

Food for thought: Royal Court of Jersey puts misrepresentation claims back on the menu

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In the recent case of *Hong Kong Foods Limited & Anr v Robin Hood Curry Limited & Anr* [2017] JRC 050, Sir Michael Birt, Commissioner, addressed a long-standing problem in Jersey contract law involving the nature of claims for misrepresentation. The Commissioner held that a standalone claim for innocent misrepresentation is recognised and that it will be possible to seek damages while leaving a contract intact, rather than the contract being automatically rendered void. He also commented on the principles applicable to "piercing the corporate veil", bringing Jersey law into line with that of England and Wales.

Background facts

The case of Hong Kong Foods involved a claim concerning a lease and sublease of premises in Jersey which were used for running a takeaway business. The plaintiffs were suing for damages alleging that, in breach of the terms of the sublease, Robin Hood Curry Limited had failed to pay rent and had vacated the property in a state of disrepair. Those breaches had apparently caused Hong Kong Foods to be unable to pay the rent under the head lease which had then been terminated by the head landlord, causing financial losses. The defendants denied breach of the sublease and counterclaimed for damages on various grounds. In particular, it was alleged that Hong Kong Foods had made material misrepresentations as to the structural state of the property which had induced Robin Hood to enter into the sublease.

Misrepresentation claims

In light of the defendants' counterclaim, it fell to the court to decide whether Jersey contract law recognises claims for innocent (including negligent) misrepresentation and to determine the legal effects and remedies available where such misrepresentation has occurred.

A number of decisions of the Royal Court and the Jersey Court of Appeal during the 1960s, 70s and 80s had all suggested that Jersey law broadly followed English common law principles in relation to misrepresentation, this being where one party to the contract makes a statement of fact which is untrue and which induces the other party to enter the contract. An innocent misrepresentation i.e. where there is no fraudulent intent, entitles the aggrieved party to set aside the contract (known as rescission) if they wish, or to seek an award of damages in lieu. The contract is voidable as a matter of choice rather than automatically void.

By contrast, more recent decisions of the Royal Court had analysed misrepresentation claims from the perspective of Jersey customary law as influenced by French contract law concepts. In both *Steelux Holdings Limited v Edmonstone* 2005 JLR 152 and *Sutton v Insurance Corporation of the Channel Islands Limited* 2011 JLR 80, the Royal Court had characterised innocent misrepresentation as a type of *vice du consentement* (a defect of consent) similar to the concept of *erreur* (mistake). The misrepresentation would have the effect of undermining the legal consent of the contracting party to whom the statement was made such that, from the outset, the contract was never validly formed. The contract would be a nullity and automatically void *ab initio*. Any property or purchase moneys received would have to be returned and crucially damages would not be available.

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Sir Michael Birt, Commissioner, reviewed these authorities in some detail before going on to state that the court should develop the Jersey law of contract so as to be "suitable for the requirements of commercial life in the 21st century". To hold that a contract induced by innocent misrepresentation is void *ab initio* was undesirable and not required by precedent. In what might be seen as something of a criticism of the decisions in **Steelux Holdings** and **Sutton**, the Commissioner stated that misrepresentation should be regarded as a standalone principle of Jersey contract law rather than "seeking to shoehorn it into the structure of a *vice du consentement*".

The Commissioner drew on the writings of early modern commentators on contract law from Jersey and France, Le Geyt and Domat respectively, in order to conclude that it was consistent with long established principles for the court to exercise a discretion as to whether to set aside a contract or to award damages for any loss caused by a misrepresentation. A contract would not be automatically void but merely voidable, which would protect the position of *bona fide* third parties and give both the court and the plaintiff flexibility as to the appropriate remedy.

Piercing the corporate veil

A cardinal principle of companies law in Jersey and England is that the separate legal personality of a company will be respected but there are limited circumstances where some abuse may entitle the courts to "look through" a corporate entity to those controlling it in order to fix liability on the proper party (usually the beneficial owner), a concept referred to as "piercing the corporate veil".

The point arose for review in **Hong Kong Foods** because, although the defendants were successful on their counterclaim, it emerged after the trial that Hong Kong Foods Limited had been dissolved and removed from the companies register. In order to avoid a Pyrrhic victory, the defendants argued that the court should pierce the corporate veil and attribute the liability of Hong Kong Foods to its beneficial owner.

Previously, the Jersey authority on the subject had been the case of **Re Esteem Settlement** 2003 JLR 188, a decision of Commissioner Birt himself. The test adopted in that case for piercing the corporate veil was that:

- The controller of the company must be able to cause the company to act in the manner complained of
- The act must involve some illegality or impropriety as a result of which the company's action operates to mask or conceal an action which in substance is the act of the controller

Having satisfied the test, there would be a cause of action against the controller of the company and not just the company itself. The test was a flexible one that emphasised the element of concealment but did not consider what specific circumstances would render that concealment abusive.

However, since the case of **Re Esteem Settlement**, the UK Supreme Court has given the principle further consideration. In England and Wales, this is now limited to the situation where a person interposes a company under their control in order to evade or frustrate an existing legal obligation or liability which that person is under. This was described by Lord Sumption in the case of **Prest v Petrodel Resources Ltd** [2013] UKSC 34 as the "evasion principle". Sir Michael Birt endorsed this more restrictive test and concluded that in the circumstances of the case there was no basis for piercing the corporate veil.

Takeaway points

The judgment should be viewed as providing welcome clarity to what had become an esoteric area of Jersey contract law. Parties entering into contractual negotiations should now have a better understanding of their responsibilities to one another outside the express terms of a contract. The inclusion of a suitably worded "entire agreement" clause in the boilerplate provisions to a contract excluding pre-contractual representations will now provide greater commercial certainty because an innocent misrepresentation will not automatically nullify the entire contract and the "entire agreement" clause with it.

Where disputes later arise, the aggrieved party and the court will have much-needed flexibility as to whether to set aside the contract entirely or merely to seek or award damages respectively. The law of Jersey has in this respect now been aligned more closely with that of England and Wales, as indeed it has in relation to the test for when the court may pierce the corporate veil.

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