A consultation has been launched in relation to changes to the Companies (Jersey) Law 1991 (the “Law”) and the introduction of a new administration regime.

Given that the Law was last amended in 2014 and the changes that have occurred over the last decade, the proposed updates to the Law are to be welcomed to ensure that Jersey remains competitive and that the Law reflects how modern companies are operated in practice.

The consultation contains a significant number of potential changes, including the following:

Removal of requirement for public companies to have at least two members

Currently there is a requirement for a public company to have at least two members and removing this requirement will harmonise Jersey law with UK law in this area.

Remove requirement for par value companies to have a specified authorised share capital

Another proposal is to remove the requirement for par value companies to specify a maximum authorised share capital in their memorandum of association. This is a helpful amendment which would bring a par value company in line with a no par value company (whose memorandum of association can state it may issue an unlimited number of shares).

However, it is proposed that shareholders can still set such a limit if desired.

Procedure in relation to the change of name

It is proposed to allow a change of name to be effected by any means provided for by the company’s articles of association rather than only by way of special resolution.

This would harmonise Jersey law with UK law in this area and there would still be a requirement for companies to notify the Jersey Company Registry of the change and for the name change only to be effective once the Jersey Company Registry issues an altered certificate of incorporation.

Abolition of 30 member rule

The consultation proposes that there will be an abolition of the 30 member rule so that a private company will no longer be deemed to be a public company simply due to it having more than 30 members.

This change will reduce the administrative burden on companies and reflect that the use of such a 30 member limit may not serve a current day purpose. For example, this will allow companies with more than 30 shareholders to maintain private status and would remove the requirement for such companies to have their accounts audited and for the accounts to be filed.

Company Seals

It is proposed to amend the Law to expressly allow for electronic company seals.

The Electronic Communications (Jersey) Law 2000 already envisages the use of electronic seals and this helpful amendment will clarify the position in relation to company seals.

Contributions of assets to companies other than in respect of an issuance of shares

The consultation also proposes to amend the Law to expressly permit contributions of assets to be made to a company other than in respect of an issuance of shares and permit the transfer of the amount or value of that contribution to either: (i) the share premium account or stated capital account (as appropriate) or (ii) to any other account of the company (other than the nominal capital account).

Although it is already market practice that such capital contributions can be made to a company (structured as a gift or donation with no terms for repayment), currently under the Law a “capital contribution” must first be made into a non-capital account and then transferred into a company’s share premium / stated capital account. This amendment would therefore expressly permit such “capital contribution” be made direct to a capital account rather having to be made via a non-capital account.

Rectification of register of members for manifest errors

It is proposed to amend the Law to give the directors an express power to rectify a manifest error in the register of members without a court order with consent from all parties impacted by the change.

In practice, this undoubtedly already takes place, and this helpful amendment would save court time and costs and will avoid having to go to court to correct genuine errors when there is no protection required.

Direct Voting

It is also proposed to amend the Law to clarify that direct voting is permitted, subject to the articles of association. This would expressly allow a member to send in a voting form which is taken directly as the vote rather than the member having to appoint a proxy who then votes on the member’s behalf.

Filing of Shareholder Agreements

The consultation proposes to amend the Law to provide that an agreement, such as a shareholders’ agreement, will not have to be filed with the Jersey Company Registry under Article 100 of the Law if it contains a term stating that in the event of a conflict between that agreement and the articles of association then the agreement will prevail and the shareholders will amend the articles of association.

This is a very helpful amendment which provides clarity and aligns with market practice.

Ratification of distributions

It is also proposed to amend Article 115 of the Law, to permit directors to ratify a distribution without a court order where a distribution has been made and there has been a technical breach, provided that the company is solvent.

Although the proposed change will not permit directors to change the classification of a payment after the event and convert it into a distribution where there was no such intention at the time of making the payment, it is a helpful proposal as it will reduce cost and the administrative burden associated with court applications.

Migrations

A number of helpful amendments are also proposed in relation to migrations, including:

- Effect of issue of certificate of continuance within Jersey – amending Article 127P of the Law to confirm the current position and expressly provide that, on a continuance of a foreign body corporate into Jersey, the resultant Jersey company is the same body corporate as the foreign entity.
- Effect of continuance overseas – amending Article 127V of the Law to confirm the current position and expressly clarify that a company which has continued is not treated as having been liquidated / dissolved and that legal personality continues.
- Notice to creditors of application to Commission for authorization to seek continuance overseas – to include a de minimis threshold of £10,000 so that notices to creditors are not required for creditors with claims under this amount. This would mirror the position taken in relation to mergers and would avoid the administrative burden of having to send out notices to all creditors, even ones with de minimis claims.

Removal of requirement for a solvency statement when buying back/redeeming fully paid up shares for nil consideration

Helpfully, it is proposed to remove the requirement for a solvency statement when redeeming shares for nil consideration.

The same is also proposed in relation to share buyback for nil consideration and to also remove the need for shareholder resolutions approving the buyback and buyback contract when buying back shares for nil consideration.

It is also suggested that directors be permitted to ratify a redemption or repurchase of shares where there was a requirement for a solvency statement and the directors failed to do so at the relevant time, which would be similar to the proposal in relation to the rectification for distributions as outlined above.

Death of a sole director

The consultation also proposes to amend Article 73 of the Law to provide that in the event of the death of a sole member and director and in the absence of any provision in the articles of association to cover the situation, the deceased's executor or personal representative shall have the power to appoint a new director.

This amendment is to prevent the situation where the death of a sole member and director results in there being no one able to appoint a director, so resulting in the need to make a Court application.

Removal of headcount test for members' schemes of arrangement

It is also proposed to abolish the headcount test for members' schemes of arrangement.

The current test might have the potential to result in the blocking of a scheme even where the holders of 75% of the voting rights of scheme shareholders have voted in favour. Indeed, in 2019 the Jersey court noted in relation to the headcount test "that the sooner this provision is given some attention by the legislature, the better" and this is viewed as a welcome change.

Summary winding up

The consultation also proposes to amend the Law in relation to summary winding up to remove references to the 6-month period, for example in relation to passing of the solvency statement.

This is a helpful amendment as references to the 6 month period is viewed as unnecessary and can cause confusion, particularly given the lack of clear consequences in the event that, where directors have stated that the company will be able to discharge its liabilities within 6 months, unforeseen liabilities subsequently arise and fall due after that period.

Internet voting and electronic register of members

Further proposed amendments include amending the Law to expressly allow telephone and internet voting unless the articles of association provide otherwise and to clarify that electronic register of members are permitted by the Law.

New Administration Regime

In addition to the proposed amendments to the Law, a new administration regime is also being considered as part of the consultation.

Currently there is no Jersey law corporate rescue procedures equivalent to English law administration and for some time there has been a call for a specific process which assists a business to recover when it is essentially viable but facing cash-flow issues which makes it technically insolvent.

In summary, it is proposed that the process should be commenced by way of application to the Royal Court of Jersey and such application should be available to, amongst others, the company, its directors, its shareholders or one or more creditors.

The test that would need to be satisfied for the administration to be granted is that the company is insolvent on a combination of the cash-flow and balance sheet tests and that the administration is reasonably likely to achieve the purpose of either the survival of the company as a going concern or a more advantageous realisation of the company’s assets than would be effected on a winding up.

The Court will appoint an administrator from the list of Approved Liquidators maintained by the Viscount. This is to ensure that the proposed administrator is a regulated professional with the necessary expertise.

Once appointed, the administrator will be tasked with reviewing how the business is operating and setting out a plan for restoring the business to solvency, with all the property of the company being taken into his custody or control. Importantly, the administrator will have wide powers and will be able to do what is necessary or expedient for the management of the affairs, business and property of the company.

Once an administration is declared by the court, it is proposed that no legal action will be permitted against the company and the company will not be placed into liquidation without leave, save that the rights of secured creditors are to be fully preserved including as to enforcement.

Conclusion

The proposed amendments to the Law are helpful and reflect recent legal developments both domestically and internationally and will assist in modernising certain provisions of the Law and should provide helpful clarity in areas that have previously been unclear.

The fact that a number of the proposed amendments should also reduce the administrative burden on companies and in some areas lower the likelihood of a court application being required is also very helpful.

With regards to the new administration regime, there have been calls for such a procedure for many years and a modern and effective corporate insolvency regime is key for the financial services industry. Indeed, a procedure which may allow a company to be rescued as a going concern and which may achieve a better result for creditors as whole is to be recommended.

Similar schemes have been implemented in other jurisdictions and have been seen to work well with other remedies and this will be a welcome addition to the procedures currently available.

We are thrilled to announce that we have been shortlisted for the prestigious Jersey Law Firm of the Year award at the IFC Awards, organized by Citywealth. This recognition is a significant milestone, reflecting our unwavering commitment to providing exceptional legal services and our dedication to the clients and community we serve.

The IFC Awards by Citywealth are highly regarded within the legal and financial sectors, in Jersey and celebrate firms that demonstrate outstanding expertise, innovation, and client service. Being shortlisted for this honor is a testament to the hard work and dedication of our talented team, who strive every day to uphold the highest standards of legal excellence.

The awards ceremony is set to take place on 28th January 2025, and we are eagerly looking forward to the event.

Commenting on the shortlisting, Managing Partner Kate Anderson stated:

“We are deeply honored to be shortlisted for Jersey’s Law Firm of the Year at the IFC Awards by Citywealth. This recognition underscores the dedication and professionalism of our entire team at Voisin Law. We remain committed to delivering the highest quality legal services to our clients and are proud to contribute to Jersey’s vibrant legal community.”

At Voisin Law, we believe that our clients’ success is our success. This nomination inspires us to continue pushing the boundaries of legal practice, ensuring that our clients receive the best possible outcomes and personalised service.

We look forward to the awards ceremony on the 28th of January, 2025, and wish all our fellow nominees the best of luck. Regardless of the outcome, being recognised at this level is an achievement in itself, and we are grateful for the continued support and trust of our clients and colleagues.

Prior to 1st March 2022, the main recourse in Jersey for the creditor of an insolvent Jersey company was to seek a declaration en désastre.

However, although a company may still be declared en désastre, the Companies (Jersey) Law 1991 (the “Law”) was amended to create another option by permitting a creditor to issue an application to the Royal Court seeking an order commencing the winding up of a debtor company and the appointment of their proposed liquidator.

In relation to who can make an application, Article 157A (1) of the Law states:

“A creditor may make an application to the court for an order to commence a creditors’ winding up if the creditor has a claim against the company for not less than the prescribed minimum liquidated sum and –

(a) the company is unable to pay its debts;

(b) the creditor has evidence of the company’s insolvency; or

(c) the creditor has the consent of the company.”

However, the Court of Appeal in the case of Representation of HWA 555 Owners, LLC [2023] JCA085 rather surprisingly held a creditor did not need to have a liquidated claim (a sum which is undoubtedly due and payable by the debtor.) in order to make an application to the court for an order to commence a creditors’ winding up under the Law and that in certain cases a contingent or unliquidated claim would suffice.

This judgment has come as a surprise to many practitioners given that the commonly held view in Jersey was that in order to have standing to make an application under Article 157A of the Law a creditor must have a liquidated claim against the debtor company.

Interestingly, in this case, there was a strong dissenting judgment on this point made by Wolffe JA who held that "the natural and ordinary interpretation" of Article 157A of the Law was that the creditor must have a claim against a company for a liquidated sum which is not less than the prescribed minimum (currently £3,000) and that a claim which is unliquidated, such as claim for damages not yet quantified by judgement or agreement does not give standing to initiate a creditors winding up.

Wolfe JA further went on to state that "The application for a declaration of désastre was one of those tried and tested and widely understood procedures" and that Article 3(1) of the Bankruptcy (Désastre) (Jersey) Law 1990 had "hitherto been understood, including by this Court, to require the creditor's claim to be for a liquidated sum."

This was important as Wolffe JA noted that the intention of the legislature had been that the same test be applied to both creditors winding up and désastre applications.

This indeed further appears to supported in the Royal Court Practice Direction 22/01 which states that an application under Article 157A of the Law must be supported by an affidavit which must among other things "state that the creditor has a claim against the company for a liquidated sum, that to the best of the creditor's knowledge and belief is not subject to a genuine dispute and arguable defence or counterclaim, and which has not been paid."

However, in light of the majority judgment, the breadth of creditors who may bring an application for creditors winding up appears to be much broader than once widely understood, with creditors with a contingent or unliquidated claim also having standing to make an application under Article 157A of the Law, as long as the claim can be demonstrated to be of value exceeding the prescribed amount.

That being said, given the strong dissenting judgment and the view that this is a departure from previously widely held interpretations of the requirements under Article 157A of Law, it is likely that this issue may well surface again in the near future.

<u>Introduction</u>

Last year the Royal Court heard the case of Hard Rock Limited and Anor v HRCKY Limited [2023] JRC169. The case stemmed from a dispute regarding a franchise agreement (the "**Franchise Agreement**") granted by the respondent Hard Rock Limited ("**HRL**") to the appellant HRCKY Limited ("**HRCKY**") which allowed HRCKY to run a Hard Rock Café in the Cayman Islands.

