



PRESS SUMMARY

23 April 2018

(1) Investec Trust (Guernsey) Ltd (2) Bayeux Trustees Ltd (Respondents) v (1) Glenalla Properties Ltd (2) Thorson Investments Ltd (3) Eliza Ltd (4) Oscatello Investment Ltd (5) Rawlinson & Hunter Trustees SA (Appellants) (Guernsey) [2018] UKPC 7

On appeals from the Court of Appeal of Guernsey

JUSTICES: Lord Mance, Lord Sumption, Lord Carnwath, Lord Hodge, Lord Briggs

BACKGROUND TO THE APPEALS

This case concerns eight appeals from the Court of Appeal of Guernsey. One of the appeals raises two points of general public importance about the interpretation of articles 26 and 32 of the Trusts (Jersey) Law 1984 (as amended) (“the TJL”). The appeals derive from disputes about the administration of the Tchenguiz Discretionary Trust (“the TDT”) of which the family of Mr Robert Tchenguiz is a beneficiary. At the outset, the sole trustee of the TDT was Investec Trust (Guernsey) Ltd (“Investec”). Bayeux Trustees Ltd (“Bayeux”) was appointed as co-trustee on 21 August 2007, in the context of the transfer of substantial assets to the TDT from the Tchenguiz Family Trust (“TFT”). Investec and Bayeux are together referred to as “I&B.” From about October 2004, a company, R20 Ltd (“R20”), acted as investment adviser to the trustees of the TFT in relation to the assets notionally allocated to Mr Robert Tchenguiz’s family. Many of those investments took the form of contracts for differences. R20’s chairman was Mr Robert Tchenguiz. R20 also acted as adviser to the TDT after the transfer from the TFT.

As the financial crisis developed, TFT urgently required to obtain funding to support its investments. On 20 August 2007, Investec, as trustee of the TFT, and three subsidiary companies of Investec, entered into a loan agreement with Kaupthing Bank hf (“Kaupthing”), which was an Icelandic bank. On 24 August 2007 various assets and related liabilities were transferred from Investec, as trustee of the TFT, to I&B, as trustees of the TDT. Among the liabilities transferred were sums owed to Glenalla Properties Ltd (“Glenalla”) and Thorson Investments Ltd (“Thorson”), companies incorporated in the British Virgin Islands (“BVI”).

Re-financing of the TDT was achieved by a number of interconnected agreements. An agreement, dated 19 December 2007 (“the Framework Agreement”), was between I&B, Kaupthing, Oscatello Investments Limited (“Oscatello”) (an off-the-shelf BVI company owned by Eliza Ltd (“Eliza”)) and other companies. The Framework Agreement was intended to transfer the shares of 11 companies, including Glenalla and Thorson, into the ownership of Oscatello and to give charges over the shares in those companies to Kaupthing as security for further lending from Kaupthing to Oscatello.

Also on 19 December 2007, Kaupthing and Oscatello entered into an overdraft loan agreement (“the Overdraft Loan Agreement”) that included funds to repay a loan of about £39m from Kaupthing to I&B as trustees of the TDT. The repayment by Oscatello of that loan is the subject matter of a restitution claim. On the same day, two companies each lent £75m to Eliza under the terms of a profit participation loan agreement. The resulting corporate structure (“the Oscatello structure”) was that I&B, as trustees of the TDT, owned Eliza, which owned Oscatello, which in turn owned the 11 BVI companies, the shares of which were charged to Kaupthing. Oscatello became Kaupthing’s debtor and Mr Robert Tchenguiz was released from certain personal guarantees. One of the principal claims in these proceedings is that I&B acted in breach of trust in failing to transfer their liability to Glenalla and Thorson into the Oscatello structure.

