

## Investec Trust (Guernsey) Limited et al v Glenalla Properties Limited et al, Court of Appeal,...

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### Investec Trust (Guernsey) Limited et al v Glenalla Properties Limited et al, Court of Appeal, 29 October 2014

*Appeal against the decision of the Royal Court on 6 December 2013 that Article 32 of the Trusts (Jersey) Law 1984 (as amended) did not apply to transactions entered into between the trustees of a Jersey law trust and companies owned by those trustees.*

Issues raised in this Court of Appeal judgment were the subject of trial before the Royal Court in which judgment was given by the Lieutenant Bailiff Sir John Chadwick PC on 6 December 2013. The first appeal on 27 June 2014 held that the trustees could rely on Article 32 of the Trusts (Jersey) Law, 1984 (TJL), meaning that the Former Trustees would have no personal liability in respect of the loans beyond the assets of the TDT.

The second appeal, on 29 October 2014, addressed the meaning and effect of Article 32 TJL and focussed on whether the trustee's liability was limited by Article 32, specifically whether the Former Trustees had a right of indemnity against the trust assets of the TDT.

## Background

Investec Trust (Guernsey) Limited and Bayeux Trustees Limited (the Former Trustees) were the Guernsey-based trustees of the Jersey law Tchenguiz Discretionary Trust (the TDT). In their role as trustees, the Former Trustees recorded that a number of loan arrangements had been entered into with several BVI Companies, now in liquidation (the BVI Companies). The Former Trustees assumed liabilities for monies owed to the first and second defendants and borrowings

under a loan agreement. Proceedings were issued in which the BVI Companies sought repayment of the loan arrangements, and the amounts claimed exceeded the value of the assets in the Trust.

## The First Instance Decision

The Royal Court held that, as the Trust was governed by Jersey law but proceedings were held in Guernsey, it was a “foreign trust” for purposes of the Trusts (Guernsey) Law, 2007 (TGL) meaning that this law could not be used. Therefore, the Former Trustees could not rely on the protection of s42 TGL which is the equivalent of Article 32 TJL, leaving the Former Trustees open to personal liability.

The principal issue then was whether the Former Trustees were entitled to rely, as against the BVI Companies, on Article 32 of the TJL. However, the Royal Court concluded that as the proceedings had been brought in Guernsey against the Former Trustees of a Jersey trust, the Former Trustees were not entitled to rely on Article 32 of the TJL and were therefore personally liable for the full claims against them.

## The Appeal

### Article 32 TJL

1. *“Where a trustee is a party to any transaction or matter affecting the trust –  
(a) If the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;  
(b) If the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity).”*
2. *Paragraph (1) shall not affect any liability the trustee may have for breach of trust.”*

### The meaning and effect of Article 32

It was not in dispute that the BVI Companies were aware that the Former Trustees were acting as trustees in the transactions with which this litigation concerned, thus Article 32(1) (a) applied.

Where a trustee is a party to a transaction to which Article 32(1) (a) applies, the Court of Appeal held that:

- (a) the trustee has no personal liability in respect of the claim which arises out of a transaction or matter;

- (b) an earlier trustee has a right to recover from a subsequent trustee such trust property as is necessary to satisfy the claim;
- (c) upon satisfying such liability to the extent of the trust property, the trustee is entitled to discharge in respect of the liability; and
- (d) the ability of the trustee to satisfy the liability out of the trust property does not depend upon whether or not there exists at the time any allegation of breach of trust, whether justified or otherwise, against the trustee.

As can be seen, Article 32(1) (a) has the effect of excluding the personal liability of the trustee where he has engaged in a transaction with a person who knows him to be a trustee. This is a matter of fact for the court to decide in each particular case, and the time the contract was entered into is the relevant time when considering the person's knowledge of who they are contracting with.

The final words of 32(1) (a) provide that any claim *"shall extend only to the trust property"*. The Court of Appeal found that the plain reading of these words was that such a claim could not extend beyond the trust property, thus the only logical consequence was that such a claim could not extend to the personal property of the trustee. Therefore, the obligation of the trustee would be fulfilled as long as he satisfied a claim by expending all of the trust assets as they exist at the time when the claim falls to be satisfied.

An issue arises where the trustee with whom the other person transacted has in the proper administration of the trust been replaced as trustee and has handed over trust assets to the new trustee, thus the former trustee does not have control over the trust assets so as to enable him to satisfy the claim from *"the trust property"*. The Court of Appeal held that 32(1) (a) does not entitle a trustee to be discharged so long as he satisfies the claim from the trust assets which the trustee holds. It follows then that the trustee who has transacted has a right to be indemnified by a subsequent trustee out of and up to the limit of the trust assets held by the latter. The Court of Appeal characterised this as an equitable right in the form of, or analogous to, a non-possessory lien.

The Court of Appeal held that sub-paragraph 1(a) does not create a direct right of recourse to the trust assets in favour of the other party who knowingly transacted with a trustee.

The Court of Appeal held that sub-paragraphs (1) (a) and (b) represent an alteration to the position of creditors as well as trustees. Paragraph 2 has the effect of entitling the creditor to have his claim settled out of such trust assets as there are, including trust assets held by a subsequent trustee, notwithstanding any dispute which may exist that the trustee is in breach of trust. This appears to improve the position of the creditor who, under the general trust law, would be prevented from satisfying his claim out of trust assets and would be prevented from having any right of subrogation to a claim from the trust assets, so long as an alleged breach of

trust was in dispute.

Therefore, in rejecting the Royal Court's decision, the Court of Appeal found that Article 32 TJL did apply in this case and the TGL did permit the Guernsey court to apply Jersey law in respect of Jersey trust law thus recognising the applicability of Article 32 in determining the disputes which were raised in these proceedings.

## Commentary

The effect of the decision of the Court of Appeal is that it confirms/restores the statutory safeguards for Jersey trustees against personal liability in certain circumstances.

But the decision is a very important reminder of three practical points for Guernsey and Jersey (and other) trustees.

First, the availability of the Jersey statutory limitation of trustee liability is not absolute – it is subject to satisfying a number of important conditions, in particular that the trustee is itself a party to the transaction and that the counterparty knows it is dealing with the trustee in its capacity as trustee as a trust. Even if a trustee seems to be within Article 32 it may lose the benefit of the protection afforded if it has conducted its trusteeship in a manner that would justify Article 32 not being applied (and the circumstances in which this may happen will be the subject of a further appeal to be heard in early 2015)

Secondly, there is no need for a trustee to rely solely upon the statutory limitation of liability. If a trustee wants greater comfort and certainty regarding the extent of their liability, they should include specific contractual liability limitation language in the documents they are party to. This is especially so when the contractual documents are not governed by Jersey or Guernsey law.

Thirdly, trustees need to think beyond just their “home” law. In the Glenalla case a Guernsey trustee was trustee of a Jersey proper law trust and contracting with BVI counterparties. It is not enough for the trustee to consider only their “home” law (i.e. the law under which they're established) – they need to consider all the relevant laws and how they interact.

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