

Court Asserts How Jersey Law Applies In Trust Cases

Kathryn Purkis, 25 April 2018



A senior UK legal body has given advice in a major, long-running Guernsey litigation case involving a Jersey trust. The article explains its significance.

A recent important ruling by the Judicial Committee of the Privy Council, which handles legal issues as applied to England and Wales, affects trusts in the Channel Islands and elsewhere. The appeals leading up to the Privy Council's comments stem from disputes about the administration of the Tchenguiz Discretionary Trust of which the family of Robert Tchenguiz, the controversial businessman, is a beneficiary. At stake was whether the personal assets of the trustees were at risk when they were involved in large commercial borrowings as trustees of a Jersey law trust.

The article is written by Kathryn Purkis of Serle Court, who appeared as junior counsel for the current trustees, led by Lord Goldsmith QC. James Brightwell of Serle Court appeared as junior counsel for the former trustees, led by Simon Taube QC. The editors of this publication are grateful for this contribution to a complex and important issue. As ever, this news service does not necessarily endorse all views of guest contributors; readers who wish to respond should email tom.burroughes@wealthbriefing.com

The Privy Council this week [23 April, 2018] handed down its advice in the weighty and long-running Guernsey litigation of *Investec Trust (Guernsey) Limited v Glenalla Properties Ltd* [2018] UKPC 7, involving a Jersey proper law trust. The advice was given by Lord Hodge on behalf of the Board (Lord Mance dissenting on two points, and Lord Briggs on one aspect of the reasoning).

This is a significant case for those involved in the offshore trusts world. It establishes first, that Jersey and Guernsey have succeeded in creating trusts regimes where a trustee has a special capacity, on behalf of the trust, and his dealings in that capacity are limited to trust patrimony; second, that that capacity is a clear enough feature of the relevant trusts laws to ensure that the trust is treated like a legal person for the purposes of private international law, so that the law of the trust applies to the trustee's obligations and not the law of the underlying obligations themselves; but third, that at least so far as the Jersey law is concerned, the statutory provision that in certain circumstances limits the trustee's liability to the trust assets, Article 32 of the Trusts (Jersey) Law 1984, does not improve the rights of trust creditors as against the trust.

Under the general law, the only right a trust creditor has to trust assets derives from the rights of the trustee to an indemnity from the trust for the obligation he owes to the creditor. That rule is not changed by Article 32. This means that any of the ways in which the trustee's indemnity can be impugned – say by way of unreasonably incurring the obligation in question, or causing any loss to the trust whatsoever – still have an impact on the creditor's ability to access trust assets. Finally, Article 32 has been held not to apply to costs orders made against trustees, meaning that such orders will always be personal liabilities, whilst still being potentially indemnifiable.

The question for the court was whether this local limitation should be recognised as applying where the obligations themselves were non-Jersey obligations, being adjudicated on outside of Jersey.

The Board by a majority upheld the decision of the Guernsey Court of Appeal that in such a situation, the Jersey law should nonetheless apply. They were not persuaded that Article 32 should be characterised as partially discharging the trustee's obligation to the third party (which would have suggested that the proper law was that of the underlying obligation rather than the trusteeship). Rather, they considered that the Article did not work any discharge of liability but, together with the definition of a trust in Article 2, should be understood as creating a special status for Jersey trustees.

However, the decision went wider: see paras 88ff of the judgment: "... [i]n the Board's opinion, the time has come to recognise that as a general rule the common law will recognise and give effect to limitations of liability which arise under an entity's constitutive law by reason of the particular status or capacity in which its members or officers assume an obligation.... The Board would not confine this rule to entities which have separate legal personality but would apply it to partnerships ... associations of persons without legal personality and also a Jersey or Guernsey trust..." (the Trusts (Guernsey) Law 2007 ("TGL") having similar provisions in sections 1 and 42). The Board gave two other reasons for its conclusion, first, by construing section 65 of the TGL as obliging the Guernsey court to apply the entire law of Jersey, including Article 32, to the question, and secondly, by applying Jersey law seemingly for policy reasons as a concomitant to insulating trust assets from exposure to personal transactions. Lord Mance provided a powerful dissenting opinion in relation to all of these reasons, and Lord Briggs on the first of those.

Secondly, the Board has confirmed that whilst Article 32 ensures that a Jersey trustee has no personal liability for trust obligations, and the creditor no claim *in rem* against the trust assets, it reversed the Guernsey Court of Appeal in three respects:

- a. the Board held that Article 32 offers the trustee no discharge once the trust fund is exhausted;
- b. Article 32 does not have the effect of enabling a creditor to seek payment from the trustee regardless of the state of the account between the trustee and the beneficiaries. The creditor has no right to the trust fund, other than through its right of subrogation to any entitlement the trustee might have to indemnity from the trust fund for the obligation to the creditor. If there are any grounds for denying the trustee that indemnity in whole or in part, whether as a result of the obligations having been unreasonably incurred, or as a result of there being any cross-claim against the trustee for breach of trust (whether related to the creation of the obligation or not), the creditor is affected too; their position is not improved by Article 32; and
- c. Article 32 does not apply to costs orders made against trustees, which are always liabilities personal to the trustee.

Thirdly, the Board has determined that the availability of the statutory indemnity offered by Article 26(2) of the TGL falls to be assessed when the liability for which the indemnity is sought, is first incurred. There is no possibility of considering whether the indemnity should be available with the benefit of the facts known at the time it is claimed.

Three reasons were given for this: the first relating to the limited ambition of the language of Article 26 itself (though Article 26 would sit alongside an indemnity under the general law), the second relating to the fact that events after the fact could best be responded to by claims for breach of trust, and the third being that otherwise a trustee exoneration clause may be in effect undercut by arguments about the unreasonable incurring or, as in this case, retention of liabilities.

The decision also confirmed that a claim in restitution cannot be maintained in the context of a contractual matrix, and dealt with various interlocutory matters.