The Representation of C; and the Z Trusts I to VIII; and Articles 51 and 53 of the Trusts (Jersey) Law 1984 (as Amended)

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	12 February 2015
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[2015] JRC 31

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, sitting alone**

In The Matter of the Representation of C
And In The Matter of the Z Trusts I To VIII
And In The Matter of Articles 51 And 53 of the Trusts (Jersey) Law 1984 (As Amended)

Advocate J. M. Renouf **for the Representor**.

Advocate N. G. A. Pearmain **for Mark Boothman for Volaw Corporate Trustee Ltd.**

Advocate E. Jordan **for Equity Trust (Jersey) Ltd (Respondent).**

Advocate M. P. Cushing **for Barclays Private Bank & Trust Ltd.**

Authorities

Lemery Holdings Pty Limited -v- Reliance Financial Services Pty Limited [2008] NSW SC 1344.

Investec Trust (Guernsey) Limited -v- Glenalla Properties Limited and Ors [2014] (29th October, 2014) Guernsey CA.

Trusts (Jersey) Law 1984.

Lewin on Aspects of Sentencing in the Superior Courts of Jersey 19th Edition.

Trust — application by beneficiary/settlor for directions to be given to former and current trustees.

THE COMMISSIONER:

1 I sat on Tuesday 10 th February, 2015, to hear, as a matter of urgency, the Representation of Mrs C ("Mrs C") who established the eight Z Trusts of which Equity Trust (Jersey) Limited ("Equity") was the original trustee. She is also a beneficiary of all but one of the trusts, all eight of which are subject to the proper Law of Jersey. Mrs C is now 87 and is Syrian by birth. English is her second language. She was born and lived in Syria all of her life until the current civil war has caused her to leave. She lives now with her son, E, in London. He has acted through Buckingham Securities Holdings Limited as advisor to the trusts, to the best of my knowledge, and it is fair to say, has been the driving force behind the activities of the trusts. Mrs C has given him a Power of Attorney and acts through him.

2 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. The Z II and III Trusts are insolvent and the remaining trusts, whilst solvent, face a number of financial difficulties. Barclays administers the Z III Trust under the protection of directions from the Royal Court.

3 To talk of an insolvent trust is of course a misnomer. A trust is not a separate legal entity and cannot, as a matter of law, be insolvent. Accounts of all eight trusts have, in accordance with good practice, been drawn up as if they were separate legal entities but the assets and liabilities disclosed by those accounts are in fact the assets and liabilities of the trustees and it is to them that creditors will have recourse, unless security has been

granted by the trustees over the trust assets. However it is a useful form of shorthand and I will continue to use it.

4 Mrs C is very critical of the conduct of Equity as trustee and, with others, has brought breach of trust proceedings against it in which it has raised its own counterclaims. Mrs C places the blame for many of the problems now facing the trusts upon Equity and it is against that background of hostility that this current application is made.

5 The current difficulties facing the trusts, in addition to the financial problems, are set out in paragraphs 24 and 25 of Mrs C's affidavit which I will not set out in full but they include:–

(i) The proceedings against Equity which I have just mentioned;

(ii) The Esporta litigation brought in England by Barclays as trustee of the Z III Trust which I am told could be worth some £25 million;

(iii) The potential claim against Z III Trust by Santander;

(iv) A number of issues facing the Z III Trust which have been occupying much court time in the last year or so; and

(v) The divorce proceedings between E and his wife, which are apparently close to settlement, and that settlement will need to be facilitated by funds from one or other of the trusts.

6 Mrs C states in her affidavit that resolving these difficulties would be very much facilitated by the appointment of one trustee to replace Volaw and Barclays and Rawlinson & Hunter Trustees SA (“R&H”) have agreed to take on that role. It is based in Switzerland but Rawlinson & Hunter is a very well-known firm. Draft deeds of appointment and retirement of trustees (“DORAs”) have been produced but Mrs C says that Equity has refused to be a party to them and is otherwise obstructing this proposed change of trusteeship.

7 Under the terms of the deeds by which Equity retired in 2006, all of which I believe are substantially in the same terms, it handed over the assets of the trusts in return for what I think can be regarded as fairly standard indemnities. The relevant provisions, which I have taken from the deed relating to the Z II Trust, are as follows:–

“4 The Retiring Trustees hereby resign from the office of trustees of the trust and the New Trustees hereby accept such resignation and the Retiring Trustees hereby acknowledge that reasonable security, inter alia in the form of the releases and indemnities herein contained, has been provided to them in respect of their trusteeship of the Trust.

