

SINELS Quarterly Review

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of the Year in Jersey



Richard Wakeham
Senior Associate

Can trustees exclude liability for gross negligence?

Introduction

Invariably, professionally drafted modern deeds of trust governed by the laws of Jersey or Guernsey expressly exclude liability for the trustee's negligence but not for gross negligence. This is so because of the statutory bars which prohibit the exclusion of liability for gross negligence, wilful default and fraud. The current position in the Channel Islands is therefore a little different to that under the English common law where a trustee may exclude liability for everything except the trustee's own fraud.

This short article focuses on the recent decision of the Privy Council on a preliminary issue in the case of *Spread Trustee Company Limited v. Hutcheson and Others*.¹ The Privy Council were sitting on an appeal from Guernsey's Court of Appeal to consider, if at all, the circumstances in which a trustee can exclude his liability for gross negligence. The decision was a close one with the Privy Council being split 3:2 in favour of the trustee being able to exclude liability for grossly negligent acts which occurred prior to the introduction of the statutory prohibition of the same in 1991.

The issue is of interest because the cases on point are sporadic and of little practical guidance. For example, the leading English

case of *Armitage v. Nurse*² confirms that English law permits you to exclude liability for gross negligence when the statutes in the Channel Islands specifically exclude this possibility. Similarly, the leading Jersey case of *Midland Bank Trust Company (Jersey) Limited & Others v. Federated Pension Services*³ generally defines gross negligence as meaning "a serious or flagrant degree of negligence."

The facts

The decision in *Spread* concerned two trusts governed by Guernsey law which were established in 1977. A new and sole professional corporate trustee had been appointed to those trusts in 1990. The beneficiaries alleged that the new trustee had failed to identify and investigate breaches of trust on the part of the outgoing trustee and claimed the substantial sum of £53.5m plus interest from the new trustee.

In order to determine whether or not the new trustee had failed to identify and investigate breaches of trust by the outgoing trustee, it would be necessary to ascertain whether the outgoing trustee had committed any breaches of trust. In order to resolve this question, it was necessary to conclude the extent to which the outgoing trustee was able to rely on an exoneration clause contained in each of the trust deeds which stated as follows:

"In the execution of the trusts and powers hereof no trustee shall be liable for any loss to the Trust Fund arising in consequence of the failure depreciation or loss of any investments made in good faith or by reason of any mistake or omission made in good faith or of any other matter or thing except wilful and individual fraud and wrongdoing on the part of the trustee who is sought to be made liable."

The draftsman had clearly sought to exclude liability for gross negligence when drafting the trust deeds for execution in 1977. Whilst this would be permissible under English law, it was questionable whether it would be possible to

do so as a matter of Guernsey law.

The legal issues

The question was not straightforward because of the timing of the introduction of the Trusts (Guernsey) Law 1989 ("the Law") effective from 22 April 1989 and its subsequent amendment on the introduction of the Trusts (Amendment) (Guernsey) Law 1990 ("the Amendment") on 19 February 1991.

Under section 34(7) of the Law, the terms of a trust governed by the laws of Guernsey could not relieve a trustee from "liability for a breach of trust arising from his own fraud or wilful misconduct." The Amendment varied this provision of the Law so as to proscribe a trustee from being relieved from liability for gross negligence.

The seemingly straightforward issues remaining were whether the laws of Guernsey permitted a trustee to exclude liability for gross negligence (a) prior to the introduction of the Law (prior to 22 April 1989) and (b) after the introduction of the Law but before the introduction of the Amendment (between 22 April 1989 and 19 February 1991). A further question was whether the Amendment could be retrospective in effect.

The decisions of the lower courts

Both the Royal Court of Guernsey and Guernsey's Court of Appeal found a trustee has never been able to exclude liability for his gross negligence.

At first instance, Lieutenant Bailiff Sir Vic de Carey held that this was so because, even prior to the introduction of the Law and the Amendment, trustees were bound to act *en bon père de famille*⁴ and it was impossible to countenance that it would be possible to discharge such a duty with gross negligence. The parties and the majority of the Privy Council accepted that this chain of reasoning was defective for it conflated the content of the duty with the ability to relieve liability for the improper discharge of that duty.

Continued...

¹ [2011] UKPC 13. ² [1998] Ch 241. ³ [1995] JLR 352. ⁴ Translation: as a prudent head of the family; in other words, as a fiduciary.

On appeal, it was held that the analysis was correct because (i) prior to the introduction of the Law and the Amendment it was unclear whether English law would permit such an exclusion, (ii) Scots law (which would likely have been followed) would certainly not permit such an exclusion, (iii) the exclusion would be inconsistent with Guernsey customary law, (iv) the fact that the provision did not feature in the Law was simply a mistake and, (v) in any event, it was accepted that fraud could not have been excluded and fraud was broad enough to include gross negligence.

