

UPDATE

Sequana - a reminder of what Guernsey law has to offer

Update prepared by Gordon Dawes and Iona Mitchell (Guernsey)

Guernsey case law has much to offer other jurisdictions.

Introduction

As a small jurisdiction, Guernsey produces comparatively little case law. As such, Guernsey lawyers are used to looking to other jurisdictions, particularly, but not exclusively, England & Wales to help fill in any 'gaps' and develop the law. It is rare that England has looked to Guernsey or Jersey, but a recent English decision shows the assistance that Channel Islands jurisprudence may offer to other jurisdictions.

Guernsey's influence on company law

The recent UK Supreme Court decision of *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 (*Sequana*) is a powerful example of the usefulness and quality of judgments in the smaller British jurisdictions.

Sequana considered important principles of company and insolvency law. In particular, it confirmed that, in the context of insolvency, directors' fiduciary duties to act in the interests of the company extend to include the interests of the company's creditors as a whole. The majority held that the so-called 'creditor duty' is engaged when the directors know, or ought to know, that the company is insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable.

In reaching their decision, the judges paid particular regard to the judgment of Her Honour Hazel Marshall KC, Lieutenant-Bailiff in the Guernsey Royal Court decision of *Carlyle Capital Corporation Limited v Conway Others* (unreported, Royal Court judgment 38/2017) (*Carlyle*). On the question of whether the interests of creditors become the 'paramount' consideration for the directors of a company on the verge of insolvency, Lieutenant-Bailiff Marshall reviewed the English authorities at length and preferred a more nuanced approach that depended on the circumstances. Giving the majority judgment in *Sequana*, Lord Briggs followed this approach and cited the Lieutenant-Bailiff at length.

Lieutenant-Bailiff Marshall's commentary on the nature of the creditor duty as an extension of the duty to act in the best interests of the company was also cited with approval by Lady Arden.

This was not the first time that Lieutenant-Bailiff Marshall's analysis of the law in *Carlyle* had been considered by the English courts. In *Popely and Another v Popely v Others* [2019] EWHC 1507 (Ch), a dispute between brothers concerning their interests in companies in the time share business, Judge Hacon (Sitting as a deputy judge of the High Court) cited Lieutenant-Bailiff Marshall's consideration of the English authorities on *de facto* directorship.

Trusts law

Reliance on Guernsey court judgments is not limited to the company law sphere. Guernsey is a leading jurisdiction in the trusts context and various English law decisions have had regard to Guernsey decisions on trusts law. For example, in *SFO, Milsom & Standish v Litigation Capital Limited* [2021] EWHC 1272 (Comm), a case concerning the competing proprietary claims of a variety of parties to assets held in onshore and offshore structures, the English High Court noted the Guernsey Royal Court decision of

Rusnano Capital AG v Molard International PTC (Limited) [2019] GRC 01 as well as Jersey authority on the 'Saunders v Vautier' rule. This was the rule that if all the beneficiaries in the trust are of adult age and under no disability, the beneficiaries may require the trustee to transfer the legal estate to them and thereby terminate the trust.

In *Shalson and Others v Russo and Others* [2005] 2 WLR 1213 (also known as *Mimran and Another*), the English High Court cited with approval the approach to sham settlements taken by the Jersey Royal Court in *In re Esteem Settlement* 2003 JLR 188. To qualify as a sham, both the settlor and the trustee must intend the settlement to be a sham; it is not sufficient to simply look at the settlor's intention.

Other

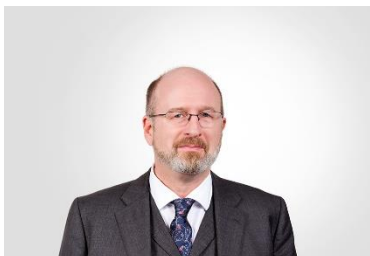
Other topics where Channel Islands jurisdiction has had an influence include:

- **Anti-suit injunctions:** *Crescendo Maritime Co v Bank of Communications Co Ltd* [2016] 1 Lloyd's Rep. 414, citing the Guernsey Court of Appeal decision of *Carlyle Capital Corporation v Conway* [2013] 2 Lloyd's Rep 179;
- **Pensions:** *Adams v Bridge* [1995] 12 WLUK 427, citing the Jersey Court of Appeal decision of *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd* [1995] 12 WLUK 427;
- **Tax and mistake:** *Yelkar Limited v The Commissioners for Her Majesty's Revenue & Customs* [2016] UKFTT 663 (TC), citing the Guernsey Court of Appeal decision of *HM Revenue and Customs v Gresh and RBC Trust Company (Guernsey) Limited* 2009–10 GLR 239 and the Jersey Royal Court decision of *In the matter of R* [2011] JRC 117.

Conclusion

Whilst of course the Guernsey and Jersey courts will more frequently look to decisions of the courts of England & Wales than the reverse, the *Sequana* decision is a useful reminder of the quality and value of Channel Islands jurisprudence. Guernsey and Jersey have judges of the highest quality at all levels, and specifically at Royal Court and Court of Appeal levels with many of the judges of the latter going on to have distinguished judicial careers in the United Kingdom, including Lord Hodge, Lord Sumption, Lord Hoffmann and Sir Geoffrey Vos, Master of the Rolls since 2021 to name but a few. *Sequana* is a great feather in the cap for Guernsey as a jurisdiction.

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