

Anti-Bartlett clauses – normal service resumed...

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Introduction

Those in the private wealth and trusts industry will be well aware of 'Anti-Bartlett clauses' in trust deeds. Such clauses are drafted to exclude the duty of a trustee to supervise or intervene in the business affairs of companies in which the trust holds shares. The first instance decision and 2017 judgment of the Hong Kong Court of Appeal (*Zhang Hong Li v DBS Bank (Hong Kong) Limited*) concerning a Jersey law governed trust, had cast doubt on the efficacy of such clauses. However, on further appeal, in a judgment handed down on 22 November 2019, the Hong Kong Court of Final Appeal has essentially restored the status quo and confirmed that Anti-Bartlett clauses effectively exempt trustees from any liability for losses incurred in transactions by a trust's underlying investment companies, unless they become aware of actual dishonesty. This decision is of wider importance to the common law trust jurisdictions as the relevant principles engaged are likely to be the same.

Origin of Anti-Bartlett clauses

Anti-Bartlett clauses were developed after the English decision of *Bartlett v Barclays* [1980] Ch 515, where it was held that, in circumstances where a trust holds a controlling block of shares in a company, the trustee has a consequent duty to: (i) take action when the affairs of the company are not being conducted appropriately; and (ii) use its powers to obtain information and decide whether to intervene. This in essence amounts to a duty to be involved in the underlying business, with *Brightman J* holding that: "Where trustees hold the whole or virtually the whole of the shares of a private company, the property of the company is regulated by the memorandum and articles of the company and the trust deed together; and the duties of the trustees in relation to the assets of the company are in some respects the same as if the assets were vested in themselves as trustee". To address this, it is often appropriate to include an anti-Bartlett clause in trust deeds, to exclude that duty to enquire and supervise in respect of situations where the trust holds a controlling interest in underlying companies.

The 2017 decision of the Hong Kong Court in Zhang Hong Li v DBS Bank (Hong Kong) Limited had raised questions on whether it was possible to exclude the trustee's duty to enquire and supervise with an anti-Bartlett clause.

Facts of Zhang Hong Li v DBS Bank

Trust structure:

- 1. Settlers - Madam Ji Zhengrong ("JZ") and her husband Zhang Hong Li were settlors of the Jersey law governed Amsun Trust (the "Trust").**
- 2. Trustee - The original trustee was DBS Trustee HK (Jersey) Limited (the "DBS Trustee").**
- 3. Investment Company - Upon establishment of the Trust, the sole share in a British Virgin Islands investment company (Wise Lords Limited, "Wise Lords") was transferred to the DBS Trustee, as the sole asset of the Trust.**
- 4. Director - Although JZ was the initial sole director of Wise Lords, upon establishment of the Trust she was replaced by a sole corporate director DHJ Management Limited (an entity of DBS Bank, the "DBS Director").**
- 5. Investment Advisor - JZ was appointed to be the investment advisor of Wise Lords, and the DBS Director granted her authority to give investment instructions on behalf of the company.**
- 6. Bank - Wise Lords held an investment account with the private banking division of DBS Bank (the "Bank").**

Importantly, the trust documentation included an extensive and bespoke anti-Bartlett clause and other relevant provisions. Of particular note was a provision stating 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". Furthermore, the trust documentation provided that the Trustee "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... until such time as they have actual knowledge to the contrary". The Trustee was relieved of any duty "at any time to take any steps at all to ascertain whether or not the assumptions contained in this sub-clause [ie the assumptions that the administration of the business of the company is being carried out competently etc] are correct".

Between 2005 and 2008, JZ executed over 500 trades in mutual funds of shares in the PRC, investing successfully and achieving profits. From about October 2007, the investments in mutual funds began to show diminished returns, and so JZ adopted a new the investment strategy focusing on foreign exchange transactions. As at 18 August 2008, the Portfolio was concentrated to the extent of approximately 85% in foreign currency exposure in various currencies, with 81% of the Portfolio with exposure to Australian dollars. JZ also caused Wise Lords to increase significantly its leverage ratio (net assets of USD 35.4m against borrowings of USD 96.4m). Therefore, the Portfolio was transformed completely over the course of about 3 months, during a period of high market volatility eventually leading to a market crash and significant losses for the Trust.

In February 2011, proceedings were commenced by the beneficiaries, successor trustee, and Wise Lords asserting claims against: (i) the Former Trustee for both dishonest and negligence breach of fiduciary duty; (ii) the DBS Director or Wise Lords for both dishonest and negligence breach of fiduciary duty; and (iii) the Bank and some of its employees for dishonest assistance of the Trustee's breaches of duty.

Decision at First Instance

The decision of the Hong Kong Court of first instance (Bharwaney J) ruled that the Trustee and the DBS Director were empowered effectively to override the decisions of JZ and reverse transactions, and therefore held that the Trustee was in breach of its "high level residual duty" to supervise the Trust (also amounting to gross negligence) and the DBS Director was grossly negligent in breach of fiduciary duty to Wise Lords in allowing it to buy such high risk products.

Decision on Appeal

On appeal, the Court of Appeal examined the anti-Bartlett clause, and upheld the Court of First Instance's decision. By this, the Court of Appeal had effectively called into question the effectiveness of anti-Bartlett clauses, with Hon Cheung JA holding:

"there is a residual obligation cast on the trustee which these clauses do not exclude. The trustee as such trustee has in relation to the trust property all the powers of a natural person acting as

the beneficial owner of such property. Although the trustee has no obligation to interfere in the business of the company, and no obligation to obtain information regarding the company, it still has a power to do so, because it is a member of the company. If circumstances were to arise where no reasonable trustee could lawfully refrain from exercising those powers, a failure to do so in such a case would amount to a breach of trust." (Hon Cheung JA, citing Professor Matthews with approval.)

Decision of Court of Final Appeal

The Hong Kong Court of Final Appeal (with a panel of Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Cheung PJ, Mr Justice Tang NPJ, and Lord Neuberger of Abbotsbury NPJ) overturned the first instance and Court of Appeal decision.

The Court held that the effect of the anti-Bartlett clause was to restrict the powers of the Trustee to interfere in the conduct or management of Wise Lords' investment business. The Court therefore concluded that the high level supervisory duty was inconsistent with the anti-Bartlett clause and thus that "there is no basis for the existence of the "high level supervisory duty" accepted in the courts below and advocated on this appeal".

Notwithstanding that the parties had reached a settlement after the conclusion of the hearing of the appeal, the Court decided that judgment should be handed down, because the case involves issues of law of general importance and which had attracted considerable public interest domestically and internationally.

Conclusion

This decision provides a welcome degree of certainty on the construction of anti-Bartlett clauses in common law courts. This is a helpful reminder to trustees to ensure that the trust documentation includes appropriate anti-Bartlett clauses and that they do not become involved in the underlying business of companies held in the trust save where they detect dishonest activities.

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