5 Subject as hereinafter provided the New Trustees hereby covenant with the Retiring Trustees for themselves and as trustees and agents for and on behalf of

each of the Indemnified Persons that the New Trustees will at all times hereafter release and indemnify and save harmless the Indemnified Persons and each of them from and against all and any actions proceedings, costs claims and demands which may be brought or made in connection with the trusts of the Trust or in any way relating thereto or to the trust funds comprised therein from time to time or the income thereof or any part thereof or any taxes duties or other fiscal liabilities whether or not now existing payable in any part of the world on or in respect of the said trust funds of the Trust or the income thereof or any part thereof respectively or in respect of any property transferred by or to or under the control of the Trustees or any persons interested under the Trust and whether or not in respect of a period or event falling wholly or partly after or prior to the date hereof and whether the same shall be enforceable in law or not it being nevertheless provided that;

(1)…….

(2) In the event of any person (a "Transferee") becoming entitled to the transfer to him as beneficiary or as trustee or otherwise of the capital of the said trust funds or any part thereof (a "Capital Amount") the New Trustees covenant that they will not part with such Capital Amount except upon terms that such Transferee shall indemnify and save harmless the Indemnified Persons in the same terms mutatis mutandis as this clause 5 (including the provisos) save that such indemnities shall relate only to such Capital Amount provided further that insofar as the New Trustees shall seek to transfer a Capital Amount to a transferee after the expiration of 10 years from the date of this Deed such indemnity shall only extend to liabilities in the character of tax, duties or other fiscal claims (including interest and penalties) as specified in clause 7 herein;

(3) the extent of the liability of the New Trustees under this clause 5 shall be limited to the said trust funds of the Trust in the possession or under the control of the New Trustees from time to time save that in the event that the New Trustees shall part with any Capital Amount without obtaining an indemnity from the Transferee as required under clause 5(2) hereof any claim under or pursuant to this clause 5 against the New Trustees shall extend also to the value of such Capital Amount."

8 Since that time Equity has been put on notice of two claims for which it says it is entitled to be indemnified both contractually and in law:–

(i) Irrecoverable legal costs in the sum of £90,820.26 incurred by it in the unsuccessful litigation brought against it in England by Fitzroy Robinson Limited, a firm of Architects.

(ii) A claim brought by the joint liquidators of Angelmist Properties Limited (in compulsory liquidation) for breach of duty by its two former directors for whose actions it is alleged Equity is vicariously liable as former trustee of the Z II Trust. The total of the claim as pleaded is some £42,500,000 but taking a very pragmatic view, Equity

has agreed to limit its claim to £2 million, being the upper limit of its estimated irrecoverable costs on the basis, as I understand it, that this sum should be ring-fenced.

9 Equity asserts that in correspondence between legal advisors Volaw had agreed to ring fence £2 million of the assets of the Z II Trust to meet this potential claim and I will comment on this in a moment. What is clear, looking at the balance sheet of the Z II Trust, is that there are no readily identifiable liquid assets which are capable of being ring-fenced. The balance sheet shows in summary:–

(i) Current assets of some £250 million comprising loans due by the Z III Trust, which is itself insolvent, of some £187 million and monies receivable under what is described as an investment management agreement, whatever that is, which the accounts say are unlikely to be recovered;

(ii) As against this it has loans payable to a number of entities in the sum of £275 million and creditors, mainly Volaw, of just over £1 million.

10 Equity is concerned to ensure that it's asserted equitable *lien* over the assets of the Z II Trust are not, in the words of Justice Beriton in *Lemery Holdings Pty Limited -v- Reliance Financial Services Pty Limited* [2008] NSW SC 1344 at paragraph 50 ***"destroyed, diminished or jeopardised".*** In its view the appointment of a non-resident trustee would make enforcement of its rights under the indemnities and under its separate equitable *lien* more difficult.

11 I was shown the correspondence between Advocate Jordan for Equity and Advocate Young and Mr Robert Christensen for Volaw in relation to this issue of ring-fencing. Advocate Jordan at the hearing made it clear that Equity was not seeking specific performance of any alleged contract to ring-fence assets but does seek an acknowledgement of Equity's equitable *lien* over the assets of the trust. It seems tolerably clear to me that at the time of this correspondence the balance sheet of Z II Trust was as I have just set out and there were no assets that could have been ring-fenced. Volaw were clearly therefore looking to provide that ring-fencing from elsewhere.

