



**Investec Trust (Guernsey) Limited et al v
Glenalla Properties Limited et al**
Court of Appeal
27th June, 2014

**JUDGMENT
28/2014**

Determination of trustees liability.

**COURT OF APPEAL
(Civil Division)**

(On appeal from the Royal Court of Guernsey Ordinary Division)

27 June 2014

**(1) INVESTEC TRUST (GUERNSEY) LIMITED
(2) BAYEUX TRUSTEES LIMITED**

Plaintiffs

and

**(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED**

Defendants

(5) RAWLINSON & HUNTER LIMITED

Defendant/Third Party Claimant

and

**(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED**

Defendants to Third Party Claim

**Before: James Walker McNeill, QC, President
John Vandeleur Martin, QC and
Robert Logan Martin QC**

**Advocate J Wessels for the Plaintiffs
Advocate JP Greenfield for the First to Fourth Defendants
Advocate IC Swan for the Fifth Defendant**

McNeill JA

Judgment of the Court

1. The Court has before it two Appeals and a Respondents' Notice arising out of a judgment issued by the Royal Court (Lieutenant Bailiff Sir John Chadwick PC) on 6 December 2013. In that judgment the plaintiffs and present appellants are referred to as "the former trustees", the first to fourth defendants are referred to as "the BVI companies" and the fifth named defendants and present appellants are referred to as "the present trustee". The same manner of identification will be used in this judgment.

Background

2. The following are the circumstances which give rise to the issues between the parties in these appeals.

3. The former trustees were formerly the trustees of a Jersey trust, known as the Tchenguiz Discretionary Trust ("the TDT"), constituted by declaration of trust dated 26 March 2007. The objects of the TDT were and are the members of a discretionary class comprising Mr. Robert Tchenguiz and his children and remoter issue. The declaration of trust gave power to the trustees, with consent, to add to the membership of the class. The trustees were empowered to deal with the whole capital of the trust fund in any manner for the benefit of all or any one or more of the beneficiaries. Clause 9.1 of the declaration of trust provided that no trustee should be liable for any loss to the trust fund or its income unless the loss should arise by reason of that trustee's own fraud, wilful misconduct or gross negligence.

4. The funding by means of which the TDT was constituted comprised the sum of £5,000 appointed from the Tchenguiz Family Trust (the "TFT"), a trust constituted under the laws of the British Virgin Islands under a declaration of trust made on 25 October 1988. The TFT was one of two settlements by means of which Mr. Victor Tchenguiz, the father of Mr. Robert Tchenguiz, made financial provision for members of his family.

5. Up until 2007 the property held for the purposes of the TFT was, in effect, held upon discretionary trusts for the benefit of Mr. Robert Tchenguiz and of his brother, Mr. Vincent Tchenguiz. The TDT was then constituted in 2007 as a result of the desire of Mr. Victor Tchenguiz to have separate sub trusts established for each of his two sons.

6. Until about 24 August 2007 the principal funds destined for the TDT continued to be held in the TFT. However a number of transactions or arrangements were made between 20 and 24 August leading up to the completion of transfers. First, on or about 20 August 2007 the first named plaintiff and appellant (as, at that date, sole trustee of the TFT) entered into a loan agreement for the borrowing of monies from Kaupthing Bank hf ("Kaupthing"). The Lender's level of commitment was potentially £100 million. Those identified as Borrowers included the first named plaintiff, the second named BVI company ("Thorson"), two other companies (Heatherville Limited ("Heatherville") and Violet Capital Group Limited ("Violet")) together with any subsidiary of the first named plaintiff in which it owned more than 75 per cent of the ordinary voting shares and which became a Borrower. Clause 11.1 of the agreement provided that each Borrower irrevocably and unconditionally jointly and severally guaranteed to the Lender punctual payment by each other Borrower of all that Borrower's obligations in relation to the facility or sums drawn under the facility. The agreement was to be governed by and construed in accordance with the laws of England.

7. On 21 August 2007 the second named plaintiff became a trustee of the TDT.

8. On 24 August 2007 the first named plaintiff, as sole trustee of the TFT, made an appointment of assets to the TDT. Included within those assets were the share capital in thirty British Virgin

Islands companies (including Thorson and the first named BVI company ("Glenalla")). Also included were loans owed to the TFT by thirty four specified companies.

9. By individual deeds of novation, each dated 24 August 2007, between, on the one hand, the first named plaintiff as trustee of the TFT and, on the other hand, the former trustees, as trustees of the TDT, together with, respectively, Glenalla and Thorson, the former trustees assumed liability for monies owed by the TFT to each of Glenalla and Thorson under certain arrangements or loans.

10. By a further deed of novation dated 24 August 2007 between the first named plaintiff as trustee of the TFT, the former trustees and Kaupthing, the former trustees received the beneficial ownership of shares in BVI companies each of which, apart from one, had been included in the list of companies identified in the deed of appointment of 24 August 2007. The former trustees also assumed the liabilities under the loan agreement of 20 August 2007 between the TFT and Kaupthing.

11. Later that year, through a document described as a "Framework Agreement" dated 19 December 2007 between the former trustees, as trustees of the TDT, Kaupthing and certain other companies, an existing corporate structure was altered through the interposition of two companies (the third named BVI company ("Eliza") and the fourth named BVI company ("Oscatello")) between the TDT and other companies in which underlying assets were held. By an overdraft loan agreement of the same date further funds were made available to Oscatello by Kaupthing for the stated purpose of refinancing certain current debt listed in a Schedule. Among other matters, the Schedule included an amount of £39,366,791 said to be due from the first named plaintiff on a loan account number 5962 as at 19 December 2007.

12. On 20 December 2007 Eliza received £150 million in accordance with the Framework Agreement and, on receipt, transferred the sum to Oscatello by way of interest free loan. On 21 December 2007 Oscatello used that sum, together with certain other monies, to make payments amounting in aggregate to £293,984,107.10 in making a payment under the Framework Agreement, making payment of a "structuring fee" to Kaupthing, making certain "collateral" payments to other companies and making five payments to Kaupthing apparently in repayment of monies owed to Kaupthing. One of the loans specifically identified was loan number 5962.

13. In August 2009 Glenalla and Thorson were placed in liquidation and the joint liquidators, in April 2010, wrote demanding payment of the outstanding loans said to be due from the trustees of the TDT.

14. Oscatello was placed in liquidation in February 2010 and, in the same month, a BVI winding up order was made for Eliza. In April 2010 the joint liquidators wrote to the former trustees demanding payment of outstanding loans said to be due to those companies.

15. In July 2010 the former trustees were replaced as trustees of the TDT by the present trustee.

Legal Proceedings

16. The proceedings leading to the determination below were commenced in March 2010. The former trustees sought determination of questions as to whether or not they had become liable – and, if so, on what terms – for monies said to be due to Glenalla, to Thorson and to either Eliza or Oscatello. They also sought declarations against the BVI companies that they had no personal liability in respect of monies said to be due and that any claims by the BVI companies extended only to trust property of the TDT held by them. As against the present trustee, the former trustees sought a declaration that they had a right of indemnity against trust assets of the TDT, whether or not currently vested in the former trustees, so that they might retain those assets until final determination of liability, realise the assets in order to meet any liability they may be found to have, and obtain exoneration.

