Rawlinson & Hunter Trustees SA (in the place of Volaw Trustees Ltd) v Advocate Steven Chiddicks, representing the minor beneficiaries of the Z II Trust

Jurisdiction:	Jersey
Judge:	Logan Martin JA, Martin JA
Judgment Date:	28 June 2019
Neutral Citation:	[2019] JCA 106
Date:	28 June 2019
Court:	Court of Appeal

Text

Between
Rawlinson & Hunter Trustees SA (in the place of Volaw Trustees Limited)
Representor
and
Advocate Steven Chiddicks, representing the minor beneficiaries of the Z II Trust
First Respondent
K, adult beneficiary of the Z II Trust
Second Respondent
Equity Trust (Jersey) Limited
Third Respondent and Appellant
Fielden Holdings Limited
Fifth Respondent
Rawlinson & Hunter Trustees SA (as trustee of the Z Trust)
Sixth Respondent
Rawlinson & Hunter Trustees SA (as trustee of the X Trust)
Eight Respondent
E
Ninth Respondent
E in his capacity as Executor of the Estate of the late C

Tenth Respondent and Respondent

[2019] JCA 106

Before:

Sir William Bailhache, **Bailiff**

John Vandeleur Martin **Q.C**.

Robert Logan Martin **Q.C**.

Court of Appeal

Court of Appeal — appeal against 3 judgments — point of law — recoverable costs and adverse costs.

Authorities

Trusts (Jersey) Law 1984

Representation of Rawlinson & Hunter Trustees SA re Z Trusts [2018] JRC 119.

Representation of Rawlinson & Hunter Trustees SA re Z Trusts [2018] JRC 164.

Representation of Rawlinson & Hunter Trustees SA re Z Trusts [2018] JRC 203.

Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd [2018] UKPC 7, [2018] 2 WLR 1465.

Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd 2014 GLR 371.

Trusts (Amendment No 7) (Jersey) Law 2018.

Re Grimthorpe [1958] Ch 615.

Butterfield v Public Trust [2017] NZCA 36.

Lewin on Trusts, 19th Ed.

re Z Trust [2015] JRC 031.

Snell's Equity, 33rd Ed.

re Pumphrey deceased (1882) 22 Ch D 255.

Octavo Investments Pty Ltd v Knight (1979) 27 ALR 129.

Southern Wine Corporation Pty Ltd v Frankland River Olive Co [2005] WASCA 236.

EC Investment Holdings Pte Ltd v Rideout Residence Pte Ltd and another [2013] SGHC 139.

re Suco Gold Pty Limited (in liquidation) [1983] 33 SASR 99.

Finnigan v Yuan Fu Markets Limited (in liquidation) [2013] NZHC 2899.

re Johnson (1880) 15 Ch D 54.

Richardson v Aileen [2007] VSC 104.

Universal Distributing Company (in liquidation) [1933] 48 CLR 171.

re Berkeley Applegate [1989] Ch 2.

Crill v Alpha Asset Finance Limited (Re Hickman) [2009] JRC 040.

Lemery Holdings v Reliance Financial Services [2008] NSWSC 1344.

Re Amarind Pty Ltd (in liquidation) [2017] VSC 127.

Abigail v Lapin [1934] AC 491 at p 504.

Dimos v Dikeakos Nominees Ltd (1997) 149 ALR 143.

Bruton Holdings Pty Ltd v Commissioner of Taxation [2009] HCA 32.

Underhill & Hayton, Law of Trusts and Trustees, 19th Ed.

ATC (Cayman) Ltd v Rothschild Trust Cayman Ltd (2012) 14 ITELR 523.

Ronori Pty Ltd v ACN 101 071 998 Pty Ltd [2008] NSWSC 246.

Scaffidi v Scaffidi Holdings Pty Ltd [2010] WASC 29.

re Caversham Trustees [2008] JRC 065.

re Carafe Trust [2005] JRC 063.

Governors of St Thomas's Hospital v Richardson [1910] 1 KB 271.

Moffett v Dillon [1999] 2 VR 480, [1999] VSCA 32.

Désastre of Overseas Insurance Brokers Limited 1966 JJ 547.

Heid v Reliance Finance Corporation Pty Ltd (1983) 154 CLR 326.

In the matter of the Esteem Settlement [2002] JLR 53.

Re Independent (2016) FLR 222.

Bankruptcy (Désastre) (Jersey) Law 1990.

Abell v Screech [1805] 10 Ves Jun 355.

Pearce v States Treasurer 2016 (1) JLR 435.

Godfray v Godfray (1865) 3 Moo.P.C.C.N.S. 316.

Loi (1851) sur les testaments d'immeubles.

Abdel Rahman v Chase Bank (CI) Trust Company Limited and others [1991] JLR 103.

Radio & Allied Industries Limited v Gordon Bennett Wholesale (Jersey) Limited (1959) 252 EX 43.

Re Désastre G.Lawrence Limited (1963) 254 Ex 509.

Security Interests (Jersey) Law 1983.

Security Interest (Jersey) Law 2012.

Bankruptcy (Désastre)(Jersey) Law 1990.

Advocate E. L. Jordan **for the Third Respondent and Appellant**.

Advocate J. Harvey-Hills **for the Tenth Respondent and Respondent**.

Logan Martin JA
Introduction

1 This is an appeal against three judgments given after hearings in the Royal Court before the Commissioner (J A Clyde-Smith) sitting alone. The Commissioner sat principally to consider a point of law which is in dispute between Equity Trust (Jersey) Limited, the third respondent and the appellant in this appeal (hereafter "Equity Trust"), and E as the Executor of the Estate of the late C, the tenth respondent and the respondent in this appeal (hereafter "the Executor"). The point of law relates to the equitable rights of a former trustee and whether those rights take priority over the rights of other claimants to the assets of a trust whose liabilities exceed its assets.