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In October 2008 Kaupthing exercised its security rights over its shareholdings in the Oscatello structure. As a result, Glenalla, Thorson, Oscatello and Eliza (“the BVI companies”) were placed into liquidation. On 22 April 2010 the joint liquidators of the BVI companies wrote to I&B demanding the payment of sums said to be due by I&B as trustees of the TDT. On 2 July 2010 I&B were replaced as trustees of the TDT by Rawlinson & Hunter Trustees SA (“R&H”). On 3 October 2017 R&H were replaced as trustees of the TDT by Fort Trustees Ltd and Balchan Management Ltd (“the current trustees”).

On 12 March 2010 I&B commenced proceedings in the Royal Court of Guernsey seeking to determine whether they had incurred liability to the BVI companies and, if so, on what terms. In a judgment dated 6 December 2013, the Lieutenant Bailiff held that I&B, as trustees of the TDT, were bound by the loans that Glenalla and Thorson had made to Investec as trustee of the TFT. However, I&B had not been grossly negligent in failing to transfer the Glenalla and Thorson liabilities before entering into the Framework Agreement or thereafter. Therefore, whilst I&B were personally liable to pay the BVI companies, they were entitled to use the TDT assets to satisfy those liabilities. The Lt Bailiff also held that Oscatello had a claim in restitution against I&B (for which I&B were personally liable).

The Court of Appeal of Guernsey issued eight judgments in the course of the appeals from the Lt Bailiff’s judgment. In the fourth of these judgments, dated 10 August 2015, the Court agreed with the Lt Bailiff’s conclusion that I&B had not been grossly negligent concerning the Glenalla and Thorson liabilities. In this judgment it also held that Oscatello had no claim in restitution because its payment of I&B’s debt arose out of the arrangements in the Framework Agreement. Before the Board, the BVI companies and R&H appeal against the conclusions of the Court of Appeal concerning the liability of I&B. Oscatello appeals against the Court of Appeal’s conclusion that it had no claim in restitution.

On 23 June 2013 R&H raised fresh proceedings (referred to by the parties as “Guernsey 3”) as trustees of the TDT in which they alleged that I&B had acted in breach of trust by, amongst other things, accepting the recommendations of R20 as to investments without proper inquiry (“the investment claims”). I&B argued that the investment claims were an abuse of process as they should have been raised in the earlier proceedings. On 11 November 2015 the Deputy Bailiff held that the Guernsey 3 proceedings were not an abuse of process. The Court of Appeal disagreed. In Guernsey 3, R&H also claimed that I&B had acted in breach of trust in their handling of litigation concerning the proceeds of the sale of shares in Somerfield, the former owner of a supermarket chain (“the Somerfield claim”). The Court of Appeal agreed with the Deputy Bailiff that the Somerfield claim had no real prospect of success. The Court of Appeal’s conclusions in Guernsey 3 are also appealed to the Board.

JUDGMENT

The Board humbly advises Her Majesty that Oscatello’s appeal on restitution be dismissed and that the BVI companies’ appeal in relation to the application of article 32 of the TJL and all of the appeals advanced by R&H and the current trustees be dismissed. The BVI companies’ appeal on costs is allowed in part [154-156]. Lord Hodge gives the advice of the Board. Lord Mance agrees with the Board’s judgment, save on two points regarding the Board’s treatment of the TJL [194-236]. Lord Briggs agrees with all the conclusions in the main judgment but disagrees with one strand of the reasoning in relation to Private International Law (“PIL”) [237-245].

REASONS FOR THE JUDGMENT

The Board first considers whether the liability of I&B as former trustees of the TDT is limited to the trust assets by operation of article 32 of the TJL [56]. Article 32(1) introduces a legal distinction between the two capacities of the trustee against whom the claim is made, personal and fiduciary. It provides that he or she may be treated as incurring liabilities not personally but “as trustee”, and therefore without recourse to his or her personal estate [61]. Article 54(4) of the TJL acknowledges the subsistence of the rule that a creditor can access the trust assets only by way of the trustee’s right of indemnity and subject to the limits on that right imposed by the trust deed or the general law. The Jersey legislature has not gone so far in the personification of a trust as to create a direct right of action against the trust in return for relieving the trustee of personal liability. Instead it has relieved the trustee

of personal liability by providing that a person, when acting as a trustee, acts in a separate capacity [63].