17. The BVI companies by counterclaim sought declarations that the monies claimed were due under binding loan agreements and sought judgments in specified sums or, in the alternative, an accounting of all sums due to them by the former trustees.

18. By counterclaim at the instance of the present trustee, it sought declarations that the BVI companies had no claims to monies due, and that the former trustees were not entitled to indemnity or right of lien or exoneration in respect of the TDT assets. The present trustee also sought an order requiring the former trustees to take all steps necessary to vest title to the assets of the TDT in the present trustee and an accounting against the former trustees on the basis of wilful default. By a third party claim the present trustee sought similar declarations as against the BVI companies.

The Determination Below

19. In considering the issues before it, the Royal Court made the following determinations.

20. First, it concluded that immediately after 24 August 2007, the former trustees were subject to binding obligations in respect of the Glenalla loan and the Thorson loan in the amounts claimed.

21. Second, the Royal Court concluded that, immediately after the transfers of funds on 21 December 2007, the former trustees were subject to binding obligations in respect of what was described as the Oscatello loan. The court was not persuaded that it had been established that the sum was paid by Oscatello under the terms of a loan agreement but was persuaded that the operation of general law gave rise to such a binding obligation where payment was made by party A to party C of a debt owed to party C by party B.

22. Third, the court concluded that the former trustees remained subject to such binding obligations notwithstanding certain book entries and an assignment in March 2009.

23. Fourth, the court was unable to conclude that the former trustees had a claim against Eliza in any sum.

24. Fifth, the Royal Court found that the former trustees were not entitled to rely (as against the BVI companies) on Article 32 of the Trusts (Jersey) Law 1984 (as amended) and thereby limit their liability to the extent of trust funds and, separately, that it was not a term of the legal obligations assumed or undertaken by the former trustees in respect of the loans that they were not personally liable.

25. Sixth, it was held that matters alleged to constitute unreasonable or improper conduct on the part of the former trustees did not do so, and therefore that liabilities incurred by the former trustees in relation to the loans remained liabilities "reasonably incurred in connection with the TDT" for the purposes of Article 26(2) of the Trusts (Jersey) Law 1984.

26. Seventh, the Royal Court determined that, having regard to Clause 9.1 of the Declaration of Trust dated 26 March 2007, there was no evidence that the former trustees had acted in any breach of trust amounting to wilful fault or gross negligence.

Grounds of Appeal

27. The former trustees and the present trustee now appeal in respect of certain aspects of the decision below. The former trustees do not appeal the determination that the obligations assumed by them in respect of the Glenalla and Thorson arrangements were obligations as borrowers under legally binding agreements. Nor do they appeal the determination as to the sums due in respect of the Glenalla, Thorson and Oscatello arrangements.

28. The former trustees contend that the learned Lieutenant Bailiff was wrong to find that Article 32 of the Trusts (Jersey) Law 1984 (as amended) did not apply to relevant transactions.

29. Separately, they contend that it was common ground between the parties at trial that Article 32 had the effect that the plaintiffs were not personally liable to the BVI companies and, accordingly, that it was procedurally irregular for the learned Lieutenant Bailiff to find the plaintiffs personally liable.

30. Against the event that they had not succeeded on the foregoing grounds, the former trustees contend that the learned Lieutenant Bailiff ought to have found that upon a proper construction the underlying agreements and transactions did not impose personal liability; alternatively that a term to that effect should be implied.

31. The further Grounds of Appeal and Respondents' issues, for procedural reasons, are not the subject of this Judgment.

Article 32 of the Trusts (Jersey) Law 1984

32. Article 32 of the Trusts (Jersey) Law 1984 (as amended) ("Article 32") provides:

"Trustees' 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."

33. At paragraph 64 of the judgment below the learned Lieutenant Bailiff had identified that issues between the parties included (a) whether the former trustees were entitled to rely (as against the BVI companies) on Article 32 in these proceedings and, if not so entitled, (b) whether it was a term of any legal obligations assumed in respect of the loans that they were not personally liable. In reaching that view, the learned Lieutenant Bailiff had noted that, in their written case, the former trustees had stated that they intended to rely upon Article 32 in the event that the Arrangements gave rise to loan agreements binding upon them: see paragraph 60. He further noted that the BVI companies, in their written defences, stated that they did not admit that the former trustees were entitled to rely on Article 32 "in casu": see paragraph 61. He then observed (paragraph 62):

"But it was accepted [on behalf of the BVI companies] in the course of the oral hearing ... that Glenalla, Thorson and Oscatello did have knowledge that the former trustees were, throughout, acting in that capacity. To suggest otherwise – in the face of the documents which they executed – would be to ignore the obvious. So it is difficult to see how it can be contended on behalf of the BVI companies that, if the present trustees are entitled to rely on Article 32 of the Trusts (Jersey) Law 1984 in the present proceedings, the case does not fall within paragraph (1)(a) of that Article: and, if so, why the BVI companies' claims should not "extend only to the trust property". But, plainly, the BVI companies do resist the declaration sought by the former trustees under the third head of relief; and do not limit the claims which they have brought against the former trustees (brought by way of counterclaim) to the extent of the trust property. In those circumstances, notwithstanding that it has now been accepted that Glenalla, Thorson and Oscatello did have knowledge that the former trustees were, throughout, acting in their capacity as trustees of the TDT, the issue raised by paragraph 55 of the Further Amended Defences – whether the former trustees are entitled to rely on Article 32 of the Trusts (Jersey) Law 1984 – remains for determination."

34. The learned Lieutenant Bailiff then noted that the present trustee had admitted that Glenalla and Thorson knew that the former trustees were acting as trustees at the time in question and had pleaded that it would, if necessary, rely on Article 32.

35. The learned Lieutenant Bailiff proceeded to consider the issue as to the entitlement of the former trustees to rely on Article 32 at paragraphs 178 – 190 of the judgment.

36. In the view of the learned Lieutenant Bailiff, in order to determine whether the former trustees were entitled to rely on Article 32, it was necessary to ask, first, why the Royal Court should treat the rights to which the BVI companies claimed to be entitled as governed by the law of Jersey rather than by the law of Guernsey or (if different) by the proper law of the contract or other transaction under which the rights arose: paragraph 178.

37. After rehearsing submissions the learned Lieutenant Bailiff indicated that, in the circumstances before him, it was, in his view, unnecessary to decide which – as between the law of Guernsey, the law of England and the law of the British Virgin Islands – should be taken to be the proper law of the new contracts which arose under the deeds of novation regarding Glenalla and Thorson. It was sufficient to decide – as he did – that the law of Jersey was not the proper law of those new contracts: paragraph 181.

38. As regards the obligation to repay the Oscanello loan, the learned Lieutenant Bailiff considered that it might have arisen either under the law of Guernsey or the law of England. He was content to assume (without deciding) that it arose under the law of Guernsey but found that there was no basis for holding that the obligation arose under the law of Jersey: paragraph 182.