The Franchise Agreement was terminated in June 2013 by HRL. In a judgment dated 19 December 2013 it was determined that this termination was lawful but that HRCKY may have a number of arguable counterclaims which should proceed to trial. At this juncture, the claims were limited to allegations regarding the breach of the implied term of good faith. In 2015, HRCKY expanded these allegations to include that they had been induced to enter into the contract on the basis of misrepresentations amounting to dol or erreur. The remaining disputed issues were:

- whether HRL fraudulently misrepresented the anticipated profits of the restaurant business. Had HRCKY been aware of the true likely position, or indeed even of the risks having regard to the worldwide experience of Hard Rock Café franchises, it would never have entered the Franchise agreement in the first place. As a result, the loss which it has sustained extends to the investment made in a business it would never have entered.
- the unreasonable way in which HRL responded to the requests made by HRCKY for changes in the standard operating business model which HRL insisted upon was a breach of the implied duty of good faith under the contract itself. This caused or contributed to the losses sustained by HRCKY in the operation of its business.

These contended matters meant that the Royal Court had to consider the scope of the doctrine of dol, in particular whether one party in the possession of significant information is under a duty to inform the other party of that information before they enter into a commercial arrangement. The Royal Court was also left to determine whether the implied term of good faith forms part of the law of Jersey and if so whether it was breached. The Royal Court would also need to assess what losses were caused by or flow from any findings of dol, erreur, misrepresentation or breach of an implied term.

Summary and the Royal Court’s conclusions

The Royal Court concluded that:

- dol par reticence and the general implied term of good faith do not form part of Jersey law.
- an implied term of good faith does form part of Jersey law in relation to long-term relational contracts.
- the Franchise Agreement is such a long-term agreement and there is nothing within it to exclude an implied term of good faith.
- The complaints of HRCKY whether on the basis of dol, dol par reticence, fraudulent misrepresentation or any kind of erreur are dismissed.
- The claims for breach of an implied term applicable to the Franchise Agreement are dismissed.
- HRCKY failed to prove that any loss stemmed from any breach of an implied term.
- The financial losses of HRCKY during the operation of the Franchise Agreement arise out of factors external to both HRCKY and the Hard Rock Group.
- Had HRCKY been able to establish any breach amounting to dol, fraudulent misrepresentation or erruer, further evidence would have been required in respect of losses arising from any such findings.

The rationale for these conclusions and the practical implications of the Royal Court’s determinations are discussed in detail below.

What is dol par reticence/reticence dolosive (fraudulent silence)

Dol is a legal concept generally analogous with fraud, which forms part of Jersey law through customary law.

In this case, the contention was that actions taken by one party amounted to dol par reticence (misrepresentation by non-disclosure). The majority of legal systems are crafted in such a way that where one party is under an obligation to warn or inform the other party, then the silent party may be found liable for failing to reveal the relevant information. In this regard, there is a divergence between English and French law. In England, the general rule is that mere silence cannot constitute misrepresentation. Contrastingly, the courts in France have accepted the position that a knowing and dishonest failure to disclose a matter which the other party has an interest in knowing, may result in dol par reticence and as such give rise to an annulment (and potentially damages). This ties into the pre-contractual duty which exists in French law. In France, the concept is known as reticence dolosive (fraudulent silence).

In Jersey, it has been accepted in the context of some contractual relationships, for instance insurance contracts that mere silence could amount to misrepresentation (see Sutton below). However, it has been unclear as to whether the concept of dol par reticence applied generally.

Why was it material in the case?

HRCKY in this appellate action had contended that it had been induced to enter into a Franchise Agreement on the basis of dol par reticence. The Franchise Agreement permitted HRCKY Limited to run a franchise restaurant of the global chain Hard Rock Café within the Cayman Islands.

Why was this case significant

The Hard Rock case was significant because it provided welcome clarity as to whether mere silence can amount to actionable misrepresentation generally. A contention was that where there was an asymmetry between the contracting parties, there was an obligation on the more astute party not to withhold material facts. The Court in Hard Rock analysed a number of salient judgments including *Steelux Holdings v Edmonstone [2005] JLR 152 ("**Steelux**").* The obiter comments of the Royal Court in *Steelux* were central to the notion that the omission of material facts by the more knowledgeable party could amount to fraud:

"Silence can, in certain circumstances, amount to fraud. If one party, particularly a party who is more experienced and worldly-wise than the other, is silent as to a material fact which, if it had become known to the other party, would have led to a refusal to enter into the contract, that may well amount to fraud which may lead to a setting aside of the contract. In French law, the concept is known as réticence dolosive. We would characterize it as dishonest or fraudulent silence".

The Court then considered Birt's observations in *Toothill v HSBC Bank Plc [2008] JLR 77* ("***Toothill***") which expressed caution at the views expressed in *Steelux* noting that the comments made in *Steelux* were obiter and that the general position under English law was materially different, as there is no general duty to disclose material facts but that there are statutory and common law exceptions to this position. Birt added:

"This court would wish expressly to leave open the question of whether the law of Jersey should recognize

a duty of positive disclosure in the wider circumstances envisaged by the Bailiff or whether a duty of positive disclosure should be confined to those circumstances where it exists under English law, even if, jurisprudentially, it is preferred in this jurisdiction to treat it as dol par réticence. Such a decision would be a matter of considerable practical importance to those who contract under Jersey law and should be the subject of full argument and consideration".

A further case analysed by the Court was *Sutton v The Insurance Corporation of the Channel Islands Limited [2011] JLR 80 ("**Sutton**").* In *Sutton*, it was noted that the doctrine of reticence dolosive was:

"useful in a case such as the present because it forms part of that package of principles which go to identify whether the parties to a contract of insurance, being a contract uberrima fides, have that common will or volonté to make it, and thus provide a proper basis for an assertion that la convention fait la loi des parties".

However, in Hard Rock it was decided that the conclusions in Sutton should be limited to claims in relation to non-disclosure by an insured and otherwise was a case that turned on its own facts:

"*In our judgment, we consider that the reference to reticence dolosive in paragraph 48 of Sutton was not necessary for the Court to find against the plaintiff and therefore its reference to réticence dolosive is obiter and not binding upon us. The contract between the plaintiff and the defendant in Sutton was a contract of insurance which, as the Royal Court noted at paragraph 48, was a contract of utmost good faith. In relation to insurance contracts, it is well known that a failure to disclose a material fact entitles an insurer to avoid a contract of insurance and accordingly a claim made under a void contract of insurance will be rejected*".

Ultimately, the Royal Court decided that dol par reticence is not a principle of Jersey customary law that applies to all Jersey law contracts. Having considered Steelux, Toothill and Sutton there was no clear consensus on the law. Secondly, the extension of the concept of dol as envisaged in Steelux had its routes in jurisprudence of the French Courts and amendments to the French civil code. The Royal Court also determined that such a development would be a step too far in that:

"*The introduction of such a principle is more than a refinement or clarification of Jersey contract law. Rather such a development would fundamentally alter the starting point for contractual negotiations which, even as noted in Steelux, requires parties to have regard to their own interests. The recognition of such a principle would have too many wide ranging consequences for too many contracts and could lead to a plethora of disputes where one party sought to set aside a contract on the basis of an allegation that the other party failed to disclose a material fact".*

The final reason relied upon was that protection of contracting consumers was already a realm that the legislature had intervened for instance through the Supply of Goods and Services (Jersey) Law 2009 and that any judicial input on the topic may cut across existing legislation.

<u>Practical takeaways</u>

In view of the Royal Court confirming that fraudulent silence is not a principle of Jersey customary law and that silence is not actionable generally the parties to a contract and their advisors should dedicate careful thought to the warranties they wish to receive from the seller. Additionally, contracting parties should be very through in their pre-contractual enquiries.

What is *Erreur*?

In England and Wales, *erreur* is understood as "mistake" and "misrepresentation". Mistake in English law is a doctrine that concerns an error made by one or more of the parties to a contract as to the terms of the contract. Misrepresentation is an English law doctrine which operates where a party has been induced into a contract by the non-contractual statement of the other party, which statement is false.

Erreur is the French Law principle which deals with an error made by one of more of the parties to a contract as to a term of that contract. *Erreur* in French law requires the error to operate on a fundamental quality of the contract in order to avoid the contract. The error is assessed subjectively and any lack of valid consent will render the contract void *ab initio*. English law will not cause a contract to be avoided unless the defendant is in some way implicated in the claimant's lack of consent.

It is seen to be far more fitting for *erreur* and *dol* to be used to address circumstances of error and deception in Jersey contract law.

The *Steelux v Edmonstone case* began to redress the balance for Jersey's customary law roots.

In the Steelux Holdings case – the courts made an important distinction between English law and Jersey law. The cases on *erreur* / misrepresentation are, in some ways, even more confused. From one perspective, these differences can be seen as merely reflective of the broader debate on the sources of Jersey law of contract, which we have already analysed in detail above. That may be true, but the interrelated nature of the heads of *vices de consentement* means that confusion over sources has spilled over into the substantive law. The interpretation of *erreur* by the Jersey courts as a form of misrepresentation may itself be a product of this phenomenon, as may the eliding of the concept of false and fraudulent statements in *Steelux Holdings Ltd*, which has broken down the distinction between *erreur* and *dol.*

The scope of claims based on erreur in Hard Rock and what was significant in the Hard Rock case?

The court outlined the three different kinds of erreur obstacle:

(a) Erreur sur la nature du contrat – a mistake as to the nature of the agreement. Classically this is where one party thought that an item was being loaned while the other party thought that a gift was being made;

(b) Erreur sur l'objet – a mistake as to the subject matter of the contract; and

(c) Erreur sur la cause – a mistake as to the basis or purpose of the agreement.

The pleaded case referred to erreur sur la cause, namely that "The vast majority of restaurants (owned by the Hard Rock Group) made a loss and were not profitable", however it was not a erreur sur la cause because the basis or purpose of the Franchise Agreement were clear to both parties, namely Hard Rock would receive royalties in return for allowing HRCKY to operate a Hard Rock Café selling food and beverage and merchandise in the Cayman Islands. Rather, HRCKY's complaint is that they did not understand that an essential part of the Hard Rock Café franchise, namely the sale of food and beverage, was based on a model where the vast majority of the food and beverage side of Hard Rock cafes owned by the Hard Rock Group made a loss and were not profitable.

The complaint of HRCKY, was that if it is an erreur at all, is that the erruer is capable of amounting to an erreur sur la substance (an *erreur* relating to the very essence of the contract itself or a mistake as to some essential quality of the subject matter of the contract).

What was significant in this case?

In relation to erreur, any erreur obstacle renders a contract void. Accordingly, the entire agreement clause will fail for the same reasons outlined by the Court of Appeal in Hard Rock in relation to claims in dol.

Practical takeaways:

The practical takeaways for prospectively contracting parties are neatly set out at para 177 of the Judgment:

"*Parties may seek or make pre-contractual inquiries and seek warranties or other assurances based on the answers to those enquiries. It then becomes a matter of negotiation about the extent of risk a party is willing to accept or not. Often if a party is not willing to accept a risk or a term cannot be agreed to address that risk then that party can walk away from the contract. Parties are therefore free to decide whether to accept a clause excluding any liability for statements made prior to the contract which do not amount to dol.*"

Ultimately, therefore, there remains an onus on contracting parties to make the pre-contractual enquiries they deem necessary and to have a solid understanding of their risk tolerance in relation to a particular transaction or contractual relationship.

Entire Agreement Clause ("**EAC**")

What are they?:

They are clauses which often from part of contracts. The practice of including EAC's in contracts is thought to have begun in the United States. The purpose of such a clause is to achieve, the exclusion of liability for statements other than those set out in the written contract.

Relevance:

The Franchise Agreement at the heart of the dispute included an EAC, in the following form:

"*This Agreement, the documents referred to herein, and the attachments hereto, if any, constitute the entire, full, and complete Agreement between Franchisor and Franchisee concerning the subject matter hereof, and supersede all prior agreements, no other representations having induced Franchisee to* *execute this Agreement. No representations, inducements, promises, or agreements, oral or otherwise, not embodied in this Agreement (as defined in the preceding sentence) or attached hereto (unless of subsequent date) were made by either party, and none shall be of any force or effect with reference to this Agreement or otherwise. Except as otherwise provided in this Agreement, no amendment, change, or variance from this Agreement shall be binding on either party unless mutually agreed to by the parties and executed by their authorized officers or agents in writing*."

A key issue in the litigation was whether the EAC precluded the claims of dol, misrepresentation or erruer as discussed above.

