

The Jersey Position for Dealing with Fraud

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The offshore world has always been seen by the media and law enforcement agencies (not necessarily in that order) as a place where illegally obtained money can be hidden under the guise of 'secrecy'. This paper will address the substantive and procedural position in Jersey which makes it plain that for a number of years Jersey has not wanted to be an 'black hole' into which ill gotten gains may be poured (see *Krohn - v - Varna* 1997 JLR 194 at 202).

The Jersey Court structure

The principal court of Jersey is known as the Royal Court which will deal with all civil and criminal cases of substance relating to fraud. The Chief Judge of the Royal Court is the Bailiff who is a Jersey qualified lawyer. The other legally qualified Judges are the Deputy Bailiff and Commissioners. The Deputy Bailiff is a Jersey qualified lawyer. The Bailiff and Deputy Bailiff are appointed by the United Kingdom Monarch acting through her advisors (i.e. the UK government in practice). Commissioners may be qualified in Jersey or the United Kingdom and are appointed by the Bailiff. They are also legally qualified.

The Royal Court in addition comprises Jurats. Jurats are non-legally qualified and are elected by a combination of lawyers and politicians. There are 12 Jurats in total. In any trial or interlocutory application they are sole judges of fact. In addition, where the Royal Court has a discretion, it is the Jurats who will exercise that discretion. Two Jurats will sit with a judge of law on all applications before the Royal Court in civil matters other than for pure questions of law, trusts, procedural directions and the initial granting of injunctions.

Proceedings are commenced through a document generally known as an Order of Justice. Where injunctions are sought the Order of Justice must be signed by the Bailiff or Deputy Bailiff for the injunctions to take effect. This paper will deal later with the detail of the procedure to apply for injunctions.

In relation to appeals, the first level of appeal is to the Jersey Court of Appeal which comprises British Queen's Counsel. After a civil trial the appeal is generally as of right save for certain exceptions (see article 13 Court of Appeal (Jersey) Law 1961 (as amended)). In interlocutory matters leave of either the Royal Court or the Court of Appeal is necessary (subject to certain exceptions which are not material) (see again Article 13 of the Court of Appeal (Jersey) Law 1961 (as amended)).

It is possible to appeal from the Court of Appeal to the Privy Council. For interlocutory matters leave of the Privy Council is required which is rarely granted. For matters which are regarded as final the appeal is as of right as long as the matter in dispute exceeds £10,000.

Jersey law on fraud

The Criminal Context

In the criminal case of *Michel and Gallichan - v - Attorney General* 2006 JLR 2007, the Jersey Court of Appeal revisited the classic definition of fraud in response to an argument by the defendants in the case that the criminal offence of defrauding the revenue could not come within the parameters of fraud under the customary law of Jersey as set out by the Court of Appeal in *Foster - v - Attorney General* 1992 JLR 6. In the *Michel and Gallichan* case (2006 JLR 287) the Court of Appeal stated as follows:-

“In *Foster*, the Court held that in order to establish criminal fraud in Jersey, it was necessary to show that the defendant deliberately made a false representation with the intention of causing thereby - and with the result in fact of causing thereby - actual prejudice to someone and actual benefit to himself or someone else. However the Court went on to state that it was impossible to say that every case satisfying those requirements would be a case of criminal fraud. If the conduct in question exhibited the requirements and was at least similar (but not necessarily identical) to conduct held criminal in decided cases, a charge of fraud might be held to be justified. If the conduct was not similar to conduct held to be criminal in decided cases, a charge of fraud would be unlikely to be held to constitute criminal fraud in Jersey”.

On the facts the defendants who were professional providers of trust and company administration services had created false structures leading to false accounts and the preparation of false documents. In the opinion of the Court such conduct was similar but not identical to the usual elements of the more complex types of tax evasion such as the creation of false structures and accounts and therefore amounted to fraud.

