

A trustee's liability for transactions affecting a trust

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Background materials

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

Lord Cairns “... whether, in any particular case, the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject-matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or in the other.” (355)

Transfer of stock in unlimited liability company to transferees “as trust disponees” did not limit the transferees’ liability to the value of the trust assets, as such a limitation was repugnant to the concept of an unlimited liability company.

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

Covenant made “as such trustees, but not so as to create any personal liability on the part of them or either of them”. The proviso was held to be repugnant to the covenant and of no effect. The covenantors were liable under the covenant as if the proviso had not been inserted in it.

In Re Robinson's Settlement [1912] 1 Ch. 717

Covenant in mortgage by “the trustees as such trustees but not otherwise”

Per Buckley LJ (obiter) “this covenant as trustees was I think not a covenant which bound Stevens personally: it was a covenant which bound only the two

trustees in respect of the trust fund in their hands at the date of the issue of the writ.”

Trusts (Jersey) Law 1984

26 Remuneration and expenses of trustee

..

(2) 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

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.

Trusts (Guernsey) Law 2007

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 in breach of trust.
- (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

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

I and B (“the former trustees”) were formerly the trustees of a discretionary trust (“the TDT”), constituted by a Declaration of Trust dated 26th March 2007.

The TDT was governed by the law of Jersey. The former trustees were based in Guernsey, and the TDT was administered in Guernsey. Clause 9.1 of the declaration of trust provided 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, wilful misconduct or gross negligence.

On 20 August 2007 I, as the sole trustee of another trust ("the TFT"), entered into a loan agreement for the borrowing of monies from K Bank. The agreement was governed by the laws of England.

On 24 August 2007 I, as sole trustee of the TFT, appointed assets to the TDT, including the share capital in thirty BVI companies.

By deeds of novation dated 24 August 2007 the former trustees assumed liability for monies owed by the TFT to two BVI companies, G and T, and for the liabilities of TFT under the loan agreement of 20 August 2007 with K Bank.

By arrangements made in December 2007, two further BVI companies, E and O, were inserted between the TDT and other companies in which underlying assets were held, and O borrowed further funds from K Bank.

K Bank collapsed in October 2008. Thereafter G, T, E and O were placed in liquidation. Their liquidators demanded payment from the former trustees of sums said to be due from them.

In July 2010 the former trustees were replaced as trustees of the TDT by R. In proceedings commenced in March 2010, the former trustees sought determination of whether they had become liable, and if so, on what terms, for monies said to be due to G, T, E and O ("the BVI companies"). They also sought declarations against the BVI companies that they had no personal

liability in respect of monies said to be due, and that any claims by the BVI companies extended only to trust property of the TDT held by them.

As against R, the former trustees sought a declaration that they had a right of indemnity against trust assets of the TDT, whether or not currently vested in the former trustees, so that they might retain those assets until final determination of liability, realise the assets in order to meet any liability they may be found to have, and obtain exoneration.

The BVI companies by counterclaim sought declarations that the monies claimed were due under binding loan agreements and sought judgments in specified sums or, in the alternative, an accounting of all sums due to them by the former trustees.

R counterclaimed for declarations that the BVI companies had no claims to monies due, and that the former trustees were not entitled to indemnity or right of lien or exoneration in respect of the TDT assets.

R also sought an order requiring the former trustees to take all steps necessary to vest title to the assets of the TDT in the present trustee and an accounting against the former trustees on the basis of wilful default.

By a third party claim R sought similar declarations as against the BVI companies.

The Royal Court determined that amounts were due from the former trustees to G, T and O and further held inter alia that:

1. The former trustees were not entitled to rely (as against the BVI companies) on Article 32 of the Trusts (Jersey) Law 1984, and thereby limit their liability to the extent of trust funds.

2. It was not a term of the legal obligations assumed or undertaken by the former trustees in respect of the loans that they were not personally liable.
3. Matters alleged to constitute unreasonable or improper conduct on the part of the former trustees did not do so, and therefore that liabilities incurred by the former trustees in relation to the loans remained liabilities “reasonably incurred in connection with” the TDT, purposes of Article 26(2) of the Trusts (Jersey) Law 1984.
4. Having regard to Clause 9.1 of the Declaration of Trust dated 26 March 2007, there was no evidence that the former trustees had acted in any breach of trust amounting to wilful fault or gross negligence.

On appeal from parts of the order of the Royal Court, the Court of Appeal held inter alia that:

1. The former trustees were entitled to rely (as against the BVI companies) on Article 32 of the Trusts (Jersey) Law 1984, and thereby limit their liability to the extent of trust funds.
2. It was a term of the legal obligations assumed or undertaken by the former trustees in respect of the loans that they were not personally liable.

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

“[Article 32 and Section 42] may not avail a trustee who enters into a transaction with a third party which is not governed by Jersey or Guernsey law.”

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

“In a case where a trustee of a Guernsey or Jersey trust enters into a contract governed by English law, and informs the other contracting party that he is acting as trustee, and the other contracting party sues on the contract in England, it is not clear that the English court would apply Jersey or Guernsey law (as the proper law of the trust) rather than English law (as the proper law of the contract) to the question whether the trustees liability should be limited to the trust property.”

Trust Law International, Vol. 20 no. 2, 2014 (David Hayton).

“On appeal the appeal was allowed, the Court of Appeal surprisingly characterised the issue as involving trust law, not contract law, likening a trust to a company, but a trust is not a legal person and so cannot employ an agent to act as agent, so the trustee acts as a principal in external dealings and is personally liable as such unless clearly restricting this to the value of the trust fund to which he can have recourse. A forum outside Guernsey or Jersey e.g. England can be expected to characterise the issue as a matter of contract”

Further references:

Jersey Law Review – June 2005, Paul Matthews, Choice of Law in Property Transactions in Jersey Law

Trusts and Trustees (OUP), Vol. 20 No. 8, October 2014 pp 835 9, Jeremy Wessels and Andrew Peedom, Case Note

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