39. Having reached that stage in his analysis, the learned Lieutenant Bailiff considered that the ensuing question should be whether the claims of the BVI companies should be treated as governed by the law of Jersey notwithstanding that the law of Jersey was not the proper law of the transactions under which the claims arose.

40. In considering this question the learned Lieutenant Bailiff noted that the TDT had been established under and was to be governed in all respects by the law of Jersey, which was to be the proper law of the trust. It therefore followed that the TDT was a foreign trust for the purposes of the Trusts (Guernsey) Law 2007. Accordingly the TDT was not a trust to which the provisions of that Law as regards dealings by trustees to third parties applied: paragraph 183.

41. The learned Lieutenant Bailiff then considered Section 65 of the Guernsey law but found nothing there which required the Royal Court to apply provisions of Jersey law – in particular, trust law – going beyond the enforcement of the trusts of the TDT.

42. It therefore seemed to the learned Lieutenant Bailiff that the issue before him was whether the enforcement of the claims brought by the BVI companies could be said to be the enforcement of the trusts of the TDT. In his judgment the answer to those questions should be in the negative: paragraph 187.

43. After rehearsing certain submissions on behalf of the BVI companies which presented an analysis which he confessed he had not found easy to follow, the learned Lieutenant Bailiff indicated that by virtue of the non admission, he considered it plain that the BVI companies did not accept that the former trustees were entitled to rely on Article 32(1)(a) to limit their personal liability. He then indicated that he had reached the conclusion that the BVI companies were correct to take the position that the former trustees could not rely on Article 32(1)(a), but that he had done so by a different route.

44. The learned Lieutenant Bailiff then proceeded to consider the issue as to whether it was a term of legal obligations that the former trustees were not personally liable.

Ground of Appeal 3

45. It is appropriate, however, to pause at this stage and deal with the contentions on behalf of the former trustees (a) that at trial it had been common ground that Article 32 applied and (b) that the BVI companies had elected to disavow an alternative claim in personal liability.

46. The former trustees submit that, by the time of trial, there was a consensus between the parties that the former trustees could not be liable in an amount greater than the value of the TDT assets, provided that the former trustees' right of reimbursement and indemnity under Article 26(2) of the Trusts (Jersey) Law 1984 was intact. In their submission, the BVI companies had elected to accept that they could not recover more than the value of the TDT assets, on the basis that they could then advance an argument that they were entitled to the TDT assets regardless of whether or not the former trustees had lost their right of indemnity. They suggest that the learned Lieutenant Bailiff either overlooked or misunderstood this argument and the concession which it entailed when he came to write the judgment. An unequivocal election prevented a party resiling from the position then adopted. Reference was made to *United Australia Ltd v Barclays Bank Ltd* [1940] AC 1, 30-31 (Lord Atkin), *Slough Estates Ltd v Slough Borough Council (No 2)* [1969] 2 Ch 305, 318 (Lord Denning MR), *Balgobin v South West Regional Health Authority* [2013] 1 AC 582 paragraphs [20] and [29] (Lord Kerr).

47. They point out that the arguments relating to Article 32 had been dominated by the respective submissions of the BVI companies and the present trustee as to construction of Article 32. No argument was directed at whether Article 32 applied at all or as to the basis of application of Article 32 to the facts of the present dispute. The position of the present trustee was that, on a true construction, Article 32 was merely a mechanism for limiting the liability of a trustee to third parties who knew they were dealing with a trustee. It did not give rise to any proprietary liability nor did it have the effect of relieving a trustee of all liability by switching liability on to trust property.

48. As regards the BVI companies, their skeleton argument for trial and, in addition, their oral closing submissions made it clear that there was no suggestion that Article 32 did not apply. Upon their construction of Article 32 whereas, under the common law regime, claimants against trustees would claim against the trustee personally and rely upon the trustees' indemnity to get access to the trust property, under the statutory regime, the creditor was given an entitlement to claim against the trust property, but only the trust property.

49. The present trustee was neutral on the question as to whether or not the learned Lieutenant Bailiff had erred in concluding that Article 32 did not apply; but will, at a future hearing, present submissions as to the proper construction of Article 32 against the event of this court concluding that Article 32 is applicable.

50. For the BVI companies, Advocate Greenfield, whilst accepting that no argument had been presented that Article 32 should not apply, indicated that numerous parts of the presentation for the BVI companies showed that a case of personal liability was maintained in the event of Article 32 not being applicable. In any event, in the whole circumstances, the former trustees could not and had not identified any prejudice suffered by them as a consequence of any manner in which the BVI companies had put their case. The former trustees had pursued all their arguments regarding personal liability and had fully argued their position in respect of implied terms and construction.

Discussion

51. We do not propose to enter into a determination of the issues as to what position was adopted by parties at trial. It does appear that parties were not engaged before the learned Lieutenant Bailiff on the issue of the applicability of Article 32 in general, although there had been an earlier issue as to whether or not this was a case of relevant knowledge: see paragraph 33 above. Having considered the authorities put to us by the former trustees, we are satisfied that something more than the adoption by a litigant of an argument in law is required before a party can be said to have abandoned the right to rely on a point of law. Obvious examples are the acceptance of a payment which results from the

alternative position or the implementation of a permission or consent which is inconsistent with the position being maintained. As regards matters internal to litigation, only proceeding to judgment will prevent reliance on a different ground of action. On our consideration of the pleadings below, both written and oral, it appears to us that whilst the principal line of argument for the BVI Companies had become that Article 32 should be applied to the former trustees and present trustee, a fall-back position of personal liability was retained. To have argued strongly for the application of Article 32 does not amount to an unequivocal abandonment – expressly or impliedly – of a right to argue an alternative in the event of it being found, that Article 32 did not apply in the relevant circumstances. There are very few concessions, made in the course of court proceedings, which cannot be withdrawn if that can be done properly and without manifest injustice to other parties. We therefore reject ground of appeal 3 and proceed to deal with the substantive matters raised by ground of appeal 1.

Ground of Appeal 1.1

52. The first argument raised under ground of appeal 1 is that the learned judge erred in concluding that he could only apply Article 32 to the arrangements between the plaintiffs and the BVI companies if Section 65 of the Guernsey law required him to do so. It was submitted, further, that he erred in concluding that Section 65 did not require him to apply Article 32 because the claims of the BVI companies could not be said to involve enforcement of the trusts of the TDT.

53. Section 65, in the submission for the former trustees, simply provides that, within this jurisdiction, a foreign trust is to be governed by and interpreted in accordance with its proper law (subject to certain exceptions in sub section (2) which are not relevant here). However the Guernsey law contains other provisions of general application, including application to a foreign trust where the context admits: see Part IV and Section 66. In particular, Section 69(1)(a) allowed the Royal Court to make orders in respect of –

- (i) the execution, administration or enforcement of a trust,
- (ii) a trustee, including an order as to the exercise by a trustee of his functions ...,
- (iii) a beneficiary or a person connected with a trust,
- (iv) any trust property, including an order as to the vesting, preservation, application, distribution, surrender or recovery thereof.