In practical terms, when dealing with such an allegation of fraud (whether at the investigation stage or trial stage) the *Michel* case requires a two stage test:-

1. Are the mechanical elements set out in *Foster* made out i.e.:-

- Did the defendant make a representation?
- Was it made deliberately?
- Was that representation false?
- Did the defendant intend to cause by the false representation actual prejudice to someone and actual benefit to himself or someone else?
- Did the representation in fact cause prejudice to someone and benefit to the defendant or someone else?

2. The second stage, however, requires the conduct in question to be at least similar to a conduct held to be criminal in decided cases since otherwise what might amount to fraud would be far too wide.

The particular significance of the Michel decision is that in cases where individuals are attempting to recover money through the Civil Courts there may well be an overlap with powers exercised by the authorities in the criminal arena.

Civil Fraud

From the perspective of a process before the civil Courts, (as opposed to the criminal process) there are a number of remedies under Jersey law available to an individual to recover monies alleged to have been wrongfully misappropriated.

The first of these is the Pauline Action which was reviewed by the Royal Court in one of the judgments coming from the Esteem litigation (2002 JLR 53). In the decision the Royal Court confirmed that a transfer of an asset could be set aside if the creditor could prove that the intention of the debtor was to defeat his creditors and their actual defeat where the debtor became insolvent as a result of the act which was challenged, if he were not already insolvent before the act.

For the purposes of a Pauline Action, a person is a creditor when the facts giving rise to his cause of action occurred even if the validity of the courts of action is not established until later.

There are two types of alienation to be considered in a Pauline Action. Where the alienation is made for cause lucrative, these are voidable where the alienor alone is guilty of an intention to defeat his creditor. Alienations made for cause oneruese (i.e. where some value is given which is commensurate and proportionate to the value of the thing being alienated) are voidable only if the alienee is also privy to the real nature of the transaction.

The second remedy an individual whose money had been wrongfully misappropriated might want to consider is a claim on the basis of dol which in the case of West - v - Lazard 1993 JLR 165 at 303

was defined with approval as follows:-

“Le dol est toute fourberie, tromperie, machination, destinée a circonvenir, tromper ou decevoir une autre”.

The third remedy that might be used to attack a fraudster again comes from the Esteem litigation and relates to the possibility of piercing the corporate veil. In the context of considering a claim to pierce the corporate veil of a trust the Jersey Royal Court reviewed the extent of which the corporate veil of a company might be pierced. The Court in its judgment stated what was needed was as follows:-

“In order to justify the piercing the veil, two matters must be demonstrated (1) control over the company such that the controller is able cause the company to act in the manner complained of and (2) that the act complained of involved some illegality or impropriety - the combined result being that the company’s action operated as a mask or concealed an action which in substance is the action of the controller and, if so treated, produces a cause of action against the controller and/or the company”. (2003 JLR 188)

The final area to investigate against a fraudster may arise out of the position held by the fraudster and whether they can be said to be subject to some form of fiduciary duty or other duty to account for monies taken by virtue of the position held. This could cover directors, agents, employees or the persons in a position of trust.

Procedural options before the Royal Court

When dealing with a fraudster steps may have to be taken either to freeze assets or to obtain information or a combination of the two. In both cases under Jersey law what is being overridden is the confidential relationship between an individual who will claim to be a customer and an institution. Under Jersey law the affairs of any individual dealing with banker or trustee are confidential unless an exception to the rules of confidentiality is made out. Those exceptions in Jersey followed the well known case of *Tournier - v - National Providential and Union Bank of England (1924)*. The duty of confidentiality will therefore be overridden where the breach of confidentiality is made under compulsion of law (e.g. an injunction).

As far as injunctions are concerned, a Jersey Court has granted freezing injunctions against assets of alleged fraudsters for many years. The principles followed as to whether an injunction will be granted are as follows:-

- There must be full and frank disclosure of all material facts including those which might weigh against the granting of an injunction.
- The Court will require a fully pleaded statement of claim.

- Evidence must be filed showing there are grounds for believing there are assets within the jurisdiction and grounds for believing there is a risk of such assets being removed before a judgment.
- A party seeking an injunction must give an undertaking as to damages i.e. if the Court later finds that an injunction was wrongly granted that a defendant has suffered loss and damage and that it is appropriate for the plaintiff to compensate the defendant (see for example *Johnson Matthey Bankers Limited - v - Arya Holdings Limited* 1965 JLR 208).

