Investec Trust (Guernsey) Limited et al v Glenalla Properties Ltd et al.
Court of Appeal
22nd December, 2015

JUDGMENT 55/2015

In relation to the administration of a discretionary trust – application for leave to appeal, a stay of execution and consequential orders.

2015 GCA 467

IN THE COURT OF APPEAL OF GUERNSEY
(Civil Division)

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

22 December 2015

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

(1) Investec Trust (Guernsey) Limited **Plaintiffs**
(2) Bayeux Trustees Limited

and

(1) Glenalla Properties Limited **Defendants**
(2) Thorson Investments Limited
(3) Eliza Limited
(4) Oscatello Investments Limited
(5) Rawlinson & Hunter Trustees SA

and

(1) Glenalla Properties Limited **Third Parties**
(2) Thorson Investments Limited
(3) Eliza Limited
(4) Oscatello Investments Limited

Mourant Ozannes, Advocates for the Plaintiffs
Carey Olsen, Advocates for the First to Fourth Defendants and Third Parties
Babbé, Advocates for the Fifth Defendant

JUDGMENT OF THE COURT

Logan Martin JA

Introduction

1. This judgment is given following the determination by the Court of the merits of all of the appeals in these proceedings. The history of the litigation is described in the third and final substantive judgment which was given by McNeill JA on 10 August 2015 (and we shall refer to it as "the August 2015 judgment"). The third judgment on the merits was preceded by a judgment of the Court also given by McNeill JA on 27 June 2014 ("the June 2014 judgment") and by a judgment of the Court given by me on 29 October 2014 ("the October 2014 judgment").

2. There has also been a series of judgments given on incidental applications during the course of the appeals and these are described in the August 2015 judgment. It is not necessary to repeat the details of these incidental judgments at present although certain of them will be mentioned below.

3. In summary, the appeals related to the administration of the Tchenguiz Discretionary Trust (referred to as the "TDT") of which the plaintiffs were previously the trustees. The proceedings were the subject of a judgment issued by the Royal Court (Lieutenant Bailiff Sir John Chadwick PC) on 6 December 2013. Following judgment, the Lieutenant Bailiff made an Order (provided to this Court only as a draft) in which he determined the merits of the claim and counterclaims which had been made. As before, we refer in this judgment to the first and second plaintiffs and appellants together as "the former trustees", to the first to fourth defendants as "the BVI companies", and to the fifth defendant and appellant as "the present trustee".

4. Following the giving of the August 2015 judgment and the final determination of the appeals, the Court now needs to consider the Order which ought to be made. This has been the subject of competing submissions by the Advocates on behalf of all parties. In addition, and in contemplation of the making of that Order, the Court has received four Applications which require to be considered. Two of these are Applications for leave to appeal to the Privy Council which have been made by the present trustee and by the BVI companies. The third is an Application for a stay of execution which has been made by the present trustee. The fourth is an Application for Consequential Orders which has been made by the BVI companies. This judgment and the Order which is related to it are intended to deal with all of the substantive appeals and what arises directly from the determination of these appeals. For the avoidance of doubt, that Order should be regarded as containing the decisions of the Court arising from the June 2014 judgment, the October 2014 judgment and the August 2015 judgment and in respect of which any issue of appeal or leave to appeal to the Privy Council should be raised now and within the prescribed statutory timetable. Separately, and aside from this judgment and the Order to which it relates, the Court has dealt with a Consent Order which set out a timetable to deal with the appeals against the judgment of the Lieutenant Bailiff as to costs and the costs of the appeals and which was agreed by all parties. The Court expects in due course to issue a further Order or Orders in respect of these matters which will then become subject to their own timetables in respect of appeal.

5. The Court has considered all of the submissions which have been received from the Advocates for the parties on the matters which are before it for determination. Having done so, and having regard to the lengthy period during which these appeal proceedings have been in existence and the many individual applications and the substantive and incidental hearings which have taken place during that period, the Court is satisfied that it is in the interests of justice to determine the

matters which are the subject of this judgment without a further hearing.

The form of Order to determine the appeals

6. Following each of the earlier judgments on the merits of the appeals, the Court made no order pending the final determination of the appeals. In the August 2015 judgment, we invited the parties to consider and discuss the form of order which ought to be made to reflect all of the matters which had been determined in each of the three judgments. The first topic of this judgment is to decide what is the form of Order that should be made.

