



Press Summary

13 October 2022

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)

[2022] UKPC 36

On appeal from: [2019] JCA 106 & [2020] GCA043

Justices: Lord Reed (President), Lord Briggs, Lady Arden, Lord Stephens, Lady Rose, Lord Richards, Sir Nicholas Patten

Background to the Appeal

These appeals concern the rights of indemnity of successive trustees against the assets of trusts where they have become insolvent, in the sense that the trust assets are inadequate to meet in full the liabilities incurred by the trustees in their capacities as trustees. The applicable law in both appeals is the law of Jersey which, as the Board holds, is the same in all relevant respects as English law.

The first appeal is from Jersey (the “**Jersey Appeal**”); the second is from Guernsey (the “**Guernsey Appeal**”). Under section 26(2) of the Trusts (Jersey) Law 1984 (the “**TJL**”), trustees have a right to be indemnified out of the trust assets for their proper expenditure.

The Jersey Appeal

The Jersey Appeal arises from Jersey trusts, the original sole trustee of which was Equity Trust (Jersey) Ltd (“**ETJL**”), the first respondent. Under the TJL in its 2006 form, ETJL was obliged to transfer the trust assets to a new trustee. ETJL entered into a deed of retirement and removal with its successor, Volaw Corporate Trustee Ltd (“**Volaw**”). Volaw held £2.5 million as security for its indemnity to ETJL for liabilities properly incurred as trustee. Volaw was later replaced by a further trustee, Geneva Trust Company.

In 2012, ETJL was sued for £53 million by liquidators of a company in the trust structure, Angelmist Limited. Following the settlement of the proceedings, ETJL sought to recover £18.9

million under its indemnity, comprising £16.5 million paid by way of settlement and £2.4 million in costs. This gave rise to a trial before the Royal Court, which held that successive trustees and the creditors claiming through them by way of subrogation ranked *pari passu* (or equally) in their claims on the trust assets. The Court also held that ETJL was not entitled to the costs of proving its claim.

On appeal, the Jersey Court of Appeal reversed this decision, holding that ETJL's right of indemnity ranked ahead of those of successor trustees on a first in time basis. The Court of Appeal also held that ETJL's costs of proving its claim were recoverable under the indemnity.

The Guernsey Appeal

The Guernsey Appeal concerns the Tchenguiz Discretionary Trust (“**TDT**”) of which Investec Trust (Guernsey) Ltd (“**ITG**”) was the original trustee. Bayeux Trustees Ltd (“**Bayeux**”) became its co-trustee. Over the following years, three further trustees held office. ITG and Bayeux, in their capacity as trustees of the TDT, assumed liabilities under a loan agreement with Kaupthing Bank HF (“**Kaupthing**”) totalling approximately £100 million and further loans due to two BVI companies, Glenalla Properties Ltd and Thorson Investment Limited (together the “**BVI Companies**”) totalling €78.825 million and £80.541 million respectively.

In October 2018, the BVI Companies commenced proceedings to identify and resolve the various claims against the assets of TDT. As part of a settlement with Kaupthing, the then trustees of the TDT took an assignment of the (now) judgment debts due to the BVI Companies and submitted proofs of debt in respect of the judgment debts. The TDT did not have sufficient assets to satisfy the claims against it, giving rise to a trial before the Royal Court.

The Royal Court held that the claims of a former trustee and its trust creditors had priority over those of successor trustees and that trustee claims had priority over creditors claiming through them as subrogated to their lien. This was upheld by the Guernsey Court of Appeal.

Judgment

There were four issues in the two appeals, as described more fully below. Lord Reed gives a brief judgment which acts as a guide to the other judgments. Lord Richards and Sir Nicholas Patten give the only judgment on the first, second and fourth issues, with which all members of the Board agree. Lord Briggs gives the lead judgment on the third issue, with which Lord Reed and Lady Rose agree and Lady Arden agrees in part. Lady Arden gives a concurring judgment on this issue. Lord Richards and Sir Nicholas Patten give a dissenting judgment on the third issue with which Lord Stephens agrees.

Reasons for the Judgment

Issue One: does the right of indemnity confer on the trustee a proprietary interest in the trust assets rather than being merely possessory?

The Board unanimously holds that the right of indemnity confers on the trustee a proprietary (rather than merely possessory) interest in the trust assets [4], [105], [238], [279].

A trustees' right of indemnity is an equitable lien which is not dependent upon possession but arises by operation of law [94]. Such an approach is consistent with English authorities which have treated the right of indemnity as a charge or lien on the trust assets [71]-[94] and with

Australian authorities which have explicitly held that the trustee's right creates a proprietary interest in the trust assets [95]-[97].

