

Anti-Bartlett clause upheld: no overriding duty to supervise the management of an underlying company

Service area / [Dispute Resolution and Litigation, Trusts and Private Wealth](#)

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On 22 November 2019, the Hong Kong Court of Final Appeal handed down its eagerly anticipated decision in *Zhang Hong Li and others v DBS Bank (Hong Kong) Limited and others* [2019] HKCFA 45.

The Court of Final Appeal allowed the appeal and overturned the decision of the Court of Appeal, which had found the former trustee of a Jersey law trust and the corporate director of a British Virgin Islands private investment company wholly owned by the trust to be liable respectively for negligent breach of trust and negligent breach of fiduciary duty.

The court delivered its judgment despite the parties having reached a settlement just two weeks prior, on the basis that the case involves issues of law of general importance and to correct erroneous propositions accepted by the court below.

The decision clarifies the scope of a trustee's duties under Jersey law where there has been delegation of investment management functions and the trust deed contains an anti-Bartlett clause.

Facts

The trust was established on 4 January 2005 by Madam Ji Zhengrong ("Ji") and her husband Zhang Hong Li ("Zhang"). Shortly thereafter, the sole share in a BVI company which made investments through DBS Bank was transferred by Ji to the trustee, and a corporate director replaced Ji as the sole director of the company.

Ji was appointed as investment advisor to the company, and was authorised to give investment instructions on behalf of the company. Further, both Ji and Zhang executed a letter of wishes stating that whilst Ji was alive the trustee "should always consult her in the first place with regards to all matters and her recommendation should be final".

In relation to the investment of the trust fund, the trust deed provided that:

- the acquisition of any investment of a speculative nature shall be deemed to be an authorised investment;
- the trustee shall be under no duty to diversify investments; and
- the trustee shall be under no duty to see that the value of the trust fund is preserved or enhanced, nor shall they be liable for any failure in those respects.

The trust deed also contained extensive anti-Bartlett provisions, which broadly provided that the trustee shall not be under any duty to, nor bound to interfere in the business, or the management of, the company.

The court said that "*these arrangements were consistent with Ji and Zhang's contemplated trust structure*".

Between January 2005 and April 2008, under Ji's direction, the company made successful investments and generated significant profit. However, in 2008, the investment strategy changed with investments being made in foreign exchange transactions focussing heavily on the Australian dollar. During the financial crash, the investments held by the company incurred significant losses, which Ji and Zhang sought to recover in the proceedings.

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Decision

The courts below found that, notwithstanding the delegation of the investment function, and the wording of the trust deed, the former trustee and the corporate director owed a “high level supervisory duty” to the beneficiaries. Further, this duty was breached when (after the respective investments had been made) the former trustee approved and did not attempt to override or reverse the investments. That breach of duty amounted to gross negligence and the resulting liability could not be relieved by any exemption clauses.

The approach of the courts below was consistent with the approach taken in the 2014 BVI decision in *Appleby Corporate Services v Citco Trustees* 17 ITELR 413. The Eastern Caribbean Supreme Court found that, despite paragraph 8 of the Second Schedule to the BVI Trustee Act which relieves trustees from any obligation to interfere in the management of underlying companies unless they have notice of misconduct, trustees are required to have appropriate risk management procedures to ensure that delegated authority is being properly exercised. Nothing in the BVI statute excluded the trustee’s overriding duty to satisfy itself from time to time that nothing untoward was affecting the value of assets of the trust.

By contrast, the Court of Final Appeal determined the alleged “high level supervisory duty” to be inconsistent with and excluded by the anti-Bartlett provisions of the trust deed. Accordingly, given the terms of the trust, the court said there is no “high level supervisory duty” which would have required the former trustee to query and disapprove of the transactions entered into by the company, thereby interfering with Ji’s management of the company.

Whilst Ji sought the former trustee’s approval of the transactions, the evidence showed that the former trustee had no active supervisory role as the transactions were reported to the former trustee after the event, and the approvals represented a mere acknowledgement of the information received. Further, the possibility of reversing any transaction after the event could only be exercised by Ji and not the former trustee.

In any event, even if the former trustee was under a duty to supervise the company’s investments, the court found that approval of the investments in question did not amount to gross negligence and any liability would be excluded by the exemption clause covering acts short of fraud, misconduct or gross negligence.

The court sent a warning shot to parties who seek to retain control over investment functions and subsequently hold the trustee liable for any losses:

“To postulate that the parties’ chosen scheme may be overridden by some implied, non-derogable external duty in circumstances “where no reasonable trustee could refrain from exercising otherwise excluded powers” would be to introduce an amorphous and ill-defined basis for undermining a legitimate arrangement consciously adopted by the parties, exposing the trustees to unanticipated risk of liability and sowing confusion as to the extent of their duties”.

Comment

This decision, which serves to affirm the effectiveness of anti-Bartlett clauses, will be welcomed by the trust industry.

However, the decision, and its effects, should be treated with relative caution, as:

- whilst expert evidence of Jersey law was provided at first instance and was considered in the appeals in this case, it remains to be seen how the Royal Court of Jersey, and the courts in other trust jurisdictions, would apply the law in light of this decision; and
- it remains the case that, for anti-Bartlett clauses to be effective and achieve their purpose, they need to be drafted with care and with the specific circumstances of the trust and the intended investments in mind.

Continued



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