

English High Court holds that Jersey law does not recognise a constructive trust of Jersey immovable property

In a recent decision of the English High Court in the case of **The Serious Fraud Office & anor v Litigation Capital Limited & ors [2021] EWHC 1272 (Comm)** Mr Justice Foxton has given a landmark ruling on an important issue of Jersey law, namely the issue of whether and, if so, in what circumstances, a constructive trust can ever arise over Jersey immovable property.

This issue has been the subject of debate in Jersey over recent years. The question was also addressed in some detail in a report by the Jersey Law Commission in September 2002 entitled *The Jersey Law of Real Property*. However, prior to the decision in **SFO v Litigation Capital**, the situation with which Foxton J was forced to grapple had not been addressed definitively by the Jersey Courts.

The claims which arose in the SFO case had their origins in business dealings between two entrepreneurs, Dr Gerald Smith and Mr Andrew Ruhan. In the words of Foxton J, both individuals “*amply merit[ed] the traditional epithet of colourful.*”

The dealings between Dr Smith and Mr Ruhan led, eventually, to what the High

Court described as a dispute of “*labyrinthine complexity... which has offered a near-infinite possibility for disputation*”. One of the (many and varied) issues in dispute concerned the ownership of four properties situated in Jersey and, specifically, whether those properties belonged beneficially to Dr Martin’s wife, Dr Gail Cohrane, or whether she held them on constructive trust for one or more of the Claimants in the proceedings.

In the course of determining this issue, the High Court received expert evidence on Jersey law from an expert instructed on behalf of one of the parties, the Viscount of Jersey. The other parties were given the opportunity to adduce their own expert evidence but chose not to do so.

The opinion of the Viscount’s expert was that Jersey law did not recognise any type of constructive trust over Jersey immovable property. In support of that argument, the Court was referred to various provisions of the Trusts (Jersey) Law 1984 (“**TJL**”) and to two decisions of the Royal Court of Jersey: **Re Esteem Settlement [2002] JLR 53 (“Esteem”)** and



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Flynn v Reid [2012] (1) JLR 370 (“Flynn”).

It was acknowledged on behalf of the Viscount that the Court in **Flynn** had left open the theoretical possibility that a constructive trust of Jersey immovables could arise in the specific context of “*trustee fraud*”. However, it was argued that it was impossible to see how this could ever arise in practice. As the Court had held in **Flynn**, Jersey law simply did not recognise the “*essential underpinnings*” of such a claim, namely the existence of an equitable proprietary interest in Jersey immovable property. Furthermore, it would be “*plainly illogical*” to hold that Jersey law

recognised the existence of a constructive trust in one context (i.e trustee fraud) but not in another (i.e a common intention to acquire property for the benefit of another) when, in all fundamental respects, both types of constructive trust were “*the same animal*”.

Two of the parties sought to challenge the expert’s evidence by way of cross-examination. In summary, they argued that:

- Flynn was not a case of “*trustee fraud*” and the Jersey Court had declined to decide whether a constructive trust of Jersey immovables could ever arise in those circumstances;
- The September 2002 Report of the Jersey Law Commission had expressed the view that Jersey law did recognise a constructive trust of immovables, and the same view had also been expressed by the authors of the leading Jersey textbook on trusts; and
- On its true construction, Article 33 of TJL provided for constructive trusts of immovable property. Further, although Article 11 (2)(a)(iii) of TJL prohibited express trusts of immovable property, it did not extend to constructive trusts;

- It was inconceivable that Jersey law would leave a victim of trustee fraud without remedy, particularly given that there existed “*an impetus in the governance of all major financial centres and institutions of the world to flush out and clamp down on fraud in all its cunning guises.*”

The decision of Foxton J

Foxton J noted that the following issues were “*clear*” as a matter of Jersey law:

- Jersey law relating to immovable property had distinctive features which made it very different from English law; indeed, the law of immovable property was an area of Jersey law where the influence of the civil law was stronger than that of English common law;
- The division of title to real property into legal and equitable interests was not recognised in Jersey customary law and the recognition of such a division in relation to movable property in *Esteem* had “*represented a significant development in Jersey law*”;
- The recognition of separate legal and equitable estates in real property would represent a very significant step for Jersey, and as the Court in

Flynn had observed, this should only be introduced “*by the legislature, after appropriate consultation and consideration*”;

- Whilst (as the Viscount’s expert quite properly accepted) the decision of the Court in **Esteem** did provide *obiter* support for the recognition of an equitable interest over Jersey immovable property, and those *obiter* remarks were not expressly disapproved in **Flynn**, the Court in **Flynn** had nonetheless emphasised “*the real difficulties which would flow from developing Jersey law in that direction*”;
- It was common ground between the parties that Article 11(2)(a)(iii) prohibited express trusts over Jersey real property. It was also clear that Jersey law did not recognise a common intention constructive trust of Jersey real property: **Flynn**.

Foxton J went on to hold that, in his view, the opinion expressed by the Viscount’s expert “*fit best*” with the conclusions summarised above and that he therefore accepted it. In particular, the Claimants’ argument that Article 33 itself introduced the concept of equitable title in land into Jersey law found “*little support in the TJL itself*”. Further, the argument that Jersey law recognised

equitable interests in Jersey land in cases of *some* types of constructive trust, but not in express trusteeship, or in cases of “trustee fraud” but not in other types of breach of trust, “*gave rise to formidable difficulties of delineation*”.

Foxton J also noted that Jersey law did provide for personal (as opposed to proprietary) remedies for victims of fraud and that there were a great many other legal systems, including those with “*major financial centres and institutions*”, which did no more.

He concluded with the (perhaps somewhat tongue-in-cheek) observation that

“It would scarcely behove a court sitting in the jurisdiction which brought the statute of Uses 1535 into being to regard it as so unlikely or extravagant that another jurisdiction should prohibit equitable interests in land in all circumstances that the only expert evidence before the court (to that effect) should be rejected.”

Conclusion

Interestingly, this is the second time in recent years where the English High Court has been called upon to determine an issue of Jersey law in the absence of any binding Jersey authority on the point, the other being the decision of HHJ Keyser QC in **O’Keefe v Caner [2017] EWHC**

1105 (Ch) on the question of whether claims made by the Joint Liquidators of two Jersey companies against their directors were time barred as matter of Jersey law.

Technically, of course, Foxton J’s decision (like the decision of HHJ Keyser before him) is not binding on the Jersey Courts. Nonetheless, given the respect typically afforded to the decisions of English High Court judges by their Jersey counterparts, such a carefully and cogently reasoned decision is likely to carry considerable weight.

Nicole Langlois was instructed on behalf of the Viscount of Jersey to give the expert evidence on Jersey law in these proceedings.