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# Carribbean update: Effectiveness of anti-Bartlett clauses confirmed

NOVEMBER 2019

The Hong Kong Court of Final Appeal has delivered its highly anticipated judgment, overturning the earlier judgments and confirming that trustees may continue to rely upon provisions commonly known as 'anti-Bartlett' clauses in trust instruments, which seek to negate a trustee's duty to enquire into or interfere in the management of underlying companies within a trust structure when an investment manager is appointed.

**Facts**

In our October 2019 article here, we touched upon the facts of ZHANG HONG LI AND ANOTHER V DBS (HONG KONG) LTD AND OTHERS [2018] HKCA 435 and addressed the reasons why the Hong Kong Court of Appeal's judgment was unlikely to affect VISTA or STAR trusts. On 22 November 2019[1], the Hong Kong Court of Final Appeal (**Court of Final Appeal**) overturned the Court of Appeal's judgment, removing all doubt about the ongoing relevance of anti-Bartlett clauses and the limited duty owed by a trustee in those circumstances.

To recap: in 2005, Zhang Hong Li (**Zhang**) and his wife Ji Zhengrong (**Ji**) established a Jersey-law governed trust (**Trust**) with the assistance 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 (**DBS Trustees**) and a BVI corporate director to Wise Lords (**Director**). Another bank entity provided administration, operational and secretarial support services in Hong Kong to the Trustees. 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.

Ji executed over 500 investment transactions on Wise Lords' account. After initially generating impressive returns, Ji changed her investment strategy following the global financial crisis with dire consequences, and the Trust suffered significant loss.

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

The High Court held that notwithstanding the terms of the trust instrument (**Trust Deed**), which sought to restrict the Trustees' duties in connection with the management of Wise Lords (principally via comprehensive anti-Bartlett clauses), the Trustees retained a residual obligation to undertake a high-level supervisory role. The

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Trustees were consequently ordered to replenish the trust fund for the amount of the loss. Following their unsuccessful appeal to the Court of Appeal, the Trustees appealed to the Hong Kong Court of Final Appeal.

**Judgment**

The Court of Final Appeal examined the anti-Bartlett clauses in the Trust Deed, together with the DBS Trustees' statutory duties pursuant to Article 21(1) of the *Trusts (Jersey) Law,1984* (**Article 21**).

It was clear that the Trust Deed intended that the DBS Trustees' powers should be narrowly confined to the conduct of the investment business of Wise Lords. In particular, the terms of the Trust Deed relieved the DBS Trustees of any duty to interfere in the management of the underlying companies unless they had actual knowledge of dishonesty.

Article 21 provides:

"*21 Duties of trustee*

1. *A trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions-*

    *(a) act –*

        *(i) with due diligence;*

        *(ii) as would a prudent person;*

        *(ii) to the best of the trustee's ability and skill; and*

    *(b) observe the utmost good faith*."

The key point here is that Article 21 sets out the standards which trustees must adhere to in executing their duties and exercising their powers – it does not "*create free-standing duties to act prudently*." The duties to interfere or become involved in the administration, management or conduct of the business or affairs of Wise Lords were expressly excluded by the anti-Bartlett clauses in the Trust Deed, and therefore, the DBS Trustees held no powers or duties in relation to the company.

The Court of Final Appeal also rejected the Respondents' contention that, by electing to approve the relevant transactions, the DBS Trustees had exercised a power to supervise and had assumed the role of controllers and ultimate decision-makers. As a matter of fact, and contrary to the Respondent's contention, that role was undertaken by Wise Lords' investment adviser and any such approval by the DBS Trustees only occurred after the transactions were reported to them – the "*so-called 'approvals' represented merely a franking or acknowledgement of the information received. In no real sense can they be said to have assumed 'control'*." The Court of Final Appeal also held that actions which the DBS Trustees did take could not be equated to them assuming a power to supervise. Such a conclusion failed to recognise that the DBS Trustees did not have a power to supervise unless they had notice of dishonesty on the part of the directors.

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The Court of Final Appeal unanimously held that the existence of any 'high level supervisory duty' was inconsistent with the anti-Bartlett clauses in the Trust Deed.