54. The former trustees brought the present proceedings in their capacity as trustees of the TDT in connection with the administration of the trust. The present trustee is a party in its capacity as present trustee of the TDT. The BVI companies claim to be entitled in the administration of the trusts to orders affecting the trust assets and accordingly invoke the jurisdiction given by Section 69.

55. In the submission for the former trustees, Section 69 applies in a wide range of circumstances. Section 65 would apply Jersey law generally to the interpretation of the present trust but Part IV of the Guernsey law then confers on the court a very wide jurisdiction to make orders in relation to the administration of the trust. The correct question for the Royal Court to have asked is whether the present proceedings concern "the execution, administration or enforcement of a trust" or "a trustee" or are proceedings in respect of "a person connected with a trust". If they are, the Royal Court was empowered to make orders and, if an issue of interpretation arose, Section 65(1) provided that interpretation should be in accordance with the law of Jersey. Given the way in which the learned Lieutenant Bailiff had approached matters, the issue, properly characterised, was as to what is the applicable law in relation to the former trustees' defence concerning the limits of their liability.

56. For the BVI companies, on the other hand, it was submitted that the critical question was whether their claims are matters which are "governed by" the proper law of the TDT or whether the enforcement of the claims brought by them can be said to be the enforcement of the trusts of the TDT. In their submission the learned Lieutenant Bailiff was correct to conclude that, in enforcing their claims, the BVI companies were in no sense seeking to enforce the trusts of the TDT. Whilst it was true that a party who has a claim against a trustee might, in certain circumstances, bring his claim directly against the trust assets this would only arise if the party was entitled to be subrogated to the trustees' lien: Lewin on Trusts (18th edition) 21-41, Underhill and Hayton (18th edition) 81.46.

57. Section 69, they contended, is a purely procedural section which identifies matters which can be brought before the Royal Court and the persons who may bring an application in respect of such matters. It does not purport to lay down a conflicts of law rule which requires the court to apply the proper law of a trust to the matters listed in Section 69(1)(a). This is apparent from the fact that Section 69 is contained within Part IV which sets out provisions of general application both to Guernsey trusts and foreign trusts.

58. Further, Section 69 being purely procedural, the court will apply the *lex causa* of the subject matter of the application to the determination of that application: that may well be a law other than the governing law of the relevant trust. Two examples were given. First, a person asserting a proprietary claim against the assets of a trust because they had been stolen from him might bring an application under Section 69 seeking recovery; but his proprietary claim might be governed by a law other than the proper law of the relevant trust. Second, a person seeking to follow trust property (Section 73) or to assert the existence of a constructive trust (Section 76) could do so under Guernsey law even although the trust concerned might be governed by a foreign law.

59. Separately, Section 69(1)(a) merely lists a number of matters in respect of which applications may be made to the Guernsey court. It does not define the scope of matters which are to be considered as amounting to the "enforceability" of a trust within the meaning of the heading to Section 65.

Discussion

60. In our opinion the former trustees are well-founded in this part of their appeal. The learned Lieutenant Bailiff had reached the view that the question before him was as to whether, in the circumstances before the Royal Court, it should hold that the trustee was entitled to rely on Article 32: paragraph 186. In reaching the view that the question was whether Section 65 of the Guernsey law required the Royal Court to apply Article 32 of the Jersey law, the learned Lieutenant Bailiff appears to have determined that the impact of Section 65 on litigation in Guernsey in relation to a foreign trust was in some way restricted to the enforcement of the trusts of the foreign trust. In our opinion, upon a proper interpretation of Part III and Part IV of the Trusts (Guernsey) Law 2007 that view is incorrect.

61. Part III makes provisions applicable only to a foreign trust: Section 64. Section 65 makes two provisions. The first is to identify, for the purposes of this jurisdiction, the proper law by which a foreign trust is to be governed and, as regards which, it is to be construed. The second, quite separately, makes provision for certain foreign trusts not to be enforceable in Guernsey to specified extents. Accordingly, on any occasion when an issue arises before the courts of this jurisdiction in respect of a foreign trust, any issue as to the governance of the trust or as to its construction is to be dealt with in accordance with the proper law. It is important to recollect, however, that at least as far as this jurisdiction is concerned, a "trust" is not a separate legal person or an inanimate object. It is a dynamic relationship which exists when a person holds or has vested in him – or is deemed so – property which does not form part of his own estate, and does so for the benefit of another person or for any purpose extraneous to him: see Section 1. Accordingly, in this statute, what is referred to as a "trust" is a dynamic linear relationship between a trustee and either a beneficiary or persons with an interest in a purpose, the relationship being governed both by identified trust purposes and the general law. It is that relationship which is valid and enforceable in Guernsey: Section 2. At least as far as Guernsey trusts are concerned, notwithstanding the terms of any constitutional documents, certain duties are imposed upon trustees: see Sections 22 to 29. Further, subject in certain respects to the terms of the trust, trustees are vested with various powers: see Sections 30 to 38. In addition, subject in certain respects to the terms of the trust, provisions are made for and regarding the liabilities of trustees: see Sections 39 to 44.

62. It is over this whole dynamic relationship that the Royal Court is given jurisdiction in respect of a Guernsey trust: Section 4(1)(a). The Royal Court is also given jurisdiction "in respect of any other trust" where the trustee is resident in Guernsey, where any property of the trust is situated in or administered in Guernsey or the terms of which provide that the Royal Court is to have jurisdiction:

Section 4(1)(b). Guernsey may, indeed, be the primary effective jurisdiction if the property of the foreign trust is situated in Guernsey and a trustee is resident here.

63. It is against that background, in our opinion, that one approaches the proper interpretation of Parts III and IV of the statute. It seems to us, therefore, that Section 65, in directing the courts of this jurisdiction to look to the proper law of the trust in respect of its governance, refers to a wide range of matters by which a legal system permits the recognition of an enforceable relationship of trust, in the sense of having control of property in which others have a beneficial interest, and regulates that relationship through the identification of powers, duties and potential liabilities.

64. Turning then to Part IV which makes provisions of general application including, where the context admits, to a foreign trust (Section 66), Section 69 makes provision as to the general powers of the Royal Court.

65. The provisions of Section 69 are expressed, quite understandably, in terms of considerable generality. Leaving aside matters set out specifically, the Royal Court may make an order in respect of the administration of a trust, in respect of a trustee, in respect of any person connected with a trust and in respect of any trust property. In the context of a resident trustee, being the trustee of a foreign trust, accordingly, the section would appear to empower the Royal Court to make an order of any sort on the application of a trustee in respect of a matter relating to his trusteeship.

66. It seems to us, therefore, that approaching the matter in the way in which the learned Lieutenant Bailiff did, it is not sufficient merely to look at Section 65 or to consider the issue as to enforcement of trusts. Rather, one has to consider, in addition, the ambit of the jurisdiction given to the Royal Court and the ambit of the powers. We therefore consider this first section of the first ground of appeal to be well founded.