Issue Two: does the proprietary interest of a trustee survive the transfer of the trust assets to a successor trustee?

The Board unanimously holds that the proprietary interest of a trustee survives the transfer of the trust assets to a successor trustee [4], [166], [238], [279].

As the indemnity creates a proprietary interest in the trust assets, it would be contrary to ordinary equitable principles if it automatically ceased to exist when the trustee parted with legal title to and/or possession of the trust property [106]-[115]. This position is supported by Australian authorities and the leading textbooks [118]-[165].

Issue Three: does a former trustee's proprietary interest in the trust assets take priority over the equivalent interests of successor trustees?

The majority finds that the successive trustees' interest in the trust assets rank *pari passu* (or equally) where those assets are insufficient to meet all the claims on them made by or through the trustees pursuant to their indemnities [238]-[278].

Giving the majority judgment on this issue, Lord Briggs notes a lack of authority on this point [246]. The trustees' lien, not being like other kinds of equitable interest, is not amenable to the application of some existing priority rule by analogy and requires a carefully worked out rule of its own [250]. Equity takes a pragmatic and flexible approach to questions such as this, as is illustrated by cases concerned with mixed funds which were inadequate to meet all the claims on them [251]-[252]. Finding an appropriate rule of priority requires a faithful dedication to the fulfilment of the purposes for which the law confers this lien, a recognition of the nature of the fiduciary office of which it is an incident, a reflective consideration of its likely effects over the whole range of fact-situations in which it may be applied, and a stand-back appreciation of which, as between potential competitors, does better justice or equity [250].

The trustees' liens were not intended to be in competition with each other and successive trustees of a trust, where the trust assets were inadequate to satisfy their indemnities, had suffered a shared misfortune in relation to the trust, which is "a form of continuing institution or scheme" and they should therefore recover *pari passu* [256]. If the lien of the first appointed trustee prevailed, it could give rise to very odd and unjust results between the successive trustees based on the precise timing of their appointment and retirement [254]. However, it might be appropriate to depart from *pari passu* in this context in very exceptional circumstances [269].

It was also significant that the trustees' lien was the vehicle for trust creditors to be paid by way of subrogation to the lien. That made first in time based on the date of the trustees' appointment even less appropriate, since trust creditors would naturally expect that they would share *pari passu* in insufficient trust assets by way of subrogation to the trustees' liens irrespective of which of the successively appointed trustees with whom they happened to have contracted. Such third-party creditors might well be unaware of the trustees' dates of appointment [276]. Justice, fairness, equity and common sense therefore strongly militate in favour of adopting *pari passu* as the applicable rule of priority [277].

Lady Arden, in a concurring judgment, agrees that *pari passu* is the appropriate rule of priority but, in part, for different reasons. To adopt first in time instead would be inconsistent with equitable principle and lack any logical basis [279], [289]-[290]. A trustee has priority for his

properly incurred liabilities as against the beneficiaries only, not as against subsequent trustees [284]. It would also cause practical difficulties whilst disputes over priority position were resolved, thereby diminishing the usefulness of the trust and disrupting its administration [291]-[292].

Lord Richards and Sir Nicholas Patten (with whom Lord Stephens agrees), dissenting on this issue, emphasise that the trustee's right of indemnity is not security for the payment of a debt but arises so as to protect the personal position of each trustee by giving them the right to seek an order for the trust assets to be applied in indemnifying or reimbursing them [170]-[172]. In this respect, the interests of successive trustees are competing or equal and accordingly the general principle applies that the first in time has priority [175]-[177]. The right of indemnity does not exist to protect trust creditors by way of subrogation to the trustee's right, but even if it did that would not be a sufficient reason for departing from the first in time principle [181]-[183]. The protection of retiring trustees by granting them security over trust assets is also inconsistent with successive rights of indemnity ranking *pari passu* upon a shortfall. If *pari passu* is applied, trustees would demand greater security upon retirement, since their lien as a prior trustee will not enjoy priority over those of their successors [191]-[200].

Issue Four: 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 Board unanimously holds that the indemnity extends to the costs of proving the trustee's claim against the trust assets [4], [235]-[237], [238], [279].

There is no basis for suggesting it did not extend to such costs incurred after a trustee's retirement, given that the indemnity survived the retirement of a trustee [235]. There was no analogy with the rule applicable to the costs of creditors in proving their debts in a formal bankruptcy proceeding [237].

References in square brackets are to paragraphs in the judgment

NOTE:

**This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at:
<http://www.jcpc.uk/decided-cases/index.html>**