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UPDATE

Anti-Bartlett clauses: what are the lessons to be learned from Zhang Li?

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Introduction

The recent decision of the Hong Kong Court of Final Appeal (Final Court) in *Zhang v DBS Bank (Hong Kong)*[1] (*Zhang*) dismisses the idea of a 'residual' or 'high-level supervisory' obligation upon trustees and endorses the effectiveness of a well-drawn anti-Bartlett clause that seeks to exclude any obligation upon the trustee to intervene in the management of an underlying company other than in the case of actual knowledge of dishonesty. This article reflects on this decision, and in particular, whether a 'residual' or 'high-level supervisory' obligation should exist and what the decision in *Zhang* means for the trust industry and anti-Bartlett clauses more generally.

Anti-Bartlett clauses

Let us start by considering the anti-Bartlett clause itself. It stems from a trustee's core duty to act, in relation to the trust's investments, as the prudent person of business:

'*The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.*[2]

In Jersey,[3] statute also requires trustees, 'so far as is reasonable' to 'preserve' and 'enhance' the value of the trust property'.[4] The position under Guernsey law is substantively the same.[5] Both Jersey and Guernsey duties are subject to the terms of the trust. The equivalent duties under both Cayman Islands and British Virgin Islands law are to preserve the trust fund and manage it for the benefit of the beneficiaries, following English law.[6] According to the line of authorities following from *Bartlett v Barclays Bank*,[7] where a trustee has a controlling interest in a company, this means that trustee shareholders cannot sit passively and leave the running of the company wholly to the directors. The trustee has a duty to monitor the business of the company and if appropriate to intervene in it. What, precisely, is appropriate will be judged at the time of the particular decision in light of the prevailing circumstances.

Enter the anti-Bartlett clause. As modern trusts have been increasingly used to structure higher-risk investments, including family businesses, the use and scope of anti-Bartlett clauses, which are designed to

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[1] *Zhang Hong Li and others v DBS Bank (Hong Kong) Ltd and others* [2019] HKCFA 45.
[2] *Re Whiteley* (1886) 33 Ch. D. 347, 355 per Lindley LJ.
[3] Which is the law governing the Amsun trust, which was the trust subject to the decision in *Zhang*.
[4] Trusts (Jersey) Law 1984 art.21(3).
[5] Trusts (Guernsey) Law s.23(b).
[6] Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts*, 19th edn (Sweet & Maxwell, 2015), para.34–050 (Management of the trust property).
[7] *Bartlett v Barclays Bank* [1980] Ch 515; [1980] 2 W.L.R. 430.

delimit responsibilities in relation to the operation of those investments, has grown. From the professional trustee's perspective, the implementation of such a clause is often significant, because he or she frequently will not have the skills in the relevant industries to run the company. Indeed, this may also be the view of those who do run the company. Such an outcome also avoids the duplication of cost with an overlapping of responsibilities between a professional trustee and the existing management in relation to the business in question.

The wording of anti-Bartlett clauses varies. One occasionally sees clauses which simply confer a power on the trustee to leave the conduct of the company's business to its directors. But that power, unless the trust instrument provides otherwise, must be exercised for the benefit of the beneficiaries, so is unlikely to make a substantive difference to the trustee's investment duties in practice. It is more common for clauses to exclude what would otherwise be the trustee's duty to monitor and intervene. Some clauses, including the one in *Zhang*, go further and exclude the power to intervene.

The facts of *Zhang*

The decisions of the Hong Kong Court of First Instance, Court of Appeal and Court of Final Appeal in *Zhang* are important because they are some of the very few decisions which grapple with the scope and effect of the clauses.

The background facts can be briefly summarised as follows:

