BRIEFING

Guernsey Court of Appeal dismisses claim for £391million

OCTOBER 2016

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On 4 October 2016, the Guernsey Court of Appeal delivered judgment on appeals from a decision of the Royal Court, the upshot of which is that a claim seeking damages of £391million has been dismissed. It is understood to be the first occasion on which the Guernsey Courts have identified the principles to be applied in strike-out applications and claims for loss of a chance, which reflect those applied by the courts of England and Wales.

Background

Proceedings for breach of trust and gross negligence had been commenced by Rawlinson & Hunter Trustees SA (**R&H**) - the current trustee of the Tchenguiz Discretionary Trust (**TDT**) - against the former trustees of the TDT, Investec Trust (Guernsey) Limited (ITGL) and Bayeux Trustees Limited (Bayeux) (the **Former Trustees**).

The TDT was a Jersey law discretionary trust established on 26 March 2007. The beneficiaries of the TDT were Robert Tchenguiz and his children and remoter issue.

ITGL was the trustee of the Tchenguiz Family Trust (**TFT**), a discretionary trust governed by BVI law. The property of the TFT was, until 2007, held for the benefit of Robert Tchenguiz and his brother, Vincent Tchenguiz. Their different business interests led to the establishment of the TDT. On 24 August 2007, assets within the TFT were appointed to the TDT, nominally held for the benefit of Robert (not Vincent) and included the entire share capital of numerous BVI companies. That appointment included loans owed to the TFT by those companies. At the time those assets were transferred, the Former Trustees entered into Deeds of Novation, whereby they assumed liability for monies owed by the TFT to the Icelandic bank Kaupthing under a loan agreement dated 20 August 2007 for £100million.

On 19 December 2007, Kaupthing's lending was consolidated by the entry into a Framework Agreement, under which a number of BVI companies which held TDT investments were transferred to a company within the TDT's structure as security for further significant borrowing from Kaupthing, in order to refinance existing debt. Companies within the TDT structure were subsequently placed into liquidation and the Joint Liquidators of those companies demanded payment of outstanding loans said to be due by the Former Trustees, totalling £183million. On 2 July 2010, the Former Trustees were replaced as trustee by R&H.

In March 2010, the Former Trustees commenced proceedings seeking declarations, amongst other things, that they were not personally liable for those loans (known as "**Guernsey 1**"). R&H counterclaimed and sought damages for breach of trust and gross negligence. The Guernsey Court of Appeal held the Former Trustees were not personally liable for the loans and upheld the Royal Court's finding that the Former Trustees had not acted in grossly negligent breach of trust. Certain aspects of Guernsey 1 have been appealed to the Privy Council.

In June 2013, R&H commenced separate proceedings alleging breach of trust and gross negligence and claimed damages of approximately £391million. The allegations fell into two distinct categories:

1. First (and amongst other things), unreasonably taking investment decisions - including a failure to challenge the investment advice received from R20 Limited (of whom Robert Tchenguiz was its Chairman and director) and failing to take steps to diversify the class of investments adequately so as to avoid loss to the trust (the Investment Allegations); and

2. Secondly, failing in its conduct of proceedings commenced in the English High Court in relation to transactions involving the Somerfield chain of supermarkets whilst they were the trustees (the Somerfield Allegations).

Crucially, much of the background identified above was repeated in the new claim. The Former Trustees applied to strike-out the Investment Allegations and sought an order for summary judgment in relation to the Somerfield Allegations. By judgment dated 11 November 2015, the Royal Court refused the Former Trustees' application in respect of the Investment Allegations, but ordered summary judgment in relation to the Somerfield Allegations. Both parties appealed.

The Former Trustees' Appeal

The Court of Appeal agreed that the Investment Allegations should have been raised in the proceedings known as Guernsey 1. It also agreed with the Royal Court's application of the legal principles which govern whether a pleading constitutes an abuse of process, citing the well-known English authorities of *Johnson v Gore Wood & Co* [2002] 2 AC1, *Stuart v Goldberg Linde* [2008] 1WLR 823, and *Aldi Stores Limited v WSP Group Plc* [2008] 1WLR 748, the latter of which dealt with the issue of the Court being required to take into account the public interest in finality in litigation and preventing a party from being vexed twice. The Court of Appeal also cited with approval the principle that it is more likely that a second claim against a party to an earlier case will be struck out than a later action against a different party, because it is important that party A should bring all of its claims against party B in one action.