**The Citco Case**

In our October 2019 article, we also discussed the decision of the BVI Court in the 2014 case of *Appleby Corporate Services (BVI) Limited v Citco Trustees (BVI) Limited* (**the Citco Case**). The trustee (**Citco Trustee**) was found to be in breach of trust for failing to take reasonable steps to satisfy itself at appropriate intervals that the investment guidelines were being observed by the appointed investment manager, despite the applicable anti-Bartlett clauses. This judgment is somewhat at odds with the judgment of the Court of Final Appeal in the DBS case and the two cases may be distinguished as follows.

In the Citco Case, the anti-Bartlett clauses relied upon were less comprehensive than those in the DBS case; the BVI Court determined that the anti-Bartlett clause did not fully relieve the Citco Trustee of its duty to satisfy itself that nothing was adversely affecting the value of the shares (although it went so far as to exclude any obligation on the Citco Trustee to interfere in the management of the underlying company within the trust structure). In contrast to the Citco Case, the anti-Bartlett clause in the DBS case had the effect of excluding *all* duties and obligations in relation to the company other than in circumstances where the DBS Trustees had actual knowledge of dishonesty. The importance of a well drafted anti-Bartlett clause could not be starker.

The reasoning for the different views taken by the courts appears to be twofold:

1. The anti-Bartlett clauses relied upon by the Citco Trustees were a creature of statute (contained in paragraph 8 to the Second Schedule to the BVI Trustee Act) and were less comprehensive. Notably, there was no clause which permitted the Citco Trustee to assume at all times that the business was being carried on honestly, diligently and in their best interests until such time as they had actual knowledge to the contrary, unlike the DBS case; and
2. In the Citco Case, the Citco Trustee and the company entered into an investment management agreement engaging the services of an investment manager, which expressly provided that both the Citco Trustee and the company reserved rights of overall supervision and control of the company's assets.

These decisions highlight the importance of a well drafted anti-Bartlett clause which, when considered with the statute of the relevant jurisdiction, the trust deed and any management agreement, will negate a trustee's duty to enquire into or interfere in the management of the underlying companies within a trust structure when an investment manager is appointed.

**Judgment post-settlement**

The DBS judgment was also important because it is understood to be the first occasion on which the Hong Kong Courts had cause to consider the exercise of its discretion to deliver judgment notwithstanding that the parties had already settled following the hearing of the appeal. The Court of Final Appeal considered that delivery of the judgment was appropriate because it involved issues of law of general importance, the matter

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had attracted international interest and it was "*necessary to correct certain erroneous propositions accepted below*".

**Comment**

The DBS judgment will be a welcome relief to trustees who, prior to the judgment, were faced with the prospect of owing a high level supervisory duty in relation to investments held by underlying companies, despite that role having been properly delegated to a third party investment manager and despite the existence of anti-Bartlett clauses.

The DBS case was decided under Jersey law, but is understood to be the first final appellate level case in any jurisdiction to examine the effectiveness of 'anti-Bartlett' clauses. As it is likely to be highly persuasive in the Caribbean courts, we consider it appropriate for trustees of BVI or Cayman law governed trusts to consider the following:

1. when establishing a new trust, ensure that comprehensively drafted 'anti-Bartlett' clauses are included in the trust deed;
2. pay careful attention to the relevant provisions of existing trust deeds to ensure the proper discharge of a trustee's duties;
3. where less than ideal anti-Bartlett provisions are included in existing trust deeds, consider with professional advisors whether there is scope to vary or amend the provisions of the trust deed;
4. do no not intermeddle in matters properly delegated to a third party investment manager in the absence of dishonest conduct, unless the trust deed provides otherwise;
5. where duties to supervise or monitor an underlying company have not been entirely excluded by the terms of the trust deed, ensure that any residual duty is exercised prudently; and
6. where investment management agreements or other contracts delegating authority are being entered into, ensure that the trustee is not a party to those agreements, or where the trustee is a party, ensure that the trustee understands its duties and obligations under that agreement.

[1] [2019] HKCFA 45

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