Booth v Zenith Trust Company Limited [2014] JRC 231: the meaning of 'fraud' for prescription purposes under Article 57 of the Trusts (Jersey) Law 1984

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Summary of facts

The Plaintiff's claim involved the operation of a tax avoidance scheme known as an ITPM Scheme, the essence of which was to attempt to save UK tax and national insurance. The Plaintiff alleged that he had entrusted the benefit of the ITPM Scheme, which he had devised, to the Defendant, requiring the Defendant to account for the value of the Plaintiff's interest in the Scheme. The Plaintiff alleged that, contrary to this arrangement, the Defendant had failed to account to the Plaintiff in contract for monies expended during the Defendant's administration of the companies. On the Plaintiff's best case, more than three years had elapsed since the Plaintiff took control of the run off of the ITPM Scheme. On the worst case, nearly ten years had elapsed since the relevant time. Proceedings had not been commenced previously because the lawyers he had retained were said to be under a conflict of interest and due to personal reasons connected with his late wife's ill health (however, no argument was taken that the Plaintiff was under a practical impossibility from suing the Defendant much earlier which, under Jersey customary (common) law, might prevent time from running against a plaintiff).

The Plaintiff conceded that his claims in tort were time barred. It was also accepted by all parties that the claim for an account in contract would be a matter for determination at trial. This left the Plaintiff's breach of trust claims which, he accepted, would also be time barred under Article 57(2) of the 1984 Law unless he could bring himself within Article 57(1)(a) of the 1984 Law, ie by proving that his claims were in respect of any fraud to which the trustee was either a party or privy.

The Court's findings

In a succinct judgment, the Master held, in relation to prescription of the breach of trust claims, as follows:

- A claim which is 'clearly prescribed' may be struck out: *Classic Herd Limited v JMMB* [2014] JRC 127 (at paragraph 5).
- On the basis of *AG v Foster* [1992] JLR 6 (approved in *Bhojwani v AG* [2010] JLR 78), fraud has been defined, in summary, as a defendant deliberately making a false representation with the intention of causing thereby (and with the result in fact of causing thereby) actual prejudice to someone, and an actual benefit to himself or somebody else.
- However, for the purposes of Article 57 of the 1984 Law, a plaintiff need not go as far as to prove criminal fraud (this type of fraud was at issue in Foster and Bhojwani, noted above). There has been previous acceptance by the Royal Court of Jersey that equitable fraud or dol was sufficient to constitute 'fraud' in a trusts context (*West v Lazard Brothers & Co Jersey Limited* [1993] JLR 165 and *Midland Bank Trust Company (Jersey) Limited v Federated Pension Services* [1994] JLR 276). In *Midland Bank v Federated Pension Services* [1995] JLR 352, the Court of Appeal did leave open the question of whether fraud meant fraud to the criminal law standard or the civil law concept of equitable fraud or dol. For the purposes of this application, the Master assumed, in the Plaintiff's favour, that allegations of dol were sufficient to involve Article 57.
- Regarding the meaning of dol, the Royal Court in the Midland Bank case made it clear that the concept of dol in Jersey 'was so surprisingly similar to the English concept of equitable fraud that we were able to extend the doctrine in that way' (at page 297, lines 36–38). In *West v Lazard Bros*, the Royal Court approved a definition of dol as being a type of device that one person uses to trick or deceive another. As such, the Master held that, to determine the Defendant's summons, it was necessary to consider whether the conduct complained of by the Plaintiff amounted to an arguable case of the Defendant trying to trick or deceive the Plaintiff.
- On the facts of the case (see paragraphs 20–29 of the judgment), none of the allegations of breach of trust amounted to fraud or, applying the lower standard to Article 57, dol. As such, those parts of the pleading containing allegations of breach of trust were struck out on prescription grounds because no exemption falling within Article 57(1)(a) of the 1984 Law could be established by the Plaintiff.
- However, the Plaintiff was permitted to apply to amend his pleading within 28 days to make clear his misrepresentation/erreur claims (which claims were previously only implicit). Directions for discovery were also made in relation to remaining claims.

Analysis

In the previous aforementioned cases, the Royal Court has extended fraud to the concept of dol in trust cases. However, the Court of Appeal judgment in Midland Bank was more cautious, with the exact ambit of the meaning of fraud being left open.

In this case, the Master was robust in assuming that allegations of dol were sufficient to involve Article 57(1)(a) (paragraph 18), thereby sanctioning the application of a lower standard than criminal fraud to allegations of fraud in an Article 57 context. The Master also firmly applied the definition of dol, set out in *West v Lazard Bros*, namely a type of device that one person uses to trick or deceive another (see paragraph 19 of the Master's judgment).

The Master's judgment provides some welcome clarity as to the approach to be taken vis-à-vis allegations of fraud which engage Article 57(1)(a) of the 1984 Law. Trustees can take some comfort in there being a decided case which clearly applies previous authority in this area, in a readily understandable way.

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