Whether article 32 of the TJJ applies in Guernsey depends on the PIL of Guernsey [64]. The Board applies the three-stage test set out in *Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC and others* [2001] QB 825 and concludes that Jersey law is applicable. As such, article 32 is determinative of the relevant issues. Therefore, the extent of the liability of I&B as trustees of a Jersey trust is governed by the proper law of that trust. [71-102]. Lord Mance disagrees on this point [194-231].

The Board's conclusions concerning the applicable law and the effect of article 32 makes it necessary to consider the meaning and effect of article 26(2) of the TJJ. Article 26(2) provides trustees with a right of indemnity which allows a trustee to be reimbursed from the trust for all expenses and liabilities reasonably incurred in connection with the trust [103]. R&H and the current trustees have attempted to block enforcement by way of subrogation by the BVI companies of this right of indemnity by making various assertions, including an assertion that the BVI loans should be treated as unreasonably incurred because of I&B's unreasonable failure to get them discharged as part of the restructuring enshrined in the Framework Agreement or thereafter. [104-105]. The Lt Bailiff held that to treat a liability originally reasonably incurred and thereafter unreasonably allowed to continue as falling outside the indemnity conferred by Article 26(2) would involve a misinterpretation of the statute [106-108]. The Board agrees with this interpretation for various reasons [111-114]. The BVI loans were liabilities reasonably incurred at the outset, sufficient to engage the indemnity in Article 26(2), and that (Lord Mance dissenting on this point [232-235]) is the end of the matter [116].

The Board is not persuaded that the Court of Appeal went outside the proper bounds of its discretion in its decision of 17 February 2015, which refused to allow R&H to expand its grounds of appeal [118-123]. The Board also rejects the current trustees' challenge to the Court of Appeal's refusal to order a retrial in its judgment of 10 August 2015. The Board is satisfied that the Lt Bailiff's conclusions were fair and balanced, and that his delay in producing his judgment does not support the view that his conclusions are unsafe. The Board is persuaded that R&H failed to show on a balance of probabilities that any failing by I&B caused loss to the TDT [124-132].

The Board also advises that Oscatello's appeal on the question of restitution be dismissed. Before the Board, Oscatello argued that the discharge of I&B's debt took place at the request or with the consent of I&B, and/or was freely accepted by I&B in circumstances making it unjust that the latter should retain the benefit thereof without indemnifying Oscatello [133-134]. The Board finds that, viewing the Framework Agreement and Overdraft Loan Agreement as a whole, Oscatello's undertaking of responsibility for discharging I&B's indebtedness can be seen to have been an element of an overall contractual package of mutual commitments, leaving no necessity or place for restitution to play a role. The Board is, like the Court of Appeal, unpersuaded that there is any scope for the operation of the principle of restitution in the present case [147-151].

On Guernsey 3, the Board concludes that the appeals in relation to the Somerfield claim and the investment claims should fail. In relation to the Somerfield claim, the Board adopts the reasoning of the Court of Appeal. The courts below were entitled to take the view that the claim was doomed to failure [169-174]. In relation to the investment claims, the Board considers that the Court of Appeal's criticisms of the Deputy Bailiff's reasoning concerning abuse of process were well founded. The breach of trust issues were more widely expressed in Guernsey 3 but related to the same series of transactions carried out by I&B as did the breach of trust issues in the earlier proceedings. Therefore, the Court of Appeal was entitled to conclude that, in the absence of any persuasive reason for the new claims not having been included in the earlier litigation, the abuse had been made out [185-190].

NOTE

References in square brackets are to paragraphs in the judgment. This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.