In support of its finding that the Investment Allegations were abusive, the Court of Appeal noted the very significant overlap between the two sets of proceedings. There had been a failure to *"analyse and emphasise the substance of the respective claims"*. Both actions involved (i) essentially the same parties; (ii) acting in essentially the same capacities; (iii) in relation to events occurring in essentially the same time period; (iv) in relation to essentially the same series of transactions; (v) raising essentially the same cause of action (ie. breach of trust); (vi) the determination of which would essentially turn on the same documentary evidence; and (vii) essentially the same witnesses. This was "*the accumulation of reasons why, having decided that the allegations in the Cause could have been brought in Guernsey 1, the Court below ought then to have come to the conclusion that, absent any special reason, those allegations should have been brought in Guernsey 1.*"

The Court of Appeal also considered the first instance Judge erred when he speculated on what the Judge in Guernsey 1 would have done if R&H had made an application to amend its counterclaim to include the Investment Allegations; it decided that this was irrelevant. The Former Trustees should not be vexed twice, and what was lacking was evidence from R&H about when the claims in the Cause were first identified and why they were not brought in Guernsey 1.

The Court of Appeal was also critical of the Royal Court's judgment which had identified that, whilst the Plaintiff's failures tipped the balance towards an abuse, this was not a complete answer to the question of whether the claim should have been brought in Guernsey 1, particularly given the Royal Court found that if the matter had have been before a court in England, the question of abuse would have posed considerable problems for it. The Court of Appeal said: *"We have difficulty with that approach. Once abuse has been identified, the Court should strike out the abusive pleading (in the absence of wholly exceptional circumstances.)"*

Finally, on what is also believed to be the first occasion, the Court of Appeal set out the test to be applied in Guernsey when an appeal Court considers interfering with a decision of a first instance judge on an abuse of process application. It considered that the principle outlined in *Aldi Stores Ltd v WSP Group Plc*. was appropriate.

The Current Trustee's Appeal

R&H's appeal was confined to the Royal Court's decision to order summary judgment in relation to the Somerfield Allegations on grounds that they had no real prospects of success; it did not appeal the Royal Court's decision to order summary judgment in relation to an allegation that the Former Trustees were in breach of trust for having commenced Guernsey 1.

The Court of Appeal acknowledged that it was only at the hearing before the Royal Court that R&H had first confirmed that its claim in relation to the Somerfield Allegations was limited to one based on loss of chance and that "*the Cause had not been pleaded with that*

principal proposition in mind." It cited with approval the Jersey Royal Court judgment on loss of chance in Café de *Lecq Limited v RA Rossborough (Insurance Brokers) Limited* [2012 (1) JLR 245] and adopted Lord Diplock's statement in *Mallett v McMonagle* [1970] AC 166 (at [176E-G]):

"...in assessing damages which depend on its view as to what...would have happened in the future if something had not happened in the past, the Court must make an estimate as to what are the chances that a particular thing...would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards...".

The Court of Appeal found this meant it was necessary "*to look at the breach of duty, the cause of loss through the loss of chance of receiving something otherwise lost, and the issue of valuation. The appraisal of the position in respect of each aspect must be real and not fanciful.*"

The Royal Court's decision was upheld. Having identified the advice from leading Counsel about the prospects of success in those proceedings, the Court of Appeal stated: "*the only proper conclusion is that the prospect of success for them [in those proceedings] were fanciful. The percentages identified are clearly of a level of which only the most committed or foolhardy litigant proceeds, at his or her own potential detriment, to a full blown expensive trial with the prospect of a damaging award of costs. It would be a rare position in which to see a trustee.*" The Court also noted that the Plaintiff had not given any *"real indication that there is a serious likelihood of a point of substance being found which would have altered the prospects for the Defendants of achieving any settlement based upon actual valuation as opposed to nuisance value."* The Court then said "*This is not a case, for example, where there is a suggestion of failure to carry out a critical step, or a suggestion of loss of a critical piece of evidence or of a failure in diligence: all that has been done is to suggest, in effect, that certain matters earlier identified by the Defendants' leading Counsel, might be worthy of consideration.*"

The Court also identified the principles to be applied in an application for summary judgment, adopting those principles identified by Lewison J (as he then was) in *BG Air Limited (Trading as Open Air) v Opal Telecom Limited* [2009] EWHC 339 (Ch).

Conclusion

The judgment is believed to be the first occasion on which the Guernsey Court of Appeal has identified the principles to be applied by the Guernsey Courts in strike-out applications based upon abuse of process and claims based upon a loss of chance. It demonstrates that the Guernsey Courts will be no less robust than the Courts of England and Wales in applying those principles , which should be welcome news for litigators and trustees.

Mourant Ozannes acted for the successful Former Trustees.

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