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

J v Lieutenant Governor [2018] JRC 072A (Royal Ct: Bailhache, Bailiff and Jurats Nicolle and Pitman)

RCL Morley-Kirk for the applicant; SA Meiklejohn for the respondent

The applicant sought leave to apply for judicial review in relation to the decision of the Lieutenant Governor to deport him from Jersey. The applicant had been sentenced to a total of six years' imprisonment in respect of three counts of indecent assault, one count of unlawful sexual intercourse, two counts of procuring acts of gross indecency and one count of attempting to do so. All of these offences were committed over an eight-month period against the same child who was aged then between 13 and 14 years. At the time of sentencing the court did not make a recommendation for deportation. Challenging the Lieutenant Governor's decision, the applicant argued *inter alia* that the process of decision making had been flawed and that an order for deportation was disproportionate having regard to his art 8 ECHR rights. Although born in Portugal and a Portuguese national, the applicant had lived in Jersey since he was four years old, was now 23 and had his roots in the Island.

Held:

Test: There is no right of appeal against the decision of the Lieutenant Governor and judicial review is therefore the only basis for examination by an independent tribunal. Although a question of judicial review, its ambit is wider because the Human Rights (Jersey) Law 2000 requires that a decision affecting human rights must be taken by a human rights compliant tribunal: *De Gouveia v Lieutenant*

Governor.[1] The court on judicial review fills the gap which otherwise exists from having no human rights compliant tribunal to which the applicant can appeal from the respondent's decision. The traditional *Wednesbury* standard of unreasonableness—was the decision so unreasonable that no reasonable decision maker could reach it?—was inappropriate where the decision under review engaged a fundamental right or important interest. Where that is the position, the decision does indeed engage the most anxious scrutiny of the courts and, the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable: *R v Lord Saville of Newdigate ex p A.*[2] There are nonetheless constraints upon the court's powers to intervene: (a) the court is not a fact finding body in this exercise and it would be highly exceptional that any evidence other than affidavit evidence would be considered by the court on such applications; (b) it is not correct to say that there is no deference to the decision taker. A higher degree of scrutiny on human rights grounds is still not a full merits review. What is needed is that the court examine what reasons have been given, whether they comply with the fundamental rights of the applicant and in particular whether the lawfulness of what has been done meets the structured proportionality test that the courts now apply, recognising that the decision taker has a discretionary area of judgment.

Procedural issues: A number of important reports and other documents which were considered by the Lieutenant Governor were not available to the applicant, and he did not therefore have the opportunity of making full representations upon them. Lord Denning, MR in *Surinder Singh Kanda v Government of the Federation of Malaya*[3] said—

> "If a right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

The process must be fair and it is a fundamental principle of administrative law that a person is entitled to make representations in relation to a matter where the decision will fundamentally affect him. Nevertheless, an appropriate balance has to be found, ensuring that the decision taker can take advice and at the same time the potential

[1] 2012 (1) JLR 291 at para 23.
[2] [2000] 1 WLR 1855.
[3] [1962] AC 322.

deportee has an opportunity to answer all the material facts put before the decision taker in the context of his decision. In the present case, the tone of the relevant report was hostile to the applicant and there were some comments within it which the applicant might have wanted to address; it was not enough now to say that the applicant's representations would have made no difference. An appropriate process requires that both parties ultimately appreciate that the decision has been arrived at fairly. The process adopted in the present case was unfair.

Human rights issues: The Convention right in art 8 (right to respect for private and family life) is a qualified right, and the extent of that qualification appears in para 2 of the article. To order the deportation from Jersey clearly interfered with the right to respect for the applicant's private and family life under para 1. The respondent was therefore required to establish that the interference fell within the exceptions in para 2 which, for the purposes of this case, required the interference to be—

> "necessary in a democratic society in the interests of . . . public safety . . . for the prevention of crime or disorder or the protection of the rights and freedoms of others."