67. The logical conclusion is that, with the exception of the provisions of Section 65, there is no conflict of laws provision in the Guernsey Law and, accordingly, one is not looking to the Guernsey Law for a direction as to how to resolve an issue which may properly be characterised as a conflict of laws issue. It seems to us, therefore, that what requires to be considered are the appropriate conflicts rules in respect of the question whether the former trustees – and, indeed, the present trustee – are entitled to rely on Article 32 in the present proceedings. This is the matter raised in ground of appeal 1.2 to which we now turn.

Ground of Appeal 1.2

68. It may be important to recollect that these proceedings embrace two sets of claims germane to consideration of this matter. The proceedings were commenced by the former trustees who sought declaratory determinations including that they were entitled to rely upon Article 32(1)(a) in respect of potential liabilities regarding monies said to be due. The other is that, by the counterclaim, the BVI companies seek judgments against the former trustees in the full sums due under the loans.

69. The approach of the learned Lieutenant Bailiff had been to look at the proper law of the transactions (paragraphs 178 – 182) and then to ask whether the claims in respect of them should be treated as governed by the law of Jersey notwithstanding the proper law of the transactions (see the subheading above paragraph 183). In approaching matters in this way, however, he was doing so without the benefit of submissions from the parties. There is, therefore, no discussion as to the proper legal characterisation of trusteeship in any particular jurisdiction or as to any conflict of laws rules either of direct application or of possible application by analogy. Whilst, in paragraph 186, the learned Lieutenant Bailiff briefly considered certain scenarios which reflected the wider international implications of the issue which he had set before himself, they were not pursued by reference to private international law considerations.

70. We turn therefore to the submissions made to this court.

71. For the former trustees it was said that the issue which arose for the courts in this jurisdiction was as to which law governed issues relating to the liability of trustees to third parties with whom they had transacted as part of the proper administration of the trust. There were no known conflicts rules of direct application but it was submitted that the proper determination could be assisted by way of analogy from rules concerning the extent of the liability of the members of a corporate body and of members of partnerships.

72. As regards the liability of shareholders in a corporation and their potential liability to third parties with whom the company transacted, it had long been held that, in answering the question whether members of a company had any liability to those who dealt with the company, the courts looked not to the law governing the transaction, but to the law which governed the formation of the company: *Risdon Iron & Locomotive Works v Furness* [1906] 1 KB 49.

73. As to partnerships, in *Johnson Matthey & Wallace Limited v Ahmad Alloush et al* (1984) WL 988886, the Court of Appeal in England had had to consider an issue relating to a partnership constituted under Jordanian law. The plaintiffs had obtained judgment against the defendants under certain promissory notes. All the defendants were partners in a Jordanian entity. The entity was what was known in Jordanian law as an ordinary limited company but, whilst it was found to have a separate legal persona, in other respects it appeared to be akin to an English partnership (which does not have separate legal personality and under which each of the partners is liable personally). The approach of the Court of Appeal (Sir John Donaldson MR, and Warner J) was to proceed by reference to the proper law by which an entity was governed but, in respect of limitation of liability under that law, to distinguish between limitation of liability as a matter of substantive law and limitation of liability as a matter of procedure. If the route chosen by the proper law of the place of incorporation was merely procedural then it would be ignored under the conflicts rule providing that all matters of procedure are governed by the domestic law of the country to which the court in which any legal proceedings are being taken belongs; procedure including, among other matters, remedies and process. Reference was made, with apparent approval, to Dicey & Morris (10th edition) at page 1192, the wording of which remains unchanged in the current (15th edition) at paragraph 7.020. In *Johnson Matthey*, upon a proper interpretation of the Jordanian law, the relevant provision was procedural rather than substantive and the individual defendants were personally liable.

74. When one turned to Article 32 it was clear, it was submitted, that it had a substantive effect. It prevented a trustee from having unlimited personal liability when dealing with third parties in appropriate circumstances. The liability of the trustee to the creditor was affected from the outset. It was further submitted that this was consistent with the contentions on behalf of the BVI companies at trial where they had submitted that Article 32 substantially changed the relative positions of the trustee and the other party to the transaction and, in cases of relevant knowledge, provided that liability was not in a personal capacity but in a representative capacity.

75. The analogy with limited companies and limited liability partnerships was strong. If the courts would respect protection afforded to members of such companies or partners in such partnerships by the foreign laws under which they were incorporated, there was no compelling reason why a court should not similarly apply the foreign law of the trust in question which limits the liability of trustees.

76. For the BVI companies it was submitted that the attempt to identify an appropriate analogy between the position of a trustee and the position of a limited liability partnership or limited company was misconceived. The two cases referred to were not analogous or relevant to the situation of the former trustees in the present case. No issue of corporate personality or agency arises.

77. The BVI companies agreed that it was necessary to identify the issue of law to which rules of private international law should be directed and then determine the most appropriate system of law to deal with that issue. In their submission the issue of law was whether the former trustees' ascertained personal liability in contract under the loans to Glenalla and Thorson, under the law of the transaction, was limited by reason of a trust provision, Article 32.

78. On behalf of the BVI companies it was submitted that *Risdon Iron*, properly understood, was not authority for the proposition that, in answering the question whether the members of the company have any liability to those who deal with the company, the court must look to the law governing the formation of the company as opposed to the law of the transaction. The basis of the determination was that, as a matter of the law of agency, no facts had been pleaded to show that the company had any authority to enter into contracts on behalf of its shareholders: see Romer LJ at pages 58, 59. Nor did the Court of Appeal purport to lay down any absolute rule that a shareholder could never be liable under a contract made between his company and a third party: Romer LJ at the passage cited and Collins MR at page 56.

79. Accordingly, the liability of the shareholder in *Risdon Iron* did not depend upon the law of the place of incorporation but upon a factual inquiry as to authority. Where a question as to an agent's authority to bind his principal arises, under both English and Guernsey conflicts of laws rules, issues of actual authority would be governed by the law applicable to the relationship but questions of ostensible or implied authority would be determined by the putative proper law of the contract: see *Novus Aviation v Onur Air* [2009] 1 CLC 850 at paragraph 40 (Lawrence Collins LJ (as he then was)). The outcome of any particular case will depend upon the application of the rules relating to questions of law of agency under private international law and are not determined by what might be perceived to be the status of a company under its laws of incorporation.

80. Further, unlike the position of a shareholder, who is a separate person from the company, the trustee is the legal owner of the trust assets and there is no separate legal person in the form of a trust. It therefore follows that the liability of a trustee for transactions into which he enters as trustee, has nothing to do with the law of agency. The former trustees were undoubtedly parties to the loan agreements and there can be no suggestion that they entered into those transactions as agent for another legal person.

81. The *Johnson Matthey* case was of no assistance. Jordanian company law created a cause of action against the partners of the company and all that the Court of Appeal decided was that the restrictions under Jordanian law preventing a creditor from pursuing the partners without first taking other steps could not apply in England because those steps were purely procedural.