The decision of the Privy Council

The beneficiaries argued that it had never been possible to exclude liability for gross negligence under the laws of Guernsey and that the Amendment was of retrospective effect. The majority of the Privy Council disagreed holding that it was possible for the terms of a trust to exclude liability for the gross negligence of the trustee prior to the introduction of the Amendment.

The Privy Council reasoned that the surest guide to Guernsey law prior to the introduction of the

Law was the Law itself. The fact that the Law did not proscribe a trustee's ability to exclude liability for gross negligence in the terms of the trust was good evidence that this was the pre-existing position under Guernsey law.

The Privy Council also rejected the assertion that the Amendment was introduced because those drafting the Law had been mistaken in not including the proscription. Instead, the Privy Council held that the Amendment was introduced to bring Guernsey's trust law in line with the recent statutory change that had been introduced in Jersey.

The Privy Council also confirmed that there was no reason why the Guernsey law would have followed Scots law on the point. The obligation to act *en bon père de famille* was a French concept which had not been imported into Scots law. It was found that Guernsey's law was much more closely associated with English law which, in the judgment of the majority, had always been clear and any court considering the issue would have relied on the cases Millet LJ referred to in *Armitage* and come to the very same conclusion i.e. that under English law it

was permissible for a trustee to exclude liability for gross negligence in the terms of a trust deed.

Although, the two dissenting judgments of Lady Hale and Lord Kerr strongly supported the judgments of the lower courts, all of the members of the Privy Council agreed that the Amendment could not have retrospective effect. It was held that if this had been the intention of the legislature, the point would have been clearly expressed.

Conclusion

If there were any doubt, the judgment confirms the overriding importance of English trust law in the Channel Islands. It also confirms that a trustee will be entitled to claim the benefit of any exclusion clauses he might have in respect of his gross negligence prior to the introduction of the statutory reforms. In all likelihood there will be few opportunities for a trustee to claim the benefit of an exclusion for gross negligence given the passage of at least 20 years since the introduction of those legislative reforms.



Steven Chiddicks
Associate

Lifting the corporate veil in Jersey

Introduction

On 9 June 2011, the Court of Appeal delivered a ground breaking judgment in *Leeds United v. Admatch* where, for the first time in Jersey, the Court held a shareholder/director of a company (Mr Weston) personally liable for the costs of an unsuccessful application by the defendant company.

The Court confirmed its power to examine the ownership and directorship of a litigant company and, where appropriate, make a personal costs order against those running the litigation. Arguably this is contrary to established company law principles of limited liability for shareholders and that a company acts as a separate legal entity from its shareholders and/or directors. Below we consider the legal principles which the Court

applied in exercising its jurisdiction to make a non-party to the litigation liable for costs.

Background

The proceedings were bitterly fought with many first instance decisions being appealed. Of particular significance are the Bailiff's decisions on 21 August 2008 and 4 December 2008 requiring Leeds United to provide security for costs. The Court of Appeal overturned the Bailiff's decisions and ordered AdMatch to pay Leeds United's costs of the appeal which were eventually certified in the sum of £63,529.79.

AdMatch failed to pay these costs which led to an application seeking, *inter alia*, that AdMatch be prohibited from defending the claim.

On 19 January 2011, the Bailiff held that it would be an abuse of process if AdMatch were allowed to continue without satisfying the outstanding costs order. The decision was based on the findings that (a) Admatch "has no real interest of its own in defending the action", (b) Admatch "has no assets which could be taken in the event of a judgment against it", (c) "[t]he sole interest in defending the case lies with Mr Weston and one or more of his other companies because, in the event of success against the defendant, it is clear that the plaintiffs intend to seek to recover the sum due from Mr Weston personally and/or from some of his companies...", (d) there was a strong argument that Admatch was in error for paying the sum of £190,000 away to Mr Weston and/or companies associated with him, and (e)

because no hardship would be caused to Mr Weston if he were forced to pay the monies to Leeds United.

The Bailiff therefore ordered that "unless [Admatch] pays costs to the plaintiffs for the outstanding costs in the sum of £63,529.79 by [23 February 2011], [Admatch's] Answer shall be struck out and the plaintiff's shall be entitled to judgment".

AdMatch sought leave to appeal the decision but the Bailiff refused leave to appeal at first instance and a subsequent application was made to the Court of Appeal. The Court of Appeal also refused AdMatch leave to appeal and was "of the opinion that it was not seriously arguable that the Bailiff had erred in the exercise of his discretion, or that there had been any material change of circumstances that would have justified a different decision".

