



**Investec Trust (Guernsey) Limited et al
v Glenalla Properties Limited et al**
Court of Appeal
19th July, 2016

**JUDGMENT
31/2016**

Applications by each of the parties to this litigation requesting leave to appeal to Her Majesty in Council.

**IN THE COURT OF APPEAL
(CIVIL DIVISION)**

ON APPEAL FROM THE ROYAL COURT (ORDINARY DIVISION)

BEFORE: **JAMES WALKER McNEILL QC, President**
ROBERT LOGAN MARTIN QC
DAVID DOYLE, First Deemster & Clerk of the Rolls, Isle of Man

BETWEEN:

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

PLAINTIFFS

and

(1) GLENALLA PROPERTIES LIMITED
(2) THORSEN INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED
(5) RAWLINSON & HUNTER TRUSTEES S.A.

DEFENDANTS

and

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

THIRD PARTIES

ADVOCATE JESSICA ROLAND for the Plaintiffs
ADVOCATE ELAINE GRAY for the First to Fourth Defendants/Third Parties
ADVOCATE NICHOLAS ROBISON for the Fifth Defendant

JUDGMENT

McNeill JA:

1. The Court has before it Applications by each of the parties to this litigation requesting leave to appeal to Her Majesty in Council. Each application is made under reference to Section 16 of the Court of Appeal (Guernsey) Law, 1961 and to the decision of this court in *Emerald Bay Worldwide Limited v Barclays Wealth Directors (Guernsey) Limited et al* (unreported, 9 January 2014) (Guernsey Judgment No. 2/2014).

2. Applications to this court for leave to appeal in respect of the substantive issues in this litigation have already been made and determined. Where leave was refused applications are being made to Her Majesty in Council. Each of the present applications seeks leave for a review of orders in respect of costs made by this court consequential upon its judgment dated 19 April 2016. Each seeks to raise somewhat different issues and each has been responded to by the other parties. We deal with each separately.

The Plaintiffs' Application for Leave to Appeal

3. The plaintiffs seek leave to appeal against paragraphs 1.a, 2.e and 2.g of the order made by this court consequential upon its judgment dated 19 April 2016. The judgment given by this court on 19 April 2016 was in respect of the appropriate allocation of costs as between the parties (the "Costs Judgment") and the Order made by this court on the same date (the "Costs Order") sought to give effect to the views set out in the Costs Judgment.

4. Paragraph 1.a of the Costs Order found the Plaintiffs entitled to their costs at first instance in respect of the counterclaim by the Fifth Defendant. Paragraph 2.e found the Fifth Defendant liable in costs to the Plaintiffs and to the First to Fourth Defendants in respect of certain aspects of the Fifth Defendant's appeal to this court. Paragraph 2.g found the Fifth Defendant liable to the Plaintiffs and the First to Fourth Defendants in respect of the issues raised by the Fifth Defendant under its Respondent's Notice and in respect of the issues raised by the First to Fourth Defendants under their separate Respondent's Notice.

5. In respect of each of those Orders, a proviso was made in the following terms:

"declaring that the liability of the present trustee for such costs extends only to the trust property of the TDT pursuant to Article 32 of the Trusts (Jersey) Law 1984 and/or section 42 of the Trusts (Guernsey) Law 2007."

6. The reference to the "present trustee" is a reference to the Fifth Defendant and the reference to the "TDT" is a reference to the Tchenguiz Discretionary Trust of which the Fifth Defendant is the present trustee and the Plaintiffs are the former trustees.

7. The Plaintiffs seek leave to appeal in order to seek a variation of those three Orders by deletion, in each case, of the words of the proviso.

8. The Plaintiffs' proposed appeal would be advanced upon a very narrow ground. It would challenge the decision of this court to impose the proviso to the extent that the decision was based upon the wording of Article 32(1)(a) of the Trusts (Jersey) Law 1984 (the "Jersey Law") and of Section 42 of the Trusts (Guernsey) Law 2007 (the "Guernsey Law"). It would not seek to maintain that this court was in error in interpreting the statutory provisions as of sufficient width to embrace issues as to costs, but would contend that this court erred in law in interpreting the wording "where a trustee has been involved in litigation with a third party, and ... where the third party has been aware that the involvement of the trustee is as a trustee" as being applicable to an action (such as the counterclaim by the Fifth Defendant as present trustee) for breach of trust; an action brought, essentially, on behalf of the beneficiaries of the trust. Accordingly, whilst in third party litigation, properly so understood, knowledge by the third party that the trustee was involved

as a trustee would allow restriction of liability on the part of the trustee, such a restriction would not be available under the relevant statutory provision where the other party was, or represented, a beneficiary.

