

High Court in England rules on Jersey limitation period for breach of directors' duties

UPDATE

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In a judgment handed down on Monday 15 May 2017 the High Court in England ruled that the Jersey limitation period for claims against directors for breach of duty under Article 74 of the Companies (Jersey) Law 1991 is 10 years.

The Jersey limitation period (or prescription period, as it is known) for claims against directors for breach of duty under Article 74 of the Companies (Jersey) Law 1991 (*Companies Law*) has not been definitively decided by the Jersey courts. The judgment of the English High Court in *O'Keefe & anor (in their capacity as joint liquidators of Level One Residential (Jersey) Ltd and Special Opportunity Holdings Ltd -v- Caner & ors* [2017] EWHC 1105 (Ch) on this particular point of Jersey law, considered as a matter of foreign law, is therefore of considerable interest.

A ten-year period was held to apply to both:

- claims for breach of a director's fiduciary duty to act honestly and in good faith with a view to the company's best interests (Article 74(1)(a)); and
- claims for breach of the director's duty of care, skill and diligence (Article 74(1)(b)).

In reaching this conclusion, the High Court accepted the expert evidence of Jersey law given by Mourant Ozannes partner and Jersey advocate Justin Harvey-Hills, who was instructed by the liquidators. This was preferred to the evidence of two other Jersey experts, who were instructed on behalf of the directors and who argued, on various grounds, that the period was three years.

Two Jersey companies, Level One Residential (Jersey) Ltd and Special Opportunity Holdings Ltd, had gone first into UK administration and then into liquidation. The liquidators then commenced proceedings in England against the directors under section 212 of the UK Insolvency Act 1986, seeking compensation for their alleged misfeasance and breach of duty. The substantive cause of action against the directors, being for breach of duty under Article 74 of the Companies Law, was governed by Jersey law. As a consequence of sections 1(1) and 4(1) of the Foreign Limitation Periods Act 1984, the applicable limitation period was in these circumstances also treated by the English courts as governed by Jersey law. The directors argued that the claims against them for breaches of duty were time-barred under Jersey law and the question of limitation was taken as a preliminary issue of Jersey law, upon which the expert evidence was heard.

There is no decisive Jersey authority on the matter. The question of the correct prescription period for claims for breach of directors' duty under Article 74(1)(a) and (b) had been considered *obiter* and on a relatively tentative basis in two Jersey cases, *In the matter of Northwind Yachts Ltd*, 2005 JLR 137 and *Alhamrani v Alhamrani* 2007 JLR 44, and more recently in a case management decision of the Master, *CMC Holdings Ltd v Forster* [2016] JRC 149. It had not, however, been the subject of a definitive judgment of the Royal Court. The issue was therefore fiercely contested in the English proceedings.

Jersey does not have a limitation statute. Where there is no specific period, the default period is 10 years save where another period is by analogy clearly more applicable (*Re Esteem Settlement* [2002] JLR 53). The directors argued variously that either the tort period under Article 2 of the Law Reform (Miscellaneous

Provisions) (Jersey) Law 1960 (three years) or the period during which a beneficiary may sue a trustee for breach of trust in Article 57(2)(b) of the Trusts (Jersey) Law 1984 (*Trusts Law*) (again three years) applied directly or by analogy.

After hearing extensive evidence on Jersey law, Andrew Keyser QC, sitting as a judge of the High Court, held that the 10-year period applied to both claims under Article 74, which were consequently not time-barred. The following aspects of the decision are worth highlighting:

- A breach of Article 74 of the Companies Law did not amount to the tort of breach of statutory duty. It was not the case that breach of any duty that is laid down in a statute amounts to that tort.
- The tort period could not apply to Article 74(1)(a) since a breach of fiduciary duty was not a tort. Damage, for instance, is not a pre-requisite for a claim for breach of fiduciary duty whereas it is generally an essential element of tort.
- The trust period under Article 57 of the Trusts Law could not apply to Article 74(1)(a) directly since a director was not a trustee and as a matter of construction of the Trusts Law, Article 57 applied only to trustees in the conventional sense. Nor was the trust period capable of application by analogy. In applying it by analogy it would be necessary to apply all of the material parts of Article 57 and not just one part. In reality the prescription period for breach of trust was potentially much longer than three years, from the date of the breach of duty, because, under Article 57(3B) of the Trusts Law, a successor trustee could sue a former trustee for breach of trust for three years following the former trustee's retirement.
- In relation to both these points, the position under Jersey law was therefore held to differ from English law, where there is a long line of authority applying section 21 of the Limitation Act 1980 (which deals with trustees) to directors on the basis that directors are treated as trustees or constructive trustees for the purposes of limitation. In Jersey there is no limitation statute and the limitation periods relating to trustees are set out in the Trusts Law and are highly bespoke to trustees.
- Breach of the duty of care in Article 74(1)(b) of the Companies Law was not a tort but rather a breach of an equitable duty of care.
- Nor was the tort period clearly more applicable by analogy to a breach of Article 74(1)(b). In fact, quasi-contract (which carries a slightly different meaning in Jersey and Guernsey to England) was the closest analogy and the period for claims in quasi-contract is again 10 years.
- The application of a prescriptive period by analogy does not turn mechanically on the similarities and dissimilarities between different causes of action. Judges in Jersey also had regard to considerations involving the coherence of the law and the practical convenience of departing from the 10-year default period in any given case. In the present case His Honour Judge Keyser found that there was no good reason to depart from the default period of 10 years. It was right that the same 10-year period should apply to claims under both Article 74(1)(a) and (b) and, as it does, to claims for breach of contract and in quasi-contract.

This is a decision of the English High Court and, as such, it will not strictly be binding on the Jersey courts. Nevertheless, it is likely to carry considerable weight. Over the course of a six day hearing it was possible to explore the issues in much greater detail than had been called for in the limited number of relevant Jersey cases. Three experts of Jersey law were instructed by the parties. Each gave extensive written and oral evidence, upon which they were then cross-examined in detail. The parties were also variously represented by three Queen's Counsel and three Junior Counsel, two of whom, acting for the directors, were also qualified in Jersey law.

Whether the period for breach of directors' duty and related causes of action *should* be shorter than 10 years is a separate question and one which is ripe for review by the States of Jersey.

Mourant Ozannes partner Justin Harvey-Hills, whose expert evidence was accepted by the High Court, was assisted by Consultant Andrew Bridgeford and Counsel Stephen Alexander, and instructed by the English solicitors for the liquidators, Memery Crystal LLP. The liquidators were represented at the hearing by Antony Zacaroli QC and Ryan Perkins of South Square. The Memery Crystal team was led by Harvey Rands and included Jenni Jenkins, Nick West and Eleanor Hassani.

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