7. The Court invited the parties to reach a final position by 12 noon on 4 September and the Deputy Registrar received submissions from the Advocates for each of the parties by that deadline. The parties were not however able to reach agreement as to what ought to be the Order to be made and the result is that the Court must now rule on the respective positions. There are two issues which remain among the parties and which require to be determined. The first is how the outcomes of the various aspects of the appeals should be reflected in an Order and the second is what directions ought to be made to deal with the consequences of the appeals. The respective final positions for the former trustees and the BVI companies have been reflected in two revised versions of the proposed Order and on each of which the present trustee has added its own final revisals.

8. The first issue relates to how the merits of the appeals should be dealt with. For the BVI companies, Carey Olsen propose a form of Order which identifies each of the grounds of appeal which has been argued and sets out the outcome on that ground. This form of proposed Order then sets out variations of the Lieutenant Bailiff's Order which are necessary to reflect the outcome of the appeals. On the other hand, Mourant Ozannes for the former trustees propose a more narrative form of Order which seeks to describe how the Court has attributed the various liabilities following the determination of the appeals. This form of Order is largely supported by Babbé for the present trustee but is opposed by Carey Olsen.

9. We are satisfied that a form of Order which sets out as straightforwardly as possible the outcome on all of the grounds of appeal is to be preferred. The alternative of a form of narrative description gives rise to the possibility of further uncertainty and even argument about what this Court has done and that would be undesirable. In coming to this view, we have taken into account the competing submissions on both the principle and the precise form of such an Order

10. The second issue concerns what consequential Orders ought to be made following the determination of the appeals. Without rehearsing what is being suggested, the former trustees and the BVI companies seek a range of orders dealing with the administrative consequences of the outcome of the appeals including the circumstances in which there can be a discharge of liability as well as the administration of the remaining receivership and the liquidation of the BVI companies. In particular, the BVI companies have proposed a series of provisions which would be made as a consequence of the judgment given by the High Court of Justice in England in the proceedings *Smalley, Brown and Grunnell* v *Investec Trust (Guernsey) Limited and Bayeux Trustees Limited*. These suggested orders are not agreed and in the final version of the draft Order proposed by the former trustees, a form of words is suggested which would reserve such matters to the Royal Court.

11. We consider that this is the form of Order which should be made in this respect. In our judgment, it would not be desirable for a number of reasons for the Court of Appeal to become involved in the detailed administrative consequences of the appeals. These will require decisions to be made over time and as matters progress and the Court of Appeal, the majority of whose members do not reside in Guernsey, is poorly placed in practical terms to be available as and when necessary. It is not the function of an appeal court to deal with the ongoing

administration of a matter which has been brought before the Royal Court, and that is particularly so in the present case where there may be additional appeals to the Privy Council as we discuss below. The Court has therefore adopted the form of Order suggested in respect of consequential matters by the former trustees and has done so in order to make clear that the responsibility for the continuing administration of all that flows from the appeals is a matter for the Royal Court.

12. Given the range of topics which have been a matter of dispute in the formulation of an appropriate Order, we have provided with this judgment a draft of what we consider the Order ought to provide in light of the decisions which we have made. Unless any party has a particular point of detail on what that draft Order contains, the Court will make an Order in that form.

Applications for leave to appeal

13. The present trustee and the BVI companies have each made Applications to this Court for leave to appeal to the Privy Council pursuant to section 16 of the Court of Appeal (Guernsey) Law 1961 ("the 1961 Law").