1. In 2005, Zhang Hong Li (ZHL) and his wife Ji Zhengrong (Ji) were settlors of the Amsun Trust (the Trust), a Jersey law governed trust, the purpose of which was 'asset protection and family wealth succession purposes'.[8]
2. The Trust was established with the assistance of DBS Bank (Hong Kong) Ltd (DBS Bank), with whom the settlors had a banking relationship. DBS Bank was the parent company of Nautilus Trustees Asia Ltd (the Former Trustee) and DHJ Management Ltd (DHJ), a BVI incorporated company providing management and corporate services. DBS Bank was also the parent company of Nautilus Corporate Services (Hong Kong) Ltd (DBS Corporate), which acted as DBS Bank's Hong Kong corporate services and corporate nominee subsidiary.
3. The Former Trustee was the original trustee of the Trust and the investments were to be held by a BVI company, Wise Lords Ltd (Wise Lords). Shares in Wise Lords were a Trust asset, held by the Former Trustee. Wise Lords' sole director was DHJ. Edwin Lim and Peter Lee were directors of DHJ.
4. The trust instrument contained a form of 'anti-Bartlett' clause. Paragraphs 4 and 5 of the First Schedule to the trust instrument contained express wording designed to disapply any duty, and to remove any power, which the Former Trustee might otherwise have had under the general law in relation to Wise Lords, unless the Former Trustee gained actual knowledge of dishonesty. Specifically:
   (a) Paragraph 4(a)(ii) imposed a mandatory requirement on the Former Trustee to leave the administration, management and conduct of the business to the directors and other authorised persons, including Ji as the company's investment adviser, unless the Former Trustee had actual knowledge of dishonesty.
   (b) Paragraph 4(a)(iii) imposed an obligation to assume that the conduct of the business was being carried on competently, the Former Trustee being under no duty to take any steps to ascertain whether or not those assumptions were correct.
   (c) Paragraph 4(d) expressly provided that the Former Trustee was not to be liable in any way for any loss to the company or the trust fund arising from any act or omission of the directors and other persons (including Ji) even where the act was dishonest, fraudulent, negligent or otherwise.
5. The relationship between the Former Trustee, DBS Corporate and Wise Lords was the subject of a services agreement, by which DBS Corporate was to perform or appoint one or more persons as nominees (which included DBS Corporate) to perform certain services in relation to Wise Lords. The services were the provision of a 'nominee' director, the provision of a registered office and onward transmission of correspondence, record keeping by company secretary and provision of bank signatories. After Ji transferred the one share in Wise Lords to DBS Trustee for the set-up of the Trust, the Former Trustee nominated DHJ to act as director of Wise Lords.

[8] *Zhang Hong Li and others v DBS Bank (Hong Kong) Ltd and others* [2019] HKCFA 45 at [11.1].

6. By an investment advisor agreement, Ji was appointed the investment advisor of Wise Lords with the ability to issue investment instructions on its behalf to DBS Bank. Wise Lords maintained a private banking account with DBS Bank in Hong Kong, through which the investments were carried out. Wise Lords was served by one key relationship manager at DBS Bank (the RM).
7. Between 2005 and 2008, Ji executed over 500 investment transactions for Wise Lords' account. The bulk, some 340, comprised trades in mutual funds. Overall, these trades had generated handsome profits. The judge in the Court of First Instance found that by May 2008, Ji had become disenchanted with mutual funds, thinking that the US market was going into a deep recession, which would affect the global economy, in turn affecting mutual funds. She redeemed most of Wise Lords' mutual fund holdings and switched her focus to investing heavily in foreign currencies, particularly Australian dollars (AUD) and euros (EUR), currency-linked notes, and, ultimately, currency decumulators,[9] with increasing leverage.
8. Between 2006 and 2008, Wise Lords' overdraft facility was gradually increased from US$10 million to US$100 million. It was later found at trial that Ji had strongly and repeatedly pressed DBS Bank to increase the credit line, and that the RM had helped support the last few applications for increases by exaggerating to DBS Bank, ZHL's and Ji's assets and income.
9. By August 2008, Wise Lords' portfolio comprised over AUD122 million deposits (purchased in 11 tranches on just six trading days in July and August 2008), currency-linked notes for US$20 million (linked to AUD and EUR) and some EUR deposits, against a US$96 million overdraft. The portfolio had grown substantially in a short time against leverage.
10. However, by August 2008, the AUD began its decline against US dollars. The purchases incurred losses given the currency mismatch (against US dollars borrowing) and leverage. It was later found at trial that, despite the worrying AUD situation and repeated warnings from DBS Bank, Ji remained bullish and resisted unloading Wise Lords' long positions at anything less than break-even point. What Ji did instead was to execute 'decumulators' for AUD76 million and €6 million. It was found at trial that Ji wanted to be able to sell Wise Lords' substantial holdings of AUD only at the rate she wished and was willing to take substantial risks to do so.
11. Over the subsequent months Wise Lords continued to suffer significant losses and by March 2009, it had suffered a net reduction in its Net Asset Value of around 70 per cent from its position in March 2008.

The decisions in *Zhang*

The judge at trial found that Ji's power to make investments was subject to the Former Trustee's and DHJ's power to override Ji's decisions, or reverse transactions she conducted for Wise Lords. The Former Trustee and DHJ had 'high-level supervisory' roles, which remained notwithstanding (in the Former Trustee's case) the effect of the 'anti-Bartlett' provisions identified above. The judge went on to note that, notwithstanding that the Former Trustee and DHJ had powers to perform supervisory functions, the powers were never exercised to reverse any of the 519 investment transactions made. In practice, approvals to transactions and credit facilities were sought from and given by DHJ and the Former Trustee after the event.

