

Representation of the Z Trusts

Insights - 16/03/2015

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Introduction

This case concerned among other things whether or not there is a form of equitable remedy which would justify an earlier trustee who had disposed of assets to a successor trustee having an entitlement to recover such of those assets as is necessary for the purpose of satisfying that earlier trustee's right of indemnity.

This question was considered by the Guernsey Court of Appeal in Investec Trust (Guernsey) Limited et al v Glenalla Properties Limited et al, who were required to determine the Jersey law position for the purposes of resolving a dispute over which the Guernsey Court had jurisdiction, in a decision dated 29 October 2014.

However, this decision is the first occasion on which the Royal Court of Jersey has been asked to determine the question.

Background

Mrs C ("Mrs C") established eight Z Trusts of which Equity Trust (Jersey) Limited ("Equity") was the original trustee. Equity retired as trustee of all of the trusts in 2006 with Volaw Trustee Limited ("Volaw") becoming trustee of the Z Trust and Z II Trust and Barclays Private Bank and Trust Limited ("Barclays") trustee of the remaining six trusts. Under the terms of the deeds by which Equity retired in 2006, all of which were in substantially in the same terms, it handed over the assets of the trusts in return for fairly standard indemnities.

Since that time Equity had been put on notice of two claims for which it said it was entitled to be indemnified both contractually and in law.

The current position was that the Z II and III Trusts were insolvent and the remaining trusts, whilst solvent, faced a number of financial difficulties. Mrs C was critical of the conduct of Equity as trustee and, with others, had brought breach of trust proceedings against it in which Equity had raised its own counterclaims. Mrs C placed the blame for many of the problems now facing the trusts upon Equity and there was therefore a general background of hostility. Mrs C stated that resolving these difficulties would be very much facilitated by the appointment of one trustee to replace Volaw and Barclays and that Rawlinson & Hunter Trustees SA (“R&H”), who are based in Switzerland, had agreed to take on that role. Mrs C alleged, however, that Equity had refused to be a party to deeds of appointment and retirement of trustees and were otherwise obstructing this proposed change of trusteeship.

For its part, Equity asserted an equitable *lien* over the assets of the ZII Trust and was concerned to ensure that this was not destroyed, diminished or jeopardised. In particular, Equity was concerned that the appointment of a non-resident trustee would make enforcement of its rights under the indemnities and under its separate equitable *lien* more difficult.

Decision

The Court was referred to the decision of the Guernsey Court of Appeal in Glenalla, wherein the Logan Martin JA, delivering the judgment of the Court, and referring to English authority stated:

“... we are satisfied that we may find that within the law of Jersey there is a form of equitable remedy which would justify an earlier trustee who had disposed of assets to a successor trustee having an entitlement to recover such of those assets as is necessary for the purpose of satisfying a claim which has been established under Article 32(1) (a) [of the Trusts (Jersey) Law 1984][1]”.

Commissioner Clyde-Smith, having regard to the fact that the Guernsey Court of Appeal is a closely connected senior court, considered that the decision in Glenalla reflected the law of Jersey and accordingly Equity, as a former trustee, had an equitable right in the sense described in Glenalla and was therefore entitled to ensure that Volaw and Barclays did not take any steps which would “*destroy, diminish or jeopardise*” that right.

The Commissioner noted, however, that that equitable right would only extend to the liabilities for which Equity would have been entitled to reimbursement out of the trust fund if it had remained trustee i.e. liabilities reasonably incurred in connection with the trusts; and that both Volaw and Barclays had reserved their positions in this respect, and also that creditors of the trusts may wish to do the same.

Questions of priority

Equity also submitted that its equitable rights constituted a first charge or *lien* upon the trust

funds in priority not only to the beneficiaries but also to other current creditors of the trusts.

Although this issue was also referred to in the Glenalla decision, the Commissioner considered that creditors (who were not before the Court on this application) should be given an opportunity to argue that point at a subsequent hearing. The question has therefore been left over for determination at a later date, and a judgment may therefore be issued in that regard in due course.

Comments

The decision to confirm in Jersey the decision of the Guernsey Court of Appeal in Glenalla, that under Jersey law a former trustee's rights of indemnity give them an equitable interest in the trust property, will no doubt be welcomed by professional trustees. There had previously been uncertainty in this regard. Indeed, this uncertainty had been explicitly acknowledged in the Economic Development Department's Green Paper dated 22 July 2008 which noted that while the Guernsey trust legislation had been amended in 2007 to provide for a statutory lien, and while in most common law jurisdictions the right of a trustee to indemnity has been seen as not only conferring a right to retain possession of trust property, but also as a property right equivalent to (and ranking ahead of) the interests of the beneficiaries, Jersey law did not have any clearly developed concept of lien. As a result, an amendment was proposed to provide for a trustee to have a non-possessory lien over the trust property. That proposal did not result in any such amendments. However, the decision in this case would seem to have the effect of confirming that, in fact, the trustee does have an equitable interest in the trust property.

The scope of the equitable interest is yet to be fully determined, although that may be more fully explored at the next hearing in this case. The Commissioner was prepared, however to make certain observations. He considered that it was tolerably clear that a trustee's equitable right takes priority over the claims of the beneficiaries. However, he considered the issue of priority over other creditors was not straight-forward. In particular, in circumstances where the current and former trustees all have equitable rights in respect of the liabilities, costs and expenses they have each incurred, whose rights should have priority in the case of a deficiency of assets to satisfy all such claims? It may that the Court will be required to rule on this question in this case, if that cannot be agreed amongst the parties.

As to whether this decision will produce any change in practice in the drafting of deeds of retirement and appointment, that remains to be seen. The purpose behind the proposal in the 2008 Green Paper was in part to address the issue of the proliferation of indemnities and chains of indemnities which arise upon the retirement of a trustee, which can make the execution and administration of trusts inefficient, thereby adding to costs. However, to some extent, the effectiveness of a *lien* depends on its recognition before the Court where it is sought to be enforced. Therefore, if a trust is transferred to a trustee in another jurisdiction, what comfort does the former trustee have that its *lien* will be recognised by the Court in that jurisdiction? As

noted above, this was precisely the concern that Equity had in this case. It would seem likely, therefore, that outgoing trustees will still wish to retain the comfort of contractual indemnities.

[1] Which provides that where a trustee is party to any transaction or matter affecting the trust, if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property.

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Meet the Author



Simon Davies

Partner

Guernsey

E: simon.davies@ogier.com

T: [+44 1481 737175](tel:+441481737175)

Key Contacts



Mathew Newman

Partner

Guernsey

E: mathew.newman@ogier.com

T: [+44 1481 752253](tel:+441481752253)



Simon Dinning

Partner

Jersey

London

E: simon.dinning@ogier.com

T: [+44 1534 514251](tel:+441534514251)



Edward Mackereth

Global Managing Partner

Jersey

E: edward.mackereth@ogier.com

T: [+44 1534 514320](tel:+441534514320)



Nick Williams

Partner

Jersey

E: nick.williams@ogier.com

T: [+44 1534 514318](tel:+441534514318)

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