



Zhang Hong Li and others v DBS Bank (Hong Kong) Ltd.: Case Comment

May 04, 2020 | Marly Peikes, associate lawyer, O'Sullivan Estate Lawyers LLP

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In November 2019, the Hong Kong Court of Final Appeal upheld an anti-Bartlett clause in a trust deed and ruled that the trustee had no overriding duty to supervise the management of an underlying company.

Anti-Bartlett clauses were developed in response to the 1980 English High Court decision of *Bartlett v Barclays Bank Trust Co. Ltd.* The Court held that Barclays Bank Trust, which was the sole trustee of a trust whose sole asset was a controlling block of shares in a company, had a duty to supervise the management of the company. To address this, anti-Bartlett clauses have been included in trust deeds in certain common law jurisdictions to exclude the trustees' duty to enquire and supervise investments by the trust in an underlying holding company. Trust instruments in Canada do not typically include anti-Bartlett clauses.

Briefly, Ji Zhengrong ("Ji") and Zhang Hong Li ("Zhang") settled a Jersey-law governed trust (the "Trust") in 2005. DBS Bank (Hong Kong) ("DBS Bank") was the trustee at the relevant time. The sole trust asset was a share in a British Virgin Islands company called Wise Lords Limited ("Wise Lords"). DHK Management Limited ("DHK Management"), a company in the same group as DBS Bank, was the sole corporate director of Wise Lords at the relevant time. Ji was the investment advisor for Wise Lords and directed all of its investments. The settlors had executed a letter of wishes stating that the trustee should always consult with Ji regarding all matters and that her recommendations are final and should be followed.

The Trust instrument included an extensive anti-Bartlett clause, which most importantly stipulated that the trustee had no duty to control or interfere with the administration, management or conduct of the business or affairs of the company in which the trust was interested and that the trustee should leave the administration, management and conduct of the business to the directors so long as the trustee did not have actual knowledge of any dishonesty.

In 2008, during the financial crisis, the investments held by Wise Lords incurred significant losses. Ji and Zhang and the current trustees of the Trust sought to recover the losses claiming that DBS Bank, the trustee of the Trust, and DHK Management, the director of Wise Lords, breached their duties as trustee and fiduciary, respectively. The lower courts held that each owed a high-level supervisory duty to the beneficiaries of the Trust, which required a trustee to intervene in certain circumstances even without knowledge of any dishonesty. Further, the lower courts determined that DBS Bank approved and did not enquire into investment decisions.

The Court of Final Appeal rejected the decisions of the lower courts, focusing on the extensive anti-Bartlett provision and the fact that DBS Bank had no active supervisory role, as the investments were shown to DBS Bank once completed and only for informational purposes. Further, the Trust stipulated that investments of a speculative nature are deemed authorized investments. The Court of Final Appeal ruled that the anti-Bartlett clause included in the Trust instrument sufficiently relieved a trustee of any duty of enquiry and supervision of a trustee-owned company. Further, the exoneration and indemnity clauses in the Trust would have relieved the trustee of any liability had such a breach of duty been found.

The decision of the Court of Final Appeal is a welcome decision for all trustees who rely on an anti-Bartlett clause to exclude the duty of a trustee to supervise or intervene in the business affairs of companies in which the trust holds assets.

We do not know what effect this case will have on Canadian trust law. Nonetheless, it is a reminder that duty modification clauses need to be drafted with care and with the specific circumstances of the settlor and the trust in mind. Additionally, trustees must keep in mind the responsibilities they have when delegating trustee duties where permitted, and must do so prudently. Trustees must consider what risk management procedures must be put in place to ensure that delegated authority is properly exercised. As well, beneficiaries should clearly understand the impact an anti-Bartlett clause has, including with regard to recourse against a trustee.

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