In a judgment of July 2018, the Court of Appeal affirmed the First Instance Court's decision and dismissed the appeals of the Former Trustee and DHJ. It also dismissed the plaintiffs' cross-appeal. The Court of Appeal found that the scope of the 'residual obligation' on the Former Trustee and DHJ was a 'high-level supervisory duty'. The Court of Appeal stated:

> 'What is important is that DBS Trustee itself recognized the purpose of this high level supervision is to ensure that the value of the trust fund is subject to appropriate controls, reviews, investment expertise and management. The bottom line for the implementation of this high level supervision was for DBS Trustee to approve the investments (although not pre-approving them) with the power to override Ji's decisions and reverse the transaction she advised for Wise Lords. My view is when the Judge held that DBS Trustee had breached this high level supervisory duty which it had accepted, he was precisely addressing the very issue that the defendants had raised in their own case. This is in line with the expert evidence of Professor Matthews about the 'core obligation' of the trustee.'[10]

[9] These were complex, high-risk instruments which were structured to allow a reduction in AUD and EUR holdings gradually over time.
[10] *Zhang* [2018] HKCA 435 at [6.14].

Then, in December 2019, the Court of Final Appeal, released its judgment on the appeal from the Court of Appeal's decision. Allowing the trustees' appeal, it decided:

1. The alleged 'high level supervisory duty' was inconsistent with and excluded by the anti-Bartlett provisions of the trust deed. Accordingly, given the terms of the trust, the court said there is no 'high level supervisory duty' which would have required the Former Trustee to query and disapprove of the transactions entered into by the company, thereby interfering with Ji's management of the company.
2. Whilst Ji sought the Former Trustee's approval of the transactions, the evidence showed that the Former Trustee had no active supervisory role as the transactions were reported to the Former Trustee after the event, and the approvals represented a mere acknowledgement of the information received.
3. In any event, even if the Former Trustee was under a duty to supervise the company's investments, the court found that approval of the investments in question did not amount to gross negligence and any liability would be excluded by the exemption clause covering acts short of fraud, misconduct or gross negligence.

Some preliminary observations on *Zhang*

Before addressing the key question about the validity of anti-Bartlett clauses, we will discuss a number of other practical issues for trustees, settlors and their advisers which the judgment raises.

The first is a drafting point, which does not appear to have been raised before the court in *Zhang*, in that there appears to have been a potential inconsistency between two of the key provisions which made up the anti-Bartlett clause. One of them stated that

> 'the Trustees shall leave the administration management and conduct of the business and affairs of such company to the directors officers and other persons authorised to take part in the administration management or conduct thereof and the Trustees shall not be under any duty to supervise such directors officers or other persons *so long as the Trustees do not have actual knowledge of any dishonesty* relating to such business and affairs on the part of any of them.'[11]

The other provided that

> 'the Trustees shall assume at all times that the administration management and conduct of the business and affairs of such company are being carried on competently honestly diligently and in the best interests of the Trustees in their capacity as shareholders or howsoever they are interested therein until such time as they shall have actual knowledge to the contrary and so that the Trustees shall not be under any duty at any time to take any steps at all to ascertain whether or not the assumptions contained in this sub-clause are correct.'[12]

Under the former provision, the trustee could only intervene if it had actual knowledge of dishonesty, whereas it seems implicit in the latter that they had a duty to intervene if they had actual knowledge that the business was not being conducted competently, honestly, diligently or in the best interests of the Trustees as shareholders. So, if they know that the company is say, being managed incompetently, but they have no knowledge of dishonesty, what should the trustee do? It is possible that they can rely on the former clause and do nothing, but given the possible inconsistency between the two, and the propensity of the courts to construe investment provisions strictly such that trustees retain discretion unless it is expressly excluded,[13] a trustee should consider whether it should apply to the court for directions.

The construction of these clauses may be an issue to be resolved in a future case, as the authors have seen these types of inconsistencies from time to time.[14] In any event, the moral is to ensure that there are no inconsistencies in the drafting.

