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## Guernsey: the time limit for claims against directors for breach of duty

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Claims made against directors of Guernsey companies for breach of duty can have significant ramifications for them and the companies they serve, both personally and professionally: especially in terms of careers, reputation and livelihoods. It is rare that directors foreshadow claims against them, and often claims arise with little if any warning, from what directors may consider to have been historic transactional decision-making. Concerns can be particularly acute towards the end of the life of a company, especially during a managed wind-down. Directors will need to be astute to matters such as indemnification periods and contingencies, D&O insurance coverage, premium costs and run-off cover.

In a recent [briefing note](#), our Jersey litigators looked at the recent decision of the English High Court in *O'Keefe v. Caner and others* [2017] EWHC 1105 (Ch) (also reported as *Re Level One Residential Property (Jersey) Limited*) in which HHJ Keyser Q.C. determined as a matter of Jersey law that the limitation period for claims against directors for breach of duty was ten years from the date of breach of duty.

What limitation period applies to claims against directors for breach of duty was described in our note as a “vexed question”, and one that had remained unresolved by the Jersey courts until it came before Keyser J. in *O'Keefe*. But what impact (if any) does *O'Keefe* have on Guernsey directors, who may feel exposed by the findings in that case, and does Guernsey law differ?

### The Judgment in *O'Keefe*

To summarise *O'Keefe*, the liquidators of two Jersey companies claimed that, between April 2007 and June 2008, improper payments of €34million were made to Mr Caner or to companies owned beneficially by him from the companies' bank accounts. Proceedings were issued in November 2015, nearly 7½ years after the last impugned transaction. The liquidators alleged 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 to: (a) act honestly and in good faith with a view to the best interests of the company; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Keyser J. explained at paragraph [27] of his judgment that as a matter of 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.”

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The judge then proceeded 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 ten years, albeit that the Jersey lawyers called as experts to assist the court disagreed as to whether this “general rule” was applicable; this was because some of the experts considered a directors breach of duty to be akin or analogous to a claim in tort or for breach of trust under Article 57 of the Trusts (Jersey) Law 1984 (as amended), for which the prescription period is three years.

Therefore, Keyser J. was confronted by the following three legal arguments in order to determine the time limit for bringing claims for breach of directors’ duties under the Jersey companies’ law:

1. that the default ten year period for an action personnelle mobilière applied, and that no other period applied either directly or by analogy; or
2. that the claim lay in tort (because it was founded on a breach of duty which is ipso facto a claim in tort, or because the nature of the claim was essentially tortious) and was subject to a three year time limit; alternatively the three year tort period applied by analogy; or that the Jersey court may hold that the three year period for breach of trust should apply directly or by analogy; or
3. that the three year period for breach of trust applied directly or by analogy.

The English court determined that for a claim for breach of directors’ duty, the default ten year period for a personal action – an action personnelle mobilière – applied, and that no other period applied either directly or by analogy. The rationale is explained (including important considerations about the fiduciary nature of some directors’ duties, and potential analogies with trustees) in our [May 2017 note](#), but what is the impact of the English court’s reasoning when applied to directors of Guernsey companies?

## The Legal Position in Guernsey

### Is O’Keefe Persuasive?

As a starting point, it is worth noting that in *Flightlease Holdings (Guernsey) Limited v. Flightlease (Ireland) Limited* (2009), Lieutenant Bailiff Southwell Q.C. sitting as a Judge of the Royal Court of Guernsey, noted that:

“the concept of a limited company was imported into Guernsey law from English law [and] ... since its importation into Guernsey in the late 1880s, it has naturally been appropriate to look to English law to help in the solution of problems concerning companies which are not covered by Guernsey statutes or customary law”.

Hence, recourse to decisions of the Jersey courts, and in this case *O’Keefe*, may not necessarily be the most persuasive before the Royal Court of Guernsey in matters relating to companies and their directors.

## No Companies Law Codification of Directors’ Duties or Prescription/Limitation Issues

It is critical to note that the Guernsey legislature (unlike Jersey’s) has not considered it necessary to codify directors’ duties, even though the Companies (Guernsey) Law, 2008 as amended followed (in time) the implementation of the English Companies Act 2006 – which for the first time codified directors’ duties under English law: see Lieutenant Bailiff Talbot Q.C. in *Jackson v. Dear et autres* (2013) Judgment 10/2013 at [15].

