



15 June 2011

## PRESS SUMMARY

**Spread Trustee Company Limited v Sarah Ann Acato Hutcheson and others [2011] UKPC 13**  
*On appeal from the decision of the Court of Appeal of Guernsey dated 26 November 2009*

**MEMBERS OF THE BOARD OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL: Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Sir Robin Auld**

### BACKGROUND TO THE APPEAL

This appeal concerns the law of trusts in Guernsey. The issue raised by the appeal is whether it was permissible for a trust deed to exclude a trustee's liability for gross negligence prior to the entry into force of the Trusts (Amendment) (Guernsey) Law 1990 ('the Amendment Law'), which expressly prohibited such an exclusion.

The respondents, beneficiaries under two Guernsey trusts, brought a claim for damages for breaches of trust resulting from acts of gross negligence against the appellant trust company ('the trustee'). The trustee is said to have failed to identify and investigate breaches of trust occurring prior to 22 April 1989, when the Trusts (Guernsey) Law 1989 came into force and between 22 April 1989 and 10 July 1990, when the Trusts (Amendment) (Guernsey) Law 1990 came into force.

Each of the trust deeds contained a clause excluding the trustee from liability for any mistake or omission except wilful and individual fraud and wrongdoing. Whether or not a trustee could by contract exclude himself from liability for gross negligence as a matter of Guernsey law during the two periods was tried as a preliminary issue. Prior to 22 April 1989, this was a question of Guernsey customary law and between 22 April 1989 and 10 July 1990 it was a question of construction of the 1989 Law.

The respondents argued that it had never been possible to exclude a trustee's liability for gross negligence as a matter of Guernsey law. They also argued that the 1989 Law and the Amendment Law have retrospective effect, with the result that the prohibition of clauses in settlements which exclude liability for gross negligence introduced by the Amendment Law is effective to defeat reliance upon the relevant clause in respect of all breaches of trust, whenever they occurred.

Section 18(1) of the 1989 Law provides that, "*A trustee shall, in the exercise of his functions, observe the utmost good faith and act en bon père de famille*". Section 34(7) of the 1989 Law provides that, "*Nothing in the terms of a trust shall relieve a trustee of liability for a breach of trust arising from his own fraud or wilful misconduct*". Subsection (7) was amended by the Amendment Law by the addition of "*or gross negligence*" at the end.

Lieutenant Bailiff Sir de Vic Carey held that it was not possible to exclude liability in respect of gross negligence either as a matter of Guernsey customary law or under the 1989 Law, which was declaratory of customary law. The Court of Appeal in Guernsey upheld the decision of the Lieutenant Bailiff. The trustee appealed to the Judicial Committee of the Privy Council.

## JUDGMENT

The Board of the Judicial Committee of the Privy Council allows the appeal by a majority of 3:2. Lord Clarke gives the judgment of the Board. Lord Mance and Sir Robin Auld give additional concurring judgments. Lady Hale and Lord Kerr give dissenting judgments.

## REASONS FOR THE JUDGMENT

The Board holds that liability of a trustee for gross negligence could lawfully be excluded as a matter of Guernsey customary law and under the 1989 Law.

- There is no case or text before 1989 which assists in answering the question what was the customary law of Guernsey in any relevant respect. In these circumstances, the Board considers the most valuable pointer to the correct answer to the question whether a term excluding gross negligence was contrary to Guernsey customary law before 1989 is the 1989 Law: [13], [83]. The fact that section 34(7) of that Law only forbids terms excluding gross negligence is good evidence that that was the position under Guernsey law before the 1989 Law: [24]. There is no reason to think that that subsection was not carefully considered and the 1990 Amendment Law, in adding the words “or gross negligence” cannot be regarded as recognition of a mistake by the 1989 draftsman, but rather as new law in line with the recent statutory change made in Jersey: [30]-[34], [119].
- Given that the 1989 Law would be most unlikely to have introduced a provision less favourable to beneficiaries than before, the Board does not agree with the Court of Appeal that it was not permissible for a trust to include a term excluding liability for gross negligence as a matter of Guernsey customary law: [34], [114]. Further, there is no reason to treat Guernsey law as following the Scottish view on this point in preference to the view taken under English law with which the Guernsey law of trusts is more closely associated: [40],[45], [109]. The underlying obligation to act en bon père de famille does not point to a conclusion that Guernsey would have adopted the Scots rule; the expression was French in origin and was not used in Scots law: [39], [122]. The Board finds that *Armitage v Nurse* [1998] Ch 241 correctly states what the law has always been in England, namely that liability for gross negligence can lawfully be excluded, and that it is much more likely than not that a Guernsey lawyer or judge or the Board itself, considering the position under English law before 1989, would have looked at the cases cited by Millet LJ in that case and reached the conclusion that he did: [57], [106].

Lady Hale and Lord Kerr dissent. They conclude that English law on the subject was not settled in 1988([130], [163]) and that the duty to act en bon père de famille is incompatible with the notion that a trustee could be exempted from gross negligence ([139], [145]). Lady Hale considers that in such circumstances there is no reason to disagree with the Guernsey courts’ conclusion as to how Guernsey law would have decided the matter then: [140]. Lord Kerr finds that in such circumstances it was entirely probable that the Guernsey court in 1988 would have been extremely reluctant to follow English law on this question: [168]. The dissenting Justices therefore would have held that it was possible to exclude liability for gross negligence as a matter of Guernsey customary law.

As to the question whether the 1989 Law and the Amendment Law have retrospective effect, the Board unanimously holds that there is nothing in the express terms of either Law that indicates an intention that the enactments were to have retrospective effect: [68], [72].

*References in square brackets are to paragraph numbers in the judgment.*

## NOTE

**This summary is provided to assist in understanding the Committee’s advice. It does not form part of the reasons for the advice. The full advice of the Committee is the only authoritative document.**

**Advices are public documents and are available at: [www.jcpc.gov.uk/decided-cases/index.html](http://www.jcpc.gov.uk/decided-cases/index.html)**