When seeking injunctions applications can be made for disclosure ancillary to such injunctions. The disclosure ordered may take a number of forms.

Firstly it may simply be to ensure compliance with the injunction; in other words the party obtaining the injunction is told what assets have been frozen and is provided with sufficient information to confirm that those assets have been caught by the relevant court order.

Secondly, the plaintiff may seek discovery orders that go beyond simply policing a freezing injunction. This type of order arises where the plaintiff is seeking information about what has happened to assets within the jurisdiction in order to commence proceedings elsewhere.

In so far as any documents are recovered pursuant to Jersey proceedings, to use those documents outside Jersey for other proceedings requires the express permission of the Jersey Court. Such permission can be sought as part of the application for an injunction. If not obtained and a plaintiff uses documents elsewhere then the plaintiff may be found to be in contempt of court. For an extreme example see *Mayo Associates - v - Anagram (Bermuda) Limited* 1995 JLR 190) which concerned execution of a search and seizure order. After execution covert surveillance equipment was discovered in the defendant's offices which was not there prior to execution of the order. The plaintiff failed to explain how this came about which justified the immediate discharge of the associated freezing injunction.

A search and seizure order is an order where a plaintiff seeks to preserve documents in the hands of a defendant because of a fear that evidence will be destroyed. It is only made in exceptional circumstances. The plaintiff must have a strong prima facie case, must show that the defendant has vital material and is likely to destroy that material to defeat the ends of justice and that there are no alternative remedies available (see *Channel Islands and International Law Trust Company Limited - v - Scarborough* 1989 JLR 354).

In terms of how an injunction is sought, the plaintiff will produce a formal court document known as an Order of Justice and Affidavit. The Order of Justice will contain the material facts relied upon as well as the orders sought from the Court. The Affidavit will contain all the evidence required to meet the applicable tests. The application is made to the Bailiff or Deputy Bailiff in Chambers initially by filing the relevant documents. A Jersey Court Advocate may be required to appear before the Judge. Once granted any injunction remains in force until trial until discharged.

(As to the principles applicable on an application to discharge an injunction see *Goldtron - v - Most Invest Limited* 2002 JLR 424 and *Play Limited - v - Legato Assets Limited* 2006 JLR 94).

A question that has been raised before the Jersey Court on a number of occasions is the extent to which the Jersey Court needs to be satisfied that there is an underlying cause of action in Jersey in order to grant injunctive relief or whether injunctions can be granted in aid of foreign proceedings. In the Court of Appeal case of *Solvalub Limited - v - Match Investments Limited* 1996 JLR 361 the Court of Appeal recognised in principle that a Jersey Court might grant an injunction in aid of foreign proceedings even if the only proceedings in Jersey were for the injunction itself. This dictum was followed in the decision of *Krohn - v - Varna Shipyard* 1997 JLR 152 and 1997 JLR 194. It is right to say, however, the principle has never been tested before the Jersey Court of Appeal and there are different views within Jersey as to the appropriateness of this jurisdiction. Absent such a challenge, the clear view of the Royal Court which has now been followed on numerous occasions is that an underlying course of action in Jersey is not required and injunctions can be granted in aid of foreign proceedings. This can also extend to arbitration awards (see *Goldtron - v - Most Invest Limited* 2003 JLR Note 40).

The other aspect to injunctions concerns pre action of disclosure and the extent to which this can be obtained. The general principle in Jersey is that such disclosure cannot be obtained. The only statutory exception to this relates at present to personal injury cases and does not therefore assist in fraud matters.

However, Jersey has often recognised the Norwich Pharmacal principle (*Norwich Pharmacal Co. and Others - v - Customs and Excise* 1987 4AC) where the English House of Lords stated:-

“If through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.”

That principle has overlapped where a plaintiff has sought disclosure of information to enable it to trace funds that have allegedly been obtained by fraud. In 2007 in the case of *Macdoel and others - v - Federal Republic of Brazil* the Jersey Court of Appeal reviewed the scope of these remedies under Jersey law.