Costs of the Appeal

The Court of Appeal decided to "issue a decision on costs separately". On 9 June 2011, the Court of Appeal provided its decision on costs and ordered that Leeds United's costs to be paid personally by Mr Weston.

In making its decision, the Court of Appeal relied on Article 16 of the Court of Appeal (Jersey) Law 1961 which gave it "full power to determine by whom and to what extent the costs are to be paid" and the authority of *Planning and Environment Minister v Yates* [2008] JLR 489.

The Court of Appeal specifically drew attention to paragraph 74 of the judgment in *Yates* (ibid) which stated the following.

- “(i) Costs orders against non-parties will be exceptional in the sense of having considerations outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.*
- ...
- (iv) Difficult cases will arise where non-parties fund litigation designed to advance the funder’s own financial interests.*
- ...
- (v) Where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, that non-party should be liable for the costs if the claim, defence or appeal fails. But the position of an individual director who participates in or funds litigation will require careful consideration.*
- ...
- (vii) Ordinarily, a non-party, non-funder, with no personal interest in the litigation and who does not stand to benefit from it will not be liable for the costs incurred by an*

unsuccessful party without a full hearing of the merits upon which it is contended that potential liability arises”.

The Court of Appeal relied on the Bailiff’s findings contained in his judgment dated 19 January 2011 and also the defendant’s own submission that it *“was an impecunious shell company for several years before the business dealings with the first plaintiff took place in mid-2004. So the plaintiff always knew of the dormant, asset-less nature of the defendant company from the start”.*

The Court of Appeal found *“[i]n the whole circumstances, we reject the assertion that the defence to these proceedings was maintained for the benefit of the defendant and Mr Weston, in his capacity as shareholder rather than as an individual. Further, the fact that other third parties may have an interest in the outcome of these proceedings does not avail Mr Weston in the defendant’s opposition to the costs application. It is his efforts which have made a defence possible. The decision to make the application for leave to appeal was taken by Mr Weston. He prepared and filed the necessary papers and represented the defendant at the hearing before us. It is his*

actings, not those of other third parties, which have caused the plaintiffs to incur costs in opposing the application for leave to appeal”. The Court of Appeal consequently held that *“it is both just and reasonable that Mr Weston should be found personally liable for the costs of and incidental to the application for leave to appeal, and we so find.”*

Conclusion

The Court of Appeal’s decision offers protection to litigants faced with hostile opponents who, because of the shield of a limited company, pursue unmeritorious points or unjustly seek to stall or prevent the Court hearing the matter. There is therefore a duty on directors of companies involved in litigation to ensure that they act in the best interests of the company during and in respect of such litigation and if they are too closely connected to the litigant (ie whether they are funding it or otherwise stand to benefit from it or are pursuing the litigation for their own personal goals) they may potentially be liable for the other side’s costs. The Court will not tolerate a director or shareholder acting in such a way that amounts to an abuse of process regardless of the protection ordinarily offered by a limited liability company.



Clive Forbes
Manager, Sintel Global Limited

Intelligence and the Bribery Act 2010

*“Bribery is like pornography - you know it when you see it”*¹

Introduction

I am told that this quote is guaranteed to your attention. However, it is no mere salacious attention grabbing headline; it also serves to define a number of the new offences arising under the Bribery Act 2010 (“the Act”). The Act which came into force on 1st July 2011 constitutes one of the biggest changes to UK law business and commercial law for some time. I am not a lawyer. My particular area of expertise lies within the field of intelligence.

I am employed as the Business Intelligence Manager of Sintel Global Limited (“Sintel”), a company incorporated under Jersey law, and based in Jersey.

Sintel’s core aim is to provide organisations and individuals both in the offshore world and elsewhere with a comprehensive business intelligence service. This service is designed to deliver to our clients the necessary insight to make effective business and litigation decisions, and whose place within the business community is very relevant in supporting organisations who are seeking compliance with, amongst other things, the Act.

The new offences

You may be aware that prior to the Act coming into force HM Government issued “guidance” outlining how organisations, their owners and employees should implement changes, checks, balances and safeguards in order to avoid committing one of the four new statutory offences created by the Act, namely;

- (i) Offering, promising or giving a bribe (active bribery)²;
- (ii) Requesting, agreeing to receive, or accepting a bribe, (passive bribery)³;
- (iii) Bribing a foreign public official⁴; and
- (iv) Failure of a commercial organisation to prevent bribery⁵.

The first three of these offences are embodied in the quotation that heads this commentary. The last of these four offences is known as “the corporate offence” and requires a little more thought.

The corporate offence is committed when an organisation fails to prevent an “associated person” (somebody within the organisations ranks or a third party acting on its behalf) bribing another person with the intention of obtaining business, or an advantage in the conduct of business, for that commercial organisation.