2 The first of the judgments was given by the learned Commissioner on 3 rd July, 2018, [2018] JRC 119 and it addressed the substantive issues raised by the point of law in question (and that substantive judgment has been referred to by the parties to this appeal as "the Priority Judgment"). The second judgment was given on 10 th September, 2018, [2018] JRC 164 and it concerned the related issue of whether Equity Trust is entitled to claim for its costs in proving a claim against a trust in a situation where the liabilities of that trust exceed its assets (and that judgment has been referred to as "the Recoverable Costs

Judgment"). The third judgment was given on 2 nd November, 2018, [2018] JRC 203 and it concerned the costs of the hearings which led to the first two judgments which costs the Commissioner ordered Equity Trust to pay to the Executor (and that judgment has been referred to as "the Adverse Costs Judgment").

3 None of the other parties to these proceedings participated in the hearings before the Royal Court nor in the appeal before this Court.

Background

4 The background circumstances are set out by the Commissioner in the Priority Judgment for the purpose of determining the point of law raised. They are also referred to in the Contentions by Equity Trust for this appeal. I summarise them as follows from these sources bearing in mind that all matters of fact are yet to be established formally in these proceedings.

5 The circumstances relate to eight trusts of which the late C was the settlor and all of which bear the title "Z". C was a beneficiary of seven of those trusts and her son, who as an individual is the ninth respondent, is a beneficiary of all of them. C died subsequently and E is her Executor and as such is the tenth respondent and the respondent in this appeal.

6 Only two of these trusts have any material bearing on the matters before this Court. One of those trusts is entitled "Z II" and it was established as a Jersey discretionary trust on 10 th December, 2004 ("the Z II Trust"). Equity Trust was the original trustee of the Z II Trust. At the request of E acting on behalf of C, Equity Trust retired as trustee on 11 th October, 2006, and was replaced as trustee by Volaw Trustees Limited ("Volaw"). A Deed of appointment and resignation of trustees was entered into on that date which included an indemnity in favour of Equity Trust ("the Volaw Indemnity"). The Commissioner has observed that documents attached to this Deed demonstrate that there were numerous companies within the trust structure which he believed were predominantly involved in property development in the United Kingdom.

7 The other of the Z trusts which is relevant is entitled "Z III" and it was established as a Jersey discretionary trust on 23 rd December, 2005 ("the Z III Trust"). Equity Trust was also the original trustee of the Z III Trust and it was similarly replaced as trustee on 26 th October, 2006, by Barclays Private Bank & Trust Limited. Equity Trust was provided with an equivalent indemnity by Deed of appointment and resignation of trustees.

8 On 31 st July, 2012, Angelmist Properties Limited, a company in compulsory liquidation ("Angelmist") instituted through its joint liquidators a claim in the High Court of England and Wales against two of its former directors and against Equity Trust ("the Angelmist proceedings"). Angelmist was one of the companies within the Z II Trust structure and was

registered in England. The claim alleged a breach of duty against the two directors who were employees of Equity Trust, and claimed against Equity Trust for vicarious liability and upon the basis that it acted as a *de facto* or shadow director of Angelmist. The amount of the claims made by Angelmist totalled some £42 million together with interest and costs. On 22 nd April 2013, Equity Trust notified Volaw of its intention to rely upon the Volaw Indemnity and sought confirmation that its rights were not prejudiced.

9 On 11 th March, 2015, Volaw issued the Representation before the Royal Court which is the basis of these proceedings. Volaw sought directions in relation to a scheme for the winding-up of the Z II Trust. On 29 th April, 2015, Volaw was authorised by the Royal Court to continue administering the assets of the Z II Trust and to be paid from those assets in priority to all other claims. On 20 th October, 2015, Volaw was given leave by the Royal Court to retire as trustee of the Z II Trust and on 13 th November, 2015, Rawlinson & Hunter Trustees SA ("R&H") was appointed as trustee in succession to Volaw. No fees or expenses are to be charged against the trust find by R&H as these are being funded separately. This means that R&H, both for itself and as successor trustee to Volaw, has no claim against the assets of the Z II Trust for reimbursement of any liabilities which it has incurred, but rather the claims that it has are the claims of creditors with whom Volaw and R&H have transacted.

10 Following a summary judgment given against the two directors on 30 th June, 2015, the Angelmist proceedings were brought to a conclusion by a Settlement Agreement dated 22 nd December, 2015. The Commissioner has stated that this agreement is confidential but he was advised that the settlement terms involved Equity Trust making a payment of £16.5 million to the joint liquidators of Angelmist and accepting liability for their own costs in those proceedings amounting to approximately £2.3 million. The Commissioner noted that the total in respect of which Equity Trust had incurred liabilities as a result of the Angelmist proceedings was in excess of £18 million.

11 The only asset of the Z II Trust is a loan due by the Z III Trust of £186 million. This loan has a current value of only about £6 million which reflects the likely recovery from the Z III Trust which is also under the supervision of the Court as its liabilities exceed its assets.

12 The total liabilities of the Z II Trust amount to some £211 million excluding the claim of Equity Trust. These liabilities are comprised in unsecured loans. The Commissioner referred to accounts relating to the Z II Trust for the period between 6 th April, 2006 and 30 th September, 2015, which state that sums are due by the Z II Trust to two further trusts being some £29.3 million due to the Z Trust and some £165.5 million due to the X Trust. The trustee of each of these trusts is R&H which in these capacities is the sixth respondent and the eighth respondent respectively. There also appears to be a loan of £1.4 million owed by the Z II Trust to the Estate of the late C.

13 The amounts of the only asset and of the liabilities of the Z II Trust demonstrate that its

liabilities substantially exceed its assets. Although a trust is not a distinct legal person, and therefore cannot be said to be insolvent in the way that an individual person or legal corporation can, the Commissioner and the parties have used the expressions “solvent” and “insolvent” to describe a trust whose assets held on trust are respectively either sufficient or insufficient to meet the claims to its assets. I am content to adopt these expressions also. This means that for the purposes of the issues before the Court, the Z II Trust can be described as an insolvent trust, as can the Z III Trust.

14 Equity Trust claims reimbursement out of the assets of the Z II Trust of the sum of approximately £18 million which it says it has incurred in the defence and resolution of the Angelmist proceedings. Most significantly, Equity Trust maintains that its claim takes priority over the other creditors of the Z II Trust.