14. In the Application by the present trustee, leave to appeal is sought against the October 2014 judgment and the August 2015 judgment, and also against the judgment given by McNeill JA on an incidental application on 17 February 2015 ("the February 2015 judgment") by which the Court refused leave to the present trustee to amend its Notice of Appeal, to lead further evidence and for orders for disclosure directed against the BVI companies and the former trustees. In support of its Application for leave, the present trustee sets out five grounds which may be summarised as follows:
    (i) The Court erred in the October 2014 judgment in its construction of Article 32 of the Trust (Jersey) Law 1984 ("the Jersey Law") focussing too narrowly on attempting to construe in isolation the wording of one part of that Article without consideration of the overall legislative framework of the Jersey Law and resulting in serious injustice. This is a matter of general public importance given the significance of trust law in both Jersey and Guernsey.
    (ii) The Court erred in the February 2015 judgment in refusing permission to amend the Notice of Appeal for the present trustee resulting in a breach of the convention rights of the present trustee provided by article 6.1 of the European Convention on Human Rights (the "ECHR") pursuant to the Human Rights (Bailiwick of Guernsey) Law 2000. In particular, the Court failed to address the present trustee's argument that the trial judge had erred in law in his approach to the effect on certain obligations of the former trustees which did not require reliance on new material but arose as a matter of law, and wrongly rejected the submission for the present trustee that the case it sought to advance by way of amendment could not have been advanced at the time of the trial.
    (iii) The Court erred in the August 2015 judgment because, having correctly concluded that there had been inordinate and unjustified delay in giving judgment after the end of the hearing and that the judgment contained errors, the Court declined to order a retrial but instead embarked upon inappropriate speculation as to what was the real basis of the trial judge's reasoning and substituting its own explanation for what the trial judge must have meant and made factual findings which were incorrect and in breach of the present trustee's rights under the ECHR;
    (iv) The Court erred in paying no proper regard to the fact that the result of the former trustees' conduct, and the trial judge's decision, is that the family home of Robert Tchenguiz would be likely to be lost; and
    (v) The cumulative effect of these errors is that the present trustee has been deprived of its right to a fair trial and that the beneficiaries of the relevant trust will lose their family home in breach of Articles 6 and 8 of the ECHR.

15. In the Application by the BVI companies, leave to appeal is sought against the June 2014 judgment, the October 2014 judgment and the August 2015 judgment, that is to say each of the three substantive judgments on the merits of the appeals. There are three Grounds of Appeal for the BVI Companies:
    (i) Ground 1: The Court erred in the June 2014 judgment in holding that the provisions of Article 32 of the Jersey Law fell to be applied in determining the liability of the former trustees under the loans to the first and second defendants ("Glenalla" and "Thorson") and, subject to ground 3 below, the restitutionary liability to the fourth defendant ("Oscatello"). The Court ought to have concluded that Article 32 did not apply.
    (ii) Ground 2: The Court erred in holding in the June 2014 judgment that the former trustees liabilities to Glenalla and Thorson under the loans properly construed were limited to the amount of the trust assets, when it ought to have held that there was no such limitation of liability.
    (iii) Ground 3: The Court erred in the August 2015 judgment in holding that the former trustees were not subject to a binding obligation in restitution to Oscatello.

    The position of the BVI companies was supported in Submissions on Applications for Leave to Appeal to the Privy Council on their behalf and received on 11 September 2015 in which they argued that leave to appeal should be given in respect of their own application but that the application for leave to appeal by the present trustee should be refused.

16. We do not rehearse in detail the submissions which have been made in support of the various grounds upon which leave to appeal is sought. In our judgment, the applications may be determined by reference to established principles which have been identified and applied by this Court. We begin by noting the circumstances in which the Court of Appeal comes to be considering an application for leave to appeal to the Privy Council. Section 16 of the 1961 Law provides:

> "No appeal shall lie from a decision of the Court of Appeal under this Part of this Law without the special leave of Her Majesty in Council or the leave of the Court of Appeal except where the value of the matter in dispute is equal to, or exceeds, the sum of £500 sterling."

    The Part of the 1961 Law to which section 16 applies relates to civil appeals and, on the face of it, the requirement for leave or special leave does not apply in a case such as the present where the matter in dispute exceeds £500. The Court has nevertheless determined the circumstances in which leave must be sought from it.

17. In *Pirito* v *Curth* [2005-06] GLR 37, the Court of Appeal considered the effect of section 16. Having considered the terms of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 and the *Notes on Procedure in Commonwealth Appeals* issued by the Privy Council dated October 1983, and having reviewed four decisions of the Privy Council, the Court observed in particular that where there was no time limit for the bringing of an appeal pursuant to section 16, there might be a situation in which an appeal had been brought only after a considerable time and where the judgment had already been put into effect. The Court then said (in the judgment of Southwell JA at paragraph 35):

> "In such a case, in our judgment, it would be essential, if serious abuse were to be prevented, for this court to have the inherent power to refuse leave. Such a power would be necessary to prevent the appeal process being carried forward and the whole basis on which the civil dispute had been resolved as between the parties being overturned *ex post facto*."

    Although the factual circumstances envisaged in that case do not exist in this case, *Pirito* stands as authority for the proposition that there is an inherent power in this Court to refuse leave if appropriate.