When might the offence be committed?

The paradigm example of when the circumstances in which the corporate offence might be committed arose in the recent phone hacking scandal involving an organisation whose senior managers denied all knowledge of unlawful payments being made to third parties to obtain private information on others. If the Act were in force and were it to be shown that the senior management had countenanced, condoned or turned a blind eye to wrongdoing to increase the sale of newspapers, this would arguably have constituted an offence under the Act.

Continued...

¹ Nick van Benschoten, Head of the Anti-Corruption Unit at Britain’s Department of Business, Innovation and Skills. ² Section 1 Bribery Act 2010. ³ Section 1 Bribery Act 2010. ⁴ Section 6 Bribery Act 2010. ⁵ Section 7 Bribery Act 2010

How do you avoid committing these offences?

Some 2500 years ago Sun Tzu, a Chinese General, penned these words:

*"Know your enemy and know yourself and you can fight a hundred battles without disaster".*⁶

These wise words indicate that knowledge is key to success. Knowledge is also key to enabling organisations to raise the statutory defence to the corporate offence. An organisation will have a defence to the corporate offence if it can show that it had in place "adequate procedures" designed to prevent bribery.

What are "adequate procedures"?

Organisations differ in so many respects that the legal press suggests that until the phrase has been tested in the courts we will not really know for certain.

Every organisation must now consider whether they have "adequate procedures" in place and also whether they are robust enough to ensure compliance with the Act. A mere box ticking exercise is unlikely to be sufficient to enable an organisation to successfully run the defence

To avoid prosecution an organisation should comply with the six guiding principles the English Government has laid down in respect of adequate procedures which are as follows.

"Principle 1 - Proportionate procedures

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

Principle 2 - Top-level commitment

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person)

are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Principle 3 - Risk Assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Principle 4 - Due diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Principle 5 - Communication (including training)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces.

Principle 6 - Monitoring and review

*The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary."*⁷

The need to prepare

As intergovernmental collaboration increases then the chance of detection of bribery and successful prosecution of those involved also increases. It is anticipated that there will be a small number of high profile prosecutions. If convicted of the corporate offence an organisation may be exposed to unlimited fines as well as other collateral and possible consequences that may lead to the organisations demise. Individuals involved may be imprisoned for up to a decade.

It is important to remember that, from an

organisation's point of view, bribery is a lot more than just a legal issue. Whilst it is driven by the law the real challenges are for management in implementing and maintaining the right processes, controls, governance and culture and encouraging the right values and behaviour.

Addressing this issue is an essential part of building a risk resilient organisation and all organisations should review their risk profile and anti-bribery programmes.

How to prepare - Information and Intelligence

One of the key drivers that should form part of the risk resilience process is the gathering of timely, accurate and up to date intelligence. Company employees engaged in this process should know what, in this context, the definitions of the words "information" and "intelligence" actually are.

Intelligence gathering should always be subjected to a directed programme sometimes referred to as "The Intelligence Cycle".⁸ This cycle enables raw data (information) extracted from any number of articles or reports from one of the many subscription only databases and from open source material, to be developed into actionable and usable intelligence. As this data may be used to populate a KYC report which in turn may be admitted as proof that the due diligence process has been carried out it is important to be able to provide evidence that a formal intelligence gathering process has been adopted thereby minimising risk to the organisation.

At Sintel we have the expertise, knowledge and ethical integrity enabling us to provide an organisation with a fully verifiable independent and accurate report in support of KYC and due diligence. Without doubt, an organisation that employs the services of Sintel or other intelligence led businesses will have the evidence to show that it has taken the necessary steps to ensure that the "adequate procedures" requirement has been fulfilled.

⁶ Sun Tzu – The Art of War: circa 500BC. ⁷ Ministry of Justice – The Bribery Act 2010 - Guidance. ⁸ Serious and Organised Crime Agency.

News

We are delighted to confirm that Philip Sinel has been chosen as the winner of the Corporate INTL Magazine's Global Award for 'Dispute Resolution Lawyer of the Year in Jersey'. The award follows

Philip's involvement in a number of high profile and difficult cases. Philip was very pleased to accept the award and commented as follows:

"I am honoured to have won this award. This achievement is in no small part due to the hard

work put in over the last year by the entire Sinels team. The firm's work has fulfilled clients' objectives and we have continued to achieve results where others have not. We look forward to continuing to strive to offer the best quality services."

Advocate Philip Sinel
Advocate Paul Tracey
Advocate Matthew Godden
Advocate Richard Wakeham
Advocate Steven Chiddicks
Catia Tavares
Lauren Glynn
Adam Marshall

Commercial Dispute Resolution
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