Conclusions of the Court:

The Royal Court referred to the Court of Appeal's comments in *HRCKY v Hard Rock Limited and Anor [2019] JCA 123*. The Court of Appeal had noted that it was difficult to see how a party who has by deception encouraged another party to enter into a contract can thereafter rely on any part of a contract which has only been entered into as a result of that deception. Further that:

"*When a contract is induced by such fraudulent or false conduct then it will be void and the contract will fall. That will mean that each and every one of the clauses, terms and conditions of the contract will be regarded as being void and not enforceable by either party. This will apply as much to an "entire contract" clause as it will to any other clause in the void contract, and it seems to us to mean that the existence of such a clause is no answer to a claim that the contract has been induced by dol. If the contract has been induced by dol, that is by fraud or falsehood, then the contract falls as a whole and cannot be kept alive by a condition which was as much induced by the fraud of falsehood as any other."*

The Court then refined this position by noting that in *Hore v Valmorbida and Anor [2022] JRC 202 ("Hore")*, the effect of a finding of dol is that a contract is voidable rather than void i.e. able to made void as opposed to automatically void. The Royal Court concluded in this respect that as a matter of principle, the existence of an entire agreement clause should not prevent, following a finding of dol, the innocent party from electing to claim damages, rather than have the contract avoided for the reasons set out for same reasons of the Court of Appeal.

The Royal Court noted that the power vested in the Court to refuse an election should not mean that a claim for damages based on a finding of dol is then precluded by an entire agreement clause. The Royal Court then added that the entire agreement should not be able to save the perpetrator of a dol in such circumstances, the Court saw no difference between this scenario and one where a party elects to claim damages on the basis of dol where it would also be unjust or inequitable for an entire agreement clause to prevent a claim for damages following a finding of dol.

The Royal Court then clarified that there was a distinction between the party electing to claim damages or only being awarded damages because a contract cannot be declared void and a positive act of affirmation following a finding of dol. If an innocent party is aware of the facts that amount to dol then proceeds to affirm the contract, that party cannot later rely on the concept of dol. The Royal Court did however note that it is not reliance on an entire agreement clause, but reliance on an act of affirmation. In determining what an affirmation was for these purposes the Royal Court once again referred to Hore, which set down the following test, the election to rely on its contractual rights must be made by the innocent party in knowledge of dol/fraud, the onus is on the party who has committed the fraud/dol to prove that the innocent party equipped with the knowledge of dol and fraud has treated the contract as binding and has made that election to rely on their contractual rights and that the Court should be slow to hold that an innocent party made such an election.

Practical Takeaways:

The primary takeaway from the Royal Court's comments is that an EAC will not generally exonerate a party guilty of dol, misrepresentation or erruer. What may also be extrapolated from the judgment is that notwithstanding the high threshold in the test set down in Hore a party in knowledge of dol or fraud, who in view of this fact wish to have the contract voided or claim damages, should be careful not to affirm the contract through their conduct.

Conclusions

This case is no doubt valuable for clarifying that there is no general duty of good faith in Jersey contracts and confirming that dol par reticence is not a principle of Jersey customary law that applies to all Jersey law contracts. Beyond the black letter law, the case serves as a salient reminder of the importance of pre-contractual enquiries and of parties satisfying themselves that they know the bargain they are committing themselves to when contracting.

In 2024, the Court of Appeal in HRCKY Limited v Hard Rock Limited and Anor [2024] JCA069 heard an appeal against the 2024 judgment made by HRCKY on the basis of nine grounds, the first eight of which concerned disputed issues of primary fact and evaluation. The final ground of appeal was to challenge the decision of the Royal Court that dol par reticence does not form part of Jersey law where commercial arrangements are concerned. The Court of Appeal ultimately decided to dismiss the appeal.

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One in vogue corporate discussion point is Artificial Intelligence ("AI"), which can be attributed to AI's rapidly improving capabilities. AI, whilst challenging to summarise, has been neatly described as "the study and development of computer systems that can copy intelligent human behaviour" by the Oxford Dictionary. However, to illuminate this concept, it is probably best to look at some practical examples of AI in action. Take for instance AI-powered assistants like chatbots which serve as a first point of contact for consumers when seeking customer assistance, or in the financial services space where AI is used in preventing fraud by analysing various data sets to create an understanding of normal customer behaviour and thereby being able to accurately flag anomalous behaviour for further investigation by natural persons.

AI Law and Europe:

Generally, as technology continues to develop at a rapid rate, so do regulatory efforts to implement effective guard rails and AI is no exception in this regard. Accordingly, the European Union (“EU”) has recently passed the Artificial Intelligence Act (“AI Act”). The aim of the artificial intelligence act is to establish a legal and regulatory framework for AI within the EU.

An important feature of the proposed legislation is that it classifies AI into separate prospective levels of risk:

- Unacceptable
- High
- Limited
- Minimal
- General-purpose AI

Naturally, AI deemed to fall into the unacceptable category will be banned with AI falling within the other categories being subject to different requirements which are contingent on their risk level.

This is perhaps unsurprising because AI is a broad church of different systems with variant applications.

Clear parallels can be drawn between the AI Act and the General Data Protection Regulation 2016/679 in that the proposed law will apply extraterritorially i.e. it will be applicable to providers from outside the EU to the extent that they have products within the EU and that an overarching regulatory body (in the case of AI, the European Artificial Intelligence Board) will be established to
oversee it.

The UK and AI Law:

As with the EU, the UK has made strides in regulating AI. However, the framework being developed in the UK is somewhat different to what is envisaged in the EU. In 2023, the UK Government released a policy paper in which it clarified that it intends to put in place a new framework to bring clarity and coherence to the AI regulatory landscape and explained that:

> “This regime is designed to make responsible innovation easier. It will strengthen the UK’s position as a global leader in AI, harness AI’s ability to drive growth and prosperity, and increase public trust in its use and application. We are taking a deliberately agile and iterative approach, recognising the speed at which these technologies are evolving. Our framework is designed to build the evidence base so that we can learn from experience and continuously adapt to develop the best possible regulatory regime. Industry has praised our pragmatic and proportionate approach.”

This new framework will be based on five principals which the UK government outlined are intended to guide and inform the responsible development and use of AI in all sectors of the economy:

- Safety, security and robustness
- Appropriate transparency and explainability
- Fairness
- Accountability and governance
- Contestability and redress

Initially, the framework is not to be put on a statutory footing and instead will be issued on a cross-sector, non-statutory basis and will be implemented by existing regulators. The UK government have explained that the rationale is that this approach makes use of regulators' domain-specific expertise to tailor the implementation of the principles to the specific context in which AI is used. The UK Government has also outlined that during the initial implementation period that it will continue to collaborate with regulators to identify any barriers to the proportionate application of the principles, and evaluate whether the non-statutory framework is having the desired effect.

Notwithstanding the Government's belief in the non-statutory approach, they have not ruled out a codified law governing AI. Indeed, the UK Government has come under pressure from peers to support the Artificial Intelligence (Regulation) Bill which was tabled by Lord Holmes of Richmond. The pressure put on by peers to implement legislation has been attributed to the belief, amongst other concerns, that the UK has lost momentum when it comes to trying to establish itself as a world leader in the sector, especially because others such as the EU have already set out their legislative framework for AI. However, the UK Government has rebutted suggestions that it has lost momentum on the issue with Technology Minister Viscount Camrose highlighting:

> "It's always been the Government's position that it's better to have a deeper understanding of the specific risks of AI across each sector and across all sectors before legislating too narrowly, and that there is a real advantage to waiting for the right moment to have judicious legislation that addresses specific risks rather than blanket legislation that goes to all of them"

What is clear is that the both the technology and the legal frameworks being used to address it are ever developing. Accordingly, for those wanting to harness the power of AI, it will be critical to keep abreast of these developments.

Jersey and AI Law:

Whilst Jersey does not currently have a specific AI Law, we take the view that it will not be too far behind in developing either a statutory or non-statutory framework to regulate the use of AI.

Indeed, as with other areas law, any changes in this space are likely to be coloured and moulded by the developments in other larger jurisdictions such as the EU and the UK. Demonstrative of this on a microscale, is that a principle based framework has been used in Jersey by the Government of Jersey Children Young People Education and Skills Department in its recently published Artificial Intelligence (AI)

Policy – Generative AI in (Jersey) Education, which provided an ethical framework which was to be followed for use of AI (particularly generative AI) in education based on principals of fairness, transparency, accountability and inclusivity. This is indicative that the rapid developments within AI are already impacting islanders lives and will no doubt be an issue under the consideration of legislators.

Jersey Finance have highlighted that AI offers the islands financial service sector some key benefits:

> "there are also opportunities for the finance industry to improve efficiency, create deeper client relationships, and better protect the stability of the sector."

For those in professional services, the natural question will be how can our organisation integrate or further integrate AI into our workspace to create greater efficiencies and accuracy in our service offering.

With that in mind, there is still trepidation when it comes to incorporating AI, not least because of the legal risk that comes with it. Indeed, a 2023 UK Finance survey found that 65% of finance firms are concerned by jurisdictional differences in the rules governing AI. That's why it is pivotal professional service providers get sound, jurisdictionally specific, advice when adopting or further expanding their usage of AI.

Whether we see an expanse of the principle based approach or whether Jersey adopts its own codified AI legislation remains to be seen, but regardless Voisin Law LLP remains on hand to advice our clients on the developments of law impacting the use of AI in Jersey.

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Background

As part of the Spring Budget 2024, the UK Government has announced changes to the treatment of Non-UK domiciled individuals ("**Non-Doms**"). In the UK Government's own words:

"The concept of domicile is outdated and incentivises individuals to keep income and gains offshore"

The UK Government has confirmed that it will be abolishing the current rules for non-UK domiciled individuals and will be introducing a new residence-based regime taking effect from April 2025.

UK Non-Doms are individuals who permanently reside or are domiciled outside the UK. Under the existing rules, Non-Doms who are resident in the UK may opt out of use of the remittance basis of taxation. In practical terms this means that they do not pay UK income tax and capital gains tax in the same way as UK domiciled persons, they only pay tax on their foreign income and gains ("**FIG**") when the FIG are remitted to the UK.

Changes

Under the proposed changes the tax treatment currently afforded to Non-Doms, which is based on domicile status, will change in respect of new FIG arising after April 2025. For new arrivals (who have a period of 10 years consecutive non-residence in the UK), there will be full tax relief on all FIG arising during the initial 4-year period of UK tax residence. During this four year period, the FIG can be brought into the UK without an additional tax charge. The changes will also impact existing UK tax residents, who have been tax resident for fewer than 4 tax years and are eligible for the scheme, who will also be able to benefit from this relief until their 4th year of tax residence.

The UK Government has also stated that it proposes to retain and simplify Overseas Workday Relief.

The UK Government has confirmed that it is removing the existing protection for non-resident trusts for new FIG arising within such trusts after 6 April 2025. New trusts and additions to existing trusts made by a non-UK domiciled settlor on or after 6 April 2025 will be subject to new residency based rules. Notwithstanding, this, the UK Government has confirmed that the treatment of non-UK assets settled into a trust by a non-UK domiciled settlor prior to April 2025 will not change, so these will not be within the scope of the UK IHT regime.

In the transitionary period, the UK Government has also announced that there will be:

- a temporary 50% reduction in the personal foreign income subject to tax in 2025-26 for Non-Doms who will lose access to the remittance basis on 6 April 2025 and are not eligible for the new 4-year FIG exemption regime.
- Re-basing of capital assets to 5 April 2019 levels for disposals that take place after 6 April 2025 for current Non-Doms who have claimed the remittance basis.
- In tax years 2025-26 and 2026-27, there will be Temporary Repatriation Facility, which will allow Non-Doms to remit FIG that arose before 6 April 2025 to the UK at a rate of 12%.

Implications and thoughts

The proposed changes to the Non-Dom taxation regime have been seen as more radical and immediate than anticipated and will no doubt have an effect on the roughly 70,000 (according to HMRC figures) individuals with Non-Dom tax status – the bulk of whom reside in London and a large proportion of whom work in the City of London.

In view of the changes to the taxation of non-UK assets settled into trust, trustees should consider whether it is prudent to make distributions before 6 April 2025 to UK-resident who will not be eligible for the 4-year rule, and trust company businesses should in any event give careful consideration to these new rules to the extent that they impact (or may impact) structures that they administer. provided it is not foreseen that the sum will not be remitted to the UK.

In view of the changes to the IHT treatment of FIG arising in non-resident trusts, consideration should also be given to whether to settle new trusts and assets into existing trusts before this prescribed date.

Voisin Law can assist with advising upon the establishment a new trust or making other changes to your existing structures in light of the changes, working closely with your UK tax advisors in this regard to ensure appropriate implementation of their structuring advice.

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Voisin Law LLP is delighted to announce the promotion of Frances Littler to Partner.

Frances joined Voisin in 2013, after having been enrolled on the firm's successful Bursary Scheme since 2008. She qualified as an English Solicitor in 2015, from which time she focused her practice on Dispute Resolution. Frances was admitted as an Advocate of the Royal Court of Jersey in 2019.

Managing Partner Kate Anderson commented: "We are delighted to welcome Frances to the Partnership, the promotion is a recognition of Frances' hard work and dedication to the firm, her excellent qualities as a lawyer and commitment to her clients. I am certain that Frances will be invaluable in assisting Voisin Law LLP to grow and develop."

To read more about Frances' areas of practice, please see Frances Littler

A Will is a written declaration of your wishes as to how your property (assets) should pass after death. A Will can be amended or revoked at any time before death, provided you retain the requisite mental capacity.

Why should I have a Will?

