

Investec Trust (Guernsey) Limited et al v Glenalla Properties Limited et al, Privy Council, 23 April

Insights - 27/04/2018

There were a number of appeals against decisions of the Guernsey Court of Appeal, however, only one raised points of general public importance regarding the interpretation of articles 26 and 32 of the Trusts (Jersey) Law 1984 (TJL).

Ogier has previously reported on the first instance and Court of Appeal decisions:

[Investec and Ors v Glenalla and Ors \(unreported\) 06/12/13](#)

[Investec and Ors v Glenalla and Ors - Court of Appeal Judgment 27 June 2014](#)

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

Background

The proceedings were concerned with a large trust structure called the Tchenguiz Discretionary Trust (TDT). The TDT was a Jersey law discretionary trust, but the trustees were Investec and Bayeux (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, willful misconduct or gross negligence.

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 (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.

The appeal to the Privy Council

A question on appeal was whether the liability of the Former Trustees was limited to the trust assets by article 32 of the TJL. The Privy Council considered the effect of article 32 was to abrogate the rule of English law that the law looks no further than the legal entity which assumed the liability. It dealt with the status of a trustee, against whom a claim was made, making a legal distinction between his personal and fiduciary capacities, providing he may be treated as incurring his liabilities "as trustee" and therefore without recourse to his personal estate. The reasons given were as follows:

- a. The object of the provision was to limit the exposure of the trustee. Since he was already entitled to do so contractually by law, it was reasonable to suppose the draftsmen intended something further;
- b. The phrase in article 32(1) (a) "shall be against the trustee as trustee and shall extend only to the trust property" must be read as a whole. The words limiting the "claim" to the trust property served to describe the character of the claim – a claim against a trustee in that capacity only, with the limitation to trust assets following on from that;
- c. That view of the matter was strengthened by the contrast between subsection (1) (a) which dealt with a claim against the trustee as such, and subsection (1) (b) which dealt with a claim against the trustee personally. Prior to the enactment of article 32, the trustee could incur liabilities only in his personal capacity. The effect of the article was to create two capacities.

As the Privy Council found that liability was limited by article 32, they had to go on to consider whether a creditor whose debt was incurred by a trustee in that capacity had direct recourse to the trust assets to satisfy his debt, or was limited to claiming through the trustees by right of subrogation (in which case, the creditor's claim would be limited to the amount the trustees could claim by way of subrogation).

The Privy Council held that nothing in article 32 modified the pre-existing rule of law that a creditor can access the trust assets only by way of the trustee's right of indemnity, subject to the limits on that right imposed by the trust deed or general law. The continued subsistence of the rule was acknowledged in section 54(4) of the TJL and the Privy Council held that the creation of a new direct means of recourse against the trust fund would be a radical departure which should not be inferred or implied in the absence of clear words.

Having answered those questions, the Privy Council examined whether article 32 of the TJL applied in Guernsey, which they noted depended on the private international law of Guernsey. The Privy Council noted that three strands emerged. The first, named the "status rule" was that the common law should recognise that questions as to the capacity in which trustees act, and the liability consequences which flow from that capacity, should be governed by the proper law

of the trust of which they are trustees. The second was that the Trusts (Guernsey) Law (TGL) sufficiently declared that the proper law of the trust determines the nature and extent of the trustees' liabilities to third parties. The third, was that in a jurisdiction in which, under its domestic law, the liability of trustees to "knowing" creditors (i.e. creditors who know they are dealing with persons who are acting as trustees) was limited to the assets of the trust, there was sufficient analogy with other limits on the classes of assets upon which creditors could enforce, to make it appropriate to recognise the substantially identical proper law of the trust, so as to make article 32 applicable.

Thus, the Privy Council concluded article 32 was applicable, such that the extent of the liability of the Former Trustees of a Jersey trust was governed by the proper law of that trust.

The Privy Council then proceeded to consider the meaning and effect of article 26(2) of the TJL. Article 26 TJL deals with the remuneration and expenses of a trustee. Article 26(2) provides "*a trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust.*" In the Royal Court, it had been alleged that the Former Trustees had acted unreasonably in allowing the BVI loans to subsist in or after December 2007. There, it had been held that to treat a liability originally reasonably incurred but thereafter unreasonably allowed to continue as falling outside the indemnity conferred by article 26(2) would involve a misinterpretation of the statute, as it sought to import into the article words of limitation the legislature had not thought fit to include – it should not be read as if 'liabilities reasonably incurred' was qualified by the words 'and reasonably permitted to subsist'. The question would not be whether the Former Trustees had acted unreasonably in failing to extinguish the liabilities, rather whether they were guilty of wilful default or gross negligence.

The Privy Council essentially agreed with the Royal Court and considered the adoption of a wider meaning which included the unreasonable failure to discharge a liability would itself be an even more certain recipe for uncertainty. It held that article 26(2) was intended to afford trustees a simple means of paying for expenses and liabilities, or refunding themselves for expenses paid from personal assets, without troubling the court for directions. If that ability was put in doubt wherever a review of their conduct after originally incurring a liability gave rise to a claim for breach of trust, the effect of the statutory indemnity would be much reduced.

Other matters

The appeal also raised another important point of law. During the course of the proceedings, the Guernsey Court of Appeal had refused a number of applications for leave to appeal to the Privy Council, applying a test of whether the appeal raised arguable questions of law of general public importance. However, the Privy Council said this approach was inconsistent with the terms of section 16 of the Court of Appeal (Guernsey) Law, 1961, which provided for an appeal as of right from the Court of Appeal where the value of the matter in dispute is equal to, or

exceeds, the sum of five hundred pounds sterling. This re-iterates the judgment of the Privy Council in the case of *A v R* [2018] UKPC 4, which was handed down on 5 March 2018.

Conclusion

The decision will be a welcome relief for Guernsey trustees who now have certainty as to the position where they are administering Jersey law trusts. In addition, the decision may be welcomed by many legal practitioners, not only because of the certainty regarding the protections afforded by articles 32 and 26(2) TJL, but also in respect of the Privy Council's strong comments regarding the right of appeal to the Privy Council.

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