18. The position adopted by this Court in *Pirito* was considered further in *Emerald Bay Worldwide Limited* v *Barclays Wealth Directors (Guernsey) Limited and another*, judgment 2/2014, 9

January 2014, unreported. In that case, this Court referred to the position of appeals to the House of Lords and United Kingdom Supreme Court which exists from the Court of Session in Scotland and with which the position of the Privy Council in a situation such as the present one under section 16 may be said "to be closely equiparated". In *Wilson* v *Jaymarke Estates Ltd* 2013 SC (UKSC) 219, Lord Hope of Craighead had said that it was "contrary to the public interest that the time of this House should be taken up with appeals which do not raise an arguable question of general public importance". Upon this basis, this Court concluded (in the judgment of McNeill JA at paragraph 7):

> "In the opinion of this court, the present litigation and the potential appeal does not raise arguable questions of general public importance of such a magnitude that the decision as to whether an appeal should be permitted should lie with this court as opposed to Her Majesty in Council."

19. We therefore begin our consideration of the applications for leave to appeal to the Privy Council by considering whether in the case of each ground of appeal an arguable question of sufficient general public importance has been raised. Adopting the approach of the Court in *Emerald Bay*, this means that unless we are satisfied that a ground of appeal does raise a question of such importance, then we will refuse leave and it will be for the party in question, if so advised, to make an application for special leave to the Privy Council if it wishes to insist upon the ground in question.

20. The first ground for the present trustee is that the Court erred in the October 2014 judgment in its construction of Article 32 of the Jersey Law. We are satisfied that this does raise an arguable question of general public importance not only within Guernsey but for obvious reasons also in Jersey, and also because it may be said to innovate upon established principles of trust law which would otherwise apply. We also note that our decision has already been relied upon in the Royal Court in Jersey in the case of *In the matter of the representation of C* [2015] JRC 031, the judgment of the Commissioner (J A Clyde-Smith), at paragraphs 12 and 13. The Court therefore gives leave to appeal to the Privy Council pursuant to section 16 of the 1961 Law in respect of the first ground stated by the present trustee.

21. The second ground for the present trustee is that the Court erred in the February 2015 judgment in refusing permission to amend the Notice of Appeal for the present trustee. This is said to be a breach of the convention rights of the present trustee provided by article 6.1 of the ECHR. This Court does not accept that this would raise an arguable question of general public importance. The decision on whether to permit amendment at the stage at which it was sought related to the particular facts and circumstances of the present case. The Court has also noted the submissions by Carey Olsen for the BVI companies that as the decision to refuse amendment was an interlocutory matter, appeal is not appropriate: see *Spread Trustee Company Limited* v *Hutcheson* [2009-10] GLR 403, the judgment of Martin JA at paragraphs 51 to 56, and the review of authorities therein. Our decision to refuse leave does not turn upon that aspect although it is consistent with it. We therefore refuse leave to appeal in this respect.

22. The third ground for the present trustee is that the Court erred in the August 2015 judgment because having correctly concluded that there had been inordinate and unjustified delay in the giving of judgment by the Lieutenant Bailiff, this Court declined to order a retrial and indulged in "inappropriate speculation" as to what was the real basis of his decision. Once again, we do not accept that this raises any point of general public importance. This Court has reached its judgment based upon our consideration of what was said by the Lieutenant Bailiff and we refer to the terms of the August 2015 judgment. In particular, the Court concluded that whatever might have been the position regarding any confusion in the mind of the Lieutenant Bailiff as to the identity of a particular witness, the critical aspect was that the present trustee needed actual evidence as to the position which would have been adopted by the lender, Kaupthing, and that it was the absence of such evidence which was the basis of the Lieutenant Bailiff's conclusion:

see the August 2015 judgment, paragraph 116. We are not satisfied that it would be appropriate for us to grant leave in respect of what is no more than our application of well understood principles and a finding of an absence of evidence of particular facts and circumstances which we regard as being essential in order to establish the matter of fact being contended for. Were an application for special leave to be made in this respect, a consideration of the merits of our judgment will be a matter for the Privy Council.