There are many advantages to making a Will:

- You ensure your assets are distributed in accordance with your wishes. If there is no valid Will, your

assets will be distributed in accordance with the intestacy rules – ‘the law’ in effect decides.
- You nominate a person of your choice to administer your ‘movable’ assets: your ‘executor’.
- You can make a clear declaration as to your domicile, or express your wishes regarding guardianship of minor children, funeral wishes, legacies/gifts to a charity, church, friend etc.
- Ultimately a Will assists with matters being dealt with as quickly and efficiently as possible on your death minimising the upset and distress for those left behind.

It is common practice in Jersey, though not a legal requirement, for separate Wills to be prepared to deal with a person’s ‘immovable’ estate or ‘realty’ (i.e. freehold land and leases over nine years) and a person’s ‘movable’ estate or ‘personalty’. This is because the process by which the Will is recognized is different for each type of property, the signing requirements for the Wills are different and there are different claims that may be made against the different types of property.

Wills of Jersey Immovable Estate (Realty)

Immovable estate includes land, (gardens, fields, etc.) and buildings on land, (houses, farms, commercial premises) including leases for more than nine years, ‘flying freeholds’ and those mortgages known as ‘hypothèques conventionelles’.

A Will of Jersey immovable estate must be read aloud to you and executed before two independent witnesses, one of whom must be an Advocate or Solicitor of the Royal Court of Jersey, a member of the States of Jersey or one of the Law Officers of the Crown.

An Executor is not appointed as the registration of the Will in the Public Registry is all that is required to transfer legal title to the beneficiaries (the devisees).

Generally, you may dispose of your immovable estate as you wish. However, if you own immovable estate in your sole name and are married or have a civil partner and you leave that your immovable estate to someone other than your spouse or civil partner, then your spouse or civil partner would have a right to claim their ‘dower’ which is life enjoyment of one third of your immovable estate.

You can leave your immovable estate to someone living outside of the Island and whilst that person will not automatically obtain general residential qualifications, they will be allowed to live in the property.

If you die intestate (without a valid Will) your immovable estate will pass according to the law to your ‘heirs at law’.

<u>Stamp Duty</u>

There is no Inheritance tax in Jersey. However, stamp duty based on the value of the Jersey Immovable Estate transferred by the Will is payable upon registration of the Will in the Public Registry.

In circumstances where the property being left is the matrimonial or civil partnership home to the surviving spouse/civil partner or the Will leaves the Jersey Immovable Estate in accordance with the law of intestacy then no stamp duty is payable on registration of the Will other than an administration charge (currently £90).

If neither of these two exceptions apply then stamp duty will be charged. The current rates are as follows:

- Exceeds 300,000 but does not exceed £500,000: £4,000 in respect of the first £300,000, plus 2% on the balance
- exceeds £500,000 but does not exceed £700,000:   £8,000 in respect of the first £500,000, plus 3% on the balance
- exceeds £700,000 but does not exceed £1,000,000: £14,000 in respect of the first £700,000, plus 3.5% on the balance
- exceeds £1,000,000 but does not exceed £1,500,000: £24,000 in respect of the first £1,000,000, plus 4.5% on the balance
- exceeds £1,500,000 but does not exceed £2,000,000: £47,000 in respect of the first £1,500,000, plus 5.5% on the balance
- exceeds £2,000,000 but does not exceed £3,000,000: £67,000 in respect of the first £2,000,000, plus 6% on the balance
- exceeds £3,000,000: £127,000 in respect of the first £3,000,000 plus 7% on the balance.

Wills of Movable Estate (personalty)

Your movable estate comprises everything you own other than immovable estate; for example: your jewellery, bank accounts, cash, investments, furniture, cars, leases for less than nine years and, importantly, 'share transfer' properties. (It is the shares that you own.)

A Will of movable estate must be signed in the presence of two independent witnesses.

The Will should appoint an executor, who can be a friend or family member or a professional adviser such as a lawyer. Voisin Law has an executor company, Voisin Executors Limited, that acts in this capacity. By appointing Voisin Executors Limited as your executor this avoids the problem encountered if an individual named as executor dies before you or is unable or unwilling to act as executor.

A Will provides for payment of debts and any funeral expenses. It will include any specific gifts that you wish to make before stating who is to inherit the balance of the estate (the 'residue'), and if more than one beneficiary, in what proportions.

Jersey law provides that if you have a spouse or civil partner and/or children then they are entitled to certain shares of your movable estate. If you fail to make such provision then your Will would not be deemed invalid but your spouse/civil partner and/or children could bring a claim before the Royal Court for their strict entitlement under the law.

If you die leaving just a spouse or just a civil partner then that spouse/civil partner is entitled to two thirds of your movable estate.

If you die leaving just children then the children are entitled to two thirds of your movable estate.

If you die leaving a spouse or civil partner *and* children then the spouse or civil partner are entitled to one third of your movable estate and the children (together) are entitled to one third of your movable estate.

There is always a “free third” over which an individual can do with what they choose.

In addition, should you make any gifts during your lifetime to any one or more of your ‘heirs at law’ i.e. a spouse, civil partner or child or children then that gift could be treated as an advance of their inheritance and another heir at law could call back that gift into account on division of the estate if a claim is made against your Will.

If you die intestate (i.e. without having made a valid Will) your movable estate will pass according to the provisions of the law.

Stamp Duty (probate court fees)

Probate Court fees are payable when an application is made for a Grant of Probate or Letters of Administration and is calculated on the value of the net movable estate at the date of death.

If, however, the total value of your worldwide estate does not exceed £30,000 an ‘applicant’ (i.e. the beneficiary) may request the estate to be released to them provided the applicant is entitled to receive your estate under the terms of your Will (or in accordance with the intestate succession provisions). It is also a proviso that no caveat is in force against the estate (which can be checked on the Jersey Government website).

The asset holder will request that the applicant complete their application form to confirm they are entitled to receive the estate, that the applicant is not liable to any other beneficiary for such assets and provide all other necessary declarations. The applicant will need to provide their personal details on such application form and once complete the asset/s will be released by the asset holder.

If a Jersey Grant is required, Stamp duty is charged at the following rates:

Where the value of the Jersey estate:

- Does not exceed £10,000: No fee
- Does not exceed £100,000: £50 for each £10,000 or part thereof
- Is in excess of £100,000 but does not exceed £13,360,000: £500 for the first £100,000 plus £75 for each additional £10,000 or part of it
- Is in excess of £13,360,000: £100,000
- In addition, the Court also charges a further £80 administration fee on all applications.

If you wish to send us instructions for making your will, please complete The Will Instruction Sheet Jersey Resident and Domiciled.

Voisin’s Estate Planning & Capacity team provide expert guidance in all matters concerning capacity issues. If you would like to have an informal discussion about these matters, please contact Eliana Lennon and Angela Roscouet at probate@voisinlaw.com.

This note is intended to provide a brief rather than a comprehensive guide to the subject under consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter.

The purpose of this guide is to set out a summary of the principal rules in Jersey relating to non-Jersey domiciled persons who die owning movable assets in Jersey.

WILLS

If you hold assets in Jersey then we recommend that you put in place a separate Jersey Will to deal solely with those assets on your death. Such assets most frequently comprise shares in Jersey companies, units in Jersey-based collective investment funds, policies payable in Jersey and deposits with banks in the Island.

Advantages of a Jersey Will

- A Jersey Will allows your beneficiaries to access the Jersey assets swiftly.
- This is beneficial where assets in other jurisdictions may be tied up in probate.
- The Jersey assets can be utilised to settle tax liabilities in other jurisdictions.
- The process is even more swift where a Jersey resident executor is appointed. Note that with a Jersey resident executor such as Voisin Executors Limited, probate may be obtained within two weeks of your death.

How do I make a Will in Jersey?

The process is simple and we can assist you with this. The first step is to complete our Will Instruction Sheet and return it to us. We can then discuss your requirements in more detail.

Validity of a Will

You can put in place a Jersey Will leaving your assets to whom you choose but in circumstances where that Jersey Will is challenged in the Jersey courts on the grounds that it is not in accordance with the succession law of your jurisdiction of domicile (e.g. where there are rules of forced heirship) then the Jersey court will apply the law of the jurisdiction of your domicile and not Jersey law. Therefore we are unable to advise on this ‘essential’ validity of your Will.

Mistaken Revocation

Once a Jersey Will is signed it will govern the devolution of your Jersey assets. Therefore, should you make another Will in future governing your assets outside of Jersey you must ensure that the new Will does not mistakenly revoke your Jersey Will (e.g. by stating that it ‘revokes all former Wills and testamentary dispositions’.) You should always advise your lawyer that you have a Jersey Will in place.

Existing Worldwide Will

You may have an existing ‘worldwide’ Will in place that covers your Jersey assets. This would need to be reviewed to ensure that it does cover the Jersey assets. Particular care should be taken that it does not refer to ‘my assets in the UK’ as Jersey does not form a part of the UK. That worldwide Will can be probated in Jersey; however, this is only after probate has issued in the jurisdiction of domicile and therefore this may take some time thus delaying the ability of the beneficiaries to access the assets in Jersey (see below).

PROBATE

A Jersey Grant of Probate (where there is a Will) or a Jersey Grant of Letters of Administration (where there is no Will) is required in order to release assets of a non-Jersey domiciled deceased person held in Jersey where the total value held by any holder exceeds £30,000.

‘Fast Track’ Probate Applications

If you are domiciled in England and Wales, Scotland, Northern Ireland, Guernsey or the Isle of Man there is a ‘fast track’ procedure for obtaining a Greffier’s Certificate equivalent to a Jersey Grant to deal with your Jersey assets where probate has been obtained in the jurisdiction of domicile. However, ability to deal with Jersey assets may still be achieved more quickly if a separate Jersey Will has been made.

Probate of a Worldwide Will

If you die domiciled outside of the British Isles and have executed a worldwide Will then that original Will must first be proved in your country of domicile before probate can be obtained in Jersey. This is the same where there is no Will: the intestacy process must be completed in the country of domicile. This is where substantial delay can arise resulting in the Jersey assets being frozen hence the advantages of having a separate Jersey Will.

Postal applications for Grants of Probate are not permitted in Jersey. If your executor is not resident in Jersey it is possible for them to appoint an attorney in Jersey to apply for the necessary Grant of Probate and then to administer the estate in Jersey. Alternatively, we have an executor company, Voisin Executors Limited, which can be appointed to act as executor of the Jersey Will.

When applying for a Jersey Grant of Probate of a ‘worldwide Will’ the following original documents will be required:

- A Court Sealed and Court Certified copy of the primary Grant of Probate/Letters of Executorship/Administration;
- A Court Sealed and Court Certified copy of the Will and any codicils;

For the avoidance of doubt a “Court Sealed and Court Certified copy” is, an office copy with (a) the official seal of the Probate Registry affixed, (b) which has been certified on the reverse of the document that it is a true copy of the original by the Probate Registrar and (c) signed with an original signature by the Registrar.

The above documents will be permanently retained in the Royal Court records.

Or: a notarised copy of the Notarial Deed or Inheritance Certificate (as appropriate);

- An original or certified copy of the death certificate;
- A Power of Attorney from the Executors or heirs at law in favour of this firm’s executor company, Voisin Executors Limited.
- Details of the Jersey situate asset(s) together with date of death valuation(s).

Any documents that are not in English will need to be translated and certificated by a professional translator.

Stamp Duty (Probate Court Fees)

Stamp duty is payable on the application for Jersey probate and is charged at the following rates:

Where the net value of the Jersey Estate:

- Does not exceed £10,000:no fee
- Does not exceed £100,000 £50 for each £10,000 or part thereof
- To exceed £100,000, but not to exceed £13,360,000 £500 in respect of the first £100,000 plus
- £75 for each additional, £10,000 or part thereof
- To exceed £13,360,000, £100,000

A further £80 stamp duty is payable on all applications by way of an administration charge.

If you wish to send us instructions for making your will, please complete The Will Instruction Sheet Domiciled Outside of Jersey.

Voisin’s Estate Planning & Capacity Team provide expert guidance in all matters concerning capacity issues. If you would like to have an informal discussion about these matters, please contact Eliana Lennon and Angela Roscouet at probate@voisinlaw.com.

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Whilst not a subject of everyday conversation, making a Will is a way for you to ensure that your affairs are in order and your wishes recorded should the worst happen.

If you die without having a Will in place your assets will be dealt with under the intestacy provisions of Jersey law. By way of an example, if you are survived by your spouse or civil partner and children they are deemed to be your heirs at law and entitled to receive your assets in the proportions set out in the law. If however you are single with no immediate descendants, or in a long term relationship but unmarried, then the position does became more complicated on your death, as your siblings and the issue of any deceased sibling would be deemed to be your heirs at law. This may be in accordance with your wishes however again it may not.

Estate planning in your lifetime may be easily dismissed with the usual "I will not be around then" but if you consider that the recipients of your "lifetime savings" could be complete strangers to you, and the persons that really matter will be left with nothing, then this is the time to take action and ensure that you provide for your loved ones, relatives and friends that would not otherwise have a right to inherit under the intestacy provisions.

In Jersey there is a distinction between movable and immovable assets. It is standard practice for a Jersey resident to dispose of their assets by means of two separate Wills, one that deals with their movable assets which includes bank accounts, investments, personal effects and belongings and the like and the other Will to deal with their immovable assets which consist of property and land in Jersey.

