the allegation of rape made against F was concocted, and that permitting cross-examination would or might have had a bearing on the complainant's credibility as a witness. On this basis, the appellant submitted that his inability to cross-examine rendered the trial unfair and, accordingly, his conviction was unsafe.

Held: In Jersey, the position in relation to other sexual behaviour was governed by customary law. The Court of Appeal adopted the approach which had also been followed by the Royal Court, namely that explained by Sir Michael Birt, Commr in *Att Gen v Correia*:[15] the general rule is that evidence that a complainant engaged in consensual sexual conduct with other persons is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason less worthy of belief as a witness. Such evidence is similarly not admissible to support the inference that a person who has previously engaged in consensual sexual conduct with other persons is for that reason alone more likely to have consented to the sexual conduct at issue in the trial. This is to counter the "twin myths" that unchaste women are more likely to consent to intercourse and in any event are less worthy of belief: see *R v A (No 2)*.[16] The general rule also recognises that to allow victims of sexual abuse to be harassed unfairly by questions about their previous sexual experience is unjust to them and may distort the course of the trial by distracting attention from the real issues which have to be determined.

An obvious exception to the general rule is evidence or questioning about a complainant's previous false complaints of sexual assault. The twin myths are not engaged, and the issue becomes one relating to the credibility of the complainant. The case law makes it clear that there must be a proper evidential basis for asserting the previous complaint to be untrue. The stronger requirements in the English case of *R v RD*[17] were to be preferred to those in *R v AM*.[18] The allegations of previous false complaints should be rigorously scrutinised. There must be material that is at the very least capable of founding an inference that the previous complaint is false without the need for the issue of falsity to be explored in cross-examination. In the absence of such

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[15] [2015] JRC 061A; 2015 (1) JLR *N* [22].
[16] [2002] 1 AC 45.
[17] [2009] EWCA Crim 2137.
[18] [2009] EWCA Crim 618.

material, a suggestion that the complaint is false is merely a matter of speculation. The test is only likely to be satisfied where there is evidence of an admission by the complainant that the earlier allegation was false, or where the complaint is, on its face, demonstrably untrue and not simply implausible. Courts should also be ready to deploy a degree of understanding of the position of those who have made sexual allegations: *R v Hilly.*[19]

The Deputy Bailiff[20] had properly come to the conclusion that there was no "sufficient" evidential basis to conclude that the allegation of rape made against F by the complainant was false and, accordingly, he declined to permit questioning in relation to it. The appeal was accordingly dismissed.

TRUSTS

Breach of trust—remedies

Liability of trustees—relief of liability

Crociani v Crociani [2018] JRC 013 (Royal Ct: Clyde-Smith, Commr, sitting alone.

AD Robinson for the plaintiffs; WAF Redgrave for the third and seventh defendants; E Moran for the fourth defendant

On a costs application, the question arose as to whether a trustee found to have been in breach of trust is subject to ordinary costs principles or must, given the trustee's obligation to restore the trust fund, always pay costs on an indemnity basis or alternatively that such restoration/compensation should extend to the irrecoverable legal costs incurred by the trust fund in successfully pursuing the defaulting trustee. The trustees had accepted liability for costs by consent. Their respective conduct in the litigation differed for the reasons below.

Held, as regards costs against the third and fourth defendants (the trustee defendants):

Costs payable by trustee in breach of trust vis-à-vis trust fund. As stated in *Target Holdings v Redfern*[21] where there has been a breach of trust, the obligation of the defaulting trustee is to restore to the trust fund what has been lost by reason of the breach or to make compensation for such loss, sufficient to put the trust fund back to what it would have been had the breach of trust not been committed.

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[19] [2014] EWCA Crim 1614.
[20] [2017] JRC 111A.
[21] [1996] AC 421.

As regards litigation costs, the question arises as to whether a defaulting trustee must always pay costs on the indemnity basis or alternatively that such restoration/compensation should extend to the irrecoverable legal costs incurred by the trust fund in successfully pursuing the defaulting trustee.

Ordinary rules as to costs apply. Under English law, costs are dealt with separately from restoration/compensation applying the ordinary rules: *Lewin on Trusts*, 18th edn, at para 27–173—

> "The ordinary rules as to costs of hostile litigation apply to breach of trust actions. Accordingly, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to the general qualifications which apply in ordinary hostile litigation."

At fn 429 the editors note that—

> "in Jersey costs are normally awarded against a defaulting trustee on the indemnity not the standard basis: *Ogier Trustee (Jersey) Ltd v C.I. Law Trustees Ltd* [2006] JRC 158 at [20]; and see *Re The Den Haag Trust* (1997–98) 1 O.F.L.R. 495, Jers RC; *Bhander v Barclays Bank & Trust Co. Ltd* (1997–98) 1 O.F.L.R. 497, Jers RC."

However, these cases cited did not establish a general rule to this effect and the principle did not extend to cases where there is a defence to the allegations of breach of trust. Where there is a defence, the trustee is perfectly entitled to defend the proceedings and to do so robustly.

Irrecoverable costs as a result of the ordinary rules. As to whether the court should nevertheless take into account the fact that the trust fund will bear an unrecoverable portion of the costs, the court noted that, in relation to indemnity costs, it is principally concerned with the losing party's conduct of the case, rather than the substantive merits of the position. It was important for the court to be able to exercise discipline over the conduct of the parties in proceedings by the imposition of indemnity costs where it is appropriate to do so, which would be undermined by the court invariably awarding indemnity costs against a defaulting trustee.

Disposal. In the present case the ordinary rules as to costs in hostile litigation were applied. Taking an overview of the litigation (*Egglishaw v Watkins*[22]) the court concluded that the third defendant's conduct of the proceedings came within the bounds of what is

[22] 2002 JLR 1.

acceptable in hard fought litigation, not justifying an award of indemnity costs. However the position of the fourth defendant was different. On the facts, its conduct in the proceedings went way beyond what was reasonable or the norm and could only be met with an order for indemnity costs.