In the same way that directors’ duties have not been codified, nor has any provision for regulating the limitation/prescription period applicable for such a claim or claims.

### Limitation and Prescription Differ Substantively

Guernsey has as a matter of substantive law the theory of prescription (which extinguishes legal rights after the expiry of time), rather than limitation (which acts as a procedural means of barring a remedy). Hence, a failure to bring a claim against a director in time will wholly extinguish the right, see Lieutenant Bailiff Hancox in *Ogier v. Grand Havre Holdings Limited* 2005-06 GLR Note 29. 30 May 2006.

That substantive legal position is subject to certain exceptions, the most important of which is an *empêchement d’agir*, i.e. a practical impossibility or impediment which prevented action, not unlike latent damage provisions in common law countries.

### What Time Limits Apply?

The prescription periods for similar claims differ in Jersey and Guernsey. The history of prescription in Guernsey law has been one of progressive reduction in time limits in line with that to be found in English jurisprudence. Hence, by reference to the types of claims articulated in *O’Keefe*, claims in Guernsey:

1. for breach of contract are prescribed after six years from the date of breach, regardless of knowledge, see the *Loi Relative aux Prescriptions 1889* and the case of *Holdright Insurance Co. Ltd. v. Willis Corroon Management (Guernsey) Ltd.*, 25 August 2000 (as a matter of Jersey law the period is longer, namely ten years);
2. founded on commercial torts are prescribed after six years from the date that relevant actionable damage occurred, regardless of knowledge, see *The Law Reform (Tort) (Guernsey) Law, 1979* and *Holdright* (as a matter of Jersey law the period is shorter, specifically three years); and
3. personal claims (droits personnel) will be prescribed after six years from the date the claim arose, see *Loi Relative aux Prescriptions 1889* (whereas as a matter of Jersey law the time period is the longer ten years).

As to claims for breach of trust (to the extent relevant), section 76(2)(a) of *The Trusts (Guernsey) Law, 2007* states, in terms which are not dissimilar to the Jersey trusts statute, that the period within which an action founded on breach of trust may be brought against a trustee is, “three (3) years from the date on which the claimant first has knowledge of the breach”, i.e. akin to Article 57 of the Trusts (Jersey) Law 1984 (as amended) as considered in *O’Keefe*.

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## Does Breach of Trust Legislation Apply (Directly or Analogously)

Because a director's duty to act honestly and in good faith with a view to the best interests of the company is fiduciary in nature (unlike the duty to exercise reasonable care, diligence and skill), the court in *O'Keefe* considered: (a) whether breach of the statutory duty was ipso facto a tort (such that the lesser three year period of prescription for Jersey tort claims applied, instead of the ten year period); and (b) whether the nature of the fiduciary obligation brought the case within the ambit of the Jersey trusts statute (which again had a lesser three year period of prescription).

In a thorough analysis of the Jersey and English authorities, Keyser J. determined that:

- fiduciary duties - which are essentially equitable in nature, dealing with concepts of loyalty and good faith - do not give rise to causes of action in tort, which arise from common law, not equity, and predominantly deal with matters of negligence, and each of which have wholly distinct remedies; as such, the prescription period for tort claims did not apply, either directly or by analogy; and
- the express provisions of the Jersey trusts law preclude analogous or direct application to directors, and that in any event 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 (by virtue of its own legal personality) and hence directors do not qua directors hold the company's assets; as such the breach of trust remedy and prescription period did not apply directly or by analogy.

It is considered that these determinations would be persuasive before the Royal Court of Guernsey.

## Conclusion

If one adopts the reasoning of Keyser J. in *O'Keefe*, but transplants Guernsey prescription periods, the timeframe for potential claims is contracted (to six years, rather than ten).

By the very nature of the applicable prescription periods in Guernsey for personal claims, torts and contract claims being identical, directors and the companies they serve can take considerable comfort in certainty as to the effluxion of time within which claims may be brought; this certainty, coherence and practical convenience assist them with making provisions and contingencies in terms of indemnification, insurance cover and defence costs cover. Further, albeit to perhaps a lesser degree (but nonetheless important), the fact that these periods are identical to or akin to those found in English law can provide further comfort in terms of cross-border commercial understanding, especially with insurers and on matters of determining periods for run-off cover.



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