The second issue is that the precise terms of the clause are important. In particular it is (probably) important to ensure that the power to intervene is excluded as well as the duty, albeit the latter is more

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[11] *Zhang* [2018] HKCA 435 at [34] [emphasis added].
[12] *Zhang* [2018] HKCA 435 at [34] [emphasis added].
[13] We discuss this point further below.
[14] For example, very similar clauses were contained in the trust instruments in another recent case: *In the Matter of the KSH No 4 Trust, the KSH no 5 Trusts, the KSH No 6 Trust and the GK and the JK Trusts* [2017] JRC 214A: see [12].

common. For example, it has been held by the BVI Court that an exclusion of the trustee's duty to interfere in the management of the underlying company[15] did not

> '... relieve [the trustee] of the duty to satisfy itself from time to time that nothing untoward was affecting the value of the shares.'[16]

In effect, the Trustee still had a duty to monitor the company's business. The clause in *Appleby v Citco* did not exclude the duty to monitor or supervise the company's business, but it is noteworthy that the Law Commission in England and Wales takes the view that it would not matter if it had done:

> 'In some cases, a trustee will be unable to rely upon duty exclusion clauses as a matter of construction of the particular clause. For example, the terms of a trust may provide that the trustee shall not be obliged to supervise or interfere in the management of any company in which he holds the majority shareholding. This duty exclusion clause does not prevent the trustee from supervising or interfering in the management of the company. It does mean that the trustee who fails to supervise or to interfere is not automatically in breach of trust. But if the failure to supervise amounts to negligence on the part of the trustee, the duty exclusion clause should not save the trustee from liability. A trustee who fails to exercise a power when he or she should do so commits a breach of trust. In this example, liability is incurred by the trustee without any need to strike down the duty exclusion clause. As a matter of construction, the clause does not apply where the trustee has acted negligently.'[17]

The Law Commission Report came out before *Zhang* but since *Zhang* does not specifically address the effect of duty exclusion clause, as opposed to the wider power exclusion clauses, it is still likely to represent the law.

Thirdly, the way in which the underlying assets become the company's assets may be relevant. Clearly, if the trustee decides to invest through an underlying company, it cannot be absolved from its usual investment duties as a result of that. On the other hand, if the shares are settled on trust with an anti-Bartlett clause in place, it should in principle apply.

This brings us into the fourth preliminary issue which arises from *Zhang*, which concerns the general investment duties of the trustee. Part of the reason for the conclusion in *Zhang* that there was no high-level supervisory duty was the existence of certain provisions in relation to the trustee's general investment duties. In short, they are as follows[18]:

1. The acquisition of speculative investments was authorised.
2. The Trustee had no duty to diversify investments.
3. The statutory duty to preserve and enhance the value of the trust fund was excluded.

It is not entirely clear from the judgment as to why these provisions were considered to be relevant—if the anti-Bartlett clause is valid, the only situation in which the trustee has a duty to intervene in the business of the company is actual knowledge of dishonesty on the part of the directors. If that is correct, it does not matter whether, for example, the assets are suitably diversified or speculative in nature. What would the position have been if these duties had not been modified in the trust instrument? It is hard to see how it could have made a difference, unless the trustee's general duties of investment also apply to the management of the assets held in the company notwithstanding the anti-Bartlett clause, which itself seems to be inconsistent with the anti-Bartlett clause.

If that is the case, does that mean that the trustee must take steps to ensure that the directors manage the assets in accordance with those duties? But if so, and the directors are in breach of those obligations, the only action the trustee can take is to apply to court for directions and it is arguable that they would have a duty to do so in those circumstances. That would be analogous to the situation where the investment powers are reserved by the settlor or conferred on a third party under the trust (we refer to such settlor or

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[15] The trust instrument in that case incorporated the standard administrative provisions set out in Second Schedule to the BVI Trustee Act 1961 (as amended) which include a common form Anti-Bartlett clause.
[16] *Appleby Corporate Services (BVI) Ltd v Citco Trustees (BVI) Ltd* BVIHC 156/2011, 20 January 2014.
[17] Law Commission Consultation Paper, LC 171 (2 December 2002), para.4.91, available at http://www.lawcom.gov.uk/project/trustee-exemption-clauses [Accessed 5 February 2020].
[18] The detailed provisions are set out in *Zhang* [2018] HKCA 435 at [33].

third party in this article as the Investment Manager) and the trustee has no concurrent investment power.[19] In that situation, if the Investment Manager abuses its power, it is likely that the trustee has a duty to apply to the court for directions.[20] It must also be arguable that a duty to apply to court arises where the directors are in breach of their duties.

