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Constructive trusts over Jersey immovable property shown red card by the English Court

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The English High Court in The Serious Fraud Office & Anor v Litigation Capital Limited & Ors [2021] EWHC 1272 has held that it is not possible to have a constructive trust over Jersey immovable property.

This is not the first time that the English High Court has weighed in on Jersey law, a notable example being its decision in O'Keefe & Anor v Caner & Ors [2017] EWHC 1105. In this case, the English High Court held that a claim against a director of a Jersey company is barred after 10 years from the date of the breach of duty (the unsuccessful counter-argument being that it will be barred after three years).

The High Court's decisions are not binding in Jersey. Jersey's autonomous legal jurisdiction means that the Royal Court of Jersey is free to make up its own mind. However, where the High Court has specifically considered and made findings in relation to Jersey law, its decisions will be persuasive until there is local authority dealing with the issue.

This article explores the ins and outs of the case and what the decision might mean in practice.

What are constructive trusts?

Article 33(1) of the Trusts (Jersey) Law 1984 (as amended) (**TJL**) states that a constructive trustee (of a constructive trust) is a person who makes or receives any profit, gain or advantage from a breach of trust and is deemed to be a trustee of that profit, gain or advantage. The exception being a *bona fide* purchaser of the relevant property for value and without notice of a breach of trust (also known as 'equity's darling').

It is therefore possible for a person to be held liable as if they were a trustee, even if they were not formally appointed as such. Article 33(3) of the TJL requires a person who is or becomes a constructive trustee to deliver up the relevant property to the person properly entitled to it. This is part of the magic of a constructive trust claim; it results in a proprietary claim against assets as opposed to just a claim against the wrongdoer personally, who might well have other creditors and insufficient assets to repay the amounts due.

The often referred to case in this regard is Re the Esteem Settlement [2002] JLR 234 where a victim of fraud sought the recovery of significant sums misappropriated in breach of fiduciary duty (in this case by a director) and which were settled into a discretionary trust. However, the TJL does not limit the circumstances under which a person may become a constructive trustee; it's an equitable legal construct based on fairness so this is unsurprising. A claim of constructive trusteeship can also often be accompanied by other claims such as

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unjust enrichment, an action *paulienne*, dishonest assistance and knowing receipt in order to recover what has been lost (or, in the alternative, recover something with equivalent monetary value).

Immovable property

While the TJL does not curtail the circumstances giving rise to a constructive trust, article 11(2)(a)(iii) of the TJL does seem to prohibit any trust over immovable property situated in Jersey. In practice this is addressed by a trust owning shares of a company which in turn owns Jersey immovable property. However, one of the (many) questions in *SFO* was whether the prohibition under article 11(2)(a)(iii) of the TJL also encompassed constructive trusts over Jersey immovable property. The English High Court held that it did.

Victim redress

One of the arguments against this conclusion was that it was not conceivable that Jersey law would leave the victim of trustee fraud without a remedy in those cases where misappropriated assets had been used to acquire Jersey immovable property. However, the English High Court found sufficient comfort in that Jersey law does provide alternative personal (as opposed to proprietary) remedies such as those identified above and there are other legal systems with major financial centres and institutions which share this approach.

Furthermore, the English High Court held that the recognition of a division between legal and equitable interests in immovable property would represent a very significant step for Jersey law and should only be introduced by legislation (as Guernsey has done). It also noted, among other things, the difficulties in cases of bankruptcy and insolvency were a proprietary claim to be made over Jersey immovable property and what that could mean for lending institutions who had taken security over that property..

Conclusion

It remains to be seen whether the Royal Court will uphold the English High Court's decision. Establishing a constructive trusteeship in cases of fraud and misappropriation of assets is a powerful tool in a wronged party's toolkit. The inability to do so in respect of Jersey immovable property is a disadvantage. However, the Royal Court's flexible and pragmatic jurisdiction still equips a wronged party with other avenues of recourse.

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