



Litigation

Landmark Privy Council Decision Peace of Mind for Guernsey Trustees?



Having sat for two full days on 13 and 14 December 2010, the long awaited landmark decision of the Judicial Committee of the Privy Council in the case of *Spread Trustee Company Limited (Appellant) v Sarah Ann Hutcheson & Others (Respondents)* was delivered on 15 June 2011.

The sixty-seven page reasoned judgment is remarkable in a number of ways. First, it covers some very important and complex issues of trust law that have significance not only for professional trustees and legal practitioners in the Channel Islands but also in the United Kingdom and elsewhere. Second, the very fact that these issues are finely balanced is reflected in the split decision (3:2) of the judges which is highly unusual for the Privy Council.

The case itself concerned the effect of a clause in a long established Guernsey settlement exonerating the trustees from certain liabilities, including gross negligence. The settlement was established before statutory legislation prohibiting such exoneration had been enacted in Guernsey.

The Guernsey Royal Court and Court of Appeal both held in favour of the beneficiaries (represented in Court by Advocate John Greenfield of Carey Olsen) to the effect that the trustees could not be relieved of liability for breach of trust arising from their own gross negligence prior to the formal Guernsey Trust Law. The trustees appealed to the Privy Council.

One significant issue at each of the Court hearings was the provision in Guernsey law that trustees must act "*en bon père de famille*". This is a principle that has its roots in Norman Customary Law and remains in force by virtue of Guernsey's statutory legislation.

It is established that the circumstances under Guernsey common law or customary law where a trustee could lawfully exclude its liability from a breach of trust had never previously been determined. The English Court of Appeal had ruled upon this, for English law purposes, in the 1998 case of *Armitage v. Nurse*.

One of the important questions for the Privy Council therefore, was whether to overturn the views of the Royal Court of Guernsey and the Guernsey Court of Appeal on what Guernsey law was. The trustees' argument that Guernsey law should follow English trust law (and that therefore the principle of "*en bon père de famille*" added nothing for this purpose) prevailed before the majority of the three Privy Council judges. One of these judges, Lord Clarke states (on P25 of the judgment) that:

"If, as is common ground, the essential obligation is to act as a prudent trustee would act, namely with reasonable care and skill, it can be said with force that the core obligation of a person acting en bon père de famille includes a duty to act with reasonable care and skill and thus without negligence."

In other words, the Guernsey law requirement to act "*en bon père de famille*" does not provide for any additional or different responsibilities or duties for a Guernsey trustee to that of an English trustee. The Guernsey Court had considered that it was incompatible for a trustee to effectively exonerate itself from its own gross negligence whilst at the same time acting under its duty "*en bon père de famille*". The majority decision of the Privy Council disagreed.

As stated above, this view was not shared by two of the Privy Council judges.

Lady Hale, dissenting, reminded the Court that this case was about the law of Guernsey (as opposed to the law of England and Wales or indeed Scotland which was also reviewed in depth). She also reminded the Court that the law of England was by no means clear and unanimous on this point. She referred to a number of concerns that had been expressed about the decision in *Armitage v. Nurse*. This will no doubt attract attention from English legal practitioners.

Lord Kerr, also dissenting, agreed with Lady Hale, noting the Guernsey Court of Appeal's conclusion "*that the law of trusts in Guernsey should not slavishly follow English Trust Law on the question of whether gross negligence could be exempted by a settlement provision*".

The judgment also makes a number of useful references to the distinction to be drawn between different types of conduct from negligence, gross negligence through to wilful misconduct and fraud (a “sliding scale”). The Judicial Committee spent much of its time at the hearing considering a long list of cases stretching over one hundred years of precedent.

Where does this judgment leave trustees, beneficiaries and legal advisors?

Many will be looking up the exact wording of their old settlement deeds rather like brushing the dust off old insurance policies. The case will be a major aid to legal advisors in assessing the chances of a claim being successful against trustees. For trustees themselves that exoneration clause (depending on where the trustees’ conduct comes in on the sliding scale) looks as though it will be indeed worth the paper it is written on. Finally, the influence of English trust law on Guernsey law is clearly well established now.

Advocate Greenfield said the impact of the Hutcheson case to English trust law, and similar trust law in other common law jurisdictions, cannot be overemphasised.

“It took the Privy Council an unusual six month period to consider and deliver its ruling which indicates just how important they believed their judgment would be. I have had a number of City trust and chancery lawyers calling me waiting for the judgment, knowing that this case would significantly impact on trust law in the future,” he said.

“This case is an instance of Guernsey leading the world in testing case law and providing a channel for change and, on a personal level, it has been exciting to be involved in something which will have such a significant role in the future of trust law around the world.”

This claim will now be referred back to the Royal Court for trial following this ruling on the preliminary issue.

The legal team from Carey Olsen that advised the beneficiaries was led by Litigation Partner John Greenfield and included Senior Associate Kelly Walton.

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

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