

Constructive trusts and immovable property

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In the recent decision of *The Serious Fraud Office & Anor v Litigation Capital Limited & ors* [2021] EWHC 1272 (Comm), the English High Court has ruled that it is not possible to have a constructive trust over Jersey immovable property. Whilst the question of constructive trusts over Jersey immovable property has been previously debated before the Jersey Courts, it is not an issue that has otherwise previously been resolved here and so there is no direct Jersey authority on the point. Consequently, the decision of the English High Court makes for an interesting read.

By way of background, the English proceedings from which this judgment arises, concerned significant litigation, described as being of "labyrinthine complexity", arising out of the business dealings of Dr Gerald Smith and concerning numerous competing claims to the ownership of various assets which included four Jersey immovable properties (the **Jersey Property**).

In November 2016, the Royal Court declared the property of Dr Gail Cochrane (the former wife of Dr Smith) en desastre, under the Bankruptcy (Desastre) (Jersey) Law 1990, the effect of which was that all property (whether movable or immovable and wherever situated) belonging to Dr Cochrane vested in the Viscount. Before she was declared en desastre, Dr Cochrane was the sole registered owner of the Jersey Property and one of the many issues in the English proceedings to be determined (and to which the Viscount was party and represented), was whether the Jersey Property belongs to Dr Cochrane or whether she holds it on constructive trust for one or more of the Claimants in the English proceedings.

It was common ground between the parties to the English proceedings that that question was a matter of Jersey law and so the English High Court received Jersey law evidence on the issue from an expert instructed on behalf of the Viscount. No other expert evidence on the question was filed.

The Viscount's position and the opinion of the expert was that it is not possible as a matter of Jersey law to have a constructive trust of Jersey situate immovable property. Support for that analysis came principally from the decision of the Jersey Court in *Re Esteem* (2002) JLR 53 and

Flynn v Reid (2012) (1) JLR 370 and the wording of the Trusts (Jersey) Law 1984 (the TJL), to the extent it applied, to which the English High Court was referred.

Re Esteem concerned proceedings brought by the victim of a fraud to recover substantial sums misappropriated in breach of fiduciary duty and then settled into a discretionary trust of which the fraudster and his family were the principal beneficiaries. One of the issues that arose for determination in *Re Esteem* was whether the beneficiary of a Jersey trust had an equitable proprietary interest in the trust assets (this being an essential pre-requisite to trace misappropriated assets). The Court in that case concluded that Jersey law does recognise the existence of equitable proprietary interests in property held on an express trust and went on to consider whether a beneficiary under a constructive trust can have an equitable proprietary interest in the trust property. The Court held that a beneficiary could have such an interest in the circumstances where the TJL makes express provision for a constructive trust to arise, ie Article 33 of the Trusts Law which imposes a constructive trust on profits made in breach of fiduciary duty. As regards whether such interests can arise in the specific context of a trust of Jersey immovable property, the Court acknowledged in *Re Esteem* that that was a matter of construction of what is now Article 11(2) (a) (iii) of the TJL which expressly prohibits express trusts of immovable property. The view expressed in *Re Esteem* was that it was "strongly arguable" that Jersey law did recognise constructive trusts of Jersey immovable property but since the Court was only concerned in *Re Esteem* with alleged trusts of movable property, it expressly left open the question and said it was not necessary for the Court to decide.

That question then arose for determination in *Flynn v Reid* when the Court held that Jersey law has never recognised equitable proprietary interests in Jersey immovable property and to do so, the law would have to recognise a division between legal and equitable interests in trust property which the Royal Court observed could only be introduced by the legislature and following appropriate consultation and consideration.

The theoretical possibility that a constructive trust of Jersey immovable property might be capable of arising in the specific context of a claim by the victim of a trustee fraud to recover misappropriated assets was left open by the Court in *Flynn v Reid*. However, it was argued on behalf of the Viscount in the English proceedings that it was impossible to see how this could arise in practice as the law of the island simply does not recognise the existence of an equitable proprietary interest in Jersey immovable property. It was further argued that it would be illogical to recognise the existence of a constructive trust in the context of a trustee fraud but not in the context of a common intention to acquire property for the benefit of another when both types of constructive trust were essentially the same.

Some of the parties to the English proceedings sought to challenge the Jersey law expert's evidence and argued, amongst other things, that on its true construction, Article 33 of the Trusts Law provides for constructive trusts of immovable property and that although Article 11(2) (a) (iii) of the Trusts Law expressly prohibits express trusts of immovable property, it does not

extend to constructive trusts.

The position of the Viscount was that Article 11(2) (a) (iii) was intended to do no more than reflect the pre-existing Jersey customary law concerning the nature of interests in Jersey immovable property (as reflected in the authorities of *Esteem* and *Flynn v Reid*) rather than alter it and therefore the question of whether Jersey law recognises constructive trusts of Jersey immovable property was a question of customary law and not one to be determined by reference to the terms of the TJL.

Having regard to the expert evidence before it on the question of whether it is possible as a matter of Jersey law to have a constructive trust of Jersey immovable property, the English High Court noted that the role of the court in these circumstances was to decide what conclusion the foreign court would reach on a developing area of the law and not to seek to anticipate a rational development in the foreign law or decide what the law should be.

In reaching its decision, the High Court said that it considered the following to be clear as a matter of Jersey law:

- The distinctive features of the law relating to immovable property in Jersey including the civilian rather than common law influence make it very different from English law.
- Jersey customary law does not recognise a division of title in respect of real property into legal and equitable interests as confirmed by the Court in *Flynn*; the recognition of such a division in relation to movable property in the case of *Esteem* represented a significant development in the law of the Island.
- As was recognised in *Flynn*, any attempt to recognise the separation of legal and equitable estates in real property should only be introduced by the legislature after appropriate consultation and consideration. Any such recognition would be a significant step and have implications for the historic civilian categories of interests recognised in Jersey land law.
- Although the Court in *Flynn* did not disapprove of the obiter comments made by the Court in *Esteem* about the possibility of recognising an equitable interest over Jersey immovable property, the Court in *Flynn* had emphasised the real difficulties that would flow from the development of Jersey law in that direction.
- And it is not possible to have an express trust over Jersey real property and it was clear from *Flynn* that Jersey law does not recognise a common intention constructive trust over Jersey real property.

With that in mind, Foxton J described the expert opinion relied on by the Viscount as being one which "best fits with the Jersey law materials which [were] available to [him], paying appropriate regard to the evidence of the only expert before the court". Consequently, the High Court was satisfied and ruled that title to the Jersey Property vested in the Viscount free of the

equitable proprietary claims advanced as part of the English proceedings.

Although decisions of the English High Court are not binding on the Royal Court, they may be persuasive. It will be interesting to see how the Royal Court resolves the question of whether it is possible to have a constructive trust of immovable property when eventually the same issue comes before the Jersey Court in another case.

Ogier continues to act for the Viscount in the context of Dr Cochrane's desastre and work closely with the Viscount's English solicitors in connection with the English proceedings.

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