12 Advocate Jordan addressed me helpfully on the issue of whether Jersey law recognises the existence of a former trustee's equitable *lien* as Advocate Renouf for C had not conceded its existence. Advocate Jordan relied upon the recent decision of the Guernsey Court of Appeal in *Investec Trust (Guernsey) Limited -v- Glenalla Properties Limited and Ors* [2014] (29th October, 2014) Guernsey CA. That case concerned a Jersey proper law trust with Guernsey former trustees against whom the joint liquidators of a number of BVI companies were seeking repayment of loans. The Guernsey former trustees sought declarations that pursuant to Article 32 of the Trusts (Jersey) Law 1984 they had no personal liability and had a right of indemnity from the current trustees, as it happens, R&H Limited. With the agreement of counsel in that case the Court of Appeal, which comprised

James McNeill QC, John Martin QC and Robert Martin QC, construed Jersey law as if it were construing a statute of Guernsey (see paragraph 22). In construing Article 32, the Guernsey Court of Appeal held that a trustee who has transacted has a right to be indemnified by a subsequent trustee out of and up to the limit of the trust assets held by the latter. Quoting from paragraph 34–37 of the judgment:–

> ***"34. The existence of a right in favour of the earlier trustee to be indemnified by his successor trustee up to the limit of the trust assets held by the successor may be characterised as an equitable right, in the form of, or analogous to, a non-possessory lien. In respect of English law, the learned authors in Lewin on Trusts, 18 th edition (2008), at paragraph 14–59, discuss the continuance of an ongoing trustee's rights of indemnity after the appointment of new trustees. In particular they state:***
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> > ***"The trustee's rights of indemnity go further than simply giving him something like a common law lien which is dependent upon the ability to exercise legal control.*** The rights of indemnity give him a proprietary equitable charge over, or equitable interest in the trust property, and there is no reason why this charge or interest should disappear upon the appointment of new trustees."
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> ***The authors then go on to distinguish between a situation where trustees have distributed assets to beneficiaries, in which case that "should be taken as releasing any equitable rights", and a situation where new trustees are appointed, in which case there is "no reason to take the outgoing trustee as giving up his rights of indemnity merely because new trustees are appointed."*** In support of the existence of an equitable interest in the trust property, the authors refer to paragraph 21–33 in which they state that a trustee "has a first charge or lien upon the trust fund, conferring an equitable interest", and for that latter proposition they cite as authority *Jennings v Mather* [1901] 1 KB 108, ***at pp113–114, and sup cit, at pp 6 and 9***.
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> ***35. As far as Jersey is concerned, the possible existence of such an equitable right was considered in the case of*** *In re Esteem Settlement* ***where the Deputy Bailiff of Jersey (Birt DB, as he then was) held that the law of Jersey recognises a form of equitable right which is available in circumstances where that is required so as to allow an interest in property to be enforced; see*** [2000 JLR 119], ***the judgment at pp136–141, and*** [2002 JLR 53], ***the judgment at paras 89 and 90***.
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> ***36. Whilst we acknowledge immediately that the circumstances which were considered in the case of*** *In re Esteem* ***involved criminal conduct, and that is to be distinguished from the issue which is before us, nevertheless 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). There are three reasons why***

we have reached this conclusion and we would regard it as being consistent with what was said by the Deputy Bailiff (who is the present Bailiff of Jersey) .

37. In the first place, and as we have already observed, it may be said to be an implied consequence of sub-paragraph (1)(a) of Article 32. That paragraph refers to "the trust property" without qualification, and whether such property remains in the hands of an earlier trustee or has been transferred to a subsequent trustee, does not affect its status as trust property. Secondly, we are satisfied that the law of Jersey as described by the learned Deputy Bailiff in *In re Esteem* ***is sufficient to acknowledge a form of equitable interest where that is justified in the context of trusts. If it were not to be recognised in circumstances such as the present, it could mean injustice both to an earlier trustee, who could not gain access to the extent of all of the trust assets necessary to satisfy his claim. Thirdly, what is said by the learned authors in*** *Lewin* ***is consistent with this. We are therefore satisfied that in the present circumstances the former trustees have a right to obtain access to any of the trust assets held by the present trustee insofar as that may be necessary in order to satisfy a claim which is properly justified in favour of the BVI companies."***

13 Advocate Renouf made the point that this judgment is not binding on the Royal Court and technically that is the case but, when pressed, he did not seriously suggest that a decision of such a closely connected senior court should not be followed. In my view that decision does reflect the law of Jersey and accordingly Equity, as a former trustee, does have an equitable right in the sense described by the Guernsey Court of Appeal in *Investec* and is entitled to ensure that Volaw and Barclays do not take steps which will ***"destroy, diminish or jeopardise"*** that right. That equitable right will, of course, 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 both Volaw and Barclays have reserved their position in this respect. It may well be that creditors of the trusts may wish to do the same.

