VOISIN LAW

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Thanks to Business Brief I, at last, can confirm what I should have known for a long time: I am an oracle. I can predict the legal future.

“Lofty claims”, you may say. Where is your evidence as to my divining skills?

You may recall in last month’s article entitled: “*New glasses, an antibiotic and a slice of Law*” that I discussed the principle of prescription in Jersey, i.e. the period in which a party can bring a claim.

Ah…prescription. You will then appreciate my surprise at the content of a Judgment landing on my desk dated 15 May 2017 from the High Court of Justice, Chancery Division, Companies Court. What is the significance? Well, having just written an article on prescription I was amazed to see that a High Court Judge (HH Judge Keyser QC) in England and Wales was adjudicating upon a matter of Jersey Law in relation to the prescription period for breach of director’s duties. Spooky.

The case was brought by liquidators of Jersey companies whose main centre of interest was in England. The companies went into liquidation a few years ago. The liquidators case was that certain payments from the companies were not made in good faith for a legitimate commercial purpose of the companies and the companies did not receive any or any adequate consideration for the payments. In short, in causing or permitting the payments to be made, certain directors of the companies acted in breach of their duties in that they did not (a) act honestly and in good faith with a view to the best interests of the companies or (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The duties relied on are set out in Article 74(1) of the Companies (Jersey) Law 1991.

In their response, the directors raised a prescription defence; namely that the claims against them for breach of director’s duties had to be brought by the liquidators within three years. The liquidators contended that the applicable prescription period was 10 years.

HH Judge Keyser QC was required to determine this argument in accordance with Jersey Law as a preliminary issue. It was common ground that there was no authoritative decision of the Royal Court of Jersey that was determinative of this.

How is a Judge of the High Court of England and Wales to determine a matter of Jersey Law? The Judge stated that the content of the law in Jersey, as of that of any other jurisdiction outside of England and Wales, is a matter of fact (though fact of a “*peculiar kind*”). Therefore the evidence of expert witnesses was necessary for the High Court to find that Jersey Law was different to English Law.

Who were those experts to be? Three wise old Advocates of the Royal Court of Jersey attended at the hearing to assist the Judge.

So we have a High Court Judge of England and Wales determining the issue of Jersey Law assisted by three Jersey Advocates. Of course, the Advocates did not all agree with each other. Such disagreement simply highlights the difficulties with our prescription periods in Jersey, as foreshadowed in my article last month.

HH Judge Keyser QC was forced to reject the evidence of certain of the Advocates. He did so with some gusto. Oops. He determined as a fact of Jersey Law that the prescriptive period for breach of director duty claims under Article 74 was 10 years.

One waits with baited breath to see whether this determination is reviewed by the Court of Appeal in England & Wales, or indeed, whether the Royal Court will be persuaded by the Judgment. Of course, the Judgment is not binding in Jersey but it may well be influential or persuasive should the issue ever fall to be determined here.

Finally, talking of English High Court Judges, there was much written last month concerning the inquest into the death of Sir Nicholas Wall who was once Britain's most senior Family Law Judge. Sir Nicholas was clearly a formidable lawyer and a brilliant Judge. What particularly caught my eye was a Judgment he gave some years ago concerning a residence order for a 9 year old boy. Commenting on the behaviour of the boy's parents, Sir Nicholas quoted the Philip Larkin "This be the Verse" poem in his Judgment:

> *"They f**k you up, your mum and dad. They may not mean to but they do."*

How refreshing in this censorious age of political correctness and restriction on free speech and thought that a Judge should so eloquently provide a warning to parents to not speak ill of each other in front of their children.

There is no doubt that such language resonates with the public. Perhaps more Judges should deploy such techniques to make their points clear to Joe and Jane Public rather than fear the backlash of the uptight and small minded army of the PC.

I am off to think about my next article which will no doubt foreshadow some extraordinary legal case somewhere in the world in the next few weeks.