82. In any event, the proper law of a contract governs its effects and those effects, it was submitted, would include both quantification and any limitation on the extent of liability of a contracting party. Reference is made to Dicey & Morris (11th edition) Rule 186(1) and (2). As a general rule, in a claim to enforce a contractual or other obligation, a statutory provision of a law other than the proper law of the obligation cannot have any effect on the obligation. In the submission on behalf of the BVI companies, these principles were reflected in well established authorities.

83. Looking first at the discharge of debt, a debt or liability arising in any country may be discharged by the laws of that country and such discharge, if extinguishing the debt or liability, will be an effectual answer to the claim not only in the courts of that country but in every other country. But the discharge of a debt or liability by the law of a country other than that in which the debt arises does not relieve the debtor in any other country: see *Ellis v McHenry* (1871) LR 6 CP 228, 234 (Bovill CJ).

84. Separately, looking at the potential interaction between the law governing a contract and a statutory provision under a different law, the law of the contract would generally prevail: see *Sayers v International Drilling Co* [1971] 1 WLR 1176 at 1184 (Salmon LJ (as he then was) and Stamp LJ).

85. These principles had also been recognised and applied by the High Court of Australia in litigations dealing with Australian legislative provisions limiting the amount of interest recoverable on debts.

86. In *Barcelo v Electrolytic Zinc* (1932) 48 CLR 391, the High Court of Australia held that a statute of the State of Victoria limiting interest payable under a debt owed by a company applied to a

contract governed by the law of that State even although the debenture over the companies assets, by which the debt was secured, had been registered in London. Dickson J had relied on the decision in *Ellis v McHenry*: see page 425.

87. In *Wanganui-Rabgitkei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, the High Court of Australia had applied the same principles to a situation in which a New Zealand public body was liable to pay interest under a debt to an Australian building society. The public body had attempted to rely upon a New South Wales statute in order to limit its liability to pay interest but the High Court held that, as the obligation was governed by New Zealand law, the Australian statute did not apply. Dickson J had again applied his reasoning in the *Barcelo* case: see page 601.

88. The principles had been applied in numerous other cases, for example in the context of exchange control laws and statutory moratoria on debts: see *Re Helbert Wagg* [1956] Ch 323, 340; *National Bank of Greece v Metliss* [1958] AC 509, 529; and *Re United Railways of Havana* [1961] AC 1007, 1067.

89. Applying such principles to the present case, under the proper law of the loan agreements and the law relating to the restitutionary obligation, there was no limitation of liability and, for reasons to be given later, no such term could be implied. There was no scope for Article 32 to override the effect of those obligations.

90. Having regard to the rule that the law of a contract will govern its effects, there was no justification for the assertion by the former trustees that it could not be assumed that the law governing a particular issue which the court had to decide would be the same as the law applicable in general to the loans and restitutionary obligation. The cases of *Macmillan v Bishopsgate Investment Trust plc (No. 3)* [1996] 1 WLR 387 and *Raffaelsen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] QB 825 were not authority for such a proposition. In particular, they were not authority for the proposition that there could be a bifurcation of law applicable to a claim and defence in respect of a contract. The *Macmillan* case had involved two quite separate issues namely original ownership rights and the extinguishment of those rights.

Discussion

91. In presenting their submissions on the proper application of private international law, each of the former trustees and the BVI companies sought to identify the appropriate characterisation of the relevant issue before this court under this Ground of Appeal. For the BVI companies it was suggested that the issue of law was whether the former trustees' personal liability under the loans to Glenalla and Thorson, under the law of the transaction, was limited by reason of a foreign law. For the former trustees, although the matter was presented in a number of different ways, the thrust was to characterise the issue as whether the plaintiffs' status as trustees, and the implications and restrictions which that status brought, fell to be recognised in determining liability in respect of relevant transactions.

92. Whilst it is often helpful to seek to identify the proper characterisation of issues, we are inclined to agree with the views expressed by Mance LJ (as he then was) in *Raffaelsen Zentralbank*, cited above, at 840 – 841, where, quoting with approval from Auld LJ in *Macmillan*, cited above, at page 407, he indicated that the quest for appropriate principles of private international law did not depend upon the application of rigid rules but, rather, upon a search for appropriate principles to meet particular situations.

93. Here, on one view, there are two related issues. The first is as to whether a contractual obligation in a particular sum is binding upon a particular person. The second is whether, albeit a binding obligation in a particular sum exists, the liability of the obligant is in some way restricted by virtue of the status of the obligant under its domestic law. There appears to be no direct guidance either in authority or in authoritative writing to assist where the status in question is that of trustee.

94. It seems to us, however, that assistance is available from certain of the authorities which have been put before us. The first of these is *Risdon Iron*, cited above. In that case an English company incorporated under statute as a limited company was formed for the purpose of acquiring and working mines in, amongst other countries, the United States of America. By the articles of association the directors were empowered to do all things necessary to comply with the requirements of the law of any country where the company might carry on business. The company acquired and worked mines in the State of California and, for that purpose, purchased machinery from the plaintiffs, manufacturers in California. By the law of California every shareholder of a company, whether incorporated in California or elsewhere, trading within that State was personally liable for an appropriate proportion of the company's debts. The company became insolvent and the plaintiffs sued in England the defendant, a shareholder, for his proportion of the price of the machinery. It was held that the defendant did not, by becoming a member of the company upon the terms of the memorandum and articles, authorise the directors to pledge his personal credit for the price of the goods supplied and that, in the absence of express authority on his part, the action could not be maintained against him.

95. The BVI companies were correct to submit that the claim foundered upon a lack of pleading on the part of the defendant of agency, or authority to bind, granted by the shareholder. However, that issue would not have been relevant had the Court of Appeal not assumed that English law applied to the question whether members of an English company were liable for the contractual debts under a contract in California. We note that the case has been viewed as an example of what is thought to be a generally accepted rule of private international law that the law of the place of incorporation determines, among other matters, the extent of an individual member's liability for the debts and liabilities of the company: see *Grupo Torras SA v Al-Sabah (No. 1)* [1996] 1 Lloyd's Rep. 7, 15 (column 2) (CA) per Stuart-Smith LJ, also quoted in *Excalibur Ventures LLC v Texas Keystone Inc., etc* [2013] EWHC 2767 (Comm) per Lord Justice Christopher Clarke at paragraph 1143.

96. In matters of conflicts of laws the courts of this jurisdiction regularly have regard to views expressed in the courts of England and Wales. Accordingly, upon the basis of the decision of the Court of Appeal in *Risdon Iron*, as viewed in the later authorities, we would apply, in this jurisdiction, a rule that the law of the place of incorporation determined the extent of an individual member's liability for the debts and liabilities of a company.

97. We also note that the decision of the Court of Appeal in *Johnson Matthey*, cited above, was cited by Lord Oliver of Aylmerton in his speech in *JH Rayner (Mincing Lane) Limited v Department of Trade and Industry and Others* (and related appeals) [1990] 2 AC 418 at 509.

98. The decision in *Johnson Matthey* appears to evidence the adoption of a similar principle in respect of partnerships, subject to the supervening application of a different rule, namely that if the restriction on liability in the law of the country under whose laws the partnership has been formed is procedural only, it will be ignored in the courts of the forum of the dispute.