Firstly, the Court stated that the scope of the Norwich Pharmacal principle was “not extended for the purpose of the disclosure which is sought in any particular case is, for example, to determine the location of embezzled funds or the methodology of the fraud rather than the identity of the wrongdoer. In our judgment where disclosure is sought from a defendant who is alleged to have become innocently mixed up in wrongdoing, the determinative question in any particular case is whether justice requires discovery to be ordered”.

Secondly, the Court of Appeal made it quite plain that because Jersey was a major financial centre

providing trust and banking facilities for an extensive international clientele, it was conscious that Jersey's reputation as a major financial centre might suffer if it were not willing to assist victims of wrongdoing to obtain redress.

The Court of Appeal case also debated to what standard did the Court have to be satisfied that a defendant had become mixed up in alleged wrongdoing so that it owed the plaintiff a duty of disclosure. This is not an issue that appears to have been debated previously. The difficulty facing the plaintiff was summarised in this way.

“Even where as here the plaintiff can produce prima facie evidence of wrongdoing, it may be very difficult for him to bring prima facie evidence that an innocent third party, such as a bank, has been unwittingly mixed up in wrongdoing. In some cases it will be impossible. It is to be expected that the wrongdoer will have taken steps to conceal the fact that the third party has facilitated the wrongdoing. The innocent bank by definition will not have known. Having regard to these considerations should the threshold in respect of the involvement be set lower than the requirement to the prima facie evidence be adduced”.

The Court of Appeal then looked at matters from the perspective of a third party in this way:-

“He is brought to Court because the person wronged believes he may have information about the wrongdoer. If it is confidential information, the duty of confidence is likely to be owed, directly or indirectly, to the wrongdoer. It is likely that the third party has become mixed up because the wrongdoer, directly or indirectly, has chosen to involve him in order to facilitate the wrongdoing. His innocence is acknowledged by fixing responsibility for his costs on the person wronged. Disclosure will only be ordered if there is no other source of information that will assist the person wronged. It does not seem to us unjust that a duty to disclose should arise where the Court is satisfied that there is a reasonable suspicion that the third party has been mixed up in the wrongdoing”.

This appears to be a lower test than prima facie evidence. The safeguard for the institution of the defendant is that the appellant would have to satisfy the Court that there was a real prospect of the information from the bank's order assist in the process of recovering monies obtained from an alleged wrongdoing.

Gagging Orders

In cases of fraud it may be necessary to obtain a gagging order. In the case of *Goldtron - v - Most Invest Limited* (2002 JLR 424), the Royal Court indicated that a gagging order was an exceptional order and required convincing evidence to justify it. If such an order was being sought an affidavit in support must refer specifically to this fact and must then go on to explain why such an order is required on the grounds for submitting that it is justified.

In practice in relation to Norwich Pharmacal Orders evidence is being sought to consider whether any claim might be brought, a gagging order may be justified. A gagging order can also be justified where information obtained in Jersey was necessary to take steps to freeze assets in other jurisdictions as part of a tracing claim. In either case, however, the gagging order is likely to be for a limited period of time.

The Criminal Law Aspect

In addition to the criminal law definition of fraud, attempting to recover assets of fraud can often give rise to money laundering issues. The Jersey money laundering position is governed by the Proceeds of Crime (Jersey) Law 1999 apart from cases related to drug trafficking or terrorism which have their own specific statutes. The Proceeds of Crime Law is an all crimes money laundering statute and extends to any criminal offence capable of carrying a sentence of imprisonment of one year or more. Where part of the alleged crime occurs outside Jersey, a single criminality test is applied, namely if the facts had occurred in Jersey, would an offence under Jersey Law have been committed. The point has not yet been addressed before the Jersey Courts although it was raised in the case of the Yaheeb Trust and Others 2003 JLR 92. This case concerned a Jersey law trust where the representor (a minister in the government of the State of Qatar) had received substantial commissions from companies seeking to do business with the State of Qatar which commissions were paid into trusts administered in Jersey. The Attorney General of Jersey launched a money laundering investigation. The minister sought to argue that as receipt of commissions was not illegal in Qatar and that the State of Qatar had authorised the payments no offence was committed in Jersey. The particular application concerned whether or not the cross examination of the foreign minister should be ordered. The Royal Court ordered cross examination and therefore left over the question of what facts were transposed until the final hearing. The case, however, did not proceed further as it was resolved by agreement.

