



**Investec Trust (Guernsey) Ltd et al v Glenalla
Properties Ltd et al**
Court of Appeal
24th February 2016

**JUDGMENT
7/2016**

Application for leave to cross-appeal pursuant to Section 16 of the Court of Appeal (Guernsey) Law 1961

**IN THE COURT OF APPEAL OF GUERNESEY
(Civil Division)**

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

24th February 2016

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

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

-and-

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

-and-

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

**Advocate J Wessels for the Plaintiffs
Advocate J P Greenfield for the First to Fourth Defendants/Third Parties**

Judgment of the Court

McNeill JA

1. There is before us an application pursuant to Section 16 of the Court of Appeal (Guernsey) Law 1961 and Rule 25(2) of the Judicial Committee (Appellate Jurisdiction) Rules 2009 for a principal order that the plaintiffs have leave to cross-appeal against paragraph 3 of the Order made by this court consequential upon its judgments dated 27 June 2014 and 22 December 2015.
2. That order, following upon the various directions which we have made in respect of the management of these appeal proceedings, sought to make a composite order in respect of all the matters upon which we have made determinations throughout the appeal proceedings. Among other matters, and dealing with the Plaintiffs' appeal, the order stated:
 - “1. Ground 1 of the Plaintiffs' Appeal is allowed.
 2. Grounds 2 and 3 of the Plaintiffs' Appeal are dismissed.
 3. No order is made as to Ground 4 of the Plaintiffs' Appeal.”
3. The plaintiffs' fourth Ground of appeal sought:

“A declaration that the Plaintiffs have no personal liability to the BVI Companies under the Arrangements and that the claims of the BVI Companies extend only to the trust property of the TDT pursuant to Article 32(1)(a) of the Trusts (Jersey) Law 1984 (as amended).”
4. The background to this Ground of appeal on behalf of the plaintiffs was that they were contending that the learned Lt. Bailiff had been wrong to find that Article 32 of the Trusts (Jersey) Law 1984 (as amended) (the “TJL”) did not apply to relevant transactions. Separately, they had contended that it had been common ground between the parties at trial that Article 32 had the effect that the plaintiffs were not personally liable to the First to Fourth Defendants (the “BVI Companies”) and, accordingly, that the determination of the learned Lt. Bailiff amounted to a procedural irregularity. It was against the event that they had not succeeded on the foregoing Grounds that the plaintiffs wished to contend that the learned Lt. Bailiff ought to have found that, upon a proper construction of the underlying agreements and transactions, they did not impose personal liability and, alternatively, that a term to that effect should be implied.

Submissions for the plaintiffs

5. The plaintiffs (the "former trustees") accepted that this court has an inherent power to refuse leave if appropriate and that leave would be refused unless the Court was satisfied that the Ground of appeal raised an arguable question of sufficient general public importance: *Emerald Bay Worldwide Limited v Barclays Wealth Directors (Guernsey) Limited* Guernsey Judgment 02/2014 at [7]. The former trustees noted that the Court of Appeal (Guernsey) Law 1961 (the “1961 Law”) was silent as to the position with respect to cross-appeals but noted also that, having regard to the Judicial Committee (Appellate Jurisdiction) Rules 2009 (the “2009 Rules”) and, in particular, Rules 25(2), 25(3) and 25(4), the net effect was that a respondent to a pending appeal must obtain leave to cross-appeal from the court below in the first instance.
6. The application was made out of an abundance of caution. Pursuant to the December 2015 judgment of this court, the BVI Companies had been granted leave to appeal in respect of the application of Article 32 and the former trustees were concerned that they could not in safety merely respond to that appeal without also being able to argue Ground of appeal 4.
7. The Grounds of appeal which the former trustees seek leave to present, set out broadly, are as follows.
8. The first is a submission that this court fell into serious procedural error in failing to give effect to its judgment dated 27 June 2014 and should have made an order allowing Ground 4 of the appeal of the former trustees. The basis of this submission was that this court had determined in its judgment of 27 June 2014 that, upon the proper construction of the Arrangements, the former trustees were liable to the first and second defendants respectively only as trustees and not personally; but that, by reason of that conclusion, had considered that it was unnecessary to determine the separate question of whether a term as to no personal liability should be implied into the arrangements.

