

Equity Trust (Jersey) Ltd (Respondent) v Halabi (in his capacity as Executor of the Estate of the late Madam Intisar Nouri) (Appellant) (Jersey); ITG Ltd and others (Respondents) v Fort Trustees Ltd and another (Appellants) (Guernsey) from the Court of Appeal of Jersey and the Court of Appeal of Guernsey [2022] UKPC 36

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Synopsis

The Judicial Committee of the Privy Council ('JCPC') considered appeals from the Guernsey Court of Appeal ('GCA') and the Jersey Court of Appeal ('JCA'). The hearings were consolidated and heard together in June 2021.

The GCA had previously upheld a judgment of the Royal Court of Guernsey (the 'Guernsey Royal Court') (handed down in December 2019) in the long running *ITG Limited & Ors v Glenella Properties Limited & Ors* litigation. The claim, commenced by ITG Limited (formerly Investec Trust (Guernsey) Limited) and Bayeux Trustees Limited as former trustees of the Tchenguiz Discretionary Trust (the 'TDT') (the 'Former Trustees'), relates to a trust governed by the laws of Jersey. The Royal Court held that the claims of a Former Trustee and its trust creditors had priority over those of the incoming trustees and in turn that the Former Trustee claims had priority over creditors claiming through them as subrogated to their lien. The GCA upheld these findings.

In *Halabi*, the Royal Court of Jersey (the 'Jersey Royal Court') had ruled at first instance that in the case of an 'insolvent' trust that the assets ought to be distributed *pari passu* between all trustees so that each (including the creditors claiming through the trustee) receives some recovery of their debt. However on appeal the JCA found that the assets ought to be distributed on the first in time basis – earlier ranking trustees being preferred.

On appeal the JCPC was unanimous in concluding that the indemnity enjoyed by trustees comprised an equitable lien such that it bestowed a proprietary interest in the trust assets. It was also unanimous in concluding that the proprietary interest of a trustee survived the transfer to an incoming trustee and that it extended to the costs of proving its claim in the event of insolvency.

The members of the JCPC differed in their reasoning as to whether a former trustee's interest in the trust assets took priority with the majority concluding there

was no priority and that such ranked *pari passu*. The minority view was that the interests of the trustees are competing ones and the first in time ought to be prioritised.

Factual background to *ITG Ltd v Fort Trustees Limited*

The TDT was set up by a Declaration of Trust dated 26 March 2007, as part of a division of the family assets of the Tchenguiz family, and for the principal benefit of that part of the family headed by Robert Tchenguiz ('Mr Tchenguiz'). Mr Tchenguiz subsequently became the protector of the TDT.

The assets of the TDT comprised, in effect, the business empire of Mr Tchenguiz. Included among his companies were the First to Fourth Defendants (the 'BVI Companies'), beneficial ownership of each of which were assets of the TDT.

Funding for such business enterprises had been obtained from banks and outside sources, subject to appropriate security. One lender was the Icelandic bank Kaupthing HF ('Kaupthing').

In December 2008, as the global economic crisis unfolded, Kaupthing appointed receivers over the shares of the First, Second and Fourth Defendants. Shortly after, all four of the BVI Companies were placed in liquidation and their common joint liquidators pursued financial claims against the Former Trustees as the result of which proceedings in 2010 came about. In July 2010, the Protector replaced the Former Trustees with GTC.

After a trial, the Guernsey Royal Court gave judgment on 6 December 2013. In his judgment, Lieutenant Bailiff Sir John Chadwick upheld the enforceability of certain of the loans against the Former Trustees as trustees of the TDT. Quantification of liability following that judgment gave rise to concern that the assets held for the TDT might be insufficient to meet the liability and, in December 2013, the Royal Court made

a Receivership Order appointing Joint Receivers of certain specified assets being the shareholdings of the TDT trustees in some thirty specified companies and an amount of cash. That order, therefore, protected those assets pending further proceedings which culminated in the Privy Council's April 2018 decision in which the substantive issues between the parties were determined.

The JCPC upheld the validity of the loans but held that the Former Trustees were entitled to the protection of Article 32(1) (a) Trusts (Jersey) Law, 1984 (as amended) such that the BVI Companies had no claim against the personal assets of the Former Trustees. Instead, the BVI Companies' claims extended only to the property held in the TDT. The Privy Council also confirmed that a creditor has no direct recourse against the trust assets and may only enforce his claim by subrogation to the trustee's right of indemnity for expenses and liabilities properly incurred in the administration of the trust.