15 It is this claim to priority by Equity Trust which is central to the issues which were before the Commissioner, and it was the subject of the Priority Judgment. If that claim is successful, the result will be that Equity Trust will recover all of the assets of the Z II Trust currently valued at £6 million towards satisfaction of its total claim of some £18 million. If that claim to priority is not successful, Equity Trust will rank *pari passu* with the other creditors of the Z II Trust and will recover only about £330,000. In passing it may be observed that in the submissions made to the Court which are referred to below, it was suggested that the realisable assets of the Z II trust may actually be less than £6 million by reference to the financial records of the Z III Trust but that is not material for the purposes of this judgment.

16 In another judgment given earlier in these proceedings on 20 th October, 2015, the Commissioner dealt with a number of issues. In particular, he granted leave for Volaw to retire as trustee of the Z II Trust and for the appointment of R&H to be sanctioned subject to a number of directions which it is not necessary to repeat. In paragraph 46(v) of that judgment, the Commissioner also directed that “The issue of whether [Equity Trust] has priority in relation to its contingent claim will be determined by the Court on a date to be fixed…”, and he then directed that ***“In order to contain costs”*** that issue was to be argued as between Equity Trust, R&H and C (now represented by the Executor). It is those particular directions which led to the hearing before the Commissioner which is the subject of the Priority Judgment.

17 In the Priority Judgment, the Commissioner determined that the claims against all trustees and the liabilities of all trustees rank *pari passu*. The Commissioner therefore found against the claim to priority being put forward by Equity Trust. When giving the Priority Judgment, the Commissioner granted leave to appeal.

18 In the Recoverable Costs Judgment, the Commissioner found that Equity Trust was not entitled to claim the costs which it had incurred in seeking to prove its claim against the assets of the Z III Trust, and this was an issue which had been left over from Priority Judgment. When giving the Recoverable Costs Judgment, the Commissioner once again granted leave to appeal.

19 In the Adverse Costs Judgment, the Commissioner found Equity Trust liable to the Executor on the standard basis for the costs of the hearings which led to the two previous judgments.

20 Equity Trust appeals to this Court against each of these judgments. In dealing with the appeals in this judgment, I begin by addressing the point of law which is the subject of the Priority Judgment as it is the most substantial element in the appeals before this Court, and I then address the other two judgments.

The relevant legislative provisions

21 The administration of trusts in Jersey is subject to legislation in the form of the Trusts (Jersey) Law 1984 ("the Trusts Law"). Four Articles of the Trusts Law as it existed at the time of the events in question are of particular relevance for the purposes of the appeal by Equity Trust against the Priority Judgment. The first is Article 26 which provided in part:

> ***"(2) A trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust."***

22 The next Article to be noted is Article 32 which provided as follows:

> ***"(1) Where a trustee is party to any transaction or matter affecting the trust—***
>
> > ***(a) 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;***
> >
> > ***(b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity)*** .
>
> ***(2) Paragraph (1) shall not affect any liability the trustee may have for breach of trust."***

23 The meaning and effect of Article 32 were the subject of determination in a decision of the Privy Council given by Lord Hodge in a majority judgment in the case of *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2018] 2 WLR 1465, which was an appeal against a decision of the Court of Appeal of Guernsey in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2014] GLR 371 (and I shall refer to that case in each of these fora as "Investec").

24 The next Article of the Trusts Law which is particularly relevant is Article 34 which provided in part:

> ***"(1) Subject to paragraph (2), when a trustee resigns, retires or is removed, he or she shall duly surrender trust property in his or her possession or under his or her control*** .
>
> ***(2) A trustee who resigns, retires or is removed may require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise before surrendering trust property*** .
>
> ***(2A) …"***

25 It may be noted that Article 34(1) and (2) were amended, and Article 43A of the Trusts Law was inserted, by Articles 7 and 11 of the Trusts (Amendment No 7) (Jersey) Law 2018 which came into force on 8th June, 2018, by virtue of Article 13. The result is that Article 43A of the Trusts Law now provides more detailed provisions regarding the security or indemnity which may be provided to a trustee who ceases to hold office or who distributes trust property. That change is not relevant for the purposes of my judgment which concerns events which took place at a time when Article 34 was in force in the terms quoted above.

26 The final Article to be referred to is Article 54 which provided in part:

> ***"(4) Where a trustee becomes insolvent or upon distraint, execution or any similar process of law being made, taken or used against any of the trustee's property, the trustee's creditors shall have no right or claim against the trust property except to the extent that the trustee himself or herself has a claim against the trust or has a beneficial interest in the trust."***

The Priority Judgment

27 The hearing before the Commissioner took place on 15th and 16th March, 2018. The judgment of the Privy Council in *Investec* was handed down on 23rd April, 2018, and the Commissioner gave the parties the opportunity to make additional written submissions in light of that judgment. Both parties did so and the Commissioner then handed down the Priority Judgment on 3rd July, 2018.

28 In order to identify the issues which are before the Court it is helpful to summarise the Priority Judgment. After describing the background and the nature of the claim made by Equity Trust, the Commissioner set out the assumptions which had been agreed between the parties and upon which the point of law in question was to be determined. These agreed assumptions are set out in paragraph 17 as follows:

These were the only agreed assumptions upon which the Commissioner proceeded. Also in paragraph 17, the Commissioner referred to other assumptions which he had made but these were not agreed assumptions.

> "(i) Equity Trust was and is entitled to be indemnified from the assets of the Z II Trust in relation to all and any liabilities and costs arising from or in relation to the Angelmist proceedings.
>
> (ii) Equity Trust did not enjoy the protection of Article 32(1)(a) of [the Trusts Law] in relation to the Angelmist proceedings.
>
> (iii) All of the other unsecured creditors of Z II Trust are Article 32(1)(a) creditors."

29 Commencing at paragraph 19, the Commissioner set out a series of "Indemnification principles" which were said not to be in dispute between the parties. These principles remain as part of the background to the point of law in issue and I repeat them:

> ***(i) By reason of Article 26(2) of the Trusts Law, a trustee is entitled to be indemnified out of the trust fund in respect of liabilities, costs and expenses reasonably incurred in connection with the performance of its duties as trustee;***
>
> ***(ii) The right of indemnity is not limited to the recouping of payments made but extends to a trustee's liabilities:*** *Re Blundell* (1889) LR Ch D 370 ***at pp 376–377;***
>
> ***(iii) In practical terms, this means that a trustee has a right of reimbursement in respect of liabilities which he has satisfied from his own resources, and a right of exoneration which entitles him to satisfy a liability directly from the trust property*** .

30 The Commissioner referred to the following authorities as demonstrating these principles: *Re Grimthorpe* [1958] Ch 615 at p 623, and *Butterfield v Public Trust* [2017] NZCA 367, at para 21. The Commissioner then referred to the right of indemnity being *"an entrenched incident of trusteeship"* which was one which continued after a trustee ceases to hold office, and he referred to *Lewin on Trusts*, 19th Ed ("Lewin"), at paras 17–034 to 17–036. The Commissioner also referred to what he described as *"this fundamental principle"* as referred to at paragraph 2.5.3 in the Consultation Paper of the Development Committee published in late 2004. In light of the contentions and submissions before us, I do not see anything contentious in the indemnification principles set out by the Commissioner.

31 The Commissioner referred (commencing at paragraph 27) to the equitable lien which exists under Jersey law. He referred to the decisions in Investec and noted that although decided initially in the Guernsey Court of Appeal, the decision in that Court had been followed in Jersey in In *re Z Trust* [2015] JRC 031. In dealing with that decision, the Commissioner identified a number of sources relating to the nature of an equitable lien

under the laws of England and elsewhere, and he referred to *Snell's Equity*, 33rd Ed ("Snell"), at paras 44–004 and 44–005, and to In *re Pumphrey deceased* (1882) 22 Ch D 255 at p 282, *Octavo Investments Pty Ltd v Knight* (1979) 27 ALR 129 at p 134, and *Southern Wine Corporation Pty Ltd v Frankland River Olive Co* [2005] WASCA 236 at para 30. It is not necessary for the purposes of this judgment to describe otherwise what the Commissioner said in relation to the judgment of the Court of Appeal of Guernsey in *Investec*.

32 The Commissioner set out (commencing at paragraph 40) the contentions of the parties and he then (commencing at paragraph 87) discussed the judgment of the Privy Council given by majority in Investec. The Commissioner quoted from each of paragraphs 57 to 63 of that majority judgment and he noted (at paragraphs 92 and 93 of the Priority Judgment) that Advocate Jordan had argued that the decision of the Privy Council supported Equity Trust. In particular, the Commissioner noted her submission that the judgment vindicated the position that, in a competition between the claim of a trustee and the claim of a creditor both claiming through the same right of indemnity, the trustee's claim is the *"better equity"* and thus should take priority if the equitable lien gives the trustee a proprietary right in the trust fund whereas a creditor does not have that right unless and until a court makes an order granting the equitable right of subrogation, and the Commissioner quoted from the judgment in *EC Investment Holdings Pte Ltd v Rideout Residence Pte Ltd and another* [2013] SGHC 139. The Commissioner noted that Advocate Harvey-Hills had submitted that the decision of the Privy Council in *Investec* had only a modest impact on the issues under consideration.

33 The Commissioner gave his own decision on the issues which were before him (commencing at paragraph 98) and he found in favour of the *pari passu* approach which was the primary positive case being put forward by the Executor. He dealt individually with the position between Equity Trust and its own trust creditors and that between Equity Trust and any successor trustee. At paragraph 102, he noted that competition between a trustee and creditors claiming through it did not arise under Jersey law until the changes made by the Trusts Law, in particular Article 32. He referred to what was said in *Lewin* at paragraphs 21–047 and 21–048, and to three authorities referred to in the footnotes to the latter paragraph, namely In *re Suco Gold Pty Limited (in liquidation)* [1983] 33 SASR 99, *Finnigan v Yuan Fu Markets Limited (in liquidation)* [2013] NZHC 2899 at para 48, and *EC Investment Holdings v Ridout Residence*. The Commissioner noted that, upon the assumed facts before him and in the event of an insolvent trustee, the claims of trust creditors to trust assets would rank *pari passu* and that that had been conceded by Advocate Jordan. The Commissioner noted that the introduction of what is Article 32 is an innovation because a trustee is given a degree of protection where a creditor knows that he is transacting with a trustee. He gave examples demonstrating the different outcomes where a trustee had transacted with an Article 32(1)(a) creditor and an Article 32(1)(b) creditor.

34 The Commissioner noted (at paragraphs 114 and 115) that the Privy Council had referred to the case of In *re Johnson* (1880) 15 Ch D 548, and he quoted from the judgment of

Jessel MR at p 552. He noted that in the case of an Article 32(1)(a) creditor who is claiming through subrogation, both the creditor and the trustee "are exercising the same right of indemnity and associated equitable lien". This meant that the right of both under that right of indemnity is subject to the state of account between the trustee and the beneficiaries.

35 The Commissioner then noted (commencing at paragraph 116) that the decision of the Privy Council had gone no further in altering the pre-existing law. Article 32 may prejudice Article 32(1)(a) creditors in that they can no longer claim against a trustee personally but Article 32 did not go further by giving a trustee priority over trust assets for its personal liability to an Article 32(1)(b) creditor. If a trustee's claim was to be given priority over the claims of its Article 32(1)(a) creditors, then that would have the result, as he put it, of the trustee *"scooping the pot"*, and that went beyond what was intended by Article 32. If a trustee were to have priority for its Article 32(1)(a) liabilities then, if a trust became insolvent, Article 32(1)(b) creditors claiming by subrogation would presumably be entitled to the same priority. The Commissioner stated that such a result would be inequitable.

36 The Commissioner therefore found (at paragraphs 121 and 122) on the issue of priority as between a trustee and its trust creditors that:

By reference to the assumed facts, the Commissioner said that this meant that the claim of an unsecured creditor who had transacted with Equity Trust as a trustee would rank equally with the claim of Equity Trust for its personal liability in respect of the Angelmist proceedings.