By making a Will you can ensure that your loved ones are left a memento by means of a gift of one of your cherished possessions which could range from a much loved ornament or an item of jewellery, a sum of money or even the gift of your property. If you support one or more charitable causes and wish to ensure that on your demise a gift is left to a particular charity, then you can record this gift in your Will too.

It is also advisable to name an ultimate beneficiary in your Will, also referred to as a backstop beneficiary, who would receive your assets in the event that your first named beneficiaries do not survive you. Naming a charity in a Will as an ultimate beneficiary would ensure that a person's assets would pass to a charitable cause of their choosing should their beneficiaries no longer be around to receive the gift or should their beneficiaries die together.

Whilst yt is possible to include charitable gifts in both a movable and immovable Will, there are certain considerations to take into account when making a gift of your property, which your legal adviser will be able to guide you through.

In addition, in your Will you can name a trusted person, be it a family member, a friend or a professional firm to act as the executor of your movable estate. Whilst careful consideration should be given to who you chose as executor, choosing the right person can give comfort that your assets will be deal with as you wished by someone you trust.

If you do not have a Will in place, or wish to update your Will to include an ultimate beneficiary clause, then this is the time to contact our experienced team who will be pleased to guide you through the process and advise you accordingly taking into account your particular circumstances.

The case of Representation of White Willow (Trustees) Limited [2022] JRC120 provides helpful clarification as to the trustee's right to reasonable security in the form of an indemnity when making an interim distribution to beneficiaries.

This case was another instalment in long running litigation concerning the Foundation, but, in summary, White Willow (Trustees) Limited (the "Trustee"), as the trustee of a charitable trust, known as the Foundation, proposed to make an interim distribution of US$20m equally amongst the eight charitable sub-trusts which are the beneficiaries of the Foundation.

The Trustee required standard indemnities to be put in place in connection with the interim distributions, as there were a number of contingent liabilities that it had identified, including: (i) potential tax liabilities; (ii) possible fines in relation to potential infringement of the laws where some of the trust assets had historically been located; and (iii) unknown liabilities (for example in connection with historic litigation) which the trustee may be unaware of.

On the other hand, the trustee of a number of the sub trusts argued that in the circumstances there was no need for an indemnity and that the risks of the contingent liabilities identified by the Trustee were fanciful.

The issue that the Royal Court was therefore required to consider was whether the Trustee was entitled to require execution of a deed of indemnity on behalf of each of the sub-trusts prior to making the distribution.

The Law

The Trusts (Jersey) Law 1984 (the "Law") helpfully provides that a Trustee is entitled to be provided with reasonable security for liabilities before surrendering the trust property and states as follows:

43A Security

(1) A trustee –

(a) who–

(i) resigns, retires, is removed or otherwise ceases to be a trustee, or

(ii) distributes trust property; or

(b) of a trust that is terminated or wholly or partly revoked, may, before distributing or surrendering trust property, as the case may be, require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise.

(2) Where security required to be provided under paragraph (1) is in the form of an indemnity, the indemnity may be provided in respect of –

(a) the trustee or a person engaged in the management or administration of the trust on behalf of the trustee;

(b) any or all of the present, future or former officers and employees of the trustee or person engaged in the management or administration of the trust on behalf of the trustee; and

(c) the respective successors, heirs, personal representatives or estates of the persons mentioned in sub-paragraphs (a) and (b), and any person in respect of whom the indemnity is provided under this paragraph may enforce the terms of the indemnity in their own right (whether or not they are party to the contract or other arrangement providing the indemnity).

(3) If an indemnity to which paragraph (2) refers is extended or renewed by a contract or other arrangement and that contract or other arrangement provides an indemnity in respect of any of the persons referred to in paragraph (2), any such person may enforce the terms of the indemnity in their own right (whether or not they are party to that contract or other arrangement).”

Article 26 (2) of the Law, further states that:

“A trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust.”

The Court’s Decision

Right to reimbursement means full repayment

In relation to Article 26 (2) of the Law, the Court helpfully reiterated that this Article reflects the general principle of trust law that a trustee is entitled to reimbursement out of the trust fund for all expenses and liabilities properly incurred and that the right to reimbursement means full repayment.

With regards to Article 43A of the Law, the Court held that it was clear from Article 43A that an indemnity is regarded as a form of security and that what is regarded as reasonable security in any given case will depend both on the nature of the liabilities in question and the nature of the security required. In other words, the greater the remaining and ongoing risks of a liability materialising after a distribution, the greater the nature and extent of security that could be sought.

In the case in question, the Court noted the limited nature of the security being sought and that this was not a request to retain assets by way of security, with the only request being for the provision of a standard indemnity for liabilities which had been properly incurred.

Contingent Liabilities

Importantly, the Court held that even in circumstances where the likelihood of the contingent liabilities materialising was very small, the limited nature of the security sought meant that it was wholly reasonable for the Trustee to seek such security. Indeed, all the provision of the indemnity meant was that, should the liabilities materialise, they are borne by the correct parties, namely the beneficiaries, rather than the Trustee. In addition, the Court held that it did not matter that there were assets remaining in the Foundation after the interim distribution had been made.

Unknown Liabilities

Regarding unknown liabilities, the Court further held that it is common practice in the offshore trust world for indemnities against unknown liabilities to be required of beneficiaries on termination of a trust or on making distributions when the assets retained in the Trust are comparatively small and that in this case it was therefore entirely reasonable for the Trustee to require an indemnity in the proposed form simply to cover any unknown liabilities even in the absence of possible contingent liabilities.

The Court went on to note that as in the case of the specific liabilities, if no such liability ever materialises, the indemnity will have cost the sub-trusts nothing and they will be able to carry on their charitable activities exactly as they wish. If, on the other hand, any such liability appears out of the woodwork, it is entirely reasonable that any such liability should be borne by the sub-trusts which have received the assets from the Foundation rather than by the Trustee itself.

Conclusion

The Court's decision provides welcome comfort to the Jersey trust industry and confirms that in seeking an unsecured indemnity in a standard form, it is unnecessary for a trustee to have to demonstrate the existence of known contingent liabilities and that it is perfectly acceptable for such indemnities to also cover unknown liabilities.

	Jersey companies	UK companies	Thoughts
Migration	In Jersey, it is permissible for existing companies to migrate into the island i.e. to continue as a validly incorporated company, provided that the laws of the country in which that company is currently incorporated permit continuance and the requirements of both jurisdictions are met. For example, the requirements of the Companies (Jersey) Law 1991 (the “Law”) involve, amongst other things, confirming that the company is not insolvent or is in the process of being wound up. Jersey-incorporated companies may also migrate outwards, provided that the destination jurisdiction permits the redomiciliation of Jersey Companies (for example, a Jersey company cannot migrate to the UK).	In contrast, and in spite of a 2021 consultation about permitting migrations and notwithstanding that foreign incorporated companies can become tax residents in the UK, UK law does not permit migrations.	The ability to migrate naturally makes Jersey an easier location for an existing company to continue in. In contrast, if a company wished to continue in the UK, re-structuring steps would need to be undertaken, for instance, a new UK holding company would need to be incorporated into the corporate structure or key staff may need to be re-domiciled to the UK for the purposes of exercising “management and control” from the UK, which is a more involved process than in Jersey.
Lack of Statutory Pre-emption Rights	The Law has not codified any pre-emption rights. In the event that pre-emption rights are required on the issue or transfer of shares, they would need to be “hard-wired” into the articles of association of a Jersey company (and, potentially, Shareholders’ Agreement).	Statutory pre-emption rights are codified under the UK law, which prescribes that the existing shareholders are to be offered any shares that the company proposes to allot in advance of and on the same or more favourable terms than any non-shareholder. In spite of this position, statutory pre-emption rights are commonly disapplied.	The absence of any statutory pre-emption rights in Jersey leaves companies completely free to choose how or if they wish to include pre-emption rights in their constitution and shield them from potential adverse effects of pre-emption rights. Although pre-emption can protect shareholders against dilution of their shareholding, disadvantages can include deterring prospective investors, causing disputes in companies looking to raise equity financing, and hampering the commercial freedom of existing shareholders.

	Jersey companies	UK companies	Thoughts
Distributions	A Jersey company may make a distribution from any source (other than from a nominal capital account and a capital redemption reserve), at any time, provided the directors are willing to provide the prescribed solvency statement (in summary that having regard to the prospects of the company and the amount and character of the company’s financial resources the company will be able to carry on business and discharge its liabilities as they fall due). Article 115(2) of the Law makes it clear that the Law only restricts or seeks to control distributions which reduce the net assets of a company and in respect of which provision would have to be made in the accounts of the company under the accounting principles adopted by the company. Determination of whether the company is solvent is undertaken on a cash flow basis i.e. is the company able to discharge its debts as they fall due out of its assets? This of course means that distributions from Jersey companies may come from a wider array of sources, provided the directors can satisfy themselves that the company is solvent within the meaning provided in the prescribed wording under Art 115(4) of the Law. The articles of association of a Jersey Company (and/or any shareholders agreement) should always be reviewed to ensure there are no restrictions on the making of distributions.	In the UK, a company may only make a distribution out of distributable profits.	The breadth of sources from which a distribution may be made in Jersey is a useful feature of the Law and gives companies greater freedom and flexibility when making a distribution than in the UK, whilst the distribution procedure in Jersey provides sufficient safeguards for creditors.
Redemptions	In a similar vein to the distributions regime, pursuant to Art 55(4) and (5) of the Law the redeemable limited shares of either a par value company or a no par value company may provided that the company in question is not an open-ended investment company and the shares are fully paid up be capable of being redeemed from any source, including capital. Again in order to give effect to this the directors must pass the prescribed solvency statement, which is materially similar to the solvency statement required for distributions.	In the UK, private companies are permitted to make redemptions out of capital and public companies are only permitted to redeem out of distributable profits or out of the proceeds of a fresh issue of shares made for the purposes of redemption, and any premium payable on redemption must be paid out of distributable profits.	As with distributions, Jersey’s redemption regime promotes greater flexibility.

	Jersey companies	UK companies	Thoughts
Share Buy-backs	A company without redeemable shares may still purchase its own shares, however unlike a redemption the specific agreement of the selling shareholder will be required (approved in advance by an ordinary resolution of the company) in order for the company to purchase the shares in question. The shareholders will need to sanction the repurchase through a special resolution unless the company in question is a wholly-owned subsidiary of another company. A company can fund its repurchase through any source provided that the shares are fully paid up and the prescribed solvency statement (in the same essential form as is required for redemptions) is passed. As is outlined above, in relation to distributions, redemptions and share buy-backs under the Law, creditor protection does not rely upon any sort of distributable reserves and is instead reliant upon the directors giving the prescribed solvency statement.	In the UK, companies are permitted to repurchase their own shares, provided that a purchase does not result in there being no member holding any issued shares of the company other than redeemable shares or treasury shares. Repayment must be made out of capital after applying for that purpose any available profits of the company and the proceeds of any fresh issue of shares made for the purposes of the redemption or purchase.	In a similar vein to distributions and redemptions, and when contrasted with the position in the UK, the funding options provided by the Law are more plentiful for Jersey companies seeking to buy back their own shares.
Capital Reductions	Historically under the Law, a reduction of capital by a company would need to be court-sanctioned. However, now a capital reduction may be sanctioned by a special resolution with a supporting solvency statement and then registered with the Jersey Company Registry, together with a legal minute stating the capital accounts of the company following the reduction.	Under UK law, private companies may reduce their capital in the same manner as a Jersey company namely by way of a special resolution supported by a solvency statement. However, for public companies capital reductions will need to be court sanctioned.	Under the Law, all Jersey companies public or private can reduce their capital without going through the cumbersome and expensive process of obtaining court confirmation.
Taxation	In Jersey, the standard rate of corporate tax is 0%. There are exceptions to this (for example, certain financial service companies will be taxed at 10%, utility companies will be taxed at 20%, and a sliding scale of 0 and 20% applies for retail companies). Jersey does not impose capital gains tax. Additionally, there is no stamp duty payable on share transfers (except in limited circumstances).	In the UK, the current rate of corporate tax is 19% but is scheduled to raise to 25% in the financial year 2023-2024. Further, the UK levies capital gains tax and stamp duty on certain share transfers.	In quantifiable terms, this makes Jersey a more tax efficient option.

	Jersey companies	UK companies	Thoughts
	The Law permits the existence of both par-value and no-par-value companies. A par value company is defined in the Law as a company: (a) Being registered with a share capital; (b) The shares are expressed as having a nominal value; and (c) Either: a. Its memorandum states that it is a par value company; or b. It is a company which was registered under the Law before this particular article came into force.		
No par value companies	The Law also provides for the existence of no-par value companies. A no-par value company is defined under the Law in the following manner: (a) It is registered with shares which are not expressed as having a nominal value. (b) Its memorandum of association states that it is a no-par-value company.	In contrast, UK companies limited by shares having a share capital must each have a fixed nominal value.	The flexibility created by the Law means Jersey provides a unique offering to those structuring investments through a corporate vehicle.
	The crucial difference is that with a par-value company, the shares are expressed as having a nominal value. For instance, the company may have five issued shares of £1 each. In the case of a no-par value company, the shares do not have a nominal value. In Jersey, no-par value companies are often used as a vehicle for collective investment funds or employee share plans. As the Law permits the company to be established with unlimited share capital. This circumvents the requirement to up the authorised share capital of the company as the fund expands. As regards distributions, a no-par value company is additionally permitted to make a distribution out of its stated capital account.		