The matters before the GCA were the issues arising out of an application which sought to have a judicial resolution to the working out of the consequences of that final decision.

In September 2018, the BVI Companies (through the liquidators) brought an application seeking directions authorising the Joint Receivers to take possession of all of the assets held for the TDT and to identify liabilities which would properly fall to be met from those assets. That process has been identifying the propriety and scale of various claims, and it is from this part of the overall process that the appeal proceeded.

In March 2019, Fort Trustees Limited and Balchan Management Limited, as the new trustees of the TDT, took an assignment of the judgment debts due to the BVI Companies and of costs orders. Formal notice of the assignment was given to the Former Trustees and to the Joint Receivers by the BVI Companies. A similar assignment of claims under judgment debts had been made to the then current Trustees as trustees of the TDT by Messrs. Smalley, Brown and Grunnell.

In April 2020 therefore, the Royal Court had to consider two issues including the assignment and also that of the priorities.

The Priorities Issue

Significantly, the Guernsey Royal Court considered the priority in which creditors of a trust are to be paid in the event of an insolvency and decided that there were two aspects to the issue: the 'Global Priorities Issue' and the 'Creditor Priorities Issue'.

The former concerned whether creditors claiming through the Former Trustees' right of indemnity took

priority over creditors claiming through subsequent trustees or whether all creditors took *pari passu*. The Creditor Priorities Issue dealt with priorities between the Former Trustees themselves as to claims made on their own account (for expenses and liabilities previously discharged from their own pocket) and outside creditors of the trust, with whom they had contracted or to who they had been held liable in respect of the trust assets, but who had not been paid and were claiming through the trustees' right of indemnity. There was an associated claim for trustee's remuneration.

As to the Global Priorities Issue, it was held that that had been decided as a matter of Jersey law by the decision of the Jersey Court of Appeal ('JCA') in *Re Z II Trust*.¹ (discussed below) where the JCA had held that the 'first in time' principle applied, so that claims through the Former Trustees' right of indemnity took priority over claims through the indemnity of subsequent trustees.

As to the Creditor Priorities Issue, the Royal Court held that a trustee making claims against trust assets in the exercise of its right of indemnity for expenses and liabilities properly incurred by it as trustee took priority over unpaid creditors of the trust claiming by virtue of their right of subrogation to such trustee's right of indemnity.

As to a former trustee's claim in respect of remuneration, it was held that a former trustee should be accorded the same priority, as between itself and other competing trust creditors entitled to claim under its equitable lien and right of indemnity, as the trustee's own claims for indemnification, i.e. the right to remuneration will rank ahead of such competing trust creditor claims.

Findings of the GCA

In its judgment handed down on 21 August 2020 the GCA dismissed the appeal of the then trustees on all grounds. The GCA addressed the priority issues as follows:

(i) Trustee Indemnity – Priority as between successive trustees

The GCA held that as no expert evidence as to the law of Jersey had been called before the Royal Court, it had no alternative but to find that the law of Jersey is as laid down by the JCA in the *Z II Trust* case. The GCA accepted that the Privy Council might take a different view on any appeal in the *Z II Trust* case. However, unless and until that occurred, the law of Jersey was as established by that case and it was not open to the GCA to find that it was different. The position remains therefore, that

Notes

1 [2018] JRC 164.

claims brought through the Former Trustees' right of indemnity and supporting lien will take priority over those brought through the right of indemnity of successor trustees including the Current Trustees.

(ii) Trustee's Lien – Priorities as between the Trustee and its Creditors

The current Trustees submitted that the observations of the JCA in the *Z II Trust* case to the effect that a trustee has priority over claims of creditors with whom he has transacted as trustee were *obiter*, were therefore not binding and that the matter should be considered afresh by the Guernsey courts. They argued that the Lieutenant Bailiff had, at first instance, erred in finding that the trustees ranked ahead of their respective trust creditors and that her views were not founded on principle or supported by authority. Article 32 TJL improved the position of the trustee by limiting the rights of third party creditors but it did not limit the creditor's recovery to the value of the trust after the trustee had satisfied his own claims. As a matter of construction, as well as a matter of fairness, there should be equal ranking.