If the trustee's investment duties are relevant to the management of the company's assets, it does also raise the question of whether the trustees had power to borrow for investment purposes, as that would not normally be permitted.[21]

Reflecting on the residual duty[22]

That brings us to the heart of the matter: the validity (or otherwise) of an anti-Bartlett clause which excludes the trustee's power to intervene except in very limited circumstances, such as dishonesty on the part of the directors. At the heart of the Final Court's reasoning is the view that there was no authority for the residual duty:

> 'But adopting the reading proposed by the Court of Appeal is even more difficult as it entails accepting that Matthews was intending to advocate the existence of a broad implied residual obligation arising outside of, and contradicting or overriding, the express anti-Bartlett provisions held by both experts to be valid under Jersey law. No authority is cited for such an obligation and it is difficult to see any principle which justifies its existence and, as mentioned, it would be inconsistent with Matthews' earlier statement. Anti-Bartlett provisions are generally incorporated in the Trust Deed in cases like the present because the parties wish to enable the settlor or the settlor's nominee freely to exercise control and management of the underlying company, especially regarding matters such as its investment decisions, and to relieve the trustees of any management or supervisory duties in that regard (save where extreme situations such as those involving actual knowledge of dishonesty might arise).'[23]

Underhill and Hayton argue[24] that there is a basis for a residual duty, citing *Beauclerk v Ashburnham*[25] and *Cowan v Scargill*[26] as authority for an overriding duty which cannot be ousted and the irreducible core content of trusteeship referred to in *Armitage v Nurse*.[27] In our view, neither is authority for any such duty. *Beauclerk v Ashburnham* was decided on the basis of the construction of the trust deed, so the point did not arise. Similarly, it did not arise in *Cowan v Scargill*, as there was no exclusion of the trustee's usual duties in that case.[28] Nor do we think that *Armitage v Nurse* is of any relevance on this question, as it only dealt with the question of the minimum standard of care which applies to the exercise of the trustee's duties, not the question of which duties can be modified or excluded by the trust instrument.[29]

However, one principle which does seem to emerge from the cases dealing with investment direction powers is that the courts have been reluctant to construe them as excluding all trustee discretion. In practice, it is likely that they will normally be strictly construed (although a principle to that effect does not seem to have been stated explicitly) such that matters which are not expressly conferred on the Investment Manager remain with the trustee. As a result, trustees have been held to retain a power to satisfy themselves on the question of price[30] and as to title and value of security.[31]

There does not therefore seem to be any judicial authority for a residual duty, but might there be another ground for attacking the validity of such clauses? After all, the consequences of a valid anti-Bartlett clause are stark in a situation where fiduciaries are holding assets for the benefit of others: the trustees cannot

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[19] If it does have investment powers, but they are subject to the direction of the Investment Manager, it can exercise them if it does not receive investment directions: *Re Hart's Will Trust* [1946] 2 All E.R. 557.
[20] Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th edn (Sweet & Maxwell, 2015), para.34–059, (6).
[21] *In re Suenson-Taylor's Settlement* Trusts [1974] 1 W.L.R. 1280; [1974] 3 All E.R. 397.
[22] When we refer to anti-Bartlett clauses in this section of the article, we mean the type of clause included in *Zhang*, where the power to intervene is excluded.
[23] *Zhang* [2018] HKCA 435 at [64].
[24] D. Hayton, P. Matthews and C. Mitchell (eds), *Underhill and Hayton, The Law of Trusts and Trustees*, 19th edn (LexisNexis, 2016), para.48.58.
[25] *Beauclerk v Ashburnham* (1845) 8 Beav 322.
[26] *Cowan v Scargill* [1985] Ch. 270; [1984] 3 W.L.R. 501.
[27] *Armitage v Nurse* [1998] Ch .241, at 253; [1997] 3 W.L.R. 1046.
[28] See also R. Davern, 'Trustee Residual Obligation: Is There a Basis for It?' (1999) 25(3) *Trusts & Trustees* 285–295.
[29] See also, Davern, 'Trustee Residual Obligation: Is There a Basis for It?' (1999) 25(3) *Trusts & Trustees* 285–295.
[30] *Re Hill* [1896] 1 Ch. 962, at 966; see also *Re Hart's Will Trusts* [1943] 2 All E.R. 557.
[31] *Re Hotham* [1902] 2 Ch. 575.

intervene in the company's business, even where they know that the directors of the company are in breach of their duties to the company and that the breach is causing loss to the trust fund. That would be the case even if beneficiaries asked the trustees to intervene (perhaps long after the settlors were gone). The trustee could presumably apply to the court for directions[32] and, if necessary, for a variation of the trust to confer the necessary power to take action. Given its fiduciary position, it must at least be arguable that it has an obligation to do so. If so, the trustee may therefore be liable to the beneficiaries for failing to apply to court in order to preserve the value of the trust fund, even if the anti-Bartlett clause is valid.