	Jersey companies	UK companies	Thoughts
Cell Companies	In Jersey, the ability to form cell companies has been a feature of the Law since 2006. There are two types of cell company that may be created, the Protected Cell Company ("PCC") and the Incorporated Cell Company ("ICC"). An ICC may create incorporated cells which each have their own legal personality, meaning they may hold assets and can bring or be subject to litigation in their own right. Conversely, a PCC may create protected cells which do not have their own legal personality – meaning a PCC and its cell form a single legal entity. In spite of this, members of protected cells are only entitled to vote on resolutions of the cell to which they are a member. Jersey does not impose restrictions on the objects of cell companies.	Cell companies are a relatively new feature of the UK companies' law regime being introduced in 2017. Under UK legislation, PCC's may be created to act as special purpose vehicles in insurance-linked securities.	Because of these differences Jersey has a broader and more mature offering than the UK when it comes to establishing cell companies.

This note is intended to provide a brief rather than a comprehensive guide to the subject under consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter. The differences highlighted above are not an exhaustive list.

The role of the Royal Court in supervising the administration of trusts is fundamental to the trust concept, with article 51 (1) of the Trusts (Jersey) Law 1984 (the "Law") permitting a trustee to apply to the Royal Court for directions concerning the manner in which the trustee may or should act in connection with any matter concerning the trust. In relation to such applications, the Royal Court has the power to make such order, if any, as it thinks fit.

The ability of a trustee to apply to the Royal Court for the court's blessing under Article 51 of the Law, is particularly helpful in situations where the trustees find themselves in a situation where they have reached in principle a decision, but where there are contentious issues or a dispute as to the propriety of the trustee's decision, as in the event that the application is successful the court's blessing will afford protection to the trustee.

Momentous circumstances where a trustee may consider making such an application, may include, by way of example, situations where the trustee is considering removing a beneficiary, disclosure of trust documents, the sale or gift of a significant trust asset or a substantial restructuring of the trust and / or its assets.

The 4 cases set out in Public Trustee v Cooper

In circumstances where a trustee is considering making an Article 51 application, it is well established that there are 4 types of cases in which the Royal Court may become involved, which were first identified in an unnamed decision of Robert Walker J in an English High Court in 1995 and then applied in the well-known English case of The Public Trustee v Cooper [1999] 12 WLUK 603 and arise where:

1. there is an issue whether, on its proper interpretation, the trust instrument permits a proposed course of action;

2. the trustee asks the court to bless a decision which it considers to be a momentous one for the trust, where the nature of the trustee's power is not in doubt;

3. the trustees surrender their discretion to the court as they are disabled from acting, for example, because they are deadlocked or there is a conflict of interest; and

4. there is a challenge to an exercise of a trust power on the grounds that it is ultra vires or has otherwise been exercised for an improper purpose.

The Momentous Decision Category

The second of the aforementioned categories is the "momentous decision" category, which arises in cases where there is unlikely to be any doubt as to the nature of the power, and the trustees will have decided how they wish to exercise it, but the decision is of such a momentous nature that they wish to seek the court's blessing.

This approach to the categorisation of cases was adopted and applied by the Royal Court in Re S Settlement [2001] JLR N 37 and has subsequently been applied by the Royal Court on many occasions.

In Re S Settlement [2001], the Royal Court's involvement arose because of a case falling within the second category and the Royal Court famously held that the Royal Court was required to consider whether the trustee's decision was:

1. formed in good faith;

2. was one, which a reasonable trustee properly instructed could have arrived; and

3. has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision

In the recent case of Representation of G.B. Trustees [2021] JRC 048, in analysing its function in relation to such applications, the Royal Court referred to an often quoted extract from Lewin on Trusts (20 th edition) which held that:

"The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view.

In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed.

The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed)."

Issues to consider when making such an application

In making such an application for the Royal Court's blessing, the trustee will need to be aware, amongst other things, that:

1. in considering such applications, the general standpoint of the Royal Court is that it will not substitute its own discretion for that of the trustee, it will merely ask the question: "is the decision one which a reasonable trustee, properly instructed, could have made, taking relevant considerations into account and ignoring irrelevant considerations;"

2. the trustee has a duty of full and frank disclosure to the Royal Court, as the Royal Court cannot be viewed as a rubber stamp and parties and their advisers must be astute not to appear to treat them as such;

3. the application must summarise the arguments for and against the proposed course of conduct, especially given that fact that such applications for administrative directions are invariably held in private and once approved, the beneficiaries will be unable to complain that a breach of trust has occurred or attempt to set it aside as flawed;

4. the decision of the trustee must be a "proper one" and the Royal Court must be satisfied as to the rationality of the decision. However, the decision need not be final, in that implementation of the decision may be conditional upon the Royal Court's approval;

5. the Royal Court needs to be satisfied that the decision was within the range of possible decisions which could reasonably be made, but also that the actual decision was arrived at by the trustee in such a way that from the range of possible decisions it was likely to be a good decision;

6. when determining whether to sanction a decision, the Royal Court should act with caution but it should not withhold approval merely because it would not itself have exercised the power in the same way;

7. the Royal Court is unlikely to entertain an application to approve a transaction already completed by the trustee where no challenge to the validity of that transaction has been initiated by the beneficiaries (Re H Trust 2006);

8. in order for the court to be able to bless a decision, there needs to be a decision to bless. In the Case of re AAA Children’s Trust, the Court found that it was impossible to pinpoint a meeting of the Trustee at which the momentous decision the Court was being asked to bless had actually been taken. As a result in this case, the Court declined to bless the transaction, highlighting the importance of trustee meetings being clearly recorded, which consider all relevant factors relating to the momentous decision;

9. the interests of minor and unborn beneficiaries must always be taken in account. In the case of Re the V, W, X and Y Trusts [2021] JRC 208 it was held that whilst the interests of the unborn children and remoter issue would be aligned with their parents, the interests of the unborn and unascertained spouses, widows or widowers would clearly not be served by the proposed exclusion of the aforementioned classes and on that basis, the court declined to bless the trustee’s decision in this case;

10. although the court will often give weight to the views of the majority of the beneficiaries, if the court is satisfied that the course of action supported by the minority best serves the interests of the trust, then the court has demonstrated its willingness for the views of the minority to prevail;

11. the trustee will need to provide the Royal Court with sufficient information, which would normally include relevant trustee minutes, any relevant expert evidence, relevant counsel advice and affidavit evidence from the trustees, as may be required;

12. the Royal Court will also generally want assurances that the trustee has taken account of the views of the beneficiaries as part of its consideration as to whether the trustee has discharged its fiduciary duties and reached a reasonable decision in the circumstances;

13. in the event that the Court blesses a transaction, the trustee is not obliged to then proceed with the action in question, if it then transpires a more favourable option is available (for example, due to changing market conditions a trust asset can be sold to another party on more favourable terms). Conversely, in the event the Court declines to bless a transaction, the trustee is not prevented from proceeding, however, as ever in such a situation, it would take a bold trustee to do so in the face of the declination of a court blessing; and

14. such applications can also be made by a beneficiary or the Attorney General

Applications involving litigation

In relation to applications involving litigation, it is important to be aware of the case of F Trust [2017] JRC

142, where the Royal Court held that it will adopt a more inquisitorial role than it would ordinary do for an application for the blessing of a momentous decision.

In this case, the Royal Court acknowledged that frequently the Royal Court would not normally claim to have any more expertise than the trustee, and indeed very possibly less in relation to the matter in question as the trustee, with its greater knowledge of the family or of acting as a trustee may have more intimate knowledge of the issues in question. In such cases, it is therefore unsurprising that the Royal Court exercises only a supervisory power in blessing a momentous decision, restricting itself to a review, as has been held in previous cases, based on honesty, lack of conflict and rationality.

However on the other hand, the Royal Court in this case held that where the substratum of the decision is the question of litigation, then this would be an issue that the Royal Court is familiar with, probably in most cases more familiar than the trustee. Where the trustee therefore seeks to have a decision to litigate blessed by the Royal Court, it should expect the Royal Court to exercise a more direct, inquisitorial role, and be ready to form its own judgement as to whether it is sensible for the trust estate to be put at risk by the litigation in question.

Conclusion

The jurisdiction that enables the Royal Court to bless momentous decisions is a useful one.

From the point of view of the trustees by seeking the court's blessing before taking a momentous decision, it protects itself from complaints from the beneficiaries whether now or in the future and from the point of view of the beneficiaries it may help overcome the inertia that can sometimes arise when a trustee is faced with a difficult decision.

Although it is relatively rare for a Royal Court to decline to bless a trustee's decision, such cases have arisen, notably the case Re the V, W, X and Y Trusts [2021] JRC 208 and it is therefore crucial for the trustee to be meticulous in preparing for such an application and ensure there are no unresolved questions at the date of the hearing.

The costs of making such applications should also be considered, as they can be significant and it is always important to seek to avoid a situation where the costs of obtaining a blessing application are disproportionate to the gravity of the decision. Although seeking the court's blessing before taking a momentous decision provides the best level of protection, in certain cases, obtaining robust waivers or indemnities from all the adult beneficiaries may be more appropriate, provided that such waivers or indemnities are provided freely and the beneficiaries have full knowledge of all material facts relating to the trustee's decision.

However, the importance of obtaining court blessings for momentous decisions in appropriate situations cannot be overstated as the costs are a lot less than fully developed hostile litigation. The case of Grand View Private Trust Co Ltd and another v Wong and others [2022] UKPC 47, indeed provides a salient warning, as in this case the trustees of the trust in question opted not to seek the blessing of the court, when taking the momentous decision to exercise its powers of addition and exclusion of beneficiaries. This left the door open for certain beneficiaries to challenge and indeed overturn the trustee decision some 13 years after it was taken.

For further information or specific advice, please contact Daniel Walker.

This note is intended to provide a brief rather than a comprehensive guide to the subject under consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter.

Recent amendments to the Proceeds of Crime (Jersey) Law 1999 (the Proceeds of Crime Law) have the scope to bring a significant number of entities that carry out business within Jersey (irrespective of whether they are located in or outside of the Island) within Jersey's regime for the prevention and detection of money- laundering, the countering of terrorist financing and the countering of proliferation financing (AML/CFT/CPF).

Background

The primary law governing AML/CFT/CPF in Jersey is the Proceeds of Crime Law. Under the Proceeds of Crime Law, it is an offence for a financial services business to fail to implement procedures to prevent and detect money laundering. Schedule 2 of the Proceeds of Crime Law lists those activities which, when conducted in the course of a business, constitute 'financial services business'. (It should be noted that express trusts do not have to be conducted as a business.) Under the Money Laundering (Jersey) Order 2008 (the Money Laundering Order), any person conducting financial services business in or from within Jersey, and any Jersey- registered legal entity carrying out such an activity or operation anywhere in the world, must have certain AML/CFT/CPF measures in place.

On 30 January 2023, a revised, wider, list of Schedule 2 activities came into force, to align the list of regulated 'financial services business' activities with the terminology used in the Financial Action Task Force (FATF) Standards. This has resulted in entities that were not previously caught by, or were exempt, now being caught by Jersey's AML/CFT/CPF regime.

What is a 'financial services business'?

There are several high level filters that can be used to determine whether an entity is a 'financial services business', namely: (1) whether any of the activities or operations specified in Schedule 2 are being conducted; and (2) if so, whether the relevant activity or operation is being undertaken 'as a business'.

The list of activities that constitute 'financial services business' are arranged in Schedule 2 under the following headings:

- Financial Institutions (FIs)

Including lending and investing, fund and security services activities, portfolio management and investing, administering or managing funds or money.

- Designated Non-Financial Businesses and Professions (DNFBPs)

Lawyers, accountants and real estate agents.

This category also includes Trust and Company Service Providers (TCSPs) including formation agents, acting or arranging for another person to act as a director or secretary of a company and providing a registered office for a company or a partnership.

- Virtual Assets Service Providers (VASPs)

This includes token exchanges and those providing custody, administrative or other services in respect of virtual assets.

- Express Trusts

Guidance put out by the Jersey Financial Services Commission (JFSC) sets out a number of subjective factors which may support the conclusion that an activity or operation is being conducted 'as a business' but this guidance is not prescriptive or exhaustive and does not provide any definitive formula. The guidance emphasises that the activities listed in Schedule 2 should be interpreted broadly.

It is also relevant whether the activity or operation is conducted 'for or on behalf of a customer' in respect of FIs; 'to a third party' in respect of TCSPs; and 'to another natural or legal person' in respect of VASPs. If they are not, the relevant entity will not be in-scope.

In every case, the JFSC's guidance should be considered in light of the relevant entity's relationships with those for whom or on behalf of it conducts the activity or operation in question and legal advice should be sought, where appropriate. The JFSC also encourages anyone with any doubts to contact the JFSC to discuss their circumstances.