> ***"(i) The claims of Article 32(1)(a) creditors to the trust assets rank pari passu inter se (as conceded by Advocate Jordan);***
>
> ***(ii) In the case of a solvent trustee, the claims of its Article 32(1)(a) creditors to the trust assets rank pari passu with the trustee's claims for its Article 32(1)(b) liabilities; and***
>
> ***(iii) In the case of an insolvent trustee, the claims of Article 32(1)(a) and (b) creditors to the trust assets rank pari passu."***

37 The Commissioner then turned (commencing at paragraph 123) to the second issue of the claims of a former trustee to trust assets in the hands of a successor trustee. The issue was whether Equity Trust's right of indemnity and associated lien (whether exercised by Equity Trust in respect of its personal liability to an Article 32(1)(b) creditor or being exercised by an Article 32(1)(a) creditor by way of subrogation) has priority over the right of indemnity and equitable lien of a successor trustee.

38 The Commissioner stated that he considered that there was clear authority that the purpose of the equitable lien is to give a trustee priority over the interests of beneficiaries and he referred to *Lewin* at para 21–043 as confirmed in the judgment of the Privy Council in *Investec*. The Commissioner observed that once a trust has become insolvent the

beneficiaries no longer have any interest in the trust assets and the only persons with an interest are trustees and those claiming through them. He referred to *Snell* at paragraph 44–004 as confirming that the equitable lien arises out of the relationship between trustee and beneficiaries and that, because "it does not arise out of the relationship between trustees, there is no reason for the general rule that equitable interests rank according to the order of their creation to apply as between trustees." The Commissioner then said that this was why it was possible to distinguish between the kinds of relationships listed by *Snell* at paragraph 44–005 which do give rise to an equitable lien under English law where priority in time prevails and the relationship between successive trustees in the ongoing administration of a trust.

39 The Commissioner observed (at paragraph 128) that he considered that there were good reasons *why* "the general rule should not apply, partly out of fairness as between trustees administering the trust and partly because it would be inimical to the good administration of trusts." A new trustee would face uncertainty as to whether the liabilities which it had properly incurred would rank behind those of a former trustee which would "scoop the pot". The Commissioner gave examples (at paragraph 130) of how that could occur.

40 The Commissioner stated (commencing at paragraph 131) that there is no authority for the proposition that, as between trustees, the right of indemnity and associated equitable lien of a former trustee takes priority over the right of indemnity and associated equitable lien of a successor trustee. He referred to the decision in *Richardson v Aileen* [2007] VSC 104 in which it was said that a former trustee's equity gave way to the equitable principle demonstrated in *Universal Distributing Company (in liquidation)* [1933] 48 CLR 171 and In *re Berkeley Applegate* [1989] Ch 2, the judgment of Mr Edward Nugee QC at p 41. That approach may be described as one where an incoming trustee which is engaged to realise funds which would not otherwise be realised can be given a priority by the court to recover its expenses. The Commissioner noted that this approach had been applied by the Royal Court in the directions given to Volaw to continue administering the Z II Trust, and similarly in relation to the Z III Trust, and had also been adopted in *Crill v Alpha Asset Finance Limited (Re Hickman)* [2009] JRC 040.

41 The Commissioner noted (at paragraph 136) by reference to *Richardson v Aileen* that that approach would not be applied where a new trustee simply took on the continuing administration of a trust. He also observed that it was difficult to see why a successor trustee which had taken on the onerous duty of being a trustee should be exposed, at some point in the future where a trust had become insolvent, to the priority of the claim of a former trustee which had not sought security at the time of its retirement under Article 34(2) of the Trusts Law.

42 The Commissioner then said (at paragraphs 137 and 138) that in a situation where the trust creditors of an insolvent trustee would rank *pari passu* as against the trust assets, there was no support in *Lewin* at para 22–047 for the proposition that creditors claiming through a former trustee would have priority over creditors claiming through a successor trustee. Such

an approach would involve “some kind of mixing of a pari passu regime and a ranking in time regime”. As both trustees have been involved in the proper administration of the trust, the Commissioner stated that “one has no better right to be indemnified than the other”.

43 The Commissioner then discussed (at paragraphs 139 and 140) the decision in *Lemery Holdings v Reliance Financial Services* [2008] NSWSC 1344 and noted that the principle stated at para 21 that a new trustee ***“takes subject to the lien of the old trustee”*** *was* based primarily on what was said in *Octavo Investments v Knight* at para 134. Having quoted that passage including the further authorities referred to, the Commissioner said that *Octavo Investments* says nothing about an insufficiency in the trust assets and how competing claims of trustees should be treated, and that the expression ***“subject to the lien of the old trustee”*** as used in Lemery Holdings meant ***“no more than that the former trustee's equitable lien continues against the beneficiaries after it ceases to be a trustee and the new trustee takes the trust fund subject to that”***.

44 In reaching his conclusion (commencing at paragraph 141), the Commissioner said that he could find no principled basis for treating the claims of former trustees and successor trustees ***“in that unequal way”*** and that rather than sweeping away the ranking *pari passu* regime, consistency and fairness favoured an extension to that regime to claims between former and successor trustees. He then set out his conclusions (at paragraph 143) as follows:

> ***“(i) The equitable lien is a device of equity granted to trustees by the Court to give them effective rights of indemnity in priority over the interests of the beneficiaries*** .
>
> ***(ii) There is no persuasive authority as to the effect of the equitable lien when a trust becomes insolvent and the beneficiaries no longer have any interest in the trust assets*** .
>
> ***(iii) That the principled and fair way forward in the case of an insolvent trust is to extend the existing pari passu regime (agreed by Advocate Jordan in part) so that not only do the claims against the trustee under Article 32(1)(a) and the liability of the trustee under Article 32(1)(b) rank pari passu, the claims against all trustees and the liabilities of all trustees rank pari passu.”***

45 The Commissioner then observed (at paragraphs 144 and 145) that he saw no unfairness to a former trustee which should know what liabilities it may have incurred and can require ***“reasonable security”*** under Article 34(2). That is what Equity Trust had done when it retired in favour of Volaw and received the Volaw indemnity under the applicable Deed of appointment and resignation of trustees.

