

Investec and Ors v Glenalla and Ors - Court of Appeal Judgment 27 June 2014

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The judgment in the Court of Appeal in the above matter considered an appeal on one part of the judgment of Lieutenant Bailiff Chadwick (the Judge) of December 2013 (the remainder of the appeal is yet to be heard). Whilst the dispute itself was a complex trust dispute involving several parties' claims and counterclaims in relation to various transactions, this appeal focussed a very specific but important point; can Guernsey-based trustees of a Jersey-law trust benefit from the limitation of liability provisions available to trustees under article 32 of the Trusts (Jersey) Law 1984 (the Jersey Trust Law) in relation to a contract, the governing law of which is not Jersey?

Background

Investec Trust (Guernsey) Limited and Bayeux Trustees Limited (together the Former Trustees) were the Guernsey-based trustees of the Jersey law Tchenguiz Discretionary Trust (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). 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. Whether the monies are due and owing was the subject of lengthy litigation. One particular aspect of that litigation was, if it were found that monies were due and owing under the loans, whether the amounts claimed were limited to the value of the trust fund or whether the Former Trustees were personally liable to pay the shortfall once the assets of the trust had been exhausted.

Article 32 of the Jersey Trust Law limits a trustee's liability to third parties in the circumstances where it is clear that a trustee is acting qua trustee. This acts to limit the trustee's liability to the trust property (although it should be noted that this does not affect any liability a trustee may

have for breach of trust).

Keeping in mind that the TDT was a Jersey trust, and the litigation was taking place in Guernsey, it was also argued at first instance that section 65 of The Trusts (Guernsey) Law, 2007 (the Guernsey Trust Law) should apply. This section, entitled 'Enforceability of foreign trusts', provides that a foreign trust is governed by, and shall be interpreted in accordance with, its proper law. Thus, it was argued at first instance, the Former Trustees were protected from personal liability by article 32.

The First Instance Decision

The Judge rejected this argument and held that article 32 should not apply. He decided that he did not need to decide which law governed the loan transactions; it was enough for him to find that the transactions were not governed by Jersey law. This then led to the question of whether the claims of the BVI Companies should be treated as governed by Jersey law despite the fact that it was not the law of the transactions. As a foreign trust, the TDT was not subject to the provisions of the Guernsey Trust Law regarding dealings by trustees with third parties. The judge therefore considered the effect of section 65 of the Guernsey Trust Law but concluded that it could only be used in the enforcement of a foreign trust. As the case was not dealing with the enforcement of the trust but instead dealt with a claim against the trust assets by a third party creditor, the judge concluded that section 65 could not be used to enable article 32 to apply, and thus the Former Trustees were held not to have the protection of article 32 and therefore could not limit their liability to the extent of the trust property. Thus the Former Trustees were held to be personally liable for the full amount of the loans (£183 million) with a right of recourse to the trust assets.

The Appeal

The Former Trustees appealed the decision in relation to article 32 and the Court of Appeal made the following three main findings:

Enforcement

The Judge's finding that the impact of section 65 of the Guernsey Trust Law was restricted to the enforcement of foreign trusts was incorrect. Section 65 was held simply to provide that a foreign trust shall be governed by its proper law. In their discussion on this point, the Court of Appeal looks at the different parts of the Guernsey Trust Law and the application of each of those parts, some of which are said to apply solely to foreign trusts, and some of which are said to be of wider application (for example section 69 which deals with the general powers of the court). The Court of Appeal therefore concluded that it was not enough to just look at section 65 and one must instead look at the jurisdiction of the Royal Court's powers. Therefore, with the exception of section 65, there is no conflict of laws provision under the Guernsey Trusts Law, and an

examination needed to be made of the conflict of laws position.

Conflict of Laws

When looking at proper law issues in his original judgment, the Judge did so without the benefit of submissions from the parties. The Court of Appeal tackled this issue head on. As there were no conflicts rules that were of direct application to the position of trustees contracting qua trustee, those rules relevant to members of a corporate body and to partnerships were examined instead. Analogies were drawn with both corporate bodies and partnerships, and the Court of Appeal reached the conclusion that there should be no distinction between trusteeship (when trusteeship is recognised by that jurisdiction and the other party is aware that the trustee is acting qua trustee) and corporate entities and partnerships with their separate personalities.

The Court of Appeal also ruled that article 32 was a substantive provision and not merely procedural, thus bringing it into the purview of conflict of laws principles. This was on the basis that it has the effect that, where it is known that party X is acting as trustee that any claim is against party X as trustee and that the liability of party X is only to the extent of the trust property. There is no need for any further procedural step to be taken. Therefore, courts should recognise article 32.

Application of Article 32

The Court of Appeal rejected the Judge's finding that article 32 did not protect the Former Trustees because section 65 of the Guernsey Trust Law did not apply, despite the trust being a Jersey trust. The view of the Court of Appeal was that, in circumstances where the Guernsey Trust Law provided exactly the same protection as the Jersey Trust Law, it would be perverse to suggest that the provisions in that other jurisdiction should not be applicable simply because the forum was Guernsey.

Conclusions

In relation to the article 32 issues raised by the first instance judgment, the Court of Appeal reversed a decision which seemed to many to have arbitrarily unfair results for Guernsey trustees of Jersey trusts. It therefore appears that those Guernsey trustees are in a far safer position in relation to non-Jersey transactions than briefly appeared to be the case, and do, it seems, have the protection of article 32.

Interestingly however, whilst it is clear from the Court of Appeal decision that this is what would happen when there are Guernsey trustees of a Jersey trust, in what other circumstances would article 32 (or, indeed, foreign equivalents) be honoured in Guernsey? Section 4 of the Guernsey Trust Law provides that the Royal Court has jurisdiction over not only Guernsey law trusts but also any trusts where a trustee of which is resident in Guernsey, any property of which is situated or

administered in Guernsey or the terms of which provide that the Royal Court is to have jurisdiction.

Whilst the Court of Appeal did not have to decide this point, there is no obvious reason of principle or policy why, as long as the Royal Court had jurisdiction under section 4, the approach of the Royal Court of Guernsey to foreign statutory provisions limiting trustee liability to the trust assets should be any different. If that is right, if the Royal Court has accepted jurisdiction over a trust dispute because, for example, the main trust asset was property administered in Guernsey there does not appear to be any reason why Jersey trustees of a Jersey-law trust, should not, if litigation was commenced in Guernsey, be protected by the provisions of article 32.

This approach, it seems, should also be taken where the Royal Court of Guernsey has to consider a trust whose governing law contains provisions similar to article 32 as long as they are not contrary to Guernsey policy or principle.

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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



Nick Williams

Partner

Jersey

E: nick.williams@ogier.com

T: +44 1534 514318

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