14 My impression from the extensive papers placed before me is that Equity's rights as a former trustee have not been fully acknowledged, possibly as an understandable consequence of the antagonism that exists between it and the family and I feel it would assist resolution of this matter if its rights were to be fully acknowledged. In the absence of any agreed ring-fencing it would seem that its equitable rights extend to all of the assets of the Z II and III Trusts.

15 Advocate Jordan went on to submit that Equity's equitable rights constitute a first charge or *lien* upon the trust funds in priority not only to the beneficiaries but also to the other current creditors of the trusts. The Guernsey Court of Appeal in *Investec* refer to this in the passage I have quoted above citing *Jennings -v- Mather* (1901) 1 QB 101. As Advocate Cushing pointed out the creditors of the Z III Trust might well wish to argue this point (in relation to

Equity's claim against that trust) at the hearing fixed by Barclays on 27 th February, 2015, when it will be seeking further directions in relation to the Z III Trust. I think it right therefore that I should delay determining this point until I have heard any contrary arguments that may be put.

16 I would however make this initial observation. It is tolerably clear, it seems to me, that a trustee's equitable right takes priority over the claims of the beneficiaries (see Lewin on Trusts 19th editionpara 21–043). The issue of priority over other creditors is not straight-forward. As previously mentioned, there are in law no creditors of the trust. The liabilities are those of the current and former trustees. Whilst I have not investigated the matter it may well be that some of the loans referred to in the accounts of say the Z II Trust were taken out by Equity when it was trustee. The current and former trustees therefore all have equitable rights in respect of the liabilities, costs and expenses they have each incurred, and in the case of the Z II and the Z III Trusts liabilities which exceed the assets of those trusts. In the case of a deficiency is it the case that Equity has priority for its liabilities as a former trustee over Volaw and Barclays for their liabilities as current trustees? This will require detailed submissions in due course if agreement cannot be reached.

17 I can however assist the administration of the trusts, other than the Z II and III Trusts over the assets of which Equity has equitable rights. Barclays and Volaw took the view, I think not unreasonably, that Equity should be a party to the DORAs in order to confirm that its contractual rights, which are of course quite separate from its equitable rights, have been preserved and Volaw and Barclays discharged from any liability under clause 5(2) in that respect. Equity accepts however, and I agree, that as a matter of law, Equity need not be a party to the DORAs provided that R&H does indemnify it in the same terms, *mutatis mutandis*, as set out in clause 5. That could be done by R&H in the DORA waiving any rights it may have or be able to claim under any rule of law relating to privacy of contract in order to avoid its liability or obligation to indemnify Equity. I had in mind that R&H would execute a separate document addressed to Equity in which it would give the indemnities required. However it is done, I am prepared to declare that if an indemnity is given by R&H to Equity in the same terms, *mutatis mutandis* of clause 5 of each of the DORAs (including the provisos) and without Equity being a party to it, then Volaw and Barclays, as the case may be, will have discharged their obligations under clause 5.2, so that pursuant to clause 5.3 their liability will be limited to the trust funds remaining in their possession or under their control from time to time. I am happy to have counsel's input on the precise wording of that declaration which we can deal with in due course. As I understand it such a declaration would enable the appointment of R&H as trustee of the Z Trust and the Z IV, V, VI, VII and VIII Trusts to proceed.

18 That is as far as I think I can properly go at this stage. I am not prepared to order Equity to enter into any contractual document which governs its rights personally; apart from doubting the Court's power to make such an order it is unnecessary. I would hope that Equity's claim over the assets of the Z III Trust can be resolved by negotiation as it is a relatively small sum and there would appear to be cash assets there which could meet it. The position in respect of the Z II Trust is, I acknowledge, more complex and I must leave it

to the parties to try and resolve it by negotiation. Equity can only exercise its equitable rights over the assets that currently exist and it does seem that its constructive suggestion of ring-fencing is just not possible to achieve. I would have thought it would be possible that the appointment of R&H as new trustee of the Z II Trust could be achieved in such a way that Equity's existing contractual and equitable right, to the extent that they are enforceable, are both acknowledged and not in any way jeopardised.

19 The issue of costs will be left over.