What do entities need to do?

At the most basic level, entities need to ask themselves whether they are carrying out any activities or operations falling within the scope of Schedule 2.

• Existing financial services businesses which were previously out-of-scope but have been brought in-scope by the revised Schedule 2 have until 11.59pm on 30 June 2023 to comply with the new regime

• Existing financial services businesses that were carrying on an in-scope activity on or before 29 January 2023 must file a notification with the JFSC that they intend to continue carrying on the Schedule 2 business.

• New financial services businesses or those financial services businesses that have commenced a new in-scope activity on or after 30 January 2023 must comply immediately or as soon as they commence the in-scope activity.

What does the new regime require?

Entities carrying on an in-scope activity must:

1. comply with the Money Laundering Order and the Jersey Financial Service Commission’s AML/CFT/CPF Codes of Practice (unless the in-scope activity is being a trustee of an express trust otherwise than in the course of a business, in which case the entity must comply with the Proceeds of Crime (Duties of Non-Professional Trustees) (Jersey) Order 2016) and the obligations in the Proceeds of Crime Law applicable to a ‘financial services business’.

This includes but is not limited to: (i) conducting a Business Risk Assessment and adopt and maintain AML/CFT/CPF policies and procedures; (ii) appointing a money laundering compliance officer (MLCO) to monitor compliance with these and with applicable legislation and codes of practice; and (iii) appointing a money laundering reporting officer (MLRO) to whom reports of possible money laundering may be made.

2. register with the JFSC under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 (the Supervisory Bodies Law) (unless the in-scope activity is being trustee of an express trust, otherwise in the course of a business); and

3. have adequate maintained and applied procedures to prevent money laundering by an ‘associated person’ (as defined by the new Article 35A of the Proceeds of Crime Law).

The penalties for non-compliance for both for an entity itself and its senior management are severe. For instance, carrying out unauthorised Schedule 2 business is an offence punishable by imprisonment for up to seven years and a fine.

Appointment of an “anti-money laundering service provider”.

An entity falling within the scope of the revised Schedule 2 may elect to comply with its AML/CFT/CPF obligations in three ways:

- by itself;
- by engaging the services of a regulated service provider known as an "anti-money laundering service provider" (AMLSP); or

- through outsourcing within the same group or to a third party (note the provision of an MLRO and MLCO cannot be outsourced in this way).

Those entities which carry on a regulated business but are not required to register under the Supervisory Bodies Law and which have an established place of business in Jersey (other than provided by a regulated trust company business or fund services business), are not eligible to appoint an AMLSP.

The arrangements between an entity and its AMLSP should be formally documented and carefully considered both at the outset and on an ongoing basis; the majority of entities which already receive services from a Jersey regulated service provider complying with Jersey’s AML/CFT/CPF regime are likely to engage that service provider to assist with these additional obligations. Nevertheless, ultimate responsibility for compliance with the AML/CFT/CPF obligations rests with the entity itself (or, in the case of a trust or LLP, its governing body), as does the obligation to comply with applicable sections of the new Code of Practice the JFSC has published for AMLSPs and their customers.

Further Information

The JFSC has created the following page on its website with additional information to help you determine whether your entity is now in-scope:

https://www.jerseyfsc.org/industry/sectors/financial-crime-schedule-2-business/

For further information in relation to the revised scope of Jersey’s AML/CFT/CPF regime or advice on any specific circumstances, please do not hesitate to contact any of the contacts listed below.

Natalie Harris
Emma Baker
Nigel Pearmain
Daniel Walker

Please note that this briefing is only intended to provide a general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

Case Name & Citation

In the Matter of the Representations of Daisy Logistics Mezz Pledgeco Limited, Daisy Stores Mezz Pledgeco Limited and Daisy Stores II Mezz Pledgeco Limited [2023] JRC051.

Factual Background

Daisy Logistics Mezz Pledgeco Limited, Daisy Stores Mezz Pledgeco Limited and Daisy Stores II Mezz Pledgeco Limited (collectively the "**Representor Companies**") were all incorporated in Jersey in August 2020 for the purpose of bidding to acquire a retail chain. Unfortunately, the bid was unsuccessful, leaving the Representor Companies and the holding structure above them redundant.

Typically, in these circumstances the Representor Companies would have no assets or liabilities, and having never carried out any activity would have gone through the process of being summarily wound up. However, by way of an oversight, their own shareholders, being the holding entities above the Representor Companies and indeed the shareholders above those holding entities had been dissolved and accordingly ceased to exist, thereby, making summary winding up unavailable.

The Representor Companies took the view that they should not simply fall away and instead should be wound up in an appropriate way.

The notion of reinstating the holding entities was considered. However, due to the complexity, cost and the likely time frame involved, another means of dissolving the Representor Companies was desired.

The Law

The law governing "just and equitable" winding up is codified under Article 155 of the Companies (Jersey) Law 1991 (the "Law").

Broadly, the Law permits a company which has not be subject to a declaration under the Bankruptcy (Désastre) Jersey Law 1990 to be wound up if the court forms the opinion that it is just and equitable to do so or it is expedient in the public interest to do so.

If such an application is successful, and the court orders a company to be wound up under this article it may do the following to give effect to such a winding up; appoint a liquidator, direct the manner in which the winding-up is to be conducted, or make such orders as it sees fit to ensure that the winding-up is conducted in an orderly manner.

The Judgment

The Royal Court, referencing earlier Jersey case law, confirmed that the law on just and equitable winding up is based upon similar provisions under English companies' law and confirmed that English authorities were useful.

Placing reliance on these authorities, the Royal Court confirmed the generality of the words "just" and "equitable" and confirmed that these words should remain general and "not to be reduced to the sum of particular instances".

Further, referencing earlier Jersey authority on just and equitable winding up the Royal Court confirmed that its authority to order a winding up under Article 155 was a wide one.

The Royal Court gleaned guidance from a previous Article 155 application with clear factual parallels to Daisy, Salamanca Corporate Services [2016] JRC 108A ("**Salamanca**"), in which a company could not be subject to summary winding up as only one of its three shareholders was still in existence and the articles necessitated a quorum of two shareholders. Given this factual background, the Royal Court confirmed that the case law was clear in that they had wide powers to order a just and equitable winding up and ordered the just and equitable winding up of the company on three grounds:

(1) that other means of winding up the company were not available;

(2) allowing the company to simply be struck-off would be inappropriate; and

(3) the company was established for the purpose of property investment. The property had since been sold and two of the shareholding companies had been dissolved, accordingly the substantive purpose of the structure had been fulfilled. Thus, leaving the company live, solvent and dormant yet serving no purpose and not due to serve any further purpose.

Conclusions

The Royal Court concluded that the application met the criteria as set out in Article 155 of the Law and confirmed that no declaration had been made under the Bankruptcy (Désastre) Jersey Law 1990, the Representor Companies were solvent, and had no creditors. The Royal Court also confirmed that it was satisfied that summary winding up was not available to the Representor Companies for the reasons outlined above.

The Royal Court ordered that the Representor Companies be wound up, but due to the complete inactivity of the Representor Companies did not think it necessary to appoint a liquidator and ordered that instead the dissolution take effect in accordance with the draft Order of Court prepared by the representors, namely that the Representor Companies be dissolved once the Act of Court is registered.

You pays your money and takes your choice – Tenant's liability for service charge

Q: If a tenant has the right to use part of a building under the terms of his lease but doesn't, is he still required to contribute towards its maintenance? A: In short, 'yes'.

In **Reekie v Oakwood Court Residents Association [2023] UKUT 45 (LC)** the Upper Tribunal (Lands Chamber) (UT) was asked to determine whether a long leaseholder was obliged by the terms of his lease to contribute towards the cost of refurbishing a lift he claimed not to use.

Background: Mr Reekie had long leases of the Flats numbered 1, 2 and 5 Oakwood Court in Eastbourne. The building was a large Victorian House which had been converted in the late 1980s to create eight self-contained flats: two were on the ground floor and three were on each of the upper two floors. Prior to Mr Reekie's acquisition, Flats 1, 2 and 5 were converted to form a single dwelling occupying most of the ground floor and part of the first floor of the building and, as part of those works, an internal staircase was installed between Flat 1 and Flat 5, making access to Flat 5 on the first floor possible without the need to use the communal side entrance, staircase or lift serving the building.

The lease of Flat 5 granted Mr Reekie an express right to use the lift and required the Oakwood Court Residents Association Ltd (**OCRA**) – the management company under the leases – to keep the lift in repair. Each of the tenants in the building were required to pay a specific percentage of the costs OCRA incurred in equal half yearly payments (the service charge) and there was an ad-hoc demand provision allowing OCRA to request contributions towards "any unusual or unexpected expenditure". Flat 5's service charge contribution was 7.338%.

In 2019, OCRA demanded £3,870 from Mr Reekie, one sixth of the estimated costs of refurbishing the lift. No contribution was sought for Flats 1 and 2 which were on the ground floor of the building. Mr Reekie refused to pay, arguing that he did not use the lift so should not be liable to contribute towards its maintenance. OCRA issued proceedings for a determination and, at first instance, the First Tier Tribunal (**FTT**) found Mr Reekie was liable to pay the contribution sought by OCRA. Mr Reekie appealed to the UT.

The issue before the UT: Clause 1 of Part II of the Fifth Schedule of Flat 5's lease said:

"In respect of any parts of the main structure of the Building (for example the lift flat roofs or balconies) and the driveway leading to the garages at the rear which are the responsibility of the Company under Part One of this Schedule but of which only a tenant or certain tenants have the use the Company may charge such tenant or those tenants either the whole or such part as the Company thinks fit of the cost of maintenance of those parts to reflect such use".

The FTT interpreted "*have the use*" in this clause as "able to use" and said Mr Reekie was liable to pay the contribution as he had the option to use the lift to access Flat 5 if he chose to do so. The UT agreed.

Mr Reekie argued the words "*the Company may charge such tenant or those tenants… the cost of maintenance of those parts to* ***reflect such use*** *[emphasis added]*", meant he was not obliged to contribute as he did not use the lift.

The UT's decision: The UT said there is a normal expectation where a building is fully let on long leases that each tenant will contribute towards the cost of keeping the whole building in repair (with the exception of the interior of the individual flats). This is reflected by the service charge.

The UT agreed with the FTT that "*have the use of*" meant there is a right to be able to use. There is a lift at the tenants' disposal and they are entitled to use it (or not). Whether they actually do is irrelevant.

The UT decided the words "*to reflect such use*" did not mean the costs associated with the lift, or any other communal facilities for that matter, should be allocated based on actual usage. If OCRA was to apportion the lift refurbishment costs in this manner: (i) Mr Reekie would never contribute, which would create a continual shortfall (as the tenants of Flats 3, 4, 5, 6, 7 and 8 were all required to meet one sixth of the costs); and (ii) the building would need surveillance or some other way of determining each tenant's actual usage, which is clearly impractical, or there would need to be a high degree of trust amongst the tenants.

Mr Reekie's appeal was dismissed and the UT determined Clause 1 to Part II of the Fifth Schedule allowed OCRA to charge a different proportion to the fixed service charge percentage for certain works, at OCRA's discretion. OCRA decided that Mr Reekie's contribution for Flat 5 should be the same as the other tenants.

The upshot: Queries commonly arise when a building is let to multiple tenants as to liability for the costs relating to repairing or maintaining communal plant and machinery or decorating the internal common parts to which basement or ground floor tenants sometimes have no access. In all cases, their liability to contribute will depend on the terms of their lease. If there is any doubt, seek early advice.

The Attorney General has released helpful guidance relating to applications for director disqualifications pursuant to Article 78 of the Companies (Jersey) Law 1991
(the "**Companies Law**").

Article 78 of the Companies Law allows the Attorney General, the Jersey Financial Services Commission or the Minister for External Relations and Financial Services to apply to the Royal Court to disqualify a person from being the director of a company where their conduct makes them unfit to be concerned in the management of a company. The Court may, on such an application being made, make an order restricting or disqualifying that person from acting as a director or manager for a period of up to 15 years.

Importantly, the guidance applies to every director of a company, including non-professional directors of charitable and other voluntary organisations. It also applies to shadow directors, being persons occupying (or deemed to occupy) the position of director even if not called by that name.