99. Turning to the potential application of these rules in the circumstances before this court, it seems to us that the rules evidenced by the cases to which we have just referred show that where the law of one jurisdiction makes provisions regarding the potential liability of persons holding a particular status, those provisions, if of a substantive nature, will be recognised in the courts of the forum of the dispute. We recognise that the concept of an enforceable trust as between two or more separate persons is not a concept recognised in law as widely in jurisdictions as the concepts of incorporation and of partnership. But the three bear a similarity: in instances where, with no room for doubt, one contracting party is seen to be a corporation – of whatever sort out of an increasingly wide genus and under whatever national system of law – or a partnership, the other contracting party is on notice that she or he is not contracting with an individual or individuals but, rather, with a different legal person (assuming the partnership to be such) and that the obligant in the contractual duties is that other legal person. The other contracting party is therefore on notice that, in order to assess the strength of the covenant being offered, it might be necessary to consider the laws by which the other

entity is governed, consider any publicly available records and ask particular questions as to the wealth of the entity, rather than the wealth of the individual.

100. Here, the issue raised by Article 32(1)(a) is one where the other party to a transaction knows that the trustee is acting as a trustee. It seems to us that such knowledge, properly analysed, puts the other party into a position closely analogous to that of the party transacting with a company or partnership with a separate personality. Through some means the other party has become aware that the human being with whom he or she is about to contract is not contracting as the individual person who appears before them. In the case of the company or partnership with separate personality it is being made clear that the individual is acting in some form of representative capacity. In relation to the trustee it is being made clear that the person is transacting not as an individual but as a trustee.

101. Whether the individual himself or herself makes clear to the other party that they are contracting as a trustee or whether this becomes clear through some other means, the other party is immediately put on their notice that a distinction from mere individual person is being put forward. The other party might know, in general terms, that trusteeship is a special category of relationship. If they do not they are on notice to ask the individual what they mean by purporting to transact as a trustee. Whilst the individual as individual and individual as trustee are not two separate persons in law (in most trust jurisdictions), whilst the one individual has direct title both to his private patrimony and his trust patrimony and whilst, therefore, the individual as trustee is not acting in a representative capacity, the other party to the transaction is being made aware that the individual wishes to contract not in his personal capacity but in the interests of other persons, that is, with a different status.

102. Upon that analysis we discern no distinctive element in the character of trusteeship which should lead to the application of a different rule in respect of the extent of liability for a trustee whose trusteeship is recognised by a jurisdiction and of whose trusteeship the other party to the transaction has been made aware than is the case in relation to corporate entities or partnerships with separate personality.

103. In reaching this opinion we are of the view that it creates no unacceptable conflict with the rule relied upon by the BVI companies that the proper law of a contract governs its effects. We observe, first, that from *Ellis v McHenry* a debt or liability arising in any country may be discharged by the laws of that country and such discharge, if extinguishing the debt or liability, will be an effectual answer to the claim not only in the courts of that country but in every other country: see paragraph 83 above. In other words, a law other than the law governing the contract can affect an outcome relating to the contract. Further, that issue was clearly before the Court of Appeal in *Risdon Iron* and in the cases in which it is referred to. Nonetheless, the importance of respecting the corporate personality and limitations which are part of the substantive law of the jurisdiction of incorporation were given the greater weight. Cases such as *Risdon Iron* and the present case are not dealing with issues of discharge of debt, such as was the case in *Ellis v McHenry*. The decision in *Sayers v International Drilling* dealt with the identification of the proper law of the contract and consequent exclusion of other laws.

104. None of the other cases relied on deal with a matter of status which applies from the very time of the formation of the contract. It is not that the result of the application of Article 32 is a subsequent limiting of an otherwise ascertained liability. Rather it is that, from the outset of the transaction, the other party to the transaction is on notice that the extent of the liability of the trustee extends only to the value of the trust property at the relevant time and does not include, in addition, the personal patrimony of the trustee. Accordingly, from the time of the formation of the contract, the parties knew or ought to have known that they were contracting upon the basis that such a potential cap on liability exists. It is a concomitant of the contract coming into existence. It is not imposed afterwards.

105. The final matter for consideration under this part of Ground of Appeal 1 is as to the juristic nature of Article 32(1)(a): that is, whether it is a substantive provision or merely procedural. Properly interpreted, it is clear that it is substantive. The sub-paragraph makes two provisions. First it provides that where the other party knows that the trustee is acting as trustee, any claim by the other

party is to be against the trustee as trustee. Secondly it is provided that the claim is to extend only to the trust property. Whilst there are some potential issues as to the proper interpretation of the provision, it is clear that, in identifying the liability of the trustee, the nature or extent of that liability is not dependent upon the taking or failure to take any other procedural steps in relation to a claim.

106. It therefore follows, in our opinion, that, as a matter of private international law the courts of this jurisdiction should recognise the applicability of Article 32 in the determination of the present disputes between the parties. Certainly, given the terms of section 42 of the Guernsey Law there is no issue as to public policy in Guernsey being offended by such a result.

Ground of Appeal 1.3

107. Under this part of the first ground of appeal, the former trustees submitted that, in his analysis of section 42 of the Guernsey law at paragraph 186 of the judgment below, the learned Lieutenant Bailiff suggested a distinction which both produced arbitrary and unreasonable results and was inconsistent with the intentions of the Guernsey law. The decision was perverse in that it also suggested that Article 32 would apply to limit the plaintiffs' personal liability if the proceedings had been brought in the Jersey courts or if the proper law of the transactions in question had been Jersey law.

108. Advocate Greenfield, for the BVI companies, supported the decision of the learned Lieutenant Bailiff. Section 42 of the Guernsey law was merely an example of a jurisdiction having a local law which provided potential advantages for a litigant over the laws that would apply if he were to litigate in another forum. If the former trustees had wanted to take advantage of the benefits of Article 32 then they could have insisted upon contracting under Jersey law. If they had wanted to take advantage of Section 42 of the Guernsey law then the TDT ought to have been established as a Guernsey law trust.

Discussion

109. Given the views which we have reached so far in respect of Ground of Appeal 1, this issue does not arise upon our own analysis. However, we consider that there is greater force in the arguments for the former trustees and this provides some support for our conclusion above.

110. Whilst expressed in slightly different terms, it appears to us that the provisions of Section 42(1) are to the same effect as those of Article 32(1), namely, that a claim by a third party, with appropriate knowledge, extends only to the trust property. On a point of policy, therefore, such protection to the trustee in question has been deemed appropriate for trusts constituted in accordance with the laws of Guernsey. Where a virtually identical provision is made by the laws of another jurisdiction which also recognises trust obligations of a similar nature to those of this jurisdiction, it does appear to us to be perverse to suggest that the provisions in that other jurisdiction should not be applicable simply because the forum of the dispute is Guernsey. Whilst section 42(4) specifically provides that its provisions apply to a transaction notwithstanding the provisions of the legal system governing the transaction, unless the parties contract otherwise, we do not consider that – apparently clarificatory – provision to provide a material distinguishing feature from the Jersey Law.

