

A timely reminder to professional trustees of their duties: A Caribbean perspective

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INTRODUCTION

The judgment in [ZHANG HONG LI AND ANOTHER V DBS \(HONG KONG\) LTD AND OTHERS](#) [2018] HKCA 435 (**the DBS case**) provides a timely reminder to professional trustees of their duties where authority has been delegated to a third party.

In the DBS case, the Hong Kong Court of Appeal found the trustee to be grossly negligent and in breach of trust for failing to supervise and intervene in the actions of an investment manager appointed by the directors of a wholly owned company, despite there being a comprehensively drafted 'Anti-Bartlett clause' in the trust instrument. Whilst the case concerns a Jersey law governed trust, the matters considered in the case are relevant to trustees in other jurisdictions.

The Hong Kong Final Court of Appeal heard the Trustee's final appeal in this case in late October 2019. We are closely monitoring the appeal proceedings and will provide an update on the outcome and any key issues arising for trustees once judgment has been handed down. In the meantime, however, it is worth considering the position from a BVI and Cayman perspective.

ANTI-BARTLETT CLAUSES – A REMINDER

So called 'Anti-Bartlett' clauses have been a trust draftsman's tool since the 1980 case which gave these clauses their name (*Bartlett v Barclays Bank Trust Co* [1980] Ch 51).

Anti-Bartlett clauses are designed to negate a trustee's duty to enquire into or interfere in the management and conduct of the company or companies held in the trust. The wording of Anti-Bartlett clauses varies, but usually they provide that the trustees need not interfere in the management or conduct of any company, even if they hold shares or securities which give them control of the company. Such clauses commonly further provide that in the absence of actual notice of fraud or dishonesty on the part of the directors of the company, the trustees may, or indeed must, leave the conduct of the business of the company to its directors.

THE CITCO CASE

Decisions from the offshore jurisdictions analysing the scope and effect of Anti-Bartlett provisions are scarce, but before the DBS case was the decision of the BVI Court in *Appleby Corporate Services (BVI) Limited v Citco Trustees (BVI) Limited* (2014) 17 ITEL 413 (**the Citco case**).

In the Citco case, the sole asset of the trust was an investment company. The trustee delegated the investment management to a professional investment management firm chosen by the settlor. Almost the entire value of the trust fund was lost after a series of speculative, high risk transactions. The nature of the transactions undertaken by the investment manager were

outside the scope of the agreed investment parameters set out in the investment management agreement. The trustee was held to be in breach of duty, as it had failed to take reasonable steps to satisfy itself at appropriate intervals that the investment guidelines were being observed by the appointed investment manager, and that the overall value of the trust fund was not falling as a result of bad investment choices. Although the applicable Anti-Bartlett provision removed any obligation on the trustee to interfere in the management of the company held in the trust, the court held that it did not relieve the trustee of its duty to satisfy itself that nothing was adversely affecting the value of the shares.

THE DBS CASE

Turning to the facts of the DBS case: in 2005, Zhang Hong Li (**Zhang**) and his wife Ji Zhengrong (**Ji**) established a Jersey-law governed family trust (**Trust**) with the help of the defendant bank, DBS Bank (Hong Kong) (**Bank**). Zhang and Ji were the settlors. The sole asset of the Trust was a BVI company (**Wise Lords**), which held investments through the Bank. The Bank provided a Jersey trustee to the Trust (**Trustee**) and a BVI corporate director to Wise Lords (**Director**). Another bank entity provided administration, operational and secretarial support services in Hong Kong to the Trustee. Zhang specifically reserved to Ji the role of investment advisor and she was authorised by the Director to (a) execute investment transactions, (b) operate bank accounts, and (c) negotiate and draw on overdraft facilities, on behalf of Wise Lords.

Between 2005 and 2008, Ji executed over 500 investment transactions on Wise Lords' account. Initially, these trades were in mutual funds, with a medium risk profile. These trades generated impressive returns. Around May 2008, Ji's view of the global economy changed and consequently so did her investment strategy. Ultimately, Ji's investment strategy failed catastrophically and the Trust suffered significant losses.

The claimants, which included Zhang and Ji, brought claims in the Court in Hong Kong against the Director for breach of director's duty and against the Trustee for breach of trust in respect of the losses sustained by the trust fund.

The Court at first instance found that the Trustee was obliged to carry out the terms of the Trust and to administer the trust assets for the benefit of the beneficiaries pursuant to the terms of the trust instrument and subject to Jersey law. The judge held that, notwithstanding the terms of the trust instrument, which sought to restrict the Trustee's duties in connection with the management of Wise Lords (principally via a widely drafted Anti-Bartlett clause), the Trustee retained a residual obligation to undertake a 'high-level' supervisory role. The judge found that the Trustee failed to discharge that duty, which it owed to the Trust. The Trustee appealed, and the Court of Appeal affirmed all aspects of the first instance judgment, dismissing the appeal against the finding of breach of trust by the Trustee.

Importantly, the Court of Appeal did not find that Anti-Bartlett clauses have no effect. It acknowledged that trust structures can be designed in such a way as to provide a measure of independence and flexibility to those managing an underlying company, but this should always be subject to the trustee's overarching supervision and regular monitoring. The Court of Appeal held that whilst a trustee is not expected to be actively involved in the day-to-day management and administration of business of an underlying company, it must ensure that it has sufficient information about the assets and affairs of a company to be able to undertake its high-level supervisory role and intervene where it is clear that no reasonable trustee would sit back and ignore what was going on. A trustee cannot rely on an absence of notice of dishonesty to justify a lack of intervention.

THOUGHTS FROM A CARIBBEAN PERSPECTIVE

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The question from a BVI or Cayman trustee's perspective is: would the court in the Citco case, and indeed the DBS case (as it currently stands), have found differently had the trust in question been a VISTA or STAR trust respectively? The answer to this must surely be yes.

As with all litigation, there is a risk that a court faced with a VISTA or STAR trust might take a similar view to that of the courts in Citco and the judgments to date in the DBS case. However, this would be a very robust position for a court to take, as it would require the court to rule in direct contradiction to black-letter law. That is, it seems very unlikely that a court would not give effect to the very clear and plain meaning of the VISTA or STAR legislation. In fact, the Citco and DBS cases arguably highlight the strength of the protection for trustees afforded by the VISTA and STAR legislation when compared to Anti-Bartlett clauses, because those types of trusts can be established with the purpose of specifically holding shares in a company with no power on the part of a trustee to intervene.

A word of warning to trustees: some VISTA and STAR trusts are better drafted than others, and therefore, some are better protected from attack than others. We recommend that VISTA and STAR trusts are reviewed to ensure that they are drafted in such a way that properly absolves the trustee of the duties which the trust instrument purports to. Similarly, when new VISTA and STAR trusts are being established, the drafting must be carefully considered. There has been a tendency to treat VISTA and STAR trusts as a 'one size fits all' option, and this should be resisted.

Collas Crill can assist with any queries related to new or existing trust structures, whether in the BVI or the Cayman Islands.

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