



Ten year limitation period for breach of directors' duties under Jersey law

Service area / [Dispute Resolution and Litigation](#)

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[O'Keefe v Caner and others \[2017\] EWHC 1105 \(Ch\)](#)

The vexed question (still unresolved by the Jersey courts) as to the correct limitation period under Jersey law for bringing a claim against a director of a Jersey company for a breach of his statutory duties as a director has been decided in the English court in English liquidation proceedings by a judgment dated 15 May 2017. Because the content of foreign (in this case Jersey) law is a question of fact, the English court received evidence as to the state of Jersey law from three Jersey Advocates called by the parties as "expert witnesses" on Jersey law. Their role as experts required them to be impartial in their evidence. Advocate John Kelleher, head of the dispute resolution team at Carey Olsen, was one of the expert witnesses.

In the fullest judicial treatment of the subject so far (on either side of the channel) Keyser J. held that such claims are barred after 10 years from the date of the breach of duty by a director. It is fair to say that this is the way the Jersey cases so far on the subject had been leaning, albeit tentatively.

[The background](#)

The liquidators' claim was for breach of duty against Mr Caner as the ultimate beneficial owner and director and against four other professional directors of the companies in liquidation.

The liquidators claimed that, between April 2007 and June 2008, improper payments of €34m were made to Mr Caner or to companies owned beneficially by him from the companies' bank accounts. The allegation was that, in causing or permitting the payments to be made, the directors had acted in breach of their duties under Article 74(1) of the Companies (Jersey) Law 1991 (the "1991 Law") to:

- "act honestly and in good faith with a view to the best interests of the company"; and
- "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".

It is significant that the two duties are quite different and they were therefore dealt with separately in the judgment.

In their defences, the directors claimed that those claims were made out of time because, they said, the limitation period (or as it is known in Jersey the "prescription period") for such claims is three years. Their counsel argued that this was because such claims should be regarded for prescription purposes as a case of breach of trust for which a three year statutory period applies in Jersey or, alternatively, should be regarded as a claim in the law of tort for which a statutory limitation period of three years also applies under Jersey law. The liquidators, on the other hand, argued that there was no such specific limitation period applicable directly or by analogy and that therefore the correct period was ten years being the default period applicable to personal claims under Jersey law.

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Reasons for the decision

As Keyser J explained at paragraph 27 of his judgment, in Jersey law: *“Certain kinds of claim are subject to particular prescription periods; for example, there is a ten-year period for claims for breach of contract and, more importantly for present purposes, a three-year period for claims for tort. In some cases no specific legislative provision or judicial decision expressly stipulates the applicable period; that is the position as regards claims for breach of directors’ duties. When a question arises as to the applicable prescription period in a given case, the starting point is to characterise the nature of the action.”*

He then went on in his judgment to explain that in the case of claims founded on personal obligations and where the aim of the action is a money payment or the recovery of an item of moveable property (called in Jersey law an *“action personnelle mobilière”*) the time limit for such claims was 10 years, a position accepted by all of the expert witnesses. The experts also accepted that, in general terms, the claims in this case fell within this general classification. However the Jersey law experts disagreed as to whether this general rule was “trumped” by a shorter prescription period of 3 years applicable by Jersey statute to breach of trust cases or by the period of three years which applies to claims in the law of tort.

Against that background, the judgment next considers whether a breach of directors’ duty claim falls within the strict definition of a breach of trust claim under the terms of Article 57 of the Trusts (Jersey) Law 1984 (as amended) or, if not directly applicable, whether this or the tort prescription period might be applied by analogy.

In considering the practice of the Jersey court of applying prescription periods by analogy, the court at paragraph 33 of the judgment gave the following useful guidance: *“The dicta in those cases indicate that the judges of the Jersey courts have not understood analogous application of prescriptive periods to involve mere comparison of causes of action but have had regard to considerations involving the coherence of the law and the practical convenience of departing from the ten-year default period in any given case. Such considerations seem to me to be quite different from the sort of policy considerations – for example, an opinion that in modern society a shorter or longer period is more desirable—that are properly the preserve of the legislature; cf. Rockhampton at para 177.”*

The court (from paragraphs 42 to 86 of the judgment) then dealt with the first of the two directors’ duties under Article 74(1) (a) of the Companies (Jersey) Law 1991 the duty to *“act honestly and in good faith with a view the best interests of the company”* which, in this context, it was accepted included the creditors of the companies.

