Anti-Bartlett Provisions - Back on Track

In a judgment delivered on 22 November 2019, the Hong Kong Court of Final Appeal has determined the extent to which ‘anti-Bartlett’ clauses commonly found in trust instruments are effective to relieve trustees of supervisory duties relating to the trust. In a ruling that will be of comfort to the trust industry, the court found that anti-Bartlett clauses were effective to relieve trustees of supervisory duties and any liability which flowed from the failure to exercise supervisory powers. Although the case was heard in Hong Kong, the law of the trust was that of Jersey, so will be of particular interest in the Channel Islands.

Background

The first and second plaintiffs were husband and wife referred to as Zhang and Ji respectively in the judgment. They were the settlors of the Amun Trust, of which DBS Trustees HK (Jersey) Limited, were the trustees. The sole asset of the trust (besides the USD10 settled on the trust as its initial property) was the sole share in a BVI incorporated private investment company, Wise Lords Limited ("Wise Lords"). At the relevant time, the directorship of Wise Lords was provided by DHJ Management Limited, but Ji was its investment advisor. A letter of wishes executed by Zhang and Ji requested that Ji should always be consulted and that her investment recommendations should be final. Ji was authorised by DHJ Management to give investment instructions on behalf of Wise Lords.

The trust documentation included an anti-Bartlett clause. The terms of the particular clause meant that the trustee was relieved of any duty to interfere in or become involved in the administration, management, or conduct of the business or affairs of any company in which the trust was interested, so long as the trustees did not have actual knowledge of any dishonesty relating to such business and affairs. The administration of such a company was to be left to its directors and other authorised persons and the trustees were required to assume at all times that such administration was carried on competently, honestly, diligently and in the best interests of the trustee as shareholder. In practice, this meant leaving the administration of Wise Lords to Ji.

Prior to and during the financial crisis, Wise Lords entered a number of high-risk transactions on Ji’s instructions. These were approved by the trustee after the fact.

Following huge losses as a result of these high-risk transactions, Zhang and Ji brought, amongst other claims, claims against DBS Trustee for both dishonest and negligent breach of trust. The Court of First Instance found that DBS Trustee had been in “serious and flagrant” breach of its duties and had breached its ‘high level of supervisory duty’ in allowing Ji to make the high-risk transactions.
Decision on Appeal
The Court of Appeal held that, even where a trust instrument included anti-Bartlett provisions, trustees were subject to a “high-level supervisory duty”. This was on the basis that Article 21(3) of the Trusts (Jersey) Law 1984 cast a “residual obligation” on a trustee which it was not possible for anti-Bartlett clauses to exclude.

Court of Final Appeal
The Court of Final Appeal held that, as a matter of Jersey law, the existence of a “high level supervisory duty” was plainly inconsistent with the anti-Bartlett provisions, which were therefore effective to exclude DBS Trustee’s liability. The Court’s reasoning was summarised as follows:

“We are unable to accept that Art 21 provides a viable basis for the “high level supervisory duty” purportedly imposed on the trustees. With respect, the Judge erroneously fails to note that Art 21(1) begins with the words: “A trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions”. The point is that the requirement that the trustees “act with due diligence, as would a prudent person, to the best of the trustee’s ability and skill; and observe the utmost good faith” operates to lay down the standards which trustees must adhere to in executing their duties or in exercising their powers. It does not create free standing duties to act prudently, etc. One must first identify the duty or power executed and then assess whether the trustees have executed or exercised the same in accordance with the specified standards or whether, on the other hand, their conduct was improper or so deficient as to constitute a breach of trust. Accordingly, if taking into account the effect of the anti-Bartlett provisions, any potentially relevant duty has been disapplied (so that, for instance, there is no duty to interfere or supervise management or to avoid speculative or non-diversified investments, or to preserve or enhance the value of the trust fund) the standards laid down by Art 21(1) do not come into play.”

Comment
From a Jersey law perspective, the decision, whilst not binding on the Royal Court, will be highly persuasive and trustees administering Jersey law trusts should take comfort from the decision. Questions are regularly asked as to how far a trustee’s duties, as a matter of general law, require it to supervise or step into the decisions at the level of a company within a trust structure (particularly if wholly owned by the trustee). This is not only in the context of anti-Bartlett provisions, but also, for example, in circumstances where a trust instrument expressly reserves powers to a settlor as permitted under the Trusts (Jersey) Law. Clearly, the terms of any provisions will need to be considered carefully, but the principle decided in this case is one that will undoubtedly be prayed in aid by trustees in the future, when faced with criticism in the face of losses suffered within a trust due to the decisions of others.

Will this apply in other offshore jurisdictions?
In light of the common use of anti-Bartlett provisions in off-shore trusts, including in Guernsey, the Cayman Islands, the BVI and Bermuda, the decision in Zhang will likely be considered highly persuasive in those jurisdictions.

In particular, the wording of Article 21 of the Jersey statute that was central to the Hong Kong Court’s decision (that a trustee’s obligation of good faith only applies to a trustee in the exercise of its duties or powers) is mirrored in Section 22 of the Trusts (Guernsey) Law 2007. Section 22 provides that a trustee’s duty of good faith and to act en bon père de famille only applies to a trustee “in the exercise of his functions”, which we consider should lead to a similar analysis being applied to that adopted in this case.
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