Subsequent to the case the States of Jersey has passed the Corruption (Jersey) Law 2006 which came into force on 27 February of this year which made it an offence to offer a bribe to a member of a public body. The statute further extends its jurisdiction extra territorially if any part of the acts are committed in Jersey. Receipt of commissions in Jersey in respect of attempt at bribery made outside Jersey would therefore be caught.

The Criminal Law - Procedural Issues

Where a criminal fraud is alleged institutions may well find themselves being required to provide information to the authorities for the purposes of overseas criminal investigations. The Attorney General of Jersey may use either the Investigation of Fraud (Jersey) Law 1991 or the Criminal Justice (International Cooperation) (Jersey) Law 2001. The Investigation of Fraud Law relates to serious and complex fraud and can be used by the Attorney General of Jersey either at the request of an investigating authority in another jurisdiction or to launch his own investigation in Jersey in

relation to serious or complex fraud. In contrast, the Criminal Justice (International Corporation) (Jersey) Law is limited to requests from foreign investigatory authorities but extends to any criminal offence.

In 2006 in the case of *Durant and Others and the Republic of Brazil* 2006 JLR 112 (arising out of the same facts which led to the *Norwich Pharmacal* case in 2007) the Court of Appeal considered the extent to which notices under the investigation of fraud law might be challenged.

The applicants asked for copies of the letter of request that had come from Brazil in order to argue before the Jersey Court that the request was not lawful. The Court of Appeal confirmed the Royal Court's decision that the letter of requests had been rightly withheld, since a letter of request was not a requirement under the Investigation of Fraud Law and as long as the Attorney General was satisfied that he was sending the information to an individual authorised to receive it for the purpose of a criminal investigation, that was sufficient for the purposes of that law.

The Court of Appeal also made it plain that those who wish to challenge the lawfulness of request based on the underlying investigation, did not need to see the request to make representations as to their unlawfulness. The Court of Appeal did however note that the position would be different under the Criminal Justice (International Corporation) Jersey Law which does require request for assistance.

The Court of Appeal also refused to disclose the letters of request since it was undesirable for the Jersey Court to have to resolve that allegations in Brazil against the persons under investigation were unfounded. The Court of Appeal took the view that it would be for the Brazilian authorities not of the Brazilian Courts to determine whether or not the allegations were well founded.

Finally, the Court of Appeal held that even though the Investigation of Fraud Law was investigating the commission of criminal offences, an application to review any decision by an Attorney General to exercise his powers under either the Investigation of Fraud Law or indeed the Criminal Justice (International Corporation) Law was an application which should be challenged by way of judicial review before the civil courts. The effect of this means that if the Attorney General's decisions in terms of investigating criminal matters are to be challenged they have to be challenged before the criminal courts by way of judicial review. In that regard the Attorney General operates under a presumption of regularity (see *Acturus - v - the Attorney General* 2001 JLR 43) which required applicants to produce evidence which was incompatible with there being reasonable grounds for the Attorney General's belief that he should exercise his powers under the law or alternatively that he held such belief at all.

| The Regulatory Position

Financial services businesses within Jersey including trust and company service providers are regulated by the Jersey Financial Services Commission. The JFSC has significant investigatory powers to review the conduct of institutions from a regulatory perspective. They also have powers

to intervene. It can also bring proceedings against institutions under the Financial Services Commission (Jersey) Law 1998. In the case of Jersey Financial Services Commission - v - Alternate Insurance Services Limited and Others 2007 JRC 48 the JFSC successfully argued that Alternate had made false or misleading statements which were made recklessly and which required Alternate to return significant sums to investors. A victim of fraud may therefore wish to consider a complaint to the JFSC.

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