46 Finally, the Commissioner considered (commencing at paragraph 146) the alternative case for the Executor and he agreed that a trustee's right of indemnity and associated equitable

lien arises with each liability as per In re Humphrey. Although the equitable lien may have been described in *Re Amarind Pty Ltd (in liquidation)* [2017] VSC 127 as akin to a floating charge, it comprises the constituent elements of the liabilities which it secures. The Commissioner agreed with Advocate Harvey-Hills that the trustee acquires successive rights of indemnification and lien as it incurs liabilities as trustee with each such individual indemnity being extinguished as each liability is extinguished (by reimbursement or exoneration or whatever).

47 The Commissioner accepted that a ranking in time regime would require all claims and liabilities to be ranked in order of time and that that could involve ***"a difficult and cumbersome inquiry"*** as to when each claim and liability under Article 32(1)(a) and (b) arose.

Notice of appeal

48 In its Notice of Appeal, Equity Trust appeals against the Priority Judgment on a number of grounds. In referring to these grounds, and to the Contentions which follow, the paragraph numbers which are stated relate to numbered paragraphs in the Priority Judgment unless otherwise indicated.

49 Equity Trust submits that the Commissioner erred in law in concluding at paragraph 143 that the claims against all trustees and the liabilities of all trustees rank *pari passu*. The Commissioner should have adopted the principle of first in time to the question of priority between the equitable liens of the former trustee, Equity Trust, and the current trustee, R&H (presumably itself as successor to Volaw), with the consequence that the equitable lien of Equity Trust takes priority. Equity Trust sets out the following reasons in support.

50 First, the Commissioner has relied at paragraph 124 upon the quotation from *Lewin* at para 21–043 but this passage applies to the relationship between a trustee and beneficiaries and not to the relationship between successive trustees. There is no reason why the first in time principle, which applies in the context of other competing equitable proprietary and security interests, should not apply.

51 Secondly, the Commissioner was wrong to conclude that the principle enunciated in *Lemery Holdings v Reliance Financial Services* which is that a new trustee takes the fund *"subject to"* an existing lien, means no more than the former trustee's lien takes priority over the interests of the beneficiaries in the fund. This is in error because the beneficiaries' interests will always be subject to the lien of the first trustee and because the Commissioner has failed to give any or sufficient weight to the equitable proprietary nature of the trustee's lien. The principle in *Lemery Holdings* demonstrates that there is already an equitable lien in place which is similar to a floating charge and which is to secure the former trustee's right of indemnity which upon an application of equitable principles has priority over the successor trustee's later lien.

52 Thirdly, the Commissioner erred in considering the distinction between Article 32(1)(a) creditors and Article 32(1)(b) creditors as being relevant to the issue of priority. Equity Trust is not an Article 32(1)(b) creditor but a trustee invoking its right of reimbursement secured by its equitable lien.

53 Fourthly, the Commissioner erred in concluding that Equity Trust is claiming through *R&H's* indemnity. Equity Trust has its own prior equitable right which is enforceable (for example by appointment of a receiver) and does not require *R&H* to exercise its right of indemnity. Equity Trust is exercising its own rights arising out of its position as a former trustee.

54 Fifthly, the Commissioner erred at paragraphs 101 to 121 and 143(iii) as a result of missing the distinction that the question of priority is between two trustees' equitable liens and the established case law does not demonstrate that there is an established or existing *pari passu* regime as a matter of law. Although it was conceded for Equity Trust that, in the case of trust creditors claiming through a trustee's lien, the *pari passu* approach would avoid cumbersome enquiries as to when the claim of each creditor arose, that had nothing to do with the relevant question of priority between two equitable liens. In any event, the issue of priorities between Equity Trust and its own creditors is irrelevant because there were no such creditors.

55 Sixthly, in holding that there were good reasons why the first in time approach should not apply, the Commissioner failed to acknowledge or give weight to the fact that the first in time rule is not absolute and can be defeated in appropriate cases. For example, the first in time rule between former and successor trustees could be departed from by a court where the former trustee had acted in a way which misled the successor trustee. Upon the facts of the present case, there was no such reason to depart from the rule. Equity Trust had an inchoate liability which crystallised as a result of actions taken by its successor trustee. In such a situation, the uncertainty faced by the former trustee is greater than that faced by the successor trustee. Any unfairness arises in the present case by not applying the principle of first in time.

56 Seventhly, the Commissioner erred in suggesting that Equity Trust could have used the protection of Article 34 in seeking security prior to its handing over of the trust assets to its successor trustee. Equity Trust could not have asked for security in respect of a liability which did not need to arise and which only arose as a result of decisions made by its successor trustee.

57 Finally, and in respect of the alternative case for the Executor, the Commissioner *erred* in accepting it. There is no basis for it and, as the Commissioner had accepted, it was contrary to the description of the equitable lien in *Re Amarind* as being of the nature of a floating charge. The Commissioner also accepted that it would create a regime which would require a difficult and cumbersome inquiry into when each and every claim arose. There is

no basis in law for the sequence of liens which would arise. On the contrary, the position is that there is one lien in the nature of a floating charge over the trust assets subject to which a successor trustee takes the fund.

The Contentions for the parties

58 In support of its Notice of Appeal, the Contentions for Equity Trust begin by summarising the position. Equity Trust has settled the Angelmist proceedings which were brought against it in its capacity as trustee of the Z II Trust. It has funded a sum in excess of £18 million in costs and liabilities. It seeks to claim back this sum from the assets of the Z II Trust which comprise principally the enforcement of the loan against the assets of the Z III Trust. The Z II Trust is insolvent because in October 2006 and February 2007, and after the retirement of Equity Trust as trustee, its successor trustee, Volaw, made loans to E as an individual and to the Z III Trust. As a consequence of the property crash in 2008, these loans could not be paid back triggering the insolvency of the Z II Trust and the Z III Trust.

59 Equity Trust contends that the Commissioner erred in concluding that all claims should rank *pari passu* and alternatively in concluding that a trustee's equitable lien arises with each liability that the trustee acquires. Equity Trust contends that the *pari passu* approach represents a departure from established principles of equity which are derived from the law of England save where modified by the law of Jersey: *Investec*, the judgment of the Privy Council at paragraphs 57 and 58.

