

UPDATE

Guernsey Court of Appeal upholds finding of no gross negligence by former Trustees of Tchenguiz Trust

Update prepared by Jeremy Wessels (Partner, Guernsey)

On 10 August 2015, the Guernsey Court of Appeal delivered its final judgment in the long-running litigation in *Investec Trust (Guernsey) Limited & Anor v Glenalla Properties Limited (In liquidation) & Ors*. Mourant Ozannes acted for the Plaintiffs, ITG Limited (formerly Investec Trust (Guernsey) Limited) (**ITGL**) and Bayeux Trustees Limited, who were the former trustees of the Tchenguiz Discretionary Trust (**TDT**) (the Former Trustees).

On 10 August 2015, the Guernsey Court of Appeal delivered its final judgment in the long-running litigation in *Investec Trust (Guernsey) Limited & Anor v Glenalla Properties Limited (In liquidation) & Ors*. Mourant Ozannes acted for the Plaintiffs, ITG Limited (formerly Investec Trust (Guernsey) Limited) (**ITGL**) and Bayeux Trustees Limited, who were the former trustees of the Tchenguiz Discretionary Trust (**TDT**) (the **Former Trustees**).

The Court of Appeal had already delivered two judgments in relation to Article 32 of the Trusts (Jersey) Law 1984 (**Article 32**); first, that it applied to the relevant transactions, and second, as to its meaning and effect. The upshot of those judgments was that the Former Trustees were not personally liable for loans of over £200 million that they entered into in their capacity as trustees of the TDT, and they were entitled to recover from a subsequent trustee such trust property as was necessary to discharge their liabilities for the loans. The Court of Appeal also decided that a trustee was entitled to use trust property to discharge the loans regardless of whether an allegation of breach of trust against the trustee existed at that time, whether justified or otherwise.

The Court of Appeal's final judgment dealt with;

- the appeal by the fifth defendant, Rawlinson & Hunter Trustees SA (the **Current Trustee**) against the Royal Court's finding that the Former Trustees were not grossly negligent, and
- the Former Trustees' and the Current Trustee's appeals against the Royal Court's finding that the fourth defendant, Ocatello Investments Limited (**Oscatello**) had a claim in restitution against the TDT.

Background

The Former Trustees were previously the trustees of the TDT, a Jersey law discretionary trust established on 26 March 2007. The beneficiaries of the TDT were Robert Tchenguiz and his children and remoter issue.

ITGL was the trustee of the Tchenguiz Family Trust (**TFT**), a discretionary trust governed by BVI law. The property of the TFT was, until 2007, held for the benefit of Robert Tchenguiz and his brother, Vincent Tchenguiz. Their different business interests led to the establishment of the TDT. Assets within the TFT were appointed to the TDT on 24 August 2007, nominally held for the benefit of Robert (not Vincent). They included the entire share capital of 34 BVI companies (including some of the respondent companies to the appeal). Included in this appointment were loans owed to the TFT by those companies. When the assets were transferred, the Former Trustees entered into deeds of novation whereby they assumed liability for monies owed by the TFT to the Icelandic bank Kaupthing under a loan agreement dated 20 August 2007 for £100 million, plus monies owing to the First and Second Respondents, Glenalla Properties Limited (**Glenalla**) and Thorson Investments Limited (**Thorson**).

On 19 December 2007, Kaupthing's lending was consolidated by the entry into a Framework Agreement, under which a number of BVI companies which held TDT investments were transferred to the fourth respondent, Oscatello, as security for further significant borrowing from Kaupthing to refinance existing debt. This included the sum of £39,366,791.

In August 2009, Glenalla and Thorson were placed into liquidation and in February 2010 Oscatello was placed into liquidation. In April 2010, the joint liquidators demanded payment of outstanding loans said to be due by the Former Trustees, totalling approximately £183 million. On 2 July 2010, the Former Trustees were replaced by the Current Trustee.

In March 2010, the Former Trustees filed an application seeking a declaration as to the validity of the loans which they entered into in their capacity as trustees, plus declarations that they were not personally liable for those loans. The liquidators for the first to fourth defendants counterclaimed for repayment of the loans, totalling approximately £183 million, plus interest. The Current Trustee also filed a counterclaim in respect of the loans, alleging that the former trustees were grossly negligent and therefore, personally liable for the loans. In addition to its findings on the application of Article 32, the Royal Court held that the Former Trustees had not acted in breach of trust - amounting to wilful default or gross negligence - by entering into the loans. It also held that the TDT was liable to a claim in restitution by Oscatello for the loan of approximately £39 million.

Current Trustee's appeal

Procedural irregularity – delay in giving judgment

One of the Current Trustee's grounds of appeal concerned what it described as the 'serious procedural irregularity and delay' between the end of the trial and the handing down of the Royal Court's judgment, which took approximately 18 months. It was on that basis that the Current Trustee contended that the judgment should be set aside and that a re-trial should be ordered.

Whilst the Court of Appeal expressed its concern at the delay which occurred between the end of the trial and the delivery of judgment by the Lieutenant Bailiff, it noted that the existence of a delay did not, by itself, constitute a reason to quash the Royal Court's judgment. After analysing the relevant authorities on delay, the Court of Appeal held that this case did not appear to be one principally or even substantially concerned with the credibility and reliability of witnesses; the lengthy cross-examination of witnesses was more about the interpretation and effect of documents, rather than the truthfulness or reliability of witnesses themselves. The Court was satisfied that although an unacceptable delay had occurred, it did not justify allowing the Current Trustee's appeal on this ground.

Gross negligence

The Present Trustee contended, *inter alia*, that the Royal Court had placed too much emphasis at trial on the pleadings. The Present Trustee also contended that had the Court also considered the Current Trustee's arguments at trial and the witness evidence, it would have found that the Former Trustees acted improperly in accepting the novations of the loans.

The Court of Appeal held that a party seeking to hold a trustee liable in gross negligence had to establish that the alleged breach of duty actually caused the loss complained of. The Court went on to say:

'The former trustees were entitled to know with precision what the present trustee said was the extent of the duty owed by the former trustees, how that duty had been broken (involving a comparison of what the former trustees did and what the present trustees said they should have done instead), why the breach was said to be a grossly negligent breach, and how the breach had given rise to the loss claimed (in other words, that the loss would have been avoided if the former trustees had done what the present trustee says they should have done). The former trustees were entitled to expect that the case they had to meet in those respects would be set out in the pleadings; and they were entitled to expect that the Lieutenant Bailiff would determine the issues identified in the pleadings.'

The Court of Appeal held that in determining the issues at trial, it was appropriate for the Royal Court to concentrate on the pleadings. Having conducted an examination of the pleadings, the Court of Appeal noted that 'what the present trustee seeks to do in this appeal, as was clear to us from the submissions... is to substitute for its pleaded case one which is somewhat imprecisely expressed in the grounds of appeal.' Importantly, it noted that the Current Trustee's case as put in its grounds of appeal was 'not a case which

was put in any real, substantial or systematically considered sense in the Present Trustee's closing submissions at trial. Nor had it been a case introduced by amendment after the evidence. Most importantly, it was not a case put to the Former Trustees' witnesses in cross examination.' The allegation of gross negligence needed to be pleaded with specificity (which it was not).

Accordingly the Court of Appeal held that it was correct for the Royal Court to come to the view that it was not unreasonable, in the circumstances, for the Former Trustees to have entered into the loans and the Framework Agreement. The finding that their conduct could not be described as a serious or flagrant degree of negligence was upheld.

The Court also dismissed the Current Trustee's ground of appeal that the Royal Court had not applied the proper test in determining whether there had been any gross negligence by the Former Trustees. It considered that the Royal Court's approach to what constituted gross negligence had been consistent with the approach of Mance J in *Red Sea Tankers Ltd v Papachristidis* (the *Hellespont Ardent*) 1997 2 Lloyd's Rep 547:

"Gross' negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language ... gross negligence is capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard or indifference to an obvious risk.'

Restitution

As part of the Framework Agreement, Oscatello had instructed Kaupthing to pay a loan of approximately £39 million, which was a liability of the Former Trustees as trustees of the TDT. The monies used to pay that loan came from monies made available to Oscatello or its parent company, out of loans under the Framework Agreement.

The Former Trustees had accepted at trial that this represented an undocumented loan by Oscatello, but the Royal Court had not found any liability in contract, which the Court of Appeal upheld.

Both the Former Trustees' and the Current Trustee's appealed the Royal Court's finding that Oscatello was entitled to a claim in restitution on the basis that it had discharged the Former Trustees' debt to Kaupthing at their request, or with their consent, in the sum of £39 million.

Applying the four-stage test set out in *Banque Financiere de la Cité v Park (Battersea) Limited*, the Court held that there had been no such unjust enrichment as there was no evidence of a request by the Former Trustees that Oscatello discharge the debt owed by the TDT to Kaupthing Bank. It said that 'the critical element of enrichment was missing. The value of the former trustees' assets in their subsidiary Oscatello had been reduced by the same amount as the debt discharged and the former trustees had transferred valuable assets to Oscatello as part of the transaction.' Accordingly, the Court of Appeal overturned the Royal Court's finding that the Former Trustees were subject to binding obligations and restitution to Oscatello.

Conclusion

The Court of Appeal's judgment not only provides useful guidance about the principles to be applied in Guernsey in a claim in restitution, but it also re-states the proper test to be applied when determining whether a party's actions were causative of loss. From a trustee's perspective, the judgment demonstrates that it is not good enough for a party to accuse a trustee of gross negligence in respect of losses incurred by a trust without articulating what could have been done to avoid a loss. It is also a salient reminder of the importance of properly pleading those steps which could have been taken to avoid a loss and why the failure to do so caused loss and constitutes gross negligence.

Mourant Ozannes acted for the successful Former Trustees.

Contacts

Jeremy Wessels

Partner, Guernsey

+44 1481 739 303

jeremy.wessels@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

[Document Reference]