RECEIVED WISDOM

THE INVESTEC ARGUMENTS BROUGHT TO ENGLAND

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Ever since the Privy Council's landmark decision in Investec v Glenalla[1] in April 2018, there have been various attempts to use the arguments raised in that case in England, on both sides of the issue (being in the main whether a trust's creditors could enforce their claims against the trust's assets directly, or had to rely on pursuing the trustees and the trustees' right of indemnity from the trust assets in turn).

January of 2021 saw a particularly ambitious attempt to use the Investec authority to the advantage of the trustees of a family will trust, endeavouring (as they were) to avoid several millions of pounds of liability to a (purportedly) secured lender.

In Williams v Simm[2] the Court was asked to look afresh at the Privy Council's decision in Investec as it applied to a notionally simple domestic will trust.

Facts

The trustees owned a significant parcel of land in Cumbria, and wanted to develop it for residential properties. To fund that development, the trustees borrowed some £4.5m from LSC Finance Limited, which was secured against the land itself (or so LSC thought, at least) in October 2016, with further funds being drawn down between 2017 and 2019.

The development did not go as the trustees planned. They had hoped to complete enough development at the site by the summer of 2019 to repay LSC's lending. That didn't happen, and consequently the trustees defaulted on repayment in September 2019. The claimants were appointed as fixed charge receivers by LSC in November 2019, and took steps to take possession of the land for the purposes of recouping LSC's debt (which by September 2020 stood at a little over £6.3m) including a sale of the land.

The trustees defended the receivers' claim, and deployed several different lines of attack to do so:

1. That some of the security paperwork was "confused" about the capacity in which the trustees had contracted with LSC, and that as there were some clauses which suggested that LSC had mistakenly tried to contract with "the trust" as opposed to "the trustees", there was in fact no security given at all (because the trust is not a legal entity at all);
2. That the beneficiaries of the trust had not consented to LSC's borrowing, and further the trustees in fact had no power under the terms of the trust to borrow funds. The trustees alleged that as LSC were aware that the trustees had no power to borrow, its legal charge over the land should be declared void, giving LSC no security for their debt;
3. That the amount of the borrowing had been varied by certain communications from LSC's Managing Director, such that LSC were now estopped from seeking repayment of the full debt; and
4. That as the beneficiaries were in actual occupation of the land when the receivers took possession, LSC had to take possession subject to those beneficiaries' interests, and couldn't therefore sell the land.

1 [2018] UKPC 7
2 [2021] EWHC 121 (Ch)

Argument

The first two of these contentions by the trustees are by far the most interesting (the others having a certain ring of desperation to them).

The trustees were correct, according to the judge, that the various facility documents "appear[ed] to demonstrate a confusion as to the true legal status of a trustee vis-à-vis the trust of which he or she is a trustee…and as to the capacity by which and in which a trustee enters into a contract as trustee of a trust where the correct position is that the trust has no distinct legal personality, and the counterparty to the contract entered into with the trustee has no right of recourse as against the trustee assets save to the extent of the trustee's entitlement to an indemnity out of the trust assets".

Many will recognise that formulation as being exactly the issue that the Privy Council was asked to deal with (in materially more complex circumstances, admittedly) in Investec.

However, the judge plainly recognised that to accept the trustees' suggestion that LSC had mistakenly contracted with a non-existent legal entity, and thereby had no recourse to recover its loans at all was obviously too bold, quite apart from being nonsensical in any commercial sense.

The second contention, that LSC knew the trustees had no authority to borrow, and shouldn't therefore have agreed to lend to them, was also given short shrift. It was true that LSC had indeed inspected the trust deed (here, the relevant Will) and must have noticed that the trustees didn't have the power to borrow even if they wanted to. However, the trustees were not allowed to pursue this line further because their own solicitor had provided a certificate for the registration of LSC's charge over the trust land which said in terms that the lending complied with the terms of the trust. Even though that may not in fact have been legally correct, LSC were still entitled to rely on that certificate (having no duty to advise the trustees themselves) and its security was valid.

The judge was satisfied overall that the receivers should be allowed to sell the land so as to recoup LSC's lending.

Conclusions

Although the trustees' arguments in this case failed entirely, the fact that the arguments were given air time at all should be a warning to secured lenders, particularly given the numerous paragraphs of the judgment dedicated to highlighting the inconsistencies between the loan, charge and facility documentation produced by LSC. But for the somewhat careless drafting of those documents, the trustees would have been unlikely to be able to mount such a defence of the receivers' action.

The case therefore serves as a fresh reminder that the Investec line of authorities remains "live" in the English Courts as well as elsewhere, and lenders should be careful in how their documentation is constructed when dealing with any trust structure as a result.