Although the deportation report of the Probation and After Care Service referred to the risk of the applicant re-offending being "high" a later assessment brought the risk profile down to a "moderate" band. In the assessment of the proportionality of a deportation order made for the prevention of crime or for the protection of the rights and freedoms of others, and especially potential victims, the court was faced with a person who was at moderate risk of reconviction but who nonetheless was facing all the controls that followed from being subject to the notification requirements and restraining orders, and being a voluntary client who would continue to engage with the Probation Service and be subject to the direction of the States of Jersey Police Offender Management Unit.

Disposal: Although this applicant was a Portuguese national by birth, his personal history was such that his roots and his living in Jersey for 19 years prior to his arrest meant that he could have applied for British citizenship. This was one of those rare cases where the decision reached by the respondent was outside the range of permissible responses open to him, and the balance struck in making the deportation order was wrong. The interference with the applicant's art 8 rights by making the deportation order was disproportionate in this case.

AGENCY

Powers of attorney—supervening incapacity

In re Matthews [2018] JRC 075 (Royal Ct: Le Cocq, Deputy Bailiff and Jurats Nicolle and Dulake)

JM Renouf for the representors

The court considered the effect of an English enduring power of attorney in respect of which the donor had lost the capacity to act personally and which had been registered with the Office of the Public Guardian. The attorney now wished to be party to a contract of sale of immovable property for the purpose of abandoning the donor's rights of dower. The enduring power of attorney was not witnessed by any person covered by art 3(2)(a) or (b) of the Powers of Attorney (Jersey) Law 1995 and under Jersey law a power of attorney is revoked by the subsequent incapacity of the donor: art 9(5). Article 3(5)(b) of the 1995 Law gives the court discretion to accept as valid a power executed outside Jersey but witnessed by a witness other than one falling within a prescribed category.

Held:

Power of attorney ceases on incapacity of donor: Were it not for the provisions of art 9(5) the court would have been minded to exercise the discretion afforded under art 3(5)(b), which allows the court to accept some other witness of a power of attorney executed outside Jersey. The donor was no longer of capacity and any power of attorney whether valid on its surface or made valid by the exercise by the court of a discretion, simply had no effect in those circumstances.

Curatorship inappropriate in this case: The appointment of a curator was inappropriate for this case to deal with a single transaction in Jersey by a person not resident in Jersey, as it would be cumbersome and a time-consuming process.

Recognition by Royal Court of non-Jersey attorney following donor's incapacity:

(a) The court was referred to a previous act of court whereby the court had appointed an attorney under an English enduring power, which had been registered in the Court of Protection, as the receiver of the donor. There was, however, no published judgment.

(b) The enduing power of attorney was a mechanism by which the properties and affairs of an interdict can be managed. This was a combination of the enduring power of attorney and its registration by the Office of the Public Guardian. That combination entitled the attorney to act in a manner analogous with a curator in Jersey. The court understood that there would be reciprocity with the

English courts as regards the authority of a curator and therefore it should seek to uphold the mechanism by which English law deals with the property of a person lacking in capacity, provided that a curatorship is not appropriate, and that the mechanism put forward is one understood and recognised by English law and by the courts of England and Wales to enable an interdict to transact. This was a sufficient and appropriate basis to exercise the court's inherent jurisdiction to order the registration of the act of court in the Public Registry for the limited purposes of the abandonment of dower. However, the court noted that for certain transactions and a number of assets it would wish to be satisfied that a different mechanism was in place.

CIVIL PROCEDURE

Discovery

CMC v Forster [2018] JRC 078 (Royal Ct: Le Cocq, Deputy Bailiff and Jurats Nicolle and Pitman)

SC Thomas for the plaintiff; JP Speck for the first and second defendants

The second and third defendants appealed against an order of the Master allowing limited discovery on a 10% dip-sampling methodology. The plaintiffs in this action were Kenyan companies. The first defendant was a director who was alleged, with other directors, to have received secret commissions in breach of fiduciary duty in an alleged over-invoicing scheme going back to 1977. The second and third defendants were alleged to have dishonestly assisted the first defendant in his breach of duty by the provision of Jersey trust and company services. There were a very large number of potentially discoverable unsorted or ill-sorted hard copy documents in warehouses in Kenya.