There are good arguments for upholding an anti-Bartlett clause and the courts will not lightly strike down arrangements which have been freely entered into. As it was put in *Zhang*:

> 'To postulate that the parties' chosen scheme may be overridden by some implied, non-derogable external duty arising in circumstances 'where no reasonable trustee could refrain from exercising otherwise excluded powers' would be to introduce an amorphous and ill-defined basis for undermining a legitimate arrangement consciously adopted by the parties, exposing the trustees to unanticipated risks of liability and sowing confusion as to the extent of their duties.'[33]

The decision may also reflect distaste at parties (such as ZHL and Ji) who seek to retain control over investment functions and subsequently hold the trustee liable for any losses. But that is not in itself a justification for finding that there is no such duty or that anti-Bartlett clauses are valid. Rather, if there is a duty imposed on the trustees notwithstanding the anti-Bartlett clause, the settlors would not normally be able to bring proceedings (as beneficiaries) for a breach of that duty as they had consented to it in full knowledge of the facts.[34] The company may also have a claim against the settlors for breach of contract or negligence or both in the performance of their investment management function, although that is likely to be more difficult to prove[35] and to be much more fact-specific. If there is a claim against the directors, a beneficiary may compel the trustee to bring a claim and an anti-Bartlett clause will not prevent it.[36]

Should wider policy considerations underpin how this issue is approached by the courts? Let us consider that question firstly from the perspective of two of the key stakeholders: the settlor and the trustee. One might argue that the assumption on the part of trustees and settlors is that the words of the trust instrument will, to the extent possible, be given effect. One might also argue that certainty for the settlor, in setting out intentions which he or she wishes to be put into effect, and for the trustees, who are clear on the precise scope of their duties and responsibilities, is important. A world in which trustees have residual duties, which are not easily defined, arguably erodes confidence for trustees and others involved in the industry, including those who provide funding for them. This may have a number of potentially undesirable consequences, including increased costs of trustee services, longer on-boarding processes and background checking, less choice in the market-place for those selecting trustees and greater restrictions on what trustees will do. Will settlors have less faith in the trust concept and, if so, might they consider alternative structuring and investment mechanisms? Although there is no express consideration of these policy issues in the Final Court's ruling, it may be possible that some regard was given as to the consequences of the residual duty when the Final Court was determining the issue in *Zhang*. On the other hand, it might also be said that a valid anti-Bartlett clause still leaves a great deal of uncertainty about their operation and the trustee's duties in practice, not least as to the question of if and when a trustee has a duty to apply to court for directions.

In any event, if it is right that residual duties exist, where are the boundaries drawn? Can they be drawn in the same way in every case? Presumably not. The issues in *Zhang* were, in many ways, an extreme example of things going wrong. The losses sustained by the trust by 2009 was in excess of 70 per cent of its NAV—in the region of US$25 million. In the lead up to these losses Wise Lords' overdraft facility had been increased, on Ji's (the investment advisor) authorisation, from US$10 million to US$100 million and over 500 investment transactions had been executed by Ji. While the trustee had the power to override or reverse Ji's decisions, at least from a company law perspective, this power was never exercised. In practice, approvals to transactions and credit facilities were sought from and given by the trustee and DBS after the event. In a case of such high stakes and missed opportunities (as well as clear anti-Bartlett provisions), the

[32] Contrast the position under a VISTA trust, which is discussed further below.
[33] *Zhang* 2018] HKCA 435 at [64].
[34] Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th edn (Sweet & Maxwell, 2015), para.39–106 et seq.
[35] One reason for that is that the duties imposed on directors are not as onerous as those imposed on trustees and in particular, the prudent person of business rule does not normally apply to directors.
[36] Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th edn (Sweet & Maxwell, 2015), para.34–059, (7).

issues around a potential residual duty are brought into focus, but the same might not be said in the majority of cases where the margins are much finer.

What does 'high-level supervision' actually mean, in any event? Take, for example, a trust which holds a family trading company. How realistic is it for a trustee without any professional skills in the business of the family company to monitor its performance so as to work out whether something untoward is going on? Also, how practical it is for the trustee to obtain the information it needs about the business? Are there restrictions on the provision of such information? Would the articles of association of underlying companies need to be changed to permit the trustee access? It seems unlikely that these issues cannot be overcome with careful planning at the establishment of the trust, but it serves to illustrate that the nature of the high-level supervisory duty will always be fact-dependent.[37]

In considering this question it is worth stepping back to consider the main principle in *Bartlett*, which was that the trustee could not avoid its usual investment duties (in that case, the duty to avoid speculative or hazardous investments) simply by investing through a company. If an anti-Bartlett clause is valid, it must follow that the trust instrument can remove the trustee's general investment duties whether or not the investments are managed through a company.