9. Secondly, if the effect of this court's judgment dated 22 December 2015 and the corresponding Order of the same date was to retract a prior decision which should have allowed Ground 4, this was a serious procedural error as there was no express statement, there were no reasons and parties had not been given notice of the proposed change.
10. Thirdly, if this court did not determine Ground 4 at all, the effect of such a non-determination was to deny the former trustees their right to a judicial determination of Ground 4.
11. Finally, if there had been no determination of Ground 4 by this court, the former trustees would invite the judicial committee to find that any effect of that non-determination, such as apparently affirming parts of the decision of the learned Lt. Bailiff, were in error and the former trustees wished to renew their arguments on Ground 4 in respect of construction and implied terms.

Submissions for the BVI Companies

12. In response the BVI Companies submitted that the application by the former trustees should be dismissed.
13. The former trustees were wrong in their assertion that this court had failed to give effect to its judgment dated 27 June 2014 by making no order in relation to Ground 4. That outcome had accurately reflected the decision of this court in respect of Ground 4.
14. Secondly, there had been no retraction by this court as there had been no prior decision to allow Ground 4.
15. Thirdly, the suggestion by the former trustees that this court had fallen into serious procedural error because it had not determined Ground 4 was misconceived. Once this court had determined that Article 32 did apply in the present case and that its effect was to exclude the former trustees' personal liability, there was no need for this court to go on to determine whether the same result had also been achieved by contractual agreement.

Discussion

16. We deal first with the applicable principles.
17. Following the determination of this court in *Emerald Bay Worldwide Limited v. Barclays Wealth Directors (Guernsey) Limited*, it seems to us just as important in considering an application for leave in a cross-appeal, as it is in considering an application for leave to appeal, that the ground of appeal raises an arguable question of sufficient general public importance for the matter to be presented to the Judicial Committee. Each case will differ, but there are two general scenarios. The first is that, an appellant having been granted leave to appeal, a respondent seeks also to have part of the order below varied. The second is that, in light of the potential for the appeal to succeed, a respondent wishes to protect its position in relation to supplementary issues which might arise in respect of the allowance of an appeal on a discrete issue.
18. It seems to us that, upon either of those scenarios, this court, for the reasons given in *Emerald Bay*, should exercise restraint in granting leave to the applicant who seeks to cross-appeal. Whether the matter upon which the applicant wishes to cross-appeal is directly related to the appeal point or not, it should not be for this court to determine that the time of the Judicial Committee should be taken up on points which do not meet the test of general public importance.
19. In our decision of 22 December 2015 we were persuaded to grant leave in respect of the proper construction of Article 32 as the issue did appear to raise an arguable question of general public importance not only within Guernsey, but for obvious reasons also in Jersey, and also because our determination might be said to innovate upon established principles of trust law which would otherwise apply: see paragraph 20.

20. We were further persuaded that leave should be granted in respect of further issues relating to Article 32 TJL in respect of our consideration in the June 2014 judgment of circumstances in which the statute of another jurisdiction should fall to be applied. It seemed to us that whilst, on one view, the ground related solely to the circumstances of this particular case, it might also be said to raise an arguable point of general public importance and was, in any event, related to the ground upon which we had earlier indicated that we did grant leave: see paragraph 24.
21. In our view, such considerations do not apply to the present application. The essence of the present application is twofold: first there are the allegations of serious procedural irregularity and, second, there is a desire on the part of the former trustees to argue issues of proper construction of specific contractual arrangements and potential implied terms.
22. In our judgment, none of these raise arguable points of general public importance.
23. The reality of the position for the former trustees is that, in the event of the appeal on the two Article 32 points being allowed, they wish to identify how their “fall back” arguments should be protected. It seems to us that this is a procedural matter for the Judicial Committee to determine. There would appear to be three possible avenues. The first is that notwithstanding the points do not raise issues of general public importance, the former trustees should be allowed to argue their “fall back” position before the Judicial Committee in order that a single final determination might be achieved. The second is that there could be a hearing on the appeal and then, depending upon the determination of the Judicial Committee on that appeal, there might be a hearing on the cross-appeal. The third is that, in the event of the appeal being allowed, the issues as to construction and implied terms is remitted to this court.
24. In our view these are issues upon which it would be inappropriate for this court to tie the hands of the Judicial Committee and, in these circumstances, we do not grant leave.
25. We would add that we consider that we have made it perfectly clear in our judgments of 27 June 2014, 10 August 2015 and 22 December 2015 that we did not determine Ground 4 as we considered that we should reserve our position on what was said to be a “fall back position” for the former trustees and, accordingly, that there has neither been procedural irregularity nor a retraction.