Held:

(1) On an appeal from the Master (acting as a Greffier Substitute operating on delegated jurisdiction from the Royal Court), the court should exercise its own discretion and give such weight as it thought fit to the discretion exercised by the Master: *Murphy v Collins.*[4]

(2) An order for discovery of documents may be limited, pursuant to Royal Court Rules, r 6/7(2) to such documents or classes of documents only, or to such only of the matters in question in the proceedings, or to the results of searches carried out by a party, as may be specified in

[4] 2000 JLR 276.

the order. Practice Directions RC17/07 and RC17/08 relating to discovery are also relevant.

(3) The challenges of discovery took this case out of the norm. An imaginative approach to the discovery exercise was called for to ensure, so far as is possible, that any relevant material was identified and disclosed without requiring any party to undertake an unnecessarily expensive exercise.

(4) The Master had formed the view that the central issue was whether the scheme was secret, but there were other issues that were equally important. Furthermore, to express the central issue in those terms appeared to presuppose that a scheme as pleaded by the plaintiffs existed. That was not accepted by the second and third defendants. The case against the second and third defendants had, in the light of the non-admittance contained in the pleadings, to be proved to the appropriate standard.

(5) Some appropriate limitation as to discovery process was desirable in this case, but without a greater understanding, the court was unable to offer any suggestions as to what may be possible, and was left with no alternative but to overturn the order of the Master and to find that the normal discovery exercise should take place. In its view a 10% dip-sampling process would not suffice to meet the justice of this case as it was currently pleaded. However, were those parameters to alter, it would be appropriate to explore and order limited discovery.

CONTRACT

Consent—objective or subjective determination

Foster v Holt [2018] JRC 076 (Royal Ct: Bailhache, Bailiff and Jurats Blampied and Christensen)

OA Blakeley for the plaintiff; SB Wauchope for the defendant

The question was raised whether the requirement of "consent" for the formation of a valid contract under Jersey law is to be determined objectively or subjectively.

Held:

(1) The four requirements for the creation of a valid contract in Jersey (consent, capacity, *objet* and legitimate *cause*) went some way to explaining the ancient maxim, *la convention fait la loi des parties*, which reflected art 1134 of the French Code Civil; the basis of the law of contract is that each of the contracting parties has a *volonté*, or will, which binds them together and requires that the mutual obligations which they have agreed be given effect by the courts. The notion of *volonté* as the foundation of the contract was sometimes thought to

result from the political and economic liberalism of the 19th century but the same rationale appeared in the commentaries of Berault, Godefroy and d'Aviron on *La Coutume Reformée de Normandie* (vol 1, at 74, 1684 edn). It is because the concept of *volonté* is so important to the making of contractual arrangements that the grounds of nullity which exist for *erreur, dol, déception d'outre moitié* and *lésion* become comprehensible.

(2) In *Marett v Marett*,[5] the Court of Appeal had overruled *Mobil Sales and Supply Corp v Transoil (Jersey) Ltd*[6] and *La Motte Garages Ltd v Morgan*[7] and concluded that the law of Jersey determines consent by use of the subjective theory of contract. However, notwithstanding that decision, in *Calligo Ltd v Professional Business Systems CI Ltd*,[8] the Royal Court, had applied an objective test to the question of consent in the formation of contracts. The Royal Court in that case referred to a postscript to the Court of Appeal's judgment in *Home Farm Developments Ltd v Le Sueur*[9] and others which suggested that there were potentially powerful arguments against the adoption of a subjective test, and that *Marett* should not be treated as authoritative without further argument. Adopting that approach, the Royal Court in *Calligo* reached the conclusion that the law of contract in Jersey should be developed to suit the needs of a sophisticated international finance centre and that, by applying that reasoning, the objective approach was more likely to provide legal certainty for commercial transactions than a subjective approach.