Ground of Appeal 1.4

111. Under this section of the first ground of appeal the former trustees observe that, at trial, they had relied on the Hague Convention on the recognition of trusts in support of their case that Article 32 was applicable. This had been set out at paragraph 263 of their skeleton argument for trial and those submissions had not been opposed by any other party to the proceedings. The learned Lieutenant Bailiff erred because he failed to provide any reasons for his rejection of the submissions or, indeed, to give any consideration to the provisions of the convention. In the proceedings before us no substantive argument was presented on the proper interpretation of the convention on behalf of the BVI companies.

112. The provisions of the Hague Convention on the Law of Trusts, set out in the schedule to the United Kingdom Recognition of Trusts Act 1987 (c.14) are part of Guernsey law. By virtue of Article

6 of the Convention and Clause 3.1 of the TDT declaration of trust, the TDT is governed by the laws of the Island of Jersey. The former trustees seek to rely upon the provisions of Article 8 in support of their case that Article 32 should be applied in the present proceedings.

113. Article 8 provides, among other matters, as follows:

"The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects and the administration of the trust. In particular that law shall govern –

- (a) ...
- (b) The rights and duties of trustees among themselves;
...
- (g) The relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
...
- (i) The distribution of the trust assets;
- (j) The duty of trustees to account for their administration."

114. Article 11 of the convention provides, among other matters:

"[recognition as a trust] shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee ...

Insofar as the law applicable to the trust requires or provides, such recognition shall imply in particular –

- (a) That personal creditors of the trustee shall have no recourse against the trust assets;"

Discussion

115. Given the views which we have already expressed in respect of the remainder of Ground of Appeal 1, it is not necessary for us to embark upon consideration of the Convention. We would observe, however, that the provisions of Article 11, whilst emphasising the distinction between the trustees' personal patrimony and trust patrimony, makes no provision as to what might be characterised as restrictions on liability. We would make similar observations in respect of Article 8. We recognise that, in the broadest of terms, the "effects" of a trust under its proper law may be, by virtue of that law, that there is a restriction on liability. But we note that, in the particularised matters in Article 8 there is no reference whatsoever – either expressly or by implication – to relationships between trustees and third parties. These could have been specified either separately or as additions to sub paragraph (b) or sub paragraph (g), but this has not been done. The general impression given is that authorisation, powers, rights and duties are subject to the applicable law, but that no primacy is given to that law as regards liabilities to third parties. In the whole circumstances, however, we express no concluded view on this part of Ground of Appeal 1.

Conclusion on Ground of Appeal 1 as stated

116. For all these reasons we consider that the former trustees are entitled to succeed in respect of the first ground of appeal and that, in the present proceedings, the provisions of Article 32 of the Trusts (Jersey) Law 1984 fall to be applied in considering the liability of the trustees of the TDT under the Glenalla and Thorson loans and the Ocatello arrangements. The precise consequence of this finding will be subject to our determinations on the grounds of appeal to be considered at a later hearing, but, unless arising from those determinations, the former trustees will have no personal liability in respect of the loans beyond the assets of the TDT.

Construction and Implied Term

117. The former trustees at trial had fall-back positions in the event that Article 32 was not applicable. These were that, properly construed, the loan documents did not impose personal liability and, separately, that if they did not, such a provision should be implied. The learned Lieutenant Bailiff

dealt with these issues at paragraphs 191-216 of the judgment below. He agreed with the former trustees that it was necessary to consider the terms of the underlying loans which were novated and not merely the novations themselves. It appears to us that, at paragraph 211, the learned Lieutenant Bailiff treated both arguments together. He appreciated the close links between borrower and lender but indicated that the Court should be looking for an indication as to the parties having given consideration to the event of the borrower for the time being ceasing to control the lender: for example circumstances in which the lender might become insolvent. He found no basis upon which to reach a view that they had. For our own part, we shall approach the matters separately.

118. Looking first at construction. The underlying loan documents had been produced below and general evidence as to the way in which the loans had come into being was given by Lydia Bleasdale, a trusts manager employed by the first named plaintiff. Put very shortly, the essential part of her evidence, for present purposes, was that funds were moved, when required, by way of internal loans rather than dividends as the latter would have attracted tax consequences. Further, instead of loans from underlying company to underlying company, they were moved from underlying company to the first named plaintiff as controlling (or sole) shareholder and then from the latter to the recipient underlying company. During the hearing before us we were shown the documentation – upon which Mrs Bleasdale was not cross-examined – and it is in the short, almost telegraphic, form which is understandable as part of a wholly internal process. It goes without saying that there is no indication on their face that liability of the trustee was being restricted to liability to the extent of then trust estate, but the clear impression is that on the share register the trustee would be registered as trustee of the TFT.

119. It is clear from the authorities set out by the learned Lieutenant Bailiff and presented to us that, at least in contracts between parties at arms-length, it may not be sufficient for a trustee to avoid personal liability merely by showing that he contracted ‘as trustee’: *Lumsden v Buchanan* (1865) 3M (HL) 89, 93 (Lord Westbury, LC). However, the question as to whether the parties were dealing with the trustees only as trustees is a matter to be determined according to all the circumstances: *ibid* at 95, 96. An example of the court being prepared to draw that inference is *Brown v Rysaffe Trustee Co (CI) Ltd* [2011] CSOH 26.

120. In our opinion the present circumstances are such that the inference should be drawn that personal liability was being excluded. As Mrs Bleasdale indicated in her witness statement: “the shareholder loans were internal arrangements between the Former Trustees, acting as trustees, and companies held within a trust structure.” (para 68). Often the same individuals were signing for both borrower and lender. The transactions were not ones determined by the parties but were the result of directions from an Investment Advisor, ‘R20’. (para 54). The loans, therefore, were merely one ongoing link of an overall, complex, investment strategy in which neither the borrowing trustee nor the lending company had any real say.

121. It is, of course, true both that the companies had separate corporate personality and had officers who ought to have borne that in mind and that the trustees had trust responsibilities to the beneficiaries; but we do not find those considerations germane to the issue before us. The loans were not ordinary commercial transactions where each contracting party would have been weighing up the covenant of the other; rather, each party was merely a vehicle in a system directed from above. In our opinion the circumstances here are such that the identification that the trustee was participating ‘as trustee’ is sufficient to be treated as a clear indication that the contracting parties were dealing only as trustees and not intending to incur liability beyond the amount of the trust funds: cf *Lumsden v Buchanan* at p. 96.

122. Having reached that view on construction, it is unnecessary for us to reach a view as to whether such a term should be implied in accordance with the well-known principles for the implication of terms in commercial contracts. We incline to the view, however, that had we been unable to identify circumstances through which to find in favour of the trustees under the principles enunciated in cases such as *Lumsden v Buchanan* it would be likely to be difficult to identify a commercial basis upon which to imply a restriction on liability.

123. As the remaining issues in the Appeals are yet to be heard, there will be no Orders following upon this judgment.