Is that possible? Or is that something which the courts should strike down on public policy grounds? Public policy does not appear to have been raised in *Zhang*. It has been described as

> '...that which has a tendency to be injurious to the public or against the public good, which may be termed as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.'[38]

Notwithstanding earlier dicta to the contrary,[39] it is now settled law that there can be new heads of public policy: 'The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time'[40]; and '[n]ew heads of public policy come into being, and old heads undergo modification.'[41]

If a clause is struck down on public policy grounds, the effect is normally that it is void, unless the offending provision can be validated by deleting parts of it under the so-called 'blue-pencil rule'.[42] It is not clear how that could leave a residual 'high-level' duty—either it is fully effective or it is entirely void and, if it is void, the trustee will have all the usual duties in relation to the management of the company's assets. That would seem harsh on the trustee where it has accepted trusteeship on the express terms that it would not have any of those duties.

Of course, settlors have no obligation to give anything to the beneficiaries (at least in jurisdictions where there are no forced heirship rules). If the settlors had retained the assets, they would have been entitled to allow the directors to mismanage the assets so that the value ultimately passing to the beneficiaries under their wills would be lower (or nothing). Why should a settlor not be able to settle assets on trust on the same basis?

A possible answer to that may be that in the trust context, no one can hold the directors to account. While the shares in the company are owned by individuals, it is their decision to hold the directors to account (and their loss if they do not). Is it against the public interest for individuals to be able to settle their assets in such a way that no one is ultimately responsible for their management, despite the fact that they are held by a fiduciary for the benefit of others? It is unlikely that well-advised settlors would want that to be the case in all circumstances—they may be happy with that position while they are managing them but what of the position after they have passed away? What if it is another family member? It seems likely that

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[37] This point was acknowledged in another Jersey case: *Re the L Trust* [2017] JRC 168A at [90].
[38] *Egerton v Brownlow (Earl)* (1853) 4 HL Cas 1 at [196], per Lord Truro.
[39] 'I deny that any court can invent a new head of public policy': *Janson v Driefontein Consolidated Mines Ltd* [1902] A.C. 484 at [491]–[492], per Lord Halsbury.
[40] *Naylor, Benzon & Co Ltd v Krainische Industrie Gesellschaft* [1918] 1 K.B. 331 at [342], per McCardie J.
[41] *Re Jacob Morris (deceased)* [1943] NSW SR 352 at [355]–[356], per Jordan CJ.
[42] Although in *AN v Barclays Private Bank And Trust (Cayman) Ltd and Six Others* [2006] CILR 367 it was held that words could be inserted to validate a clause, at least where there was an express provision in the trust instrument to that effect; this was the provision in the trust deed in the AN case: 'If anything herein contained is contrary to any such law then the offending provision shall be deleted or if possible construed in accordance with such law without prejudice to the remainder of the terms and provisions hereof.'

he or she would want them to have some protection (perhaps an exclusion of liability for mere negligence), but would that extend to all breaches of duty, such that the other beneficiaries have no protection? What if it is a professional investment manager? But if that is what the settlor genuinely wants, then why should the courts not give effect to it?

The decision raises some other difficult issues. As controlling shareholder, the trustee typically has power (as a matter of company law) to remove and appoint directors of the company. At some point, directors will retire, die or become incapable of acting. What should the trustee do? As this is not a case of dishonesty, can the trustee take action to appoint successors? On the natural meaning of the clause, the answer would appear to be no, although it would be possible in principle to avoid this particular problem by careful drafting. These are issues that are expressly dealt with under the VISTA[43] legislation. VISTA provides for rules governing the appointment, retirement, removal and remuneration of directors and for the principles which should apply in the absence of office of director rules.[44]

Assuming the trustees do appoint directors, can they then rely on the anti-Bartlett clause, so that the trustee cannot take any action, however incompetent the directors are, provided they are not dishonest? Could the trustee be liable for the appointment? It would be odd if they were not, but if so, that seems harsh as, once the directors are appointed, they cannot then remove them, even if they are incompetent or otherwise acting in breach of their duties.

In those types of circumstances, a trustee would seem to have little choice but to apply to the court for directions. It was this concern that led the BVI to exclude any duty on the trustee of a VISTA trust to apply to court.[45]

Conclusions

Let us turn back to the questions posed at the beginning of this article, namely, should a residual duty on trustees exist and where does the decision in *Zhang* leave trustees and others working in the trust industry? Should they be confident in the protection that anti-Bartlett clauses offer, or should they nevertheless be exercising caution when considering their actions and conduct in light of these clauses?

Our tentative view is that anti-Bartlett clauses should in principle be upheld, as there is no clear basis for a residual duty and no obvious public policy reason to strike them down, but the contrary is arguable and, if they are to be used, great care should be taken in drafting them. But, of course, what will be of most interest, in particular, is how the Jersey courts, applying Jersey law, or indeed, the courts in Cayman, BVI, Guernsey or any other offshore jurisdictions will approach the issue as and when it arises.

Consideration should be given to including provisions permitting the trustee to intervene in carefully defined circumstances, and only when requested to do so. That is part of the framework of VISTA trusts, in which trustees can only intervene if called upon to do so by 'interested persons'[46] (such a call is known as an 'intervention call') and only if one or more specified grounds (the 'permitted grounds for complaint') are made out. Indeed, it would often be preferable to use a special trust regime, such as VISTA or STAR[47] which would give greater certainty for both trustees and settlors and therefore reduce the likelihood of a court application being necessary.

In terms of drafting new anti-Bartlett clauses in new trusts:

1. It would be prudent to do so with the blue pencil test in mind so that offending provisions can be deleted if it were held to be void. In short, the test is that '.... to be severable, a provision had to be capable of being removed without adding to the remaining wording.' For an example of this technique in relation to forfeiture (no contest clauses)—see Drafting British Virgin Islands Trusts,[48] paras 22.7 to 22.14 (No-contest clauses).

[43] Virgin Islands Special Trusts Act, 2003 (as amended) (VISTA).
[44] VISTA s.7; see also J. Kessler, T. Pursall and N. Chand, *Drafting British Virgin Islands Trusts*, 1st edn (Sweet & Maxwell, 2014), Ch.17 (VISTA Trusts).
[45] VISTA s.6(3)(d) provides that subject to the Act, the trustee '.... shall not apply to the court for any form of relief or remedy in relation to the company.'
[46] This includes beneficiaries.
[47] See, for example, J. Kessler and T. Pursall, *Drafting Cayman Islands Trusts*, 1st edn (Kluwer Law International, 2006), Ch.17 (STAR Trusts).
[48] Kessler, Pursall and Chand, *Drafting British Virgin Islands Trusts*, 1st edn (Sweet & Maxwell, 2014).

2. Consider including the equivalent of (1) office of director rules (2) permitted grounds for complaint and (3) intervention calls, to minimise the risk of there being a gap which means that the trustee's only recourse is an application to court.
3. For greater certainty, use a regime such as VISTA or STAR.

With regard to existing trusts, the trust industry can take comfort from the observations of the Final Court, but it would seem prudent for the industry to adopt a defensive approach to how it deals with problems which arise where an anti-Bartlett clause is said to be in operation. We suggest that that defensive approach should include:

1. As a starting point, understanding the scope of the anti-Bartlett clause in question. Does it address the supervision or conduct at hand? Is there any scope for widening the wording? If the assets of the trusts are financial investments, trustees may wish to reflect on whether, for example, there is room for expanding that scope so as to disclaim liability for their withholding approval for investments recommended by the investor advisor.
2. It will usually be inappropriate for a trustee to disregard the anti-Bartlett provision completely and to instead deeply immerse themselves with those assets or that business. If the trustee does so, he or she may have assumed a duty of care to the beneficiaries. The trustee will then be required to take wider, more substantive steps if they are to avoid a claim for breach of trust.
3. A trustee should, nevertheless, stay engaged in relation to the assets under his or her control. If that is the shares in an underlying company in respect of which he or she is not a director and has little or no day-to-day involvement, then he or she should be considering, notwithstanding the existence of an anti-Bartlett clause, whether he or she is doing enough to safeguard those assets under his control. At least, they must have a duty to take reasonable steps to ensure that they are likely to be on notice of an issue which does require them to intervene. Whether it is then enough to raise concerns with the Investment Manager or the directors (or both), or require an application to court for directions will be a difficult decision for the trustees which is likely to turn on its facts. If a trustee has wider responsibilities, then different considerations will apply. If in doubt, the trustee should take appropriate legal advice.

Whatever the position the courts ultimately reach on the validity of anti-Bartlett clauses, it seems likely that those advising both trustees and settlors will be scrutinising these types of clauses in more detail in the future and they will be subject to a greater degree of negotiation.

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