23. The fourth and fifth grounds upon which leave is sought by the present trustee may be taken together. It is suggested that this Court paid no proper regard to the fact that as a result of the Lieutenant Bailiff's decision, the family home of Robert Tchenguiz would be likely to be lost leading to a breach of the present trustee's convention rights. We observe that this matter was not argued at any length before us in the course of the substantive appeals although it was the subject of submission at the stage of an application for a stay of execution immediately following the Lieutenant Bailiff's judgment and which was the subject of a judgment given by me on 14 January 2014 ("the January 2014 judgment"). We find it difficult to see how this Court can be criticised in the giving of the judgments on the substantive appeals in respect of a ground which was not actually argued. In any event, Mr Tchenguiz himself sought to intervene in the appeal proceedings but his application was refused by the Court's judgment of 11 September 2014 and leave to appeal to the Privy Council was refused on 23 September 2014. In these circumstances, we are satisfied that this ground does not disclose any arguable point of general public importance which would be appropriate for appeal to the Privy Council, and we refuse leave.

24. In the grounds upon which leave is sought by the BVI companies, it is contended in ground 1 that the Court erred in the June 2014 judgment in holding that the provisions of Article 32 of the Jersey Law fell to be applied in determining the liability of the former trustees. In that judgment, the Court considered the circumstances in which the statute of another jurisdiction should fall to be applied. In support of this ground, it has been submitted on behalf of the BVI companies that this Court was wrong to conclude that the liabilities of the former trustees "were limited by a statutory provision under a law other than the law governing those obligations", and that the Court was wrong to hold "that there was 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". Without necessarily accepting these characterisations of what this Court decided in the June 2014 judgment, we nevertheless acknowledge that the issues raised are of some significance. Although it might be said that this ground relates solely to the circumstances of this particular case, nevertheless we are satisfied on balance that leave to appeal to the Privy Council should be granted on this ground. In our judgment, it may be said to raise an arguable point of general public importance and in any event it has some relationship to the first ground for the present trustee upon which we have already indicated that we do grant leave. In these circumstances, we grant leave to the BVI companies to appeal to the Privy Council pursuant to section 16 of the 1961 Law in respect of their ground 1.

25. Ground 2 for the BVI companies is that the Court erred in holding in the June 2014 judgment that the former trustees' liabilities to Glenalla and Thorson were limited to the amount of the trust assets. This ground is presented upon the basis that the Court actually reserved its position on the former trustees' alternative ground of appeal relating to the construction of the former trustees' contractual liability as based upon the loan documents. If that is not the case, the BVI companies contend that the Court erred in holding that the liabilities of the former trustees to Glenalla and Thorson under the loan agreements were limited to the amount of the trust assets. This ground relates to what was Ground 4 of the former trustees' Appeal and the Order which we propose to make follows the form of the draft provided most recently by Babbé (although that is not agreed by Mourant Ozannes). In their submissions in support of this ground, reference is made by Carey Olsen on behalf of the BVI companies to what was said in paragraphs 117, 118, 120, 121 and 122 of the June 2014 judgment where this issue was said to

represent "fall-back positions" on the part of the former trustees. Although we did reach a view on the construction of the loan documents which was "that the contracting parties were dealing only as trustees and not intending to incur liability beyond the amount of the trust funds", we did not go on actually to consider whether such a term should be implied in accordance with the principles of commercial contracts: see the June 2014 judgment, paragraphs 121 and 122. To that extent, ground 2 for the BVI companies proceeds upon the correct hypothesis which is that this Court did not determine the relevant Ground of Appeal. This being so, it would not be appropriate to grant leave to appeal and we refuse leave on this ground.

26. Ground 3 for the BVI companies is that the Court erred in the August 2015 judgment in holding that the former trustees were not subject to the binding obligation in restitution to Oscatello. It is submitted that this Court was wrong to overturn the Lieutenant Bailiff's factual finding. It is said that "the Court of Appeal applied the wrong test by considering whether Oscatello acted 'in the reasonable expectation that it would be entitled to an immediate recoupment' from the Former Trustees" rather than "to have considered simply whether Oscatello acted at the request or with the consent… of the Former Trustees in discharging the liability to Kaupthing." We do not consider that this ground raises any arguable question of general public importance but relates solely to the particular circumstances of this case and the legal relationships amongst the parties. We therefore do not grant leave on this ground.

27. In summary, the Court grants leave to appeal to the Privy Council in respect of matters relating to the application and interpretation of Article 32 of the Jersey Law as determined in the June 2014 judgment and the October 2014 judgment. The Court refuses leave in all other respects.