The range of opinions of the expert witnesses regarding the prescription period for breach of the duty in Article 74(1)(a) was as follows:

- One view was that the default ten-year period for an *action personnelle mobilière* applied and that no other period applied directly or by analogy. Naturally, counsel for the liquidators argued for this view given that if the court held that the period was three years the claims would be out of time and the case dismissed.
- Another view was that the claim lay in tort, either because it was founded on a breach of statutory duty, which was *ipso facto* a claim in tort, or because the nature of the wrong was essentially tortious; alternatively, that the three-year tort period applied by analogy.

In a closely reasoned 13 pages of the judgment, the court declined to follow the Jersey law opinion that the 3-year prescriptive period for claims in tort applied. The second expert had opined that this was the case as a breach of statutory duty is deemed to be a tort under Jersey law. The expert also expressed the view that this was so because the claims would have lain in tort in customary law before they were given a statutory basis and were therefore intrinsically tortious in nature by reference to the broad concept of tort in Jersey law.

In its judgment the court then considered and rejected the direct application to the duty to act honestly and in good faith under Article 74 (1) (a) of the 1991 Law of the statutory prescription period for breaches of trust laid down by Article 57 (2) of the Trusts Law 1984. This provides that in cases other than fraudulent breaches of trust or to recover trust property *“... the period within which an action founded on breach of trust may be brought against a trustee by a beneficiary is 3 years from—(a) the date of delivery of the final accounts to the beneficiary; or (b) the date on which the beneficiary first has knowledge of the breach of trust, whichever is earlier.”*

The court held at paragraphs 76 and 77 that, as a matter of the construction of that statute, it had no direct application to an action based on breach of the directors’ duties under Article 74(1) of the Companies Law 1991 because *“...directors are not by virtue of their office trustees of the company’s property. This is because a company is the legal and beneficial owner of its property; the directors do not qua directors hold the company’s assets.”*

The Court also concluded (at paragraphs 79–80 of the judgment) that Article 57 of the Trusts (Jersey) Law 1984 cannot have direct application to company directors because of the very precise definitions of what constitutes a trust contained in that Law. The court said *“...these provisions seem clearly to apply only to trusts in the strict sense, namely, where the property is legally owned by someone who is not its beneficial owner. That would exclude the case of a company director, because in Jersey as in England a company holds its own property; the property is not vested in the directors.”*

Continued

From paragraph 87 of the judgment, the court then gave separate treatment to the second of the directors' duties being that under Article 74(1) (b) of the 1991 Law to "... exercise the care, diligence and skill that a reasonably prudent person would...".

In that respect, it firstly rejected the argument that the three-year period for tort actions applies directly by reason only of the fact that the duty is in statutory form for the same reasons that it had rejected that reasoning in regard to the first duty under sub paragraph (a) of Article 74(1).

Then the court considered the possibility that the three-year period for tort actions applied directly because, it was said by the second expert, the duty in Article 74(1)(b) is by nature tortious (i.e. regardless of its statutory form) or because the statutory form of the duty is most properly to be regarded as tortious. Again in a closely reasoned analysis of the arguments and views of the experts the court rejected this view and held at paragraph 113 that "...the director's duty of care and skill is best seen as an equitable duty or, if one prefers, as a sui generis duty arising out of the relationship of a director to his company."

From paragraph 114 of the judgment the court went on to consider the application of prescription periods by analogy under Jersey law. The court rejected any analogy between the duty under Article 74 (1) (a) of the 1991 Law of honesty and good faith with the breach of trust prescription provisions under Article 57 of the Trusts (Jersey) Law 1984. This was because it considered that the range of claims that might be made against trustees under the latter made it inapposite to do so. The court considered such factors as the fact that claims by new trustees could also be made under Article 57(3B) against former trustees (whereas only a company could make the claim under Article 74) and that such claims by new trustees could be made 3 years after the replacement of the defaulting old trustee which might be long after the three years under Article 57(2) had passed.

Finally the court rejected the view that the three-year period for claims in tort should be applied by analogy to the duty of care under Article 74(1)(b). This was because the court considered that the director's duty was more closely analogous to an equitable, or in Jersey terms, quasi-contractual obligation. The court noted that in Jersey law "... an action for breach of fiduciary duty is an action *personnelle immobilière*; the default period for such claims is ten years, from which, in the absence of a period made directly applicable by statute or case-law, one should depart only if some other period is by analogy clearly more applicable."

Conclusions

The Judgment is an extremely useful review of this difficult and contentious subject. Whilst not binding on the Jersey courts it will no doubt be given close attention to by advisers and is likely to be taken by many to represent the most likely outcome if the matter were to be conclusively litigated before the Jersey court.

Given the importance of Jersey companies to the island's economy it is to be hoped that legislation will be passed in Jersey to determine what the period will be for the future rather than to continue the uncertain position as it stands in the island.



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