The guidance sets out a list of factors (which is not exhaustive) that may trigger an application for disqualification under the Companies Law, including:

1. criminal convictions arising out of or in the context of a person's directorial/corporate managerial activities, or which otherwise calls into question their suitability to be a director of a company, (for example, offences of dishonesty);

2. court orders in relation to wrongful trading in respect of the director (for example, in cases where a director knew there was no reasonable prospect that the company would avoid a creditors' winding up or on the facts known to him was reckless as to whether the company would avoid a creditors winding up and did not take reasonable steps with a view to minimising the potential loss to the company's creditors);

3. court orders in relation to fraudulent trading in respect of the director (for example where it appears that any business of the company has been carried on with intent to defraud creditors or for a fraudulent purpose);

4. transactions at an undervalue, the giving of a preference or extortionate credit transactions and the director was directly involved in such a transaction or reckless
as to his or her fellow directors being involved in the same;

5. corporate governance breaches including: (i) poor or non-existent statutory records, poor or non-existent records of board meetings and poor or non-existent financial records being kept by the company; (ii) the director failing to take professional advice when reasonably necessary or failing to encourage his or her fellow directors to do the same; (iii) a director acquiescing and/or failing to appropriately challenge other directors and/or company management; and (iv) a director delegating or acquiescing in the delegation of duties to persons who are incompetent and/or failure to ensure the board has appropriate skills;

6. failure by the director to co-operate with any liquidator or the Viscount (the executive officer of the Royal Court, whose department administers en désastre proceedings in cases of insolvency) where the company is subject to winding-up or bankruptcy proceedings or to account for company property or to deliver the same to any liquidator or the Viscount where required to do so;

7. negligent completion by the director of a statement of solvency (for example in relation to distributions);

8. a director being personally culpable of a serious breach by the company of the JFSC Codes of Practice;

9. a director failing to declare or act appropriately as regards conflicts of interest; and

10. the Company committing an offence, under the Companies Law or the Bankruptcy (Désastre) (Jersey) Law 1990 with the acquiescence of the director,

Importantly, the guidance also sets out certain aggravating factors including:

1. where the director is professionally qualified and/or experienced;

2. where there is loss to investors or creditors, based on the effect of the loss in light of the injured party’s circumstances;

3. where there is repeated offending; or

4. where there are wider public interest considerations.

It is no coincidence that this guidance has been issued in the run up to the MONEYVAL inspection of Jersey’s financial services sector, which is due to commence later this year.

Directors of regulated trust company and funds services providers should in particular note the list of aggravating factors listed above.

That being said, the guidance does state that in cases where the Attorney General considers the issue to be minor, the Attorney General may resolve the matter informally with a written warning.

In relation to the corporate governance breaches listed above, particular note should be taken of the importance of ensuring that, where a director delegates duties to another person, that person must have appropriate skills and adequate scrutiny and oversight of that person must take place. Directors must also be prepared, where appropriate, to challenge the decisions of other directors – it is not sufficient to simply agree with the majority, if such consent is likely to result in a breach of director duties or indeed the criteria set out in these guidelines.

The majority of directors will undoubtedly view the guidance as "common sense" and should not have any concerns arising. However, the guidance is helpful in emphasising the importance of good record-keeping and decision-making, together with highlighting that directors should act in the best interests of the company at all times.

In the recent case of Monarch Investments Limited [2023] JRC024, the Royal Court was faced with a Jersey company which had become 'paralysed' as a result of a breakdown of relations between its two shareholders.

Background

The case concerned Monarch Investments Limited (the "Company"), which was a Jersey company incorporated in April 1971 and which held, as its principal assets, two properties in the heart of St. Helier.

The two shareholders of the Company were Robert Gibbons ("Robert") and Kenneth Gibbons ("Kenneth"), who were brothers and Robert was also the sole director of the Company.

Kenneth was a minority shareholder of the Company and held 35% of the shares, with the balance of the shares being held by Robert.

The dispute between the two brothers had been ongoing for many years, with proceedings brought before the Royal Court in 2015. In that hearing, the Royal Court was not asked to consider ordering the just and equitable winding up of the Company, but rather was simply asked for a declaration that the substratum of the Company (broadly the objects for which the Company had originally been incorporated) had been lost, which the Royal Court declined to give.

Turning now to the present case, the Court noted that matters had further deteriorated since the last court hearing and that:
"No matter who is to blame for these difficulties, it seems clear that the relationship between Kenneth and Robert has effectively broken down and Monarch has not been run in a way which either benefits it or ultimately its shareholders............ the company is currently dysfunctional in its operation and has not been administered and run appropriately and in its interests."

In particular, the Royal Court noted that the relationship between the brothers had broken down to such an extent that the brothers have only met twice in recent years, despite many efforts by Kenneth to make contact. The affairs of the Company were also in complete disarray, with the Company being in arrears in respect of its tax liabilities, parish rates for the properties having not been paid, annual accounts having not been prepared and one of the properties being left empty and in need of repair.

The Royal Court further noted that matters were not helped by the age of the shareholders, with the Court noting in particular that Robert (who failed to respond to correspondence relating to the proceedings and did not attend the hearing) may have been suffering from poor health and had encountered significant financial problems recently.

The inability of Robert, as majority shareholder and sole director, to manage the Company had in turn led to a considerable burden being placed on Kenneth, which he had difficulty discharging as he was not a director. Kenneth was also unable to change the composition of the board as he was also a minority shareholder.

As a result of the aforementioned issues, Kenneth had sought an order that the Company be wound up on a just and equitable basis, on the footing that the properties should be sold and the assets of the Company distributed between the shareholders, with the process being overseen by an independent liquidator.

Winding up on just and equitable grounds pursuant to Article 155 of the Companies Law

Pursuant to Article 155 of the Companies (Jersey) Law 1991 (the “Companies Law”), the Royal Court may grant a winding up order on the grounds that it is just and equitable to do so, and such an order can be granted in relation to a solvent or insolvent company.

Importantly, an Article 155 application can be made by the company, a director, a shareholder, the Chief Minister, the Minister for Treasury and Resources or the Jersey Financial Services Commission.

Although the Royal Court will have regard to English case law in assisting their interpretation of "just and equitable," Jersey case law has seen a wide approach to the application of the Court’s discretion in interpreting this concept, which has led to the widening of circumstances in which such an order has been granted in Jersey. The Court has the power to direct the manner in which the winding-up is to be conducted and to make such orders as it sees fit to ensure that the winding-up is conducted in an orderly manner.

In the case of Financial Technology Ventures and Others v ETFS Capital Limited and Graham Tuckwell [2021] JRC 025, the Royal Court provided examples where it may be just and equitable to wind up a company and stated:

“It is not possible exhaustively to define all of the circumstances when it may be just and equitable to order the winding up of a company. The Court has a wide discretion and each case must be assessed on its own merits. Common examples of where just and equitable winding up has been ordered by the court include (i) where the substratum of a company has gone; (ii) where a company is insolvent and its affairs need to be investigated; (iii) where there is a deadlock between the members and / or directors preventing decision making on matters central to the company's prospects and; (iv) where, if the company is a quasi-partnership, there has been a breakdown of relations between the participants such that they are unable to cooperate in the conduct of the company's affairs."

In Representation of Abdallah [2021] JRC 249, the Royal Court provided further examples of where the Court may be satisfied that a winding up order is "just and equitable order" including:

1. a justifiable loss of confidence in the probity and a lack of impartiality in relation to the management of a company, particularly where the controlling director treats the business as his own; or

2. in cases where there is conduct deliberately calculated to 'freeze out' a minority shareholder, driving him to sell his shares at an undervalue,
with the Court noting that such orders would always be "context specific."

In examining the relevant case law, the Royal Court also noted that a winding up order on just and equitable grounds was certainly unusual in the case of a solvent company, and in the Australian case of Peter Exton v Extons Pty Ltd [2017] VSC 14 it was "accepted that the winding up of a solvent and flourishing company should be a last resort".

In this present case, the Royal Court however held that this was a case of "last resort" as the Company had now become "paralysed" due to the breakdown of relations between the two shareholders.

The Royal Court's Decision

The Royal Court noted that In Representation of Abdallah, that there were 3 questions that the court needed to ask itself when considering whether to order the winding up of the company on just and equitable grounds which were: (i) is there a lost confidence in the probity or impartiality of the director to manage the Company; (ii) is that loss of confidence justified; and, if so (iii) is it sufficient to prompt a just and equitable winding up of the Company?

Applying these 3 questions to the present case, the Royal Court held that:

1. that there had been a loss of confidence in the probity or impartiality of Robert to manage the Company, as Kenneth had offered to assume the directorship of the Company and to assist Robert in managing the Company and such offers had been rejected;

2. Kenneth's loss of confidence had been objectively justified, owing to his brother's conduct in running the Company over the last few years and that Robert's own wish to continue to control the Company and to exclude Kenneth from assisting had prejudiced the interests of the Company and Kenneth as the minority shareholder; and

3. the circumstances of the case were sufficient to prompt a just and equitable winding up of the Company, as it was an unusual case and there were no other options readily available to the Court – somebody needed “to be in control of the Company”, given that it was diminishing in value as a consequence of Robert’s neglect.

The Court therefore ordered that the Company should be wound up on the just and equitable basis under Article 155 of the Companies Law and a liquidator be appointed to carry out the winding up process.

Conclusion

As the Royal Court rightly noted, this was an “unusual case,” with the breakdown of the relationship between the two shareholders being described as “total”, which had led to the Company diminishing in value and being neglected. However, the case is of great importance in highlighting the flexible and broad interpretation which the Court will adopt to the phrase “just and equitable” in considering whether to grant an order under Article 155 of the Companies Law.

Indeed, as the Jersey insolvency regime does not yet include procedures like administration under the UK Insolvency Act 1986, the Royal Court’s broad interpretation of when it is just and equitable to wind up a Jersey company has also enabled the Royal Court to issue bespoke orders in insolvency scenarios in order to enable the company to realise a better return for its creditors by, for example, permitting it to trade for a further period or enter into a pre-pack sale of its assets.

This case also highlights the importance of putting in place a good shareholders agreement, in circumstances where a company has multiple shareholders. For example, a robust shareholders agreement should help protect the rights of minority shareholders who otherwise might have little power over the running of the business and have mechanisms in place to assist in avoiding disputes between shareholders escalating. Normally a shareholders agreement would also set out a process to follow when a shareholder wants to sell their shares or dies, which in many cases will enable the parties to avoid expensive court applications ever taking place.

The European Union has adopted various anti-money laundering directives in recent years, with the Fourth Anti-Money Laundering Directive requiring member states to implement central registers of beneficial owners of companies and the Fifth Anti-Money Laundering Directive, requiring each EU member state to make the information stored on its central register publicly accessible.

In consequence of these directives, a number of countries including Luxembourg have since 2019 maintained a register of beneficial ownership with unrestricted public access. However, actions were brought in Luxembourg on the basis that this level of unlimited access to personal information endangered the privacy of the respective beneficial owners and the case was referred to the Court of Justice of the European Union.

The European Court of Justice decision, which was rendered on 22 November 2022 has far-reaching consequences for the ongoing viability of a number of public registers containing the personal details of the beneficial owners of companies.

The judgment has some striking findings, including:

1. the interference with rights by the introduction of public registers of beneficial owners was neither limited to what is strictly necessary, nor was it proportionate to the objectives being pursued;

2. public access to personal information constitutes a "serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter" [of Fundamental Rights of the European Union], being the rights to respect for private life and to the protection of personal data; and

3. the increased interference was not capable of being offset by any benefits which might result from the new regime.

As a result of this ruling, a number of EU countries have already taken down access to their public registers.

Although Jersey is not part of the EU and the judgment, therefore, has no direct impact, in 2019, Jersey made a political commitment to enable public access to its beneficial ownership registers, which is aligned to the approach taken in the EU Anti Money Laundering Directives.

Therefore, this ruling will undoubtedly have an impact in Jersey when making decisions about the future of Jersey's beneficial ownership registers and indeed the government of Jersey has already announced that it is delaying the implementation of legislation to implement full public access to registers of company beneficial ownership, following this decision.

However, notwithstanding the delay in the implementation of full public access to registers of company beneficial ownership, entities registered in Jersey are already required to provide verified beneficial ownership information on entities in Jersey. The verifying of such information, especially by regulated trust and corporate service providers, ensures the accuracy of data that is shared with relevant authorities and indeed law enforcement authorities can request and receive beneficial ownership information from the Jersey Company Registry within 24 hours, or potentially sooner if urgent. The Financial Action Task Force (FATF) has recognised the merit of this effective measure in supporting the fight against financial crime.

The arguments for and against public registers are long established, with supporters of public registers arguing that public registers seek to prevent money laundering by creating complete transparency which would act as a powerful deterrent. On the other hand, arguments against public registers include, as highlighted in the judgment, the principle that the fundamental rights of beneficial owners (including the right to privacy and protection of personal data) should outweigh the public interest in preventing money laundering through public access. The judgment also highlighted the risk, where providing information on public registers could potentially, in certain circumstances, expose beneficial owners and their families to a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment,
violence or intimidation.

It is unknown what the approach will be going forward, as the international community awaits the next moves concerning EU public registers. However, it can be argued that the recent judgment supports the view that Jersey’s approach of identifying beneficial owners and holding such verified beneficial owner information on their registers, that can be shared with the relevant authorities if required, may represent an appropriate balance between the rights of beneficial owners and the need to prevent money laundering and terrorist financing.

Voisin Law has advised Jeralie Pallot on her sale of Rowlands Recruitment, a leading local recruitment company as part of a management buyout of the company.

The Voisin Law corporate team was led by partner Daniel Walker.

Speaking on the transaction Voisin Law Partner, Daniel Walker commented:

“We have worked with Jeralie Pallot for many years and have seen the business grow from strength to strength. We were very pleased to support Jeralie in relation to this sale. Jeralie is remaining as an executive director of Rowlands Recruitment and I know she is excited about working with the new owner going forward.”