Application for a stay of execution

28. The present trustee seeks the variation of the Order made following the January 2014 judgment. In the January 2014 judgment, the Court considered two applications for a stay of execution in respect of the judgment of the Lieutenant Bailiff following trial. The first was an application by the former trustees seeking a stay of the enforcement by the first, second and third defendants of the judgment of the Lieutenant Bailiff pending the final determination of the former trustees' appeal, and the second was an application by the present trustee seeking a stay of execution in respect of that judgment pending final determination of the present trustee's appeal. Insofar as the present trustee is concerned, the result of these applications was that the Court granted the application for a stay of execution in respect of the house occupied by Robert Tchenguiz and his family until the final determination of the appeals, and the Court refused the application by the present trustee for a stay of execution in respect of all of the other assets of the TDT. The Court also gave leave to any party to make any further application on cause shown. The family home of Mr Tchenguiz is the former premises of the Royal College of Organists (and is referred to as the "RCO House") and it is held on leasehold by Iver Resources Limited ("Iver") which is a company in which the TDT is a shareholder.

29. In the present Application which is made following the determination of the appeals, the present trustee seeks a further stay of execution in respect of the shareholding in Iver and that company's leasehold interest in the RCO House. In summary, the present trustee seeks a stay pending the making by it of an application for Permission to Appeal to the Privy Council, and if that application is granted until the final determination of that appeal, and if that application is not granted for a further period to enable the present trustee to make an application to the European Court of Human Rights (the "ECtHR") and until the final determination of that application to the ECtHR. In its skeleton argument, the present trustee contends that the result of the appeals is that the former trustees are entitled to realise the assets of the TDT in order to reimburse themselves in part for their liability to the BVI companies. Given that the trust assets are inadequate, that realisation would inevitably involve a sale of the RCO House which asset would not be recoverable in due course if the present trustee's appeal were to be successful because the proceeds would be paid over to the BVI companies and could not be recovered

because the BVI companies are themselves insolvent.

30. In the response for the BVI companies in the form of Submissions on Consequential Applications dated 11 September 2015, it is contended that the power to stay the execution of a judgment applies only in the case of an appeal to this Court. It appears to be accepted that this applies to an appeal from this Court to the Privy Council but not to proceedings which are to be initiated before the ECtHR. The BVI companies assert that the appeals by the present trustee are bound to fail. They suggest that the application for a further stay is "a continuation of R&H's [that is, the present trustee's] (and Robert Tchenguiz's) long-established tactic of seeking to disrupt proceedings so as to put all other parties to costs and deprive them (for as long as R&H can) of the fruits of their judgment." In these circumstances, it is said that the appeal for the present trustee "is not being pursued in good faith". The BVI companies contend that the RCO House is a depreciating asset in particular because its maintenance is not fully funded. They also contend that because Mr Tchenguiz is failing to pay the full market rent for the RCO House, the BVI companies are suffering continuing prejudice so long as the stay of execution remains. The refusal of a further stay of execution in respect of the RCO House is supported by a number of factual matters which are put forward on behalf of the BVI companies and in an affidavit by Mr Stephen Akers who is one of their joint liquidators.

31. In its final response in the form of a skeleton argument which was received on 5 October 2015, the present trustee contends that the reasons given by the BVI companies for not maintaining the stay of execution are misconceived because they fail to address the over-riding reason why the stay was granted initially. This was to ensure that the outcome of the appeal against the judgment of the Lieutenant Bailiff after trial was not rendered nugatory and thereby to cause prejudice to the beneficiaries of the TDT. Any prejudice which might be suffered by the BVI companies and their joint liquidators would be outweighed by the prejudice suffered by the present trustee and by Mr Tchenguiz because the sale of his family home, which is said to be unique, would be irretrievable. The present trustee disputes the suggestion that the RCO House is a depreciating asset because that is said to be based upon an outdated valuation. The present trustee contends that its application for the stay to be extended is in the first instance only to allow its application for leave to appeal to be determined and that it cannot be criticised for delaying matters indefinitely.

32. In its final (and substantial) response in the form of Reply Submissions on Consequential Application which were received on 13 October 2015, the BVI companies raise a number of points and present authorities on a range of issues. In relation to a continuation of the stay of execution in respect of the RCO House, the BVI companies maintain the position that the present trustee has failed to show that it has justifiable grounds for an appeal and that an appeal to the ECtHR would provide no proper basis for a stay. They suggest that the result of an appeal on the meaning of Article 32 would be academic because whatever the outcome of an appeal to the Privy Council the result for the present trustee would be the same. They also dispute the evidence that the RCO House is an appreciating asset and refer again to the prejudice caused by the failure of Mr Tchenguiz to pay a commercial rent.

