Clarity for trustees around corporate trustee mergers

Insights - 02/11/2023

The recent English case of *USAF Nominee No. 18 Limited & Ors v Watkin Jones & Son Limited [2023] EWHC 1880 (TCC)* considered a number of preliminary Jersey law related issues. This included whether, by reason of a merger in 2009 under Jersey law, there was a defect in the appointment of trustees thereafter which adversely affected the ability of each claimant to bring proceedings.

The Court confirmed the widely accepted view that Article 127FN (formerly Article 127G) of the Companies Law (Jersey) 1991 (the **Companies Law**) does apply to merging corporate trustees. This means that the respective trusteeships, together with all rights and obligations in respect thereof, continue in the surviving merged entity by operation of law, without the requirement for any additional trust documents or assignments or novations. As a result, the Court found that there was no defect in the subsequent appointment of trustee and so, there was no impediment to the claimants issuing proceedings against the defendant.

While this is an English law judgment, the Jersey courts would likely find it highly persuasive.

Background

The case concerned proceedings brought by USAF Nominee No. 18 Limited (**C1**), USAF Nominee No. 18A Limited (**C2**) and Apex Group Trustee Services Limited (**C3**) (C1, C2 and C3 together, the **claimants**) concerning the alleged defective design and construction of the external façade of a building known as "Jennens Court" in Birmingham by Watkin Jones & Son Ltd (the **defendant**). The contract under which the defendant was engaged was a JCT 1998 Edition with Contractor's Design, with bespoke amendments, dated 4 Jul 2007, for the design and construction of 586 ensuite student bedrooms in cluster flats, some retail units and a dance studio (the **development**). The cost of the development was £17,980,000.

On 22 February 2008, the defendant provided a collateral warranty and in mid-2020, following an inspection of Jennens Court, concerns were raised about the suitability of the cladding which

was later replaced. The total cost of the replacement works was £3,797,000.

C1 and C2 are the present registered title holders to a long lease of Jennens Court as nominee for C3 (as trustee of the USAF Portfolio 18 Unit Trust (the **Trust**)) and together brought claims for breach of the collateral warranty and/or negligence under the Defective Premises Act 1972. Aside from the substantive dispute on the claims, the defendant alleged that the claimants did not have title to bring the claims on the basis that, by reason of a merger in 2009 between two BNP Paribas entities under Jersey law, there was a defect in the subsequent appointment of trustees thereafter which adversely affected the ability of the claimants to bring these proceedings.

The merger

On or around 22 February 2008, the long lease to Jennens Court was assigned by the defendant to BNP Paribas Services Trust Company (**B1**) and BNP Paribas Securities Services Custody Bank Ltd (**B2**). On 30 June 2009, B2 merged with a different BNP Paribas entity, namely BNP Paribas Services Trust Co. (Jersey) Ltd (**B3**) (the **merger**). For the purposes of the merger, B2 and B3 each passed a special resolution stating that B2's issued share capital would be added to that of B3, with its own shares being cancelled. The special resolutions were registered with the Jersey Financial Services Commission (**JFSC**) and the Certificate of Incorporation notes that "B2 and B3 continue as one company, being B3". Furthermore, a letter from the Deputy Registrar of the JFSC dated 7 July 2009 noted that B2 ceased to be a company incorporated under the law on 30 June 2009 and "having ceased to be a company under the Companies Law, BNP Paribas Securities Services Custody Bank Ltd cannot be reinstated".

The defendant's position

The defendant contended that the effect of the merger was that B2 did not continue in existence as part of B3 such that B3 did not, as a result, acquire any of the property or rights or liabilities of B2. The only way that B3 could have such property, right or liabilities vested in it is first, and crucially, if it had been appointed as a trustee in place of B2 – but it never was. The effect of this, as contended by the defendant, is that the later, subsequent appointment of C3 as trustee was invalid. Equally invalid were the transfers of the long lease and the benefit of the collateral warranty to C1 and C2 to hold as nominee for and on behalf of C3. The defendant also contended that the Merger under Jersey law is irrelevant since the question of transfer should be decided under English law.

The claimants' position

The claimants contended that the effect of the merger was that B2 continued in existence as part of B3 and further, that the legal title to the long lease and the benefit of the collateral warranty vested in B1 and B3 by operation of law, namely pursuant to the provisions of Article

127FN (formerly Article 127G) of the Companies Law. Furthermore, and again by operation of law, B3 became the "other" trustee to B1. Accordingly, C3 was properly appointed as trustee on 9 December 2015 and C1 and C2 had title to the benefit of the collateral warranty and the long lease to hold on trust for C3. The fact that all of the claimants expressly held their interests upon trust (in the case of C1 and C2 as nominee for C3 and in the case of C3, for the beneficiaries of the Trust) does not, as contended by the claimants, affect their ability to bring these claims and nor does it impede their ability to recover damages for the losses caused by the defendant.

Judgment

Having preferred the evidence of the claimants and agreeing that Jersey law should apply, the Court found that the long lease and the benefit of the collateral warranty vested in B3 (jointly with B1) because of the merger. As a result, the argument put forward by the defendant that an assignment or novation of the long lease or the collateral warranty was irrelevant. The Court rejected the argument that vesting does not occur where the underlying substantive rights or property are held by the merging company as trustee (as shown by B2) and that the trusteeship does not move. The Court also rejected the argument put forward by the defendant that B2 was never "entitled" to the benefit of trust property. The overall conclusion was therefore that there is no impediment to the claimants' title to sue.

Ogier corporate partner, Raulin Amy, gave evidence on behalf of the claimants.

The practical reality here is that the merger provisions in the Companies Law have historically been used by multiple trust companies on internal restructurings usually after trust company acquisitions. Trust companies have "merged" corporate trustees and the surviving trustee entity from the merger has carried on as trustee of the trusteeship of all the merging corporate trustee entities without the requirement for deeds of appointment and retirement or any other trust documents such as deeds of assignment or novation to be entered into. Using the merger option is generally far more cost effective than the trustee having to enter into potentially hundreds of deeds of appointment and retirement in respect of its trusteeship. It has always been understood that the merger provisions in the Companies Law allowed for this.

We now have clarity from a High Court judgment that this is indeed the effect of the merger provisions and that nothing else is required at trust level. Consideration has previously been given to amending the Trusts (Jersey) Law 1984 and the Companies Law (which seems the better of the two options) to clear up any perceived grey area on this issue and to provide absolute certainty.

It remains to be seen whether these changes will be introduced but the judgment provides considerable clarity and comfort on this issue.

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