The Availability of “Backward Tracing” in Jersey Offers Creditors Another Remedy Offshore

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One of the major offshore financial centers, Jersey, has been a jurisdiction of choice for those seeking to conceal their ill-gotten assets. But, developing case law offers solace for creditors to recover those illegitimately acquired assets.

"Equitable tracing" is a process which permits a claimant to identify one right as a substitute for another. For example, if a fraudster transfers money into an account in the name of a third party, the victim can trace its right against the fraudster into the fraudster's right against the third party. But, if the property is dissipated, the tracing process ends. On the other hand, "backward tracing" is where the claimant's property is traced to an asset the fraudster has already. For example, the fraudster takes a loan to pay for an asset, then diverts property to pay off the loan. Strictly speaking, the beneficiary's property has been dissipated. However, backward tracing allows the beneficiary to claim the asset acquired by the fraudster with the loan money.

Jersey law recognizes the concept of constructive trust to hold that a beneficiary of a constructive trust has an equitable proprietary interest in the assets that are a subject of the trust. In *The Federal Republic of Brazil v. Durant International Corporation* (Jersey),(2015) UKPC 35, bribes were paid to a former mayor and his son and laundered through BVI companies belonging to the municipality of the former mayor. The Royal Court of Jersey found the BVI companies liable to the municipality as constructive trustees. The issue was the extent of the liability. The court allowed tracing the payments backward to two accounts after transfer from the initial account were the bribe payments were originally deposited. The key concern of the court was deterring fraud. The court reasoned that it should not allow "a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect". Fraudsters should not be able to design transactions with the aim of defeating claims. Backward tracing should be available where the claimant can establish between the depleting of trust property and the acquisition of substitute property.

This, the principles of "backward tracing" enables creditors to better deal with complex schemes to launder money. The Durant decision suggests courts are recognizing the need to fight fraud in the modern world.

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