

Investec and ors v Glenalla and ors (unreported) 06/12/13

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The recent judgment in the Guernsey case of (*Investec & ors v Glenalla & ors*) deals with the risks faced by the Trustees of an insolvent trust.

There were two sets of proceedings in this case, known as Guernsey 1 and Guernsey 2. Guernsey 1 was the main claim which took place in open court. Guernsey 2 was in private and comprised a number of *Beddoe/Public Trustee v Cooper* -type applications in which approval or guidance was sought from the Court in relation to the continuing administration of the trust and its assets. In Guernsey 2 Ogier represented the current trustees, Rawlinson and Hunter (R&H), and played a major role in a large number of these applications.

Guernsey 1 was concerned with a large trust structure called the Tchenguiz Discretionary Trust (or TDT). The TDT was a Jersey law discretionary trust, but the Trustees were Investec and Bayeux (the **Former Trustees**) in Guernsey who ran and administered the trust from Guernsey. The trust contained an indemnity clause which stated that no trustee should be liable for any loss to the trust fund or its income unless the loss should arise by reason of that trustee's own fraud, wilful misconduct or gross negligence.

| Facts

The Former Trustees entered into a transaction which should have allowed limited recourse to a prescribed group of companies, but instead, opened up the whole of the trust assets to the liability. As a result of the 2008 financial crisis, the companies on the other side of the transaction (known as the **BVI Companies**) went into liquidation, and made a huge claim well above the value of the trust against the Former Trustees, who in turn sought an indemnity from the trust assets. There was some argument about whether the claim should be brought in Jersey

or in Guernsey, but it was held that it should be heard in Guernsey, and Jersey law should be applied under section 4 of the Trust (Guernsey) Law, 2007 (the **Guernsey Trust Law**).

The Former Trustees were replaced as trustees by R&H, but in order to protect themselves, the Former Trustees took a lien over the trust assets. This left the trust in the bizarre situation whereby R&H were not in control of any of the trust assets as they were all held by the Former Trustees. With the current trustees not in control of the assets, the majority of the general administration of trust property had to be overseen by the Court in the Guernsey 2 proceedings.

Judgment

It was held that whilst the Former Trustees had been negligent in entering into the transaction they were not grossly negligent, nor did their behaviour amount to wilful default.

It was also determined that the Former Trustees were not, as a result of improper or unreasonable conduct, deprived of their right to rely on article 26(2) of the Trusts (Jersey) Law 1984 (the **Jersey Trust Law**) (which allows the trustee to reimburse himself out of the trust for expenses/liabilities reasonably incurred in connection with the trust).

Article 32

The parties had all proceeded on the basis that the trust should either be governed by principles of Jersey Law (in accordance with the Trust Instrument) or by Guernsey Law (in accordance with where the Trustees were based and where the trust was administered).

If governed by Jersey Law, under Article 32, a claim against a Trustee qua trustee would be limited to the extent of the Trust property. In these circumstances, this would mean that the Former Trustees (even if found liable) would be protected in their personal capacity, and the BVI companies, if successful in their claim, could only recover to the extent that their claim was covered by the value of the trust assets. Section 42 of the Guernsey Trust Law contains a similar section which has the same effect. The judge, however ruled as follows:

- 1 If the proceedings had been brought in a Jersey court by a third party against the Trustee of a Jersey trust, article 32 would apply notwithstanding the *lex causae* of the transaction, unless it was expressly provided for;
- 2 If the proceedings had been brought in a Guernsey Court by a third party against the trustee of a Jersey trust, and the proper law of the transaction was Jersey law, then article 32 would apply;
- 3 If the proceedings were brought in a Guernsey court in relation to a Guernsey trust, the trustee could rely on section 42 of the Guernsey Trust law.

However, because in the present case the proceedings were brought by a third party against a Guernsey trustee (or former trustee) of a Jersey Trust to enforce claims arising under Guernsey law, article 32 was held not to apply. This was because section 65 of the Guernsey Trust Law (the section which deals with the enforcement of foreign trusts) could not be used to make article 32 apply as this was not a case about enforcing the trust; it was a third party claim. This, in turn, meant that the trustees were not held to have the protection of article 32.

If this case is upheld at appeal, it will mean that Guernsey trustees of a Jersey trust will need an express Jersey jurisdiction clause in any transactions that they enter into qua trustee, if they want to enjoy the protection of article 32.

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Meet the Author



Simon Davies

Partner

Guernsey

E: simon.davies@ogier.com

T: [+44 1481 737175](tel:+441481737175)

Key Contacts



Mathew Newman

Partner

Guernsey

E: mathew.newman@ogier.com

T: [+44 1481 752253](tel:+441481752253)



Simon Dinning

Partner

Jersey

London

E: simon.dinning@ogier.com

T: [+44 1534 514251](tel:+441534514251)



Edward Mackereth

Global Managing Partner

Jersey

E: edward.mackereth@ogier.com

T: [+44 1534 514320](tel:+441534514320)



Nick Williams

Partner

Jersey

E: nick.williams@ogier.com

T: [+44 1534 514318](tel:+441534514318)

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