

UPDATE

# First Tower Trustees v CDS – English Court of Appeal finds trustees personally liable under statute

Update prepared by Abel Lyall (Partner, Guernsey) and Justin Harvey Hills (Partner, Jersey)

---

*First Tower Trustees Ltd & Anor v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396 (19 June 2018) provides a timely warning that while trustees may readily contract out of contractual liabilities, greater care must be taken if they are to avoid liability arising under statute or tort.

---

In *First Tower Trustees Ltd v CDS* the English Court of Appeal considered a claim between CDS as tenant, and two Guernsey trust companies as landlord of leased premises.

The lease followed enquiries before contract in which the landlord trustees stated that they had not been notified of any environmental problems relating to the premises. This statement was false, the landlord trustees having had notice of asbestos contamination. The landlord trustees were held to be liable for statutory damages under the Misrepresentation Act 1967.

The misrepresentation finding was not challenged on appeal. What the Court of Appeal did have to consider was whether the landlord has any defence to that statutory liability.

## The Appeal

The principal issues for the appeal were whether any defence existed by reason of:

- Reliance on Article 32 of the Trusts (Jersey) Law 1984 (**Article 32**), limiting the landlord trustees' liability as trustees to the value of the assets of the trust.
- A clause in the lease providing that the tenant had entered into the lease without reliance on any representation made; and
- The landlord having contracted in their capacity as trustees, and not otherwise.

## Article 32

The landlord trustees had sought to introduce new issues on the first day of trial regarding the landlord's liabilities as trustees, including seeking to plead Article 32. It is surprising that the point had not been run sooner, and less surprising that the first instance judge refused to allow this amendment.

The landlord trustees challenged this decision on appeal. The Court of Appeal noted that at the time of the first instance decision there had been some doubt regarding the effect of Article 32. This has now been clarified by the Privy Council in: *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7 in which Mourant Ozannes represented the successful party (for our update please click [here](#)). As held in *Investec*, Article 32 does not cap a trustee's liability; rather it limits the class of assets to which a creditor may have recourse for enforcement of a debt. The Court of Appeal found that since the landlord had paid all sums ordered, the question of enforcement no longer arose.

This appeal point was dismissed in any event. The Court of Appeal held that the first judge was entitled to make the decision and that there were no grounds for the appeal court to interfere with that exercise of discretion. Due to the lateness of the request to amend, allowing it would have unfairly deprived the tenant of the opportunity to investigate and call expert evidence about the effect of Article 32.

## Reasonableness of Exclusion Clause

The Court of Appeal upheld the first instance's decision that the clause in question was an exclusion clause, seeking to exclude liability for misrepresentation. Consequently that clause was subject to the test of reasonableness under section 11(1) of the Unfair Contract Terms Act 1977.

Considered in context and by reference to the evidence available, the Court of Appeal upheld the first instance decision that the clause was not reasonable.

## Trustees Contracting In Their Capacity as Trustees and Not Otherwise

The landlord trustees entered into the lease "*in their capacity as trustees of the Barnsley Unit Trust and not otherwise*".

The Court of Appeal noted that, as recent restated by the Privy Council in the *Investec* decision, a person who enters into a contract in the capacity of trustee may limit his contractual liability to the extent of the trust fund, and will incur no personal liability in excess of the fund, provided that suitable words are used.

The difficulty for the landlord trustees in this instance was that the liability in question was not contractual. It was a liability for statutory damages arising under the Misrepresentation Act 1967. The question was whether the contractual wording was sufficient to extend to that statutory liability.

As the *Investec* authority made clear, English law does not recognise a trustee as having limited capacity or liability in respect of a third party. A trustee's personal liability will not be limited to the trust fund available for the purpose of meeting the claim. The default position is that a trustee is personally liable for damages for misrepresentation, which are not damages recoverable in contract. That liability may be limited or qualified by contract, but to do so effectively requires suitably precise wording. The Court of Appeal was not persuaded that the wording in this instance had been effective to limit or eliminate statutory liability.

## Lessons

The case serves as a reminder for trustees that they may contract to limit their personal liabilities as against third parties. This is readily achievable for contractual liabilities. For liability under statute and/ or tort, additional care must be taken to draft exclusions which are effective.

The need for care, and detailed legal advice, is increased where matters involve trusts issues and multiple jurisdictions. In this instance there were English law contractual and statutory provisions, Guernsey based trustees acting under a Jersey law trust. In addition to the drafting of exclusion clauses, advice is also valuable where parties are in dispute. Early engagement with qualified advisors is often key to determining strategy, brokering settlement and the presentation of such issues before the English courts.

The prominence of the *Investec* decision in this Court of Appeal judgment reinforces the reputation of the Channel Islands as the engine room of modern trusts law.

## Contacts

---



**Abel Lyall**  
Partner, Mourant Ozannes  
Guernsey  
+44 1481 739 364  
abel.lyall@mourant.com



**Justin Harvey-Hills**  
Partner, Mourant Ozannes  
Jersey  
+44 1534 676 105  
justin.harvey-hills@mourant.com

---

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED