Introduction

In a welcome reassurance to trustees, the Hong Kong Court of Final Appeal recently ruled that the terms of a trust can operate to exclude obligations and liabilities otherwise incumbent upon trustees.

As a general rule, trustees owe numerous obligations to the trust that they must discharge. To minimise the trustees’ liability, trust deeds often include anti-Bartlett clauses which purport to exclude the trustees’ supervisory duties. Notwithstanding the inclusion of an anti-Bartlett clause in the present case, the Hong Kong Court of First Instance ruled that the trustee continued to owe a “high level supervisory duty” to the trust.

This ruling was overturned by the Hong Kong Court of Final Appeal (“Court”) in IQ EQ (NTC) Trustees Asia (Jersey) Limited and another v Bruno Arboit and Roderick John Sutton and another [2019] HKCFA 45, holding that the anti-Bartlett clause successfully excluded any such “high level supervisory duty” owed by the trustee.

Brief Facts

A husband and wife, Zhang and Ji, sought to set up a trust to protect their family assets from inheritance tax. They incorporated Wise Lords Limited (“Wise Lords”) as their investment vehicle, and established the Amsun Trust which held the sole share in Wise Lords as its trust asset. Ji retained considerable control over the investments of the Amsun Trust – she was authorised to give investment instructions on Wise Lords’ behalf, while the trustee of the Amsun Trust (“DBS Trustee”) was required to consult Ji and defer to her wishes. The governing law was stated in the terms of the Amsun Trust to be Jersey law.

Wise Lords subsequently invested in high-risk investments and incurred substantial losses. Zhang and Ji brought proceedings against DBS Trustee among others, alleging dishonest and negligent breach of trust.

Decisions of the Court of First Instance and the Court of Appeal

The Hong Kong Court of First Instance held that DBS Trustee was liable for negligent breach of trust, ruling that DBS Trustee had a “high level supervisory duty” to supervise the trust’s investments.

DBS Trustee appealed on the grounds that the terms of the Amsun Trust contained an anti-Bartlett clause expressly disapplying any obligations incumbent on DBS Trustee to interfere with the management of Wise Lords. However, the Hong Kong Court of Appeal held that notwithstanding the
anti-Bartlett clause, DBS Trustee had a “residual obligation” that could not be excluded by the anti-Bartlett clause.

**Decision of the Hong Kong Court of Final Appeal**

The Court held that a continuing “high level supervisory duty” was inconsistent with the plain terms of the anti-Bartlett clause. While it acknowledged that Jersey law required trustees to execute their duties by acting in good faith and with due diligence, the anti-Bartlett clause stated that DBS Trustee’s duties did not include supervising or interfering with the management of the trust’s investments in the first place. DBS Trustee therefore was not required to fulfil duties that had been expressly excluded by the anti-Bartlett clause.

This held true although DBS Trustee had in practice given after-the-event approvals to a number of investments. Given that the investments had already been effected, retrospective approval represented a mere acknowledgement and not the exercise of a supervisory power. There was no legal basis for transforming the giving of after-the-event approvals into a de facto supervisory duty.

**Concluding Remarks**

The prior decisions by the Court of First Instance and the Court of Appeal to hold DBS Trustee liable were highly concerning for two reasons: (1) anti-Bartlett clauses are commonly relied upon to protect trustees from liability; and (2) the decision in this case was likely to influence most of the major common law jurisdictions, as Jersey law governed this dispute despite being heard in the Hong Kong courts.

While the parties opted to settle the matter before judgment was given, the Court fortunately elected to publish its grounds of decision nonetheless, providing reassurance to trustees worldwide that anti-Bartlett clauses continue to be effective.

For further enquiries or discussion on the above matters, please do not hesitate to contact our team below.
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