TRUST CASES IN COURT IN GUERNSEY DURING 2021

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The last twelve months or so have seen some significant Guernsey trust cases. Here are three especially interesting ones.

Can a trustee recover its successful defence costs from trust assets?

Even after a decade or more, the Investec v Glenalla litigation keeps giving. Earlier this year, Hon Hazell Marshall, QC Lieutenant Bailiff, heard what has become known as an "Alhamrani taxation" (or assessment) [1] on the extent to which former co-trustees could claim under their right of indemnity against the trust assets, the costs they incurred in successfully defending two claims against them for breach of trust. Note that right subsists even after retirement; a trustee who has vacated office, should not become liable for costs to which her indemnity applied whilst she was a trustee.

Trustees are concerned not to be litigating for the beneficiaries at their own cost.

Where they properly pursue litigation on behalf of the trust against third parties, trustees usually get their costs out of the trust assets. But where they are sued for misconduct themselves, it might be thought they should fund even a successful defence from their own pocket. After all, defending the action benefits the trustee, not the trust, and trustees can be denied their indemnity if costs are unreasonably incurred (in type or quantum) or they display misconduct. So, where the defence is that whilst at fault, the trustees were not grossly negligent, should not the indemnity be automatically denied?

Marshall LB thought not. A trustee had a basic right to be held harmless against liability it incurred without material fault, through being a trustee. Only "operative misconduct" would deny it that right. So, if the trustee properly conducted a successful defence of a claim brought against it as trustee, but is left with a costs bill, the indemnity would apply in

1 ITG Limited & anr v Glenalla Properties Limited & ors [2021] GRC007.

principle; “in principle” because other matters could still prevent the trustee from relying on it, quantum and nature being obvious ones.

In that regard, some useful principles emerged. The trust in Investec was in danger of insolvency, but even that did not mean the trustee’s right of reimbursement was to be proportionately reduced; the right of indemnity was a right to be paid in full, not in part. Moreover, the trustees’ use of English lawyers in Guernsey litigation concerning a Jersey law trust was not unreasonable, given their historical associations with the trust and their position in the commercial litigation market. Finally, the trustees’ lawyers’ costs when dealing with insurers and even managing media updates were in part recoverable.

Reflective loss again

Readers may be aware of cases where trustees who are sued for losses caused to underlying companies can raise the so-called “reflective loss” defence. This says that that given it is the company which has suffered the loss, only the company and not the shareholders or the beneficiaries, can claim to recover the loss. A recent UK Supreme Court decision[2] rather poured cold water on that, by saying the defence only held good where a shareholder brought the claim, and not a creditor or by implication a beneficiary.

In May this year, following trial in September 2019, McMahon, Bailiff, issued judgment in the case of Pilatus (PTC) Limited v RBC Trustees (Guernsey) Limited. [3]In that case, he said the rule against reflective loss was part of Guernsey law, and followed the approach in the UK Supreme Court to say it did not offer a former trustee a defence when it was sued by its successor.

Gross negligence by a trustee

Last year, the Guernsey Court of Appeal overturned a decision of the Royal Court in Manita Khuller v FNB International Trustees Limited[4] to find for the first time in Guernsey that a trustee was grossly negligent. Mrs Khuller sued her trustee for her loss of pension funds resulting from the collapse of what she claimed were three inappropriate high- risk investments. The trustee responded that an investment company had selected the investments on behalf of Mrs Khuller who had appointed them, and recommended their purchase by the trustee. Thus, if Mrs Khuller had any complaint, it was against the company as the trustee’s role was that of an execution only trustee.

However, it was established the trustee also had appointed the investment company as an investment advisor and not as it claimed as investment manager. That meant when acting on instructions from the company the trustee had a responsibility to assess the risk posed by the investments being recommended. When it ignored the red flag of a warning from its own head of pensions, that the most substantial of the three investments was in what he called “bubble territory” and presumably about to burst, the Court found the trustee grossly negligent. Given the investment company was an adviser, not a manager, the trustee’s “..clear duty was at least some effort to look into what was proposed, with its possible risk, and to exercise its own judgment as to suitability of the investment”, and when it ignored the red flag, it “went ahead with what can only be described as indifference to its duty and the identified risk…[which] ….qualifies as having been grossly negligent”.

Khuller is an interesting case. Significantly, the Court of Appeal did not stop at saying the trustee should have thought about the investment recommendations made to it before going ahead.

It went on to say that “If the trustee’s task was only to give effect to an instruction (or request), still a red flag should usually be given at least some attention, if only to confirm that the instruction (or request) had been made with knowledge of the red flag”.

That sounds very much like saying that even where a trustee has no discretion, and must follow instructions, it still has a residual duty of sorts. The extent of that duty is a matter for another day.

2 Sevilleja v Marex Financial Ltd [2020] UKSC 31.

3 [2021] GRC012.

4 [2020] GCA051 overruling [2019] GRC 063.