(3) It was unfortunate that the authorities provided to the Royal Court in *Calligo* had been limited; the court was not referred to Bailhache, "Subjectivity in the formation of a contract—a puzzling postscript",[10] in which there was a respectful but forceful critique of the postscript in *Home Farm Devs Ltd*. Nor was the court shown many of the recent cases in the Royal Court involving consent in the law of contract—*Incat Equatorial Guinea v Insurance Corp of the Channel Islands Ltd*,[11] *Flynn v Reid*[12] among them.

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[5] 2008 JLR 384.
[6] 1981 JJ 143.
[7] 1989 JLR 312.
[8] [2017] JRC 159.
[9] [2015] JCA 242.
[10] Bailhache "Subjectivity in the formation of a contract—a puzzling postscript" (2016) 2 *Jersey and Guernsey Law Review* 160.
[11] 2011 JLR 80.
[12] 2012 (1) JLR 370.

(4) Courts of commensurate jurisdiction are not to depart from each other on the law unless the second court considers that the earlier court was plainly wrong. The present court could not agree with the conclusion that the objective test is the right test. Public policy was not a proper basis on which to remove a central plank in the law of contract. It was only legitimate to take the law in a new direction if there was some authoritative principle that had previously been adopted by the courts and there was no contrary binding authority. The postscript of the Court of Appeal in *Home Farm Devs Ltd* was clearly *obiter*. It was not open to the Royal Court in *Calligo* to disregard the authority of the Court of Appeal in *Marett* which was binding upon it. Other principles of the Jersey law of contract have grown out of the requirement for subjective consent to the formation of a contract. To hold that the test for whether a party consented to a particular contract is objective and not subjective was to remove the cornerstone on which all these principles were built.

(5) Although there may be cases where the difference between a subjective and an objective test would be significant, the French and English approaches would often reach the same practical result: see Nicholas in his introduction to the *French Law of Contract* (1992, 2nd edn), at 35. Further, in applying the subjective test the court will look closely at all the evidence to see whether a party has in fact established that he had the subjective intention which he asserts.

COURTS

Open justice

HSBC Trustee CI v Kwong [2018] JRC 051 (Royal Ct: Birt, Commr and Jurats Grime and Sparrow)

NAK Williams for the representor; JD Kelleher for the 1st respondent; N-LM Langlois for the 2nd respondent; JMP Gleeson for the 3rd–6th respondents; SJ Alexander for the 7th–10th respondents; the 11th–13th respondents did not appear and were not represented.

An issue arose as to whether this judgment should be published. In the ordinary way, although the hearing was in private, it would be published in anonymised form. However the parties were in agreement that it was not possible in this particular case to anonymise the judgment effectively. Accordingly, they said, the choice was between not publishing the judgment at all or publishing it as delivered including identification of the parties.

Held:

Importance of open justice: It is well established that open justice is a principle of fundamental importance to the rule of law. It is a

protection against injustice on the part of the courts: *Jersey Evening Post Ltd v Al Thani*;[13] *R v Legal Aid Board ex p Kaim Todner (a firm)*[14]; Jacob, *The Fabric of English Civil Justice* (1987), at 22–23.

Exceptions: However, the principle of open justice is not absolute: *Scott v Scott.*[15] As matters have developed, in addition to procedural hearings as described at para 21 of the judgment in *Al Thani*, there were at least three categories where public justice may yield to some other factor. These are (i) cases concerning minors or other persons under a disability; (ii) where sitting in public or issuing a public judgment would defeat the very objective of proceedings, so that the court could not do justice; and (iii) where the right to privacy outweighed the interests of public justice.