60 The Contentions for Equity Trust note what it suggests are a number of orthodox equitable principles. The Commissioner has recognised that a trustee's right of indemnity (whether existing, future, contingent or otherwise) is secured by an equitable lien. That equitable lien is a form of equitable charge upon property until certain claims are satisfied. It arises from the relationship between the parties rather than from a deliberate act to constitute it: *Snell* at paragraphs 44–004 and 44–005 which are referred to by the Commissioner. It provides security without possession and, as a form of equitable charge, the property is charged and the trustee can have it realised by judicial process: *Snell*, paragraph 36–003. The lien is not capable of application to only some of the trust assets but applies to all of those assets in the trustee's possession: *Octavo Investments v Knight*. The lien gives the trustee an equitable proprietary interest in the trust assets: *Southern Wine Corporation v Frankland River Olive Co*, *Octavo Investments v Knight*, and *Lewin*, paragraph 21–043 (referred to by the Privy Council in Investec). As observed in *Lemery Holdings v Reliance Financial Services* at para 46, the nature of the trustee's interest is that of *"an equitable security interest"* arising by operation of law. Equitable interests bind successors in title and third parties: *National Provincial Bank v Ainsworth* [1965] AC 1175 at pp 1237–1238; and where of equal standing, equitable interests rank in order of time on the principle *qui prior est tempore potior est jure*: *Snell*, para 4–002; a principle which is consistent with the Jersey law of hypothecation. Such a prior equitable interest may be postponed if prejudiced by act or default: *Abigail v Lapin* [1934] AC 491 at p 504.

61 Such a lien is not lost by the retirement or removal of the trustee: Investec, the judgment of the Privy Council at para 59(vi) citing In *re Johnson* at p 552. The equitable interest attaches to the trust assts irrespective of possession: *Dimos v Dikeakos Nominees Ltd* (1997) 149 ALR 143, and *Bruton Holdings Pty Ltd v Commissioner of Taxation* [2009] HCA 32 at para 43. Because the equitable interest attaches to the trust assets, the successor trustee takes the trust assets subject to the subsisting equitable interest (as would any secured creditor with notice of a prior security). This can be seen in *Underhill & Hayton, Law of Trusts and Trustees*, 19th Ed (" *Underhill & Hayton*") at para 81.1 (a passage which, in an earlier edition, was cited with approval in *ATC (Cayman) Ltd v Rothschild Trust Cayman Ltd* (2012) 14 ITELR 523 at pp 544–555), in *Lemery Holdings v Reliance Financial Services* at paras 21 and 31, and in *Ronori Pty Ltd v ACN 101 071 998 Pty Ltd* [2008] NSWSC 246, per Barratt J at paras 16 and 18. It is for this reason that Article 34(2) of the Trusts Law provides that " *an outgoing trustee may require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise before surrendering trust property"*. It is also why, as the Commissioner observed in an earlier judgment in this case in February 2015, a former trustee is entitled to ensure that his successor trustee does not *"destroy, diminish or jeopardise"* the former trustee's right.

62 A trustee's equitable lien has priority over third parties granted a subsequent charge or other equitable interest in the fund: *Re The Exhall Coal Company (Limited)* (1866) 35 Beavan 449, and *Underhill & Hayton* again at paragraph 81.1. Since a successor trustee obtains a *"subsequent charge"* in the form of its own lien, there is no reason in principle why the equitable principles of priority should not apply to its interest as they apply to other interests. The application of orthodox equitable principles of priority can be seen in the so-called "Berkeley Applegate" orders. This is clear from the decision in *Richardson v Aileen* which applied In re Berkeley Applegate (Investment Consultants) Ltd and also *Universal Distributing Company Ltd.* Equity Trust submits that there is no reason in principle to depart from the application of equitable principles of priority where the equitable lien of a former trustee takes priority over any equitable lien which may arise subsequently in favour of successor trustees.

63 Equity Trust then points to what are said to be the errors in the Commissioner's analysis. The first is referred to as the "relationship" error. This arises from what is said at paragraph 124 of the Priority Judgment where the Commissioner concluded that ***"There is clear authority that the purpose of the equitable lien is to give trustees priority over the interests of the beneficiaries"***. This conclusion is extrapolated from *Lewin* at paragraph 21–043 *and from* the judgment of the Privy Council in *Investec* at paragraph 177. Equity Trust contends that this overstates the effect of these passages because what is said in *Lewin* does not state that the only purpose of an equitable lien is to give priority over the interests of the beneficiaries. It says nothing about priority between former and successor trustees. Equity Trust refers to the preceding sentence in paragraph 21–043 of *Lewin* which is endorsed by the Privy Council in *Investec* at paragraph 59(v) and to a number of cases in the footnotes to paragraph 21–043 of *Lewin*.

64 Equity Trust then refers to the Commissioner's conclusion at paragraph 125 that once a

trust is insolvent the beneficiaries no longer have any interest in the trust assets and thus there is no equitable lien to enforce against them. Equity Trust contends that the authorities demonstrate that a trustee's equitable interest is not simply enforceable against beneficiaries but is enforceable against the trust property itself. Equitable security interests are extinguished in defined circumstances, for example upon payment of the underlying indebtedness, but the effect of the Commissioner's conclusion is that a trustee's equitable security interest is effectively extinguished in the case of the insolvency of a trust. That is said to be inconsistent with the decision in *Investec* which says that the only relevant respect in which the pre-existing law is altered by Article 32 is that it abrogates the rule of English law that the law looks no further than the legal entity which has assumed the liability by providing that a trustee may be treated as incurring liabilities not only personally but as trustee and thus without recourse to his personal estate.

65 At paragraph 126, the Commissioner states that the basis of the trustee's equitable lien "arises out of the relationship between the trustee and the beneficiaries; it does not arise out of the relationship between the trustees". That is erroneous because, once an equitable interest has arisen, it attaches to the relevant property and binds third parties and successors in title. The former trustee's equitable interest in the trust property can place a fetter on its successor's rights to deal with the trust property and this must be correct: see the potential fetter referred to in *Scaffidi v Scaffidi Holdings Pty Ltd* [2010] WASC 29 at paras 36 and 37.