The background to the litigation in relation to the TDT and the Courts' decisions in relation to its administration as an insolvent trust (analogous with corporate law insolvency principles) are complex.

The GCA found that the Lieutenant Bailiff had reached the correct conclusions and in particular, made a 'first in time' finding, meaning that a successor trustee will rank behind all its predecessor trustees when seeking to have recourse to the trust assets in the event of a later insolvency. However, such was subject to further appeal to the JCPC (discussed below).

Factual background to *Equity Trust (Jersey) Ltd ('Equity Trust') v Halabi*

In this case Equity Trust was the former trustee of a Jersey Trust ('ZII Trust') and it retired in favour of Volaw Trustees Ltd ('Volaw') who in turn retired in favour of Rawlinson and Hunter Trustees SA ('Rawlinson and Hunter'). The trust liabilities exceeded its assets and as such was 'insolvent'. Following its retirement, Equity Trust became liable for and paid out of its own resources a total of £18m in settlement of a claim. It was assumed that this was a properly incurred liability for which Equity Trust could seek reimbursement out of the trust assets from Rawlinson and Hunter.

The question arose as to the priority of payments with Equity Trust seeking to exercise a lien over the assets held by Volaw. Equity Trust argued that its claim took priority over the claims of the other creditors (who, it would seem, were all claiming through one or other of the successor trustees) and that it should therefore

recover all of the assets of the ZII Trust (which were some £6m). One of the other creditors (the estate of the settlor) argued that all the debts should rank *pari passu*, with the result that Equity Trust would only recover some £330,000.

The case was advanced in the Jersey Royal Court on the basis that Jersey law was, in this respect, the same as English law, in that a creditor has no direct access to trust assets to enforce his claim. His action lies against the trustee and his only recourse, in the event of the trustee not satisfying the claim, is by way of subrogation to the trustee's right of indemnity. The case was also argued on the basis that the former trustee has an equitable lien to secure his right of indemnity.

The Jersey Royal Court held that Equity Trust had no priority and that all claims were to be on a *pari passu* basis - largely for reasons of fairness.

The Jersey Court of Appeal

Equity Trust appealed and the JCA reversed the Jersey Royal Court decision. It held, *inter alia*, as between successive trustees, a former trustee's indemnity and lien rank ahead of a successor on a 'first in time' basis and further that its costs of proving its claim were recoverable under such indemnity.

The Privy Council

The judgments were appealed to the full board of the privy council and in its judgment, it raised and considered the following issues:

1. Does the right of indemnity confer on the trustee a proprietary interest in the trust assets?
2. Does the right of indemnity of a trustee survive the transfer of the trust assets to a successor trustee?
3. Does a former trustee's claim take priority over the equivalent interests of successor trustees?
4. Does a trustee's indemnity/lien extend to the costs of proving its claim against the trust if the trust is 'insolvent', in the sense that trustees' claims to indemnity exceed the value of the trust fund?

The judgment was delivered on 13 October 2022. Issues 1, 2, and 4 were unanimously confirmed with the Court being split in regard to issue 3 with the answer being 'no' all claims rank *pari passu* (by the a majority of 4:3). Of interest are the following findings of the board:

Issue 1

Whilst the privy council noted that the English courts had not yet determined this issue – it took guidance

from other common wealth jurisdictions insofar as the analysis that the right confers an enforceable charge over the property thus creating a proprietary interest in favour of the trustee and the trustee may be entitled to retain assets prior to a transfer to the new trustee.

Issue 3

The majority view was sent out in the judgment of Lord Briggs with the dissenting judgment delivered by Sir Nicholas Patten. He considered the unique nature of the trustees' lien as distinguished from other types of equitable interest and this enabled the majority to depart from the usual first in time rule. It was noted that

ranking trustees' claims on a first in time basis may give rise to prejudice and thus favoured *pari passu* considering justice and equity albeit whilst acknowledging that *pari passu* will not always work in every instance.

It is without doubt that the decision in relation to priority will affect all trustees and the takeaways for all will be that a considered approach will need to be adopted in relation to the trustees' lien and the ability to recover the same. There is now certainty that Trustees have a proprietary in the trust property (even after they are replaced) but given the *pari passu* ranking trustees will want to carry out sufficient enquiries as to the trust assets and their sufficiency before taking any appointments.