Practice for trustee directions applications: In relation to directions applications by trustees for the blessing of a momentous decision, the court proceeds as envisaged in para 28 of *Al Thani*. In other words, it sits in private to hear direction applications.

Anonymisation of published judgment: The court was conscious of the importance of public justice and accordingly its practice was that, if a written judgment is produced, it will normally arrange for the judgment to be published but in anonymised form. The judgment will, so far as possible, contain the full reasoning and factual description contained in the judgment but will simply omit names and any other matters that would permit identification. Publication of an anonymised judgment serves two important purposes: it is the next best thing to open justice, and it assists the legal profession to be aware of developments in the law.

Exceptional cases where even anonymisation does not meet the needs of justice: In some cases, publication of even an anonymised judgment is not possible if the interests of justice are to be served. For example, in a *Beddoe* application, the trustee must tell the court about all the strengths and weaknesses of its position in the proposed litigation. Publication of even an anonymised judgment would inform the other side in the proposed litigation of the weaknesses in the trustee's case. However, subject to exceptions such as this, this court's policy is clear, namely that although directions applications will normally be heard in private, any reasoned judgment should be published subject to anonymisation so as to protect the privacy of

[13] 2002 JLR 542.
[14] [1999] QB 966, at 977.
[15] [1913] AC 417.

those involved and to ensure that full disclosure to the court is given by the parties.

Balance of rights: This policy struck the appropriate balance between, on the one hand, the privacy rights of the beneficiaries under art 8 Convention rights (respect for private life) and the interests of justice as summarised above and, on the other, the importance of public justice and the art 10 Convention rights in respect of freedom of expression.

Cases where anonymisation would not prevent identification: The court was not satisfied that there was a general rule that, where even an anonymised version would not prevent identification, the solution is not then to publish at all. Any decision must be fact specific. In some cases, the right course will be not to publish at all where anonymisation is not possible, such as where beneficiaries have a high profile such that anonymisation would not achieve its purpose. However, that will not necessarily be the case. The court must have regard to all the circumstances of the particular case.

Decision: There had to be a good reason to depart from public justice. In this case, the facts did not fall into any of the three categories mentioned above. This was a case where the application was known about by the media and details of the application and of the factual background had been widely reported. Questions would undoubtedly be asked as to whether the court had given a decision and, if so, what that decision was. It would be unsatisfactory for the media to be told that the decision and the reasons for it were private, which would be likely to lead to further speculative (and possibly inaccurate) reporting coupled with the risk of unofficial leakage of the decision. Given the level of detail already in the public domain and the attitude of the other members of the family, the court held that, in the particular circumstances of this case, the balance came down firmly in favour of publication of the judgment in anonymised form rather than non-publication.

PLANNING

Appeals on point of law

Therin v Minister for Planning and Warwick [2018] JRC 098 (Royal Ct: Bailhache, Bailiff sitting alone)

HJ Heath for the appellant; DJ Mills for the Minister; DJ Read for the second respondent

This appeared to be the first planning appeal to the court under the new appeal arrangements which were introduced in 2014 into the Planning and Building (Jersey) Law 2002. The appeal to the court is

only on a point of law. The court therefore considered the nature of such appeal against a planning decision.

Held:

New right of appeal to the court is only on point of law: As provided by art 116(5), the appeal to the court is on a point of law. It is not a full merits appeal, which was an appeal to the Minister carried out by the Inspector, and it is not even an appeal under the previous procedure which required the Royal Court to form its own view of the merits of the application before, allowing the Minister a margin of appreciation, it considered whether the Minister's decision had been unreasonable. The revised appeal provisions now classically engage the GCHQ principles of illegality, impropriety and irrationality.[16] To the extent that the question of reasonableness was engaged this was *Wednesbury* unreasonableness[17]—a decision by the Minister which falls outside the range of responses which a Minister could reasonably adopt. It is a higher test than existed under the previous law. The court should be astute not to allow a point of fact to fly under the false flag of a point of law, and one should realise that an error of fact has to be quite fundamental if it is to become an error of law.

Article 6 compliant: The new procedure for appeal was compliant with art 6 Convention rights. Despite differences in the appeal processes, the reasoning in the decision of the House of Lords in *R (Alconbury Devs Ltd) v Secy of State for the Environment, Transport and Regions*[18] was applicable.

Status and relevance of the Island Plan: Planning decisions are taken in relation to planning policy, the most important policy document of which is the Island Plan approved by the States. The interpretation of the Island Plan is a matter of law for the courts. The application of policy within the Island Plan is an exercise of planning judgment by the relevant decision maker, in this case the Planning Committee and, on appeal, the Minister. It may however be asserted that the Minister's decision was *Wednesbury* unreasonable and such submissions require rigorous analysis to ensure that the court does justice to the jurisdiction which the Planning Law has conferred upon it. The status of the Island Plan was such that if a particular application were in accordance with it, planning permission to the proposed

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[16] *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 WLR 1174.
[17] *Associated Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680.
[18] [2001] 2 All ER 929.

development must be granted. If the proposed development is inconsistent with the Island Plan, planning permission may be granted, but the Planning Committee or Minister must be satisfied that there is sufficient justification for doing so: art 19. A decision on whether or not a proposed development is consistent with the Island Plan is one of mixed fact and law; a decision as to whether there is sufficient justification for a departure from the policies contained in the Island Plan is a judgment call for the decision taker, but it is a matter of law as to what the Island Plan means and whether the decision is sufficiently reasoned as objectively justifies the departure from it. If the policy set out in the Island Plan is to be departed from, then clear reasons must be given for doing so. Those clear reasons must, as required by art 19(3), disclose "sufficient justification" for granting permission that is inconsistent with the Island Plan: *Minister for Planning and Environment v Fairman and Hobson.*[19] The appeal would be allowed.

TRUSTS

Ratification

In re Link Trustee Services (Jersey) Ltd, re the B Trust [2018] JRC 043 (Royal Ct: Clyde-Smith, Commr and Jurats Nicolle and Blampied)

A Kistler for the representor

The court set aside, under both arts 47F and 47G of the Trusts (Jersey) Law 1984, certain appointments of assets made by the trustee of a Jersey trust in reliance on erroneous UK tax advice. The appointments had established a new trust. The court was requested to ratify certain administrative actions taken by the trustee in its capacity as trustee of the new trust as valid actions on behalf of the original trust and considered what would be the appropriate means of making such ratification.

[19] [2014] JCA 148.

Held:

(1) In the case of *In re Z Trust*,[20] which involved an invalid appointment of a trustee, the court distinguished between three forms of ratification or confirmation, all of which may have substantially the same practical result but which are conceptually distinct:

(i) *Confirmation by perfection of an imperfect act or transaction (ratification properly so-called).* The court accepted that this form of confirmation is available in relation to administrative actions of a trustee and regardless of whether the original act was voidable or void;

(ii) *Confirmation by replacement of a tainted or doubtful act or transaction by an effective one with a similar effect*. It is essential for this form of confirmation that there be a continuing power or discretion which enables the trustee to achieve what was intended to be achieved by the original transaction; 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. The trustee resolves not to act due to the waste of time and money that would be involved in seeking to undo the invalid action and to recover trust property, or because it would otherwise not be in the best interests of the beneficiaries to do so.

(2) In *Z Trust*, the court held that the parties' objectives were better achieved by orders based on confirmation by replacement and confirmation by non-intervention (*i.e.* the second and third forms of confirmation). However, in the present case, the preferred approach which would best achieve the representor's objectives, and which would protect the interests of all relevant parties, would be an order based on confirmation by perfection of an imperfect act or transaction (*i.e.* the first form of confirmation), so far as these were administrative rather than dispositive in this case.

[20] 2016 (1) JLR 132.