



CAREY OLSEN

## Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Rawlinson and Hunter Trustees

Service area / [Dispute Resolution and Litigation](#)

Location / [Guernsey and Jersey](#)

Date / [January 2014](#)

The Plaintiffs as the former trustees (the “Former Trustees”) of the Tchenguiz Discretionary Trust (the “Trust”), a trust governed by Jersey law, brought proceedings in the Guernsey Royal Court under Section 69 of the Trusts (Guernsey) Law, 2007 (“TGL”) inter alia for declarations against four British Virgin Island companies (the “BVI Companies”) which were creditors of the Former Trustees pursuant to loan arrangements.

The declarations sought by the Former Trustees were to the effect that the Former Trustees’ liability to the BVI Companies was only as trustee and that the claims could only be enforced against the Former Trustees to the extent that they held assets of the Trust available to satisfy these demands.

The BVI Companies counterclaimed for payment of loans of £62million, £80million and £39million respectively. The Former Trustees had been replaced as trustees in 2010 but retained the Trustassets by exercising their lien over those assets. The assets held by the Former Trustees were worth substantially less than the amounts claimed.

Rawlinson & Hunter Trustees S.A. as the current trustees and as third party claimants (the “Current Trustees”) sought, as against the Former Trustees, declarations that the BVI Companies had no claims to monies due and that, in any event, the Former Trustees were not entitled to any indemnity out of or any right of exoneration from or any lien over the assets of the Trust in respect of any demands for payment made by the BVI Companies.

### Issues and principles

One of the issues which the Court had to determine was whether the Former Trustees were entitled to rely, as against the BVI Companies, on Article 32 of the Trusts (Jersey) Law 1984 (“TJL”) and if (or to the extent that) the Former Trustees were not so entitled, whether it was a term of the loan arrangements (if any) assumed by the Former Trustees that they were not personally liable in respect of the obligations assumed beyond the extent of the trust assets.

As the proceedings had been brought in the Guernsey Court, the Court found it was necessary to ask first why the Guernsey Court should treat the rights to which the BVI Companies claimed to be entitled and which they sought to enforce against the Former Trustees, as governed by the law of Jersey rather than by the law of Guernsey or (if different), by the governing law of the contract or other transaction under which the rights arose.

The Court analysed the various transactions giving rise to the claims and concluded that the law of Jersey was not the governing law of the contracts and obligations concerned. The Court was content to assume (without finding it necessary to decide) that the loans and arrangements were governed by Guernsey law as contended by the Former Trustees (Guernsey being the place of administration of the Trust).

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The Trust was governed by Jersey law. The Court held that the Trust was therefore a “foreign trust” for purposes of the TGL and accordingly, it was not a trust to which the provisions of Part II of the TGL apply as that part applies only to trusts governed by Guernsey law. Consequently, the Former Trustees could not rely on the protection of Section 42 of the TGL which reads:

“Dealings by trustees with third parties 42(1) Subject to subsection 3(1) where, in a transaction or matter effecting a trust, the trustee informs a third party that he is acting as trustee or the third party is otherwise aware of the fact, the trustee does not incur any personal liability and a claim by the third party in respect of the transaction or matter extends only to the trust property. (2) If the trustee fails to inform the third party that he is acting as trustee and the third party is otherwise unaware of the fact – (a) he incurs personal liability to the third party in respect of the transaction or matter, and (b) he has a right of indemnity against the trust property in respect of his personal liability, unless he acted in breach of trust. (3) Nothing in this section prejudices a trustee’s liability for breach of trust or any claim for breach of warranty of authority. (4) This section applies to a transaction notwithstanding the lex causae of the transaction, unless the terms of the transaction expressly provide to the contrary.”

The Court referred to Part III of the TGL and in particular Section 65(1) of the TGL which provides that, subject to sub-Section 65(2), “a foreign trust is governed by and shall be interpreted in accordance with its proper law”. However the Court found that there was nothing in Part III of the TGL which required the Court to apply Jersey law and in particular the TJL, save to the extent of enforcing the trusts of the Trust, but noted that the enforcement of these particular claims did not amount to an enforcement of the trusts of the Trust.

The Court then referred to the terms of Article 32 of the TJL which falls within Part II of the TJL and therefore applies only to trusts governed by Jersey law. Article 32 reads as follows:

“32 Trustee’s liability to third parties (1) Where a trustee is a party to any transaction or matter affecting the trust – (a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property; (b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity). (2) Paragraph (1) shall not affect any liability the trustee may have for breach of trust.”

The Court, without deciding the point, assumed that had the proceedings been brought in Jersey by a third party against the trustee of a Jersey trust, Article 32 of the TJL would be held to apply whatever the lex causae (or proper law) of the transaction to which the Trustee and third party were parties unless (perhaps) the terms of the transaction expressly provided to the contrary. The Court pointed out that Article 32 of the TJL does not have an express provision as is found under Section 42(4) of the GTL which expressly stipulates that Section 42 applies to a transaction notwithstanding the lex causae of the transaction, unless the terms of the transaction expressly provide to the contrary. The question whether, as a matter of Jersey law, protection is afforded by Article 32 of the TJL in circumstances where the governing law of the transaction is a law other than the law of Jersey, remains undecided.

## Judgment

The Court held that the BVI Companies succeeded in their counterclaim for payment of the loans plus interest. The Court also ruled that the Former Trustees may retain and realise trust property held by them in order to satisfy their obligations as borrowers from the BVI Companies. On the declarations sought by the Former Trustees to limit their liability to the extent of trust property, the Court concluded that, as the proceedings had been brought in Guernsey against the former trustee of a Jersey trust to enforce claims which arose under transactions the governing law of which is said to be the law of Guernsey, the Former Trustees were not entitled to rely on the limited recourse protection afforded by Article 32 of the TJL. There is nothing in the TGL and specifically Section 65 of the TGL, which requires the Guernsey Court to treat the enforcement of third party claims against the Former Trustees, as being governed by the proper law of the trust. Consequently the Court concluded that the Former Trustees could not rely on Article 32 and were personally liable for the entirety of the three claims, with that liability not being limited to the trust property. The Court also found that it was not an implied term of the loan arrangements that the Former Trustees were not personally liable.

As the Court found that the Former Trustees were not entitled to rely on Article 32 of the TJL, the various issues which arose as to the interpretation and effect of Article 32 were not decided.

Continued

## Comment

Both the Former and Current Trustees have indicated their intention to appeal the judgment which may not, therefore, be the final word on these issues. In the meantime, however, the judgment underlines the importance of including appropriate limited recourse language in contracts entered into by a trustee, especially where the governing law of the contract is not the same as the proper law of the trust. Trustees should not assume that Article 32 of the TjL or Section 42 of the TGL will automatically afford the necessary protection to trustees, especially where the *lex causae* is not the same as the governing law of the trust.

Guernsey and Jersey trustees should also be aware of the additional risk that they face where they administer trusts, the governing law of which is not that of Guernsey or Jersey (as the case may be) because where a claim is brought against them in their home jurisdiction, the trust would be treated as “foreign” with the consequence that they would be unable to rely on the protection afforded by either Section 42 of the TGL or Article 32 of the TjL. Absent an express limitation of liability clause in the contract, the trustee would be personally liable and that liability would not be limited to the extent of the trust fund.

On 23 December 2013 the court made orders ancillary to the judgment, including an order that the BVI Companies be subrogated to the Former Trustees’ rights and an order appointing receivers to the assets of the TDT. Both orders are understood to be the first of their kind in the offshore trust world. A further briefing note will be issued shortly.



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