Slowly getting to grips with unjust enrichment and Jersey's legal hot potatoes (CMC v Forster)

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Private Client analysis: This long-running fraud case illustrates the difficult task that the Channel Island courts sometimes have in comparing and distinguishing between developed principles of English law and foundational elements of the customary law of the islands which borrow from French and other civilian law jurisdictions.

It tackles two 'hot potatoes' in Jersey law. The first is the question of the rights between wrongdoers to claim an indemnity or contribution outside of the scope of the limited statutory scheme between joint tortfeasors and, secondly the extent and nature of the doctrine of unjust enrichment in Jersey law. Nick Williams, partner, at Ogier in Jersey, comments on the case *CMC v Forster and others* [2019] JRC 202].

What are the practical implications of this case?

This Jersey fraud case has been going on for over three years and is still dealing with attempts to limit discovery this most recent interlocutory judgment reveals.

On the procedural front, it demonstrates a detrimental aspect of the appeal procedure against interlocutory orders in Jersey. Under the Jersey court rules those disaffected with the decision of the Master of the Royal Court on interlocutory applications (including strike out and summary judgment applications) can have a second bite at the cherry, so to speak, by a full de novo appeal rehearing in the Royal Court itself. This inevitably slows down the proceedings and increases costs.

The wider implications of the case are the interest that has been shown in the development of legal argument in the strike out and summary judgment applications in the third-party proceedings concerning two legal hot potatoes' in Jersey law. The first is the question of the

rights between wrongdoers to claim an indemnity or contribution outside of the scope of the limited statutory scheme between joint tortfeasors and, secondly and more fundamentally, the extent and nature of the doctrine of unjust enrichment in Jersey law. The latter issue illustrates the difficult task that the Channel Island courts sometimes have in comparing and distinguishing between developed principles of English law and foundational elements of the customary law of the islands borrowing as it does from French and other civilian law jurisdictions.

What was the background?

The plaintiffs are Kenyan companies who import vehicles from overseas vehicle manufacturers and supply them to the East African market. They seek relief in respect of the defendants' participation in an alleged secret scheme under which, funds properly due to the plaintiffs were diverted at the instruction of certain directors of the plaintiffs, in breach of fiduciary duty owed by them to the plaintiffs and in breach of trust. Those directors were alleged to have been dishonestly assisted by the second and third defendants (RBC Trust Company (International) Limited and the Regent Trust Company Limited) who provide fiduciary and corporate services in Jersey.

The scheme was allegedly funded by secret commissions paid by vehicle manufacturers that supplied vehicles to the second plaintiff. They were paid directly to bank accounts in Jersey operated by offshore companies and structures (operated, so it is alleged, by the second and third defendants) which were unconnected with either of the plaintiffs and without the knowledge or authorisation of the plaintiffs. Funds paid into the scheme were transferred between those entities, invested, and over time substantially distributed to a small group of people, including the first defendant and other of the plaintiffs' directors who were privy to the scheme.

The plaintiffs claim that the secret commissions paid into the scheme and their proceeds were the result of breaches of fiduciary duty and breaches of trust by directors of the plaintiffs, including the first defendant. The plaintiffs seek orders that the first defendant account to the plaintiffs for all sums that were paid into the scheme as a consequence of his breaches of fiduciary duty and breaches of trust. The plaintiffs also seek an order that he account to the plaintiffs for his profit from the scheme still in hand. The plaintiffs also seek orders for the second and third defendants to account to the plaintiffs for all sums paid into the scheme on the ground of their dishonest assistance in these breaches of fiduciary duty and or breaches of trust, or in the alternative on the basis that they are vicariously liable for the dishonest assistance provided by their agents and employees.

A number of other directors have been joined as third parties at the instance of the second and third defendants. The first defendant alleges that far from being a scheme that was unknown to the plaintiffs and therefore improperly to their prejudice, in fact, the plaintiffs set up the scheme

in order to achieve the legitimate purpose of payments to directors and employees. The second and third defendants deny any wrongdoing and specifically do not admit the existence of the scheme. They say that they reasonably believed that the plaintiffs were aware of and authorised a number of actions including payment and receipt of monies and the various entities and bank accounts which are allegedly part of the scheme. It is also the second and third defendants' case that not only did the plaintiffs know of the so-called scheme but in effect they approved it as it was for the benefit of the plaintiffs and a way of securing the services of foreign employees.

What did the court decide?

Probably the most significant interlocutory judgment in the case from a substantive law perspective has been that of the Master of the Royal Court of 9 November 2017 *CMC Holdings Ltd v Forster* [2017] JRC 14A. The court refused to strike out the third party claim of the second and third defendants against one of the former directors of the plaintiffs who had not been sued by the plaintiffs. The court held that it was clear from In re *Esteem Settlement* [2002] JLR 53 that the law of unjust enrichment formed part of the law of Jersey. The question of the correct test for unjust enrichment was considered by reference to the earlier Jersey decision of *Flynn v Reid* [2012] (1) JLR 370 where the court has considered Scots law cases and approved of the approach in *Mckenzie v Nutter* [2006] Lexis Citation 4701, 2007 SLT (Sh Ct) 17, at para 33 where Sheriff Principal Lockhart described the test as:

- has the appellant been enriched at the expense of the respondent and what is the nature of that enrichment?
- if so, was that enrichment unjust?
- if so, what remedy, in the particular circumstances of this case, is open to the respondent?
- is that remedy equitable?

By reference to *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, [2003] 2 All ER (Comm) 451 and (*Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487, [2004] All ER (D) 298 (Apr), [2004] 2 All ER (Comm) 289, the Master held that the second and third defendants had a prima facie case for a contribution, that their claim was arguable and may represent how the law of unjust enrichment might develop.

Case details

- Court: Royal Court
- Judge: T Le Cocq, Esq, Deputy Bailiff, Jurats Crill and Christensen
- Date of judgement: 09/10/2019

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