9. In our judgment the Plaintiffs' proposed 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: the test set by this court in *Emerald Bay Worldwide Limited v Barclays Wealth Directors (Guernsey) Limited et al.* The proposed issues relate only to issues as to costs, so the argument would run, as between beneficiaries (or trustees on their behalf) and other trustees. But the argument is that the unsuccessful present trustee should be personally liable to the former trustees who no longer represent beneficiaries. No line of argument is suggested as to why those – such as former trustees – who are no longer internal to a trust – but with, it follows, clear knowledge that the involvement of the present trustee is as a trustee – should be in a better position than persons completely external to the trust who happen to have the same knowledge.

10. We add that, whilst we granted leave to appeal to the Privy Council in respect of the principal issue of interpretation of Article 32 of the Jersey Law, the issues to be considered on appeal in that matter were of a different quality to those raised in the present application, were, in our view, of general public importance and, in particular, dealt with an arguable innovation upon established principles of trust law: see paragraph 20 of the judgment of this court of 22 December 2015 (Guernsey Judgment No. 55/2015).

The Application by the First to Fourth Defendants for Leave to Appeal

11. The First to Fourth Defendants (the “BVI Companies”) seek leave to appeal against paragraphs 1.a, 1.b, 1.c, 1.d, 2.a, 2.c, 2.d, 2.e and 2.g of the Costs Order.

12. This application is to similar effect to that of the Plaintiffs, namely the removal of the proviso, but the grounds are expressed differently.

13. In the first place the BVI Companies suggest that leave to appeal should be granted in respect of a proposed argument that Article 32 of the Jersey Law 1984 applies only to liabilities governed by Jersey Law. It is suggested that leave should be granted because this proposed ground mirrors grounds in respect of which leave to appeal has already been granted to them. In our view this is not the case. The matters for which leave has been granted to the BVI Companies are contentions 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 the co-relative 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. These issues are arguably of substance and general importance in respect of liabilities which might be of considerable magnitude. The same cannot be said of a determination in respect of costs, even where the basis for the determination is a matter of statutory interpretation.

14. Secondly the BVI Companies contend that Article 32 does not apply to costs orders as a matter of statutory interpretation. Whilst this issue would be presented as one of statutory interpretation, for the reasons which we have already expressed we do not consider that a question of general public importance of such a magnitude that the decision as to whether an appeal should be permitted should lie with this court is raised.

15. Thirdly the BVI Companies would wish to raise similar issues in relation to Section 42 of the Guernsey Law. Some of the proposed arguments would reflect those suggested in respect of Article 32 of the Jersey Law, but the BVI companies would also wish to argue that this court erred in its interpretation of Section 42 in that the application of Section 42 by a Guernsey court was dependent upon establishing that the particular liability in issue was a transactional matter affecting a Guernsey trust and not a foreign trust.

16. In our judgment this does not raise a matter of adequate general public importance. As was made clear in paragraph 99 of the Costs Judgment, the inclusion of the reference to Section 42 of the Guernsey Law was made in the very specific circumstances of this case.

17. Fourthly there is a specific reference to paragraph 2.b of the Costs Order by which the court ordered the BVI Companies to pay the Plaintiffs' costs on the issue of the applicability of Article 32. As the Article 32 issue is already being appealed, we do not see that we have power to make a separate order.

18. Lastly the BVI Companies wish to present an argument that the Plaintiffs and Fifth Defendant should pay the BVI Companies' costs in relation to the Oscatello claim in unjust enrichment. It seems to us that this matter is inextricably linked with a substantive issue upon which the BVI Companies are seeking permission from the Privy Council to appeal. There would seem to be no logic in this court granting leave on this matter when the Privy Council is still to determine whether permission should be granted on the substantive matter. If thought necessary, the BVI Companies can amend their present application to Her Majesty in Council.

Application by the Fifth Defendant for Leave to Appeal

19. The Fifth Defendant seeks to have paragraph 3.a of the Costs Order set aside insofar as it makes the Fifth Defendant personally liable for the costs incurred by the Plaintiffs and the BVI Companies in relation to the "Interlocutory Applications".

20. In seeking leave the Fifth Defendant submits that the question of whether a trustee can be personally liable for costs where a trustee is acting within a statutory ambit, where the trustee participates in litigation through its legal representatives and where there is no finding of misconduct by the trustee in those proceedings, is a matter of general public importance. In our judgment it is not. The Costs Judgment made it quite clear that the determinations were made upon numerous factual findings, only some of which the Fifth Defendant would seek to challenge on appeal. The determination of this court was therefore made in respect of circumstances quite specific to this litigation and this party. Having regard to the tests set out in *Emerald Bay* we do not consider that it would be appropriate for us to grant leave on this application.

General

21. For all these reasons we consider that decisions as to leave on these applications should be taken by an appeal panel of Her Majesty in Council to determine whether the matters raised are of such importance that the issues ought to be considered in Council.