



# A trustee's liability for transactions affecting a trust

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## Basic principles of English law:

- A trust is not a legal entity separate from a trustee
- A trustee who enters into a contact with a third party contracts as principal, not as agent for the beneficiaries
- The trustee's liability to the third party is not limited to the value of the trust assets
- A trustee is entitled to be indemnified out of the trust property in respect of properly incurred liabilities
- A trustee's right of indemnity is secured by a lien
- A third party may be entitled to be subrogated to the trustee's right of indemnity and lien



The trustee may limit his liability to the third party by contract:

*Muir and Others, Trustees v City of Glasgow Bank and Liquidators* (1879) 4 App Cas 337

*Watling v Lewis* [1911] 1 Ch. 414 (Warrington J)



# Trust (Jersey) Law 1984

*Applicable only to Jersey trusts:*

## **32 Trustee's liability to third parties**

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.



- “transaction or matter” - extends beyond contractual liability
- Time when knowledge must be acquired – before becoming a party to the transaction or matter
- Time for ascertaining the trust property to which the third party’s claim extends – possibly issue of proceedings: *Re Robinson's Settlement [1912] 1 Ch. 717*
- A direct claim by the third party against the trust property? No
- Is the right of recourse referred to in paragraph (1) (b) different from the right of reimbursement referred to in Article 26 paragraph (2)? No
- Is the trustee’s right of recourse or reimbursement defeasible by claims against him? Yes



## Trusts (Guernsey) Law 2007

*Applicable only to Guernsey trusts:*

### **Dealings by trustees with third parties.**

42.

1. Subject to subsection (3), where, in a transaction or matter affecting a trust, a trustee informs a third party that he is acting as trustee or the third party is otherwise aware of the fact, the trustee does not incur any personal liability and a claim by the third party in respect of the transaction or matter extends only to the trust property.
2. If the trustee fails to inform the third party that he is acting as trustee and the third party is otherwise unaware of the fact –
  - a) he incurs personal liability to the third party in respect of the transaction or matter, and
  - b) he has a right of indemnity against the trust property in respect of his personal liability, unless he acted



## Trusts (Guernsey) Law 2007

*Applicable only to Guernsey trusts:*

### **Dealings by trustees with third parties.**

42. (continued)

3. Nothing in this section prejudices a trustee's liability for breach of trust or any claim for breach of warranty of authority.
4. This section applies to a transaction notwithstanding the *lex causae* of the transaction, unless the terms of the transaction expressly provide to the contrary.



## **Investec Trust (Guernsey) Ltd et al v Glenalla Properties Ltd et al**

*Royal Court of Guernsey Ordinary Division (Lieutenant Bailiff Sir John Chadwick) 6 December 2013*

- Claims to enforce the loans were not claims to enforce the trusts of the Settlement, but third party claims against the trustees
- Whether Article 32 applied was governed by the proper law of the loan agreements
- The proper law of the loan agreements was not Jersey law, so Article 32 was



*Court of Appeal (Civil Division) (J W McNeill QC, J V Martin QC, R L Martin QC) 27 June 2014*

Two related questions:

- whether a contractual obligation in a particular sum is binding on a particular person;
- if it is, whether the liability of the obligor is restricted by virtue of its status under its domestic law

Rule of English conflict of laws that the law of a company's place of incorporation determines the extent of a member's liability for the company's liability; similar rule in relation to limited liability partnerships

The rule extends to a trustee



Extension:

limited to the situation where a third party contracts with a person knowing that he is a trustee.

treats proper law of a trust as the equivalent of the law of incorporation of a company.

Ratio: where, to the knowledge of one party to a contract, the other party is acting as a trustee, Guernsey law will give effect to a limitation on the liability of a trustee arising under the proper law of the trust.



**Conclusion:** under Guernsey law, the liability of a trustee under a contract with a third party is limited:

to such extent as the contract provides; and additionally

if the trust is a Guernsey trust and the other party knows that the trustee is acting as trustee, to the trust property (Trusts (Guernsey) Law 2007 section 42)

if the trust is not a Guernsey trust and the other party knows that the trustee is acting as trustee, to the extent provided by the proper law of the trust.



Prior academic comment:

Kessler & Matthews, *Drafting Trusts and Will Trusts in the Channel Islands*, 2nd ed., para 51

Lewin on Trusts, 18th ed., para 21-11 note 41

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