Corporate Trustees: how gross must negligence be?

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Authors/Presenters

Ed Marlow

Co-Author

Counsel
London, UK
ed.marlow@bryancave.com

Surprisingly, the distinction between negligence and gross negligence in English contract and trust law is unclear. On one view, reflected in the older cases, there is little or no difference at all. The contrary view, reflected in more modern cases, is that there is indeed a difference and potentially, depending on the circumstances, it can be a significant one. In the law of tort, it is certainly true that gross negligence and ordinary negligence have the same legal effect.

For Corporate Trustees, this can be important. Take for example the UK Loan Market Association's recommended form of Intercreditor Agreement. Under this, a Security Trustee's rights and exclusions from liability are qualified in a number of places by reference to gross negligence.

In *Tradigrain SA v Internek Testing Services* (2007) the English Court of Appeal observed that gross negligence did not have a recognised meaning under an English law contract – although often found in commercial documents, it had "never been accepted by English civil law as a concept distinct from civil negligence". Compare the position under New York law, under which conduct is grossly negligent if in effect it is so careless as to show complete disregard for the rights of others.

In *Camerata Property Inc. v Credit Suisse Securities (Europe) Ltd.* (2011), the English High Court had to consider whether advice given by an investment bank fell within an exclusion clause in the bank's terms and conditions. The exclusion clause expressly did not cover advice which was grossly negligent. The judge decided that the question was not whether gross negligence was a concept understood in English civil law but rather the correct approach was to construe the expression as it was used in the bank's terms and conditions. The use of both "negligence" (with regard to the bank's custody activities) and "gross negligence" (with regard to other matters including the bank's investment advice) in those terms and conditions indicated that a difference was intended. In the judge's view, it was a difference of degree and not of kind (endorsing *Armitage v Nurse* (1997), a case before the English Court of Appeal concerning a settlement and its trustees). He noted that the distinction is not easy to define or even to describe with any precision. Unfortunately for us, the judge did not have to delve into the difference as he decided that the bank had not been negligent, let alone grossly negligent. He did however endorse the words of the judge in *The "Ardent"* (1997): ""Gross" negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence". The judge in the later case of *Winnetka Trading Corporation v Julius Baer International Ltd* (2011) agreed with the approach of the judge in *Camerata*, adding "However, it seems to me that "gross negligence" is not the same as subjective recklessness, although it may come close to it…". Again, the judge did not have to go into further detail since, as in *Camerata*, there was no breach of duty.

So the meaning of "gross negligence" is not easy to pin down. Modern case law indicates that the English courts will normally give effect to the word "gross" when a contract or other document expressly refers to "gross negligence". Quite what that effect is will be a question of degree applying the usual rules of construction. It will therefore be interpreted by the English courts on a case by case basis – whether there will be any difference in a court's interpretation of that expression when used in a trust as distinct from a contract is an interesting question. What is clear is that English contract and trust law "has always drawn a sharp distinction between negligence, however gross, on the one hand and fraud, bad faith and wilful

misconduct on the other" (*Armitage v Nurse*).

The language of the UK Credit Rating Agencies (Civil Liability) Regulations 2013 (SI 2013/1637), which implement an EU Regulation on the civil liability of credit rating agencies, is worth noting. The UK Regulations define gross negligence of a credit rating agency by reference to the recklessness of its senior management, i.e. "if they act without caring whether an infringement occurs", which is a subjective test. Although the UK Regulations are narrow in their application, might the English courts somehow be influenced by the language of the Regulations when construing the expression "gross negligence", perhaps when used in a document entered into after the coming into force of the UK Regulations? An interesting thought perhaps but not one that the English courts have had to consider.

Once the meaning of an exclusion clause has been established, there is of course the separate question whether it will be effective as a matter of law, for example whether it will be subject to the Section 2(2) Unfair Contract Terms Act 1977 requirement of reasonableness. That subsection (when applicable – there has been some debate whether the subsection catches a trustee's duties) applies to clauses intended to exclude or restrict liability for negligence.

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