33. Having considered these competing contentions, the Court is satisfied that the application for a continued stay of execution in respect of the RCO House may be determined and granted upon an application of the relevant legal principles. The Court considered these principles in the January 2014 judgment and decided that whilst the appeal proceedings were pending, a stay of execution should be granted in respect of the shareholding in Iver and the leasehold interest in the RCO House because otherwise "it would render nugatory" the outcome of the present trustee's appeal: see the January 2014 judgment, paragraph 58. Given that we have determined that leave to appeal to the Privy Council should be given in respect of the first ground of appeal for the present trustee and ground 1 for the BVI companies, the position remains the same and

we therefore allow the application for a stay of execution which has been made by the present trustee. We do not need to address what would be the position were the only route of appeal or review to be proceedings before the ECtHR although that is an aspect which might become relevant at a later stage. We also make no comment on the allegations made by the BVI companies about the conduct of the present trustee in continuing to pursue its appeal and we do not need to resolve the competing matters of fact which are put forward because the application for a further stay of execution may in our judgment be decided upon the same basis that it was granted in the first place.

Application for consequential orders

34. The BVI companies have made an Application for a series of consequential orders which may be summarised as follows. First, the BVI companies seek the discharge of the joint receivers of the assets set out by the Lieutenant Bailiff in an Order made by him on 24 January 2014 and varied on 28 April 2015 (referred to as "the Receivership Order") and the consequential transfer of these assets to the joint liquidators of Glenalla and Thorson. Secondly, the BVI companies seek the lifting of the stay of execution in respect of the shareholding in Iver and the leasehold interest in the RCO House and the transfer of those assets by the former trustees to the joint liquidators. Thirdly, the BVI companies seek provision to be made out of the assets realised by the former trustees for the retaining of a payment in order to satisfy the judgment against the former trustees in favour of Mr Smalley, Mr Brown and Mr Grunnell who were the plaintiffs in the proceedings against the former trustees in the High Court of Justice in England. The BVI companies also apply for Messrs Smalley, Brown and Grunnell to be made parties to these proceedings for the purposes only of that provision.

35. The BVI companies and the present trustee have presented competing contentions on these issues in the skeleton argument and submissions referred to above. The former trustees have also presented a skeleton argument in response to the Application by the BVI companies for orders in relation to the receivership. In particular, the former trustees contend that as there are important points of principle to be determined, and as the matters now raised were not canvassed either at first instance or in the course of the appeals before this Court, they should be heard in the first instance by the Royal Court. In their final Reply Submissions, the BVI companies dispute the complexity of what has to be decided and suggest reasons why it can be said that the Royal Court could not decide the issues "in a way which could be remotely fair to the BVI Companies". They suggest that if the issues were to be decided by the Royal Court, opportunities would be "taken to derail and hijack the proceedings" and that "history shows that every possible point will be appealed". These statements are made in the context of a number of allegations of bad faith and similar on the part of the present trustee and Mr Tchenguiz. In addition, and by a letter from Carey Olsen dated 2 December 2015, the attention of the Court was drawn to the recent judgment of the Lieutenant Bailiff (JA Clyde-Smith Esq) in the case of *In the matter of the Representatives of Z* [2015] JRC214 in which the Royal Court considered the directions to be given in the case of insolvent trusts.

36. We have already determined in respect of the Order which should be made following the outcome of all of the substantive appeals that it would not be desirable for this Court to be taking responsibility for detailed administrative matters arising in the context of the Receivership Order. We are also satisfied that the matters raised in the Application by the BVI companies in relation to the receivership should not be determined for the first time in this Court and should be the subject of determination in the first instance by the Royal Court. In doing so, we have no doubt that the suggestion by the BVI companies that this would somehow give to a disappointed party unjustified opportunities to present arguments, and if appropriate to appeal, amounts to no more than an attempt to deprive such a party of a proper opportunity to present its case as it sees fit and of its right of appeal which is provided by statute. We therefore decline to make any orders consequent upon the first and third parts of the Application by the BVI companies. In reaching this decision, we have considered what was said by he

Lieutenant Bailiff in the case of *In the matter of the Representatives of Z* and are satisfied that it does not affect our decision.

37. In the case of the second part of the Application for the BVI companies, we have already decided that the application for a continuation of the stay of execution in respect of the RCO House should be allowed.