Privy Council: trustee exoneration clauses can exclude liability for gross negligence

Most pension scheme's trust deeds will contain a provision under which the trustees will not be liable for claims by the beneficiaries except in limited circumstances, normally acts of a dishonest nature. This is commonly referred to as an 'exoneration clause' or an 'exclusion clause'. Should a court consider that certain acts on the part of trustees amount to severe incompetence (the possibility of which, given the highly professional nature of trustees, is remote) then further comfort can be taken from Spread Trustee v Hutcheson, a Privy Council decision, allowing liability for gross negligence to be excluded in a trust deed.

In this case, from Guernsey, the Privy Council addressed the question of whether under English law it is permissible for a trustee exoneration clause in a trust deed, to exclude liability for acts of gross negligence. In a 3:2 decision, the board reconfirmed the principal in Armitage v Nurse [1998] Ch 241 that all liability could be excluded except liability for dishonest/fraudulent acts.

The Privy Council is the highest court of appeal for a number of Commonwealth countries, Crown Dependencies and British Overseas Territories. The members of the Privy Council are, for the most part, UK Supreme Court Justices and so Privy Council judgements, whilst not law in the UK, are said to be persuasive.

Background:

- Spread Trustees v Hutcheson [2011] 071 PBLR concerns the law of trusts in Guernsey. In the proceedings the beneficiaries under a trust were claiming damages for breach of trust from the professional trustees for failing to identify and investigate breaches of trust on the part of previous trustees. In their defence, the trustees sought to rely on an exclusion clause in the trust deed that purported to exclude liability for gross negligence.

- The question raised in this preliminary hearing was whether it was permissible for a trustee exoneration clause to exclude liability for acts of gross negligence under Guernsey customary law.

- In determining the basis of Guernsey customary law, a key question was whether Guernsey trusts law was mostly based on English law, Scots law, Norman law, Roman law, a combination of them or something unique to Guernsey.

- English law on the question of whether it was permissible for a trustee exoneration clause to exclude liability for acts of gross negligence was
established in *Armitage v Nurse* [1998] Ch 241. This Court of Appeal decision determined that it was permissible for trustees to exclude liability for all loss except that caused by actual fraud and Millet LJ had explicitly held that a trustee exoneration clause can validly exclude liability for gross negligence.

Decision

The Judicial Committee of the Privy Council allowed the appeal by a majority of 3:2. The majority held that Guernsey trusts law is most closely associated with English trusts law. The majority found that *Armitage v Nurse* stated what the law has always been in England, that a trustee exoneration clause can validly exclude liability for gross negligence.

Lord Mance, writing for the majority, reconfirmed English law as follows:

"English law will construe exempting provisions strictly, but there is in my opinion no general principle of English law which could preclude trustees from exempting themselves from liability for gross negligence. The position is in this respect was and is as stated in *Armitage v Nurse* [1998] Ch 241 and in the Jersey Court of Appeal in *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Services* [1995] JLR 352...More recently, in *Walker v Stones* [2001] QB 902 the Court of Appeal followed and explained *Armitage v Nurse*" [107]

Lady Hale, who dissented, expressly noted the importance of the Privy Council's determination in this case, "Thus, if this appeal succeeds, this Board will be taken to have decided a question which has never been decided at this level by the Courts of England and Wales. It will be taken to uphold in Guernsey law the decision of the English Court of Appeal in *Armitage v Nurse* [1998] Ch 241 although the Supreme Court of the United Kingdom has never had an opportunity to consider whether that case was rightly decided." [129]

Comment

Whilst the decision of the Privy Council is not binding on English courts it is persuasive authority for the principle established by the Court of Appeal in *Armitage v Nurse* that it is permissible for a trustee exoneration clause to exclude liability for acts of gross negligence. That would mean that trustees can rely on exoneration clauses to protect them from liability for all acts except those involving dishonesty or fraud.

For further information about this case please contact Dan Schaffer or Sarah McNally.

To subscribe or unsubscribe
To enquire about further publications or to unsubscribe from this e-bulletin, please email us, or visit the Herbert Smith website here.

The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

Herbert Smith LLP, Gleiss Lutz and Stibbe are three independent firms which
have a formal alliance.