

Equitable set-off lands in Jersey

UPDATE

Update prepared by Justin Harvey-Hills (Jersey)

Justin Harvey-Hills, Luke Olivier and Dilly Wright of Mourant and Melanie Hart of Ince, who act for the plaintiffs, examine the Royal Court's very recent decision in *Monteagle International Limited -v- Grocery Market Research Limited* [2021] JRC 260

It's official – equitable set-off now forms part of Jersey law

The Master of the Royal Court made this finding in his judgment of 20 October 2021. In this case, the plaintiffs are claiming against the defendants in respect of the alleged breach of a consultancy agreement and misuse of confidential information for the purposes of setting up a competing business. The judgment concerned a summary judgment application by the defendants in respect of a loan from one of the defendants to one of the plaintiffs. The plaintiffs did not dispute the existence or validity of the loan or the fact that the repayment date had passed. However, they argued that they had a defence of equitable set-off by which they were entitled to set off the amount of the loan against part of the amount of that plaintiff's claim for breach of confidence.

Equitable set-off is a doctrine of English law. It operates as a substantive defence to a claim when there is a cross-claim which is 'so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim' (*Geldof Metaalconstructie NV-v-Simon Carves Ltd* [2010] 4 All ER 417). In other words, if there is a claim for GBP 1 million for a loan and a closely connected cross-claim for GBP 1 million for damages, the cross-claim is treated as a substantive defence to the loan claim. The loan claim cannot be determined until the cross-claim has also been determined. On the example, if the cross-claim were to succeed at trial, judgment would not be entered on the loan claim. The cross-claim would operate as a substantive defence and would extinguish the loan claim. To extinguish the claim in its entirety, the cross-claim must over-top the amount of the claim. If it does not do so, judgment will be entered on the claim for the amount by which the cross-claim falls short.

The first question was whether Jersey law even recognised the doctrine of equitable set-off. There was a long-standing doctrine of Jersey law known as *compensation* but the Master held that this only allowed claims that were liquid and sufficiently certain to be set off against each other (similar to the concept of legal set-off in England). In this case, the plaintiff's claim was unliquidated and contested and potentially included future losses. Accordingly, *compensation* did not apply. The defendants had accepted that, for the purposes of the summary judgment application, the court should proceed on the basis that equitable set-off might form part of Jersey law. However, the court went further than that and effectively made a positive finding that it did. The Master said:

'For the principle of equitable set-off not to form part of the law of Jersey (subject to any necessary qualification in relation to immovable property which is for another day) would otherwise run the risk of manifest injustice where a counterclaim existed that met the relevant test.'

As this was a summary judgment application, the second question was whether there was a real prospect of the plaintiff succeeding at trial in its argument that the claim and cross-claim were sufficiently closely connected. The court found that this threshold was met. The parties had worked together for many years. The defendants received fees under consultancy agreements and a minimum share of profits as well as

interest on accumulated profits. The loan arrangement was some form of mechanism by which the defendants invested in the business. Successful operation of the consultancy agreements also led to profits, some of which were distributed and some of which were not and instead became due under the loan agreement. The relationship was intertwined on a number of different levels and was quite informal. A trial would be required to determine the level of connection. Thus, the plaintiffs had an arguable defence of equitable set-off to the claim under the loan agreement and summary judgment could not be entered.

This case represents an important development in Jersey law. As the Master recognised, without recognition of the principles of equitable set-off, there would be a risk of manifest injustice where parties had separate but closely related claims and cross-claims. The limited doctrine of *compensation* has now been expanded and updated in an important modernisation of this area of Jersey law.

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