COLLAS CRILL

Investec v Glenalla - Tchenguiz Discretionary Trust

APRIL 2018

On Monday (23 April 2018), the Privy Council (on appeal from the Guernsey Court of Appeal) handed down its much anticipated judgment in *Investec v Glenalla* [2018] UKPC 7, the latest judgment in the long running litigation in respect of the Jersey law Tchenguiz Discretionary Trust (**TDT**). A link to the full judgment can be found here.

The judgment is of interest to trustees in relation to the findings relating to the scope and application of Article 32 of the Trusts (Jersey) Law 1984 (**TJL**), which provides that a trustee's liability to a third party will be limited to the trust property where the third party has knowledge that it is dealing with a trustee. A similar provision exists in Guernsey under Section 42 of the Trusts (Guernsey) Law, 2007.

The case concerned proceedings which were commenced in Guernsey by the then trustees (both Guernsey based) of the TDT for a declaration that, pursuant to Article 32 of the TJL, they were not personally liable to repay loans which they had taken from companies in the TDT structure and which joint liquidators had been appointed over. The joint liquidators counterclaimed for repayment of the loans.

The relevant findings of the Privy Council can be summarised as follows:

- The effect of Article 32 TJL is to modify the common law rule that a trustee is personally liable for any transaction entered into as trustee, unless it **contractually** limits it liability. Article 32 in the words of the Privy Council was designed to “improve the position of trustees” by providing relief from personal liability for transactions entered into as trustee provided that the other party to the transaction has knowledge that they are dealing with a trustee.
- Article 32 of the TJL does not, however, operate so as to exonerate trustees from liability for costs orders made against it in the course of litigation, as this would conflict with Article 53 of the TJL which provides the courts with full discretion as to costs.
- Creditors of a trustee do not have direct recourse against the trust assets. A creditor is only able to access the trust assets to enforce a liability incurred by a trustee (in its fiduciary capacity) by way of subrogation to the trustee’s right of indemnity. The Privy Council stated that direct recourse against the trust assets would be a “radical departure” from English law. If the trustee has lost its right of indemnity (for example where the liability has been unreasonably incurred or where the trustee has committed a breach of trust) the effect is that the creditor will have no ability to enforce its claim against the trust assets or the trustee’s personal assets.
- The extent of a trustee's liability is governed by the proper law of the Trust. In this case the TDT was a Jersey law trust and the trustees were Guernsey based. The majority of the Privy Council found that Article

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32 of the TJL applied even though the loan agreements were not governed by Jersey law and in circumstances where the proceedings were commenced in Guernsey.

Given the similarities in wording between Article 32 and Section 42 it is expected that the findings of the Privy Council are likely to be followed as a matter of Guernsey law.

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