

Trustee indemnities and liens – a valuable resource and a pragmatic process

UPDATE

Update prepared by Bruce Lincoln (Partner, Jersey)

The recent Jersey case of *In the matter of the Representation of C and in the matter of the Z trusts I to V*¹ has provided some welcome reassurance to former trustees who are faced with liabilities in respect of trusts from which they have retired.

In this particular case, after retiring as trustees of a number of family trusts in favour of other trustees by deed of appointment and retirement (the **Original Deed**), the former trustees were put on notice of two claims against them.

When the successor trustees subsequently wished to retire in favour of new trustees, the former trustee refused to agree to be party to the deed of appointment and retirement of trustees. The former trustees were concerned that the appointment of the new trustees (not being resident in Jersey) would:

- make their enforcement rights under the indemnities provided in the Original Deed more difficult; and
- potentially destroy, diminish or jeopardise their equitable lien over the assets of the trust.

Indemnities

The chain indemnities contained in the Original Deed required the successor trustees to ensure that, when a new trustee was appointed, the successor would ensure that this new trustee would covenant with it (for and on behalf of the former trustees) to indemnify the former trustee in identical terms to the Original Deed.

Such chain indemnities were acknowledged by the Court as 'fairly standard' and the Court concluded that as a matter of law, the former trustee did not need to be a party to the new deed of appointment and retirement provided that the new trustee does, in fact, indemnify it in the same terms as the Original Deed.

The Court expressed the view that where such an indemnity is obtained from the new trustees in favour of the former trustees, whether by way of a separate document addressed to the former trustees or as part of the deed of appointment and retirement or otherwise, the successor trustees would have discharged their obligations under the chain indemnity requirement and the contractual right of the former trustee would be acknowledged.

Lien

The former trustees also sought an acknowledgment of their equitable lien over the assets of the trust. The Court, acknowledging the construction of Jersey law by the Guernsey Court of Appeal in the case of *Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Ors*¹ confirmed that, under Jersey law, a former trustee has an equitable right and is entitled to ensure that the successor trustees do not destroy, diminish or jeopardise that right.

¹ [2014] (29 October 2014) Guernsey CA.

Such an equitable right would extend to all of the assets of the trusts concerned (the *Glenalla* case suggested that this would include new assets obtained after the retirement) and the Court made the further observation that this right takes priority over the claims of beneficiaries. However, it is less clear when it comes to the order of priority between this equitable right and the rights of other creditors and it remains for this uncertainty to be resolved, possibly either in the next stage of these proceedings or in the *Glenalla* litigation.

The position is similar in the Cayman Islands. Beneficial entitlements are subject to a retiring trustee's right of indemnity and to the lien which the retiring trustee will have over the trust assets in his possession. A retiring trustee is also entitled to withhold trust assets in satisfaction of his lien (*ATC v Rothschild*²).

In Guernsey, there is a statutory non-possessory lien for trustees albeit this can be lost in certain circumstances.³

The BVI Court can also be expected to follow the position taken in England, Jersey, Guernsey and the Cayman Islands.

Conclusion

This provides some welcome clarity and reassurance for trustees. However, it remains sensible for trustees not to rely solely on their equitable rights and to seek the further comfort of appropriate contractual indemnities including potentially in an appropriate case, genuine security over trust assets (although that will probably not be necessary in most straightforward cases). It should also be borne in mind, when considering whether it might be possible to satisfy chain indemnities by giving an indemnity in favour of the retiring trustee without them being party, that the drafting of indemnity provisions will differ according to the draftsman and therefore careful attention will need to be paid to the precise terms of the indemnity that will be required to satisfy such requirements. Further clarity on the issues of priority is awaited with interest.

Contacts

Bruce Lincoln

Partner, Jersey

+44 1534 676 461

bruce.lincoln@mourant.com

² [2006] CILR 73.

³ The Trusts (Guernsey) Law, 2007.

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED