VOISIN LAW

Trustees incur personal liability due to inadequate protection under a lease | 1

Those closely following legal developments in the trust world will have welcomed the decision earlier this year of the Privy Council in the case of *Investec Trust (Guernsey) Limited and others v Glenalla Properties Limited [2018] UKPC 7* which concerned the personal liability of Trustees for loans that they had created with certain offshore companies forming part of the trust structure and where, amongst other things, the Privy Council confirmed that by dint of Article 32 of the Trusts (Jersey) Law 1984 the trustees on that occasion were insulated from personal liability connected to the loan transactions as per Article 32 the claims only extended to the trust property because of the known transacting status of the trustees as trustees of a Jersey Trust.

However, in the more recent English Court of Appeal case of *First Tower Trustees Limited & another v CDS (Superstores International) Limited (2018) EWCA Civ.1396.* two Guernsey-based trustees were not so fortunate on this occasion to avoid personal lability in respect to foreign obligations (under English law).

In that case the Trustees were acting as co-trustees of a unit trust (a GPUT) under which they held property and acted as landlords.

In response to a pre-contractual enquiry relating to the entering into of a lease, the Trustees stated they were not on notice of any breach of any environmental law but "*the buyer must satisfy itself*". Whilst at that time, this response was correct, at the time of entry into the lease the Trustees had received a report indicating the presence of asbestos at the property and they were put on notice by an advisory firm of health and safety risks arising from this.

In the event the tenant claimed damages for negligent misstatement against the Trustees including costs for remedial works and alternative accommodation in the meantime.

The Trustees had contracted under the lease "*in their capacity as trustees of the Barnsley Unit Trust and not otherwise*" but notwithstanding this the Court found that the lease drafting was only effective to limit the Trustees contractual liability under the lease and did not extend to limit its liability for pre-contractual misrepresentations (the tortious claim that was bought).

As the Court reminded itself "*a trustee may, like any other legal owner of property, become personally liable in tort in respect of acts or omissions of himself or his employees or agents in connection with the administration of trust property*..."

Here the Trustee could have limited its liability to the extent of the trust fund and incur no personal liability in excess of it, provided that suitable words were used but as the Court noted, if the lease sought to remove a common law remedy (such as a tortious claim) then it had to be done clearly and the form of words used in the lease did not clearly exclude such remedies.

As such, the case serves as a useful reminder of the need to precisely draft exclusionary wording in contracts if the intention is to exclude remedies that may exist at common law or under statute and not merely rely upon a "status" clause referring to the capacity in which the trustee transacts.

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