66 Equity Trust describes the second error as the "fairness" error. The Commissioner appears at paragraph 128 to approve a number of policy reasons for the adoption of *the pari passu* approach. These are predicated upon the basis that trustees "hold a joint fiduciary office" and should operate in a collegial and co-operative manner and are engaged in a *"collective endeavour"*: see paragraph 73 and 74 of the Priority Judgment. Equity Trust contends that although this may apply to co-trustees, it does not apply to trustees in succession. It cannot be suggested that Equity Trust has ever "held a joint fiduciary office" with Volaw or R&H. In any event, the idea of a collective endeavour ignores the obligations and responsibilities of each individual trustee: *Snell*, paragraphs 29–005 and 30–007. The Commissioner refers to the uncertainty and difficulty which would be faced by a successor trustee where a former trustee asserts priority over the rights of the successor trustee in the case of insolvency but in such a situation the new trustee is on notice of the former trustee's equitable interest and can take security against such uncertainty before accepting the trusteeship. Any uncertainty is that faced by the former trustee which is greater than that of a successor trustee because the former trustee no longer has control of the trust assets and no insight into the administration of the trust and the liabilities being incurred by the successor trustee. In any event, the first in time principle is not absolute and a former trustee's equitable interest may be postponed.

67 The suggestion by the Commissioner that the former trustee may obtain reasonable security pursuant to Article 34(2), actually creates more uncertainty. If a former trustee requires to take steps to protect itself from personal liability, it would require to take assets or security in respect of any contingent claim of which it has no notice at the time that the

assets of the trust are being delivered to the successor trustee. In any event, in the present case there is no such uncertainty because neither Volaw nor R&H have any personal liabilities for which they require to seek reimbursement pursuant to their own equitable liens; the only unfairness in the present case is because the Commissioner's analysis deprives Equity Trust of its prior equitable interest exposing it to substantial personal liability for any liability which was crystallised as a consequence of the acts of its successor trustee. This is in contrast to the position of R&H who are able to rely upon Article 32(1)(a) as against the claims of the C and E as a complete defence against any personal liability.

68 At paragraph 130, the Commissioner relies on the potential unfairness to trust creditors of ranking behind an Article 32(1)(b) liability of a former trustee, but that overlooks the fact that a trustee's equitable lien arises to protect the trustee in return for its undertaking onerous duties: *Butterfield v Public Trust*. It does not arise to protect the position of trust creditors as the Privy Council makes clear in *Investec* at paras 62 and 63. As observed in *Investec* at para 59(vii), a creditor can protect his position for example by taking a fixed charge over trust assets or stipulating for a personal guarantee from the principal beneficiary. Comparison with Article 32(1)(b) creditors is erroneous because that did not arise in the present case. Equity Trust is not an Article 32(1)(b) creditor but a trustee seeking its right of reimbursement and there are no Article 32(1)(b) creditors.

69 The next error contended for by Equity Trust is said to be the erroneous analogy with priority between trust creditors. This is said to be erroneous in three respects. First, the extrapolation by the Commissioner at paragraph 137 from Lewin at paragraph 22–047. That passage in *Lewin* relates to the situation where a trustee is insolvent and there is no suggestion that trust creditors claiming through a former trustee could have priority over trust creditors claiming through a successor trustee. Secondly, in finding at paragraph 138 that because the ranking as between trust creditors claiming through a trustee's equitable lien should be *pari passu* it would then be inconsistent to establish a priority of ranking in time as between former and successor trustees, that is to conflate two separate and distinct issues of law. The question of priority as between those claiming through one equitable interest is distinct from the question of priority between two competing and separate equitable interests. Thirdly, the Commissioner overlooks the fact that trust creditors claiming through separate equitable interests do not come to the trust assets on an equal basis, and that is confirmed in Investec and acknowledged in the Priority Judgment at paragraph 148(ii). Although a trust creditor seeking the derivative remedy of subrogation is at the mercy of the state of account of the trustee to whose lien it is subrogated, its rights are not further dependent upon the right of indemnity of any successor trustee. The *pari passu* approach does not result in an equal sharing of all trust assets amongst all trust creditors and it is not like the *pari passu* sharing amongst unsecured creditors in an insolvent company winding up.

70 The decision of the Privy Council in *Investec* makes clear that the claims of a trust creditor are subject to the trustee through whom the creditor claims having a positive account. Equity Trust provides examples of how various situations might work out and seeks to demonstrate that creditors will be treated differently according to the equitable lien through

which they claim and that they do not come to the trust fund equally. Equity Trust contends that the assumption that a *pari passu* approach between all creditors will necessarily lead to a fair and equal result is not justified. Equity Trust asks why is it fair for the trust creditors of an earlier trustee to lose the priority otherwise accorded to that trustee's prior equitable interest and then to have to share *pari passu* with trust creditors who contracted with a subsequent trustee at a time when the trust's financial health was in peril and who claim through a later equitable interest.

71 The next error suggested by Equity Trust is what is said to be the strained interpretation of the decision in *Lemery Holdings v Reliance Financial Services*. It is contended that the Commissioner's interpretation cannot be sustained when he concludes at paragraphs 139 and 140 that the statement that a successor **trustee** ***"takes subject to"*** the former trustee's equitable lien ***"means no more than that the former trustees equitable lien continues as against the beneficiaries"***. This is said to amount to a rewriting of what was actually said by the judge in *Lemery Holdings* and it ignores the context in which it was said.

72 The final error contended for by Equity Trust is in reference to what is said to be the Article 34(2) error. If in the absence of priority, a former trustee must obtain "reasonable" security, it is likely that Equity Trust would have insisted upon security in the sum of many millions of pounds in respect of potential contingent liabilities which might never have arisen had it not been for the acts of its successor trustee: In *re Caversham Trustees* [2008] JRC 065, and In *re Carafe Trust* [2005] JRC 063. Placing the emphasis on Article 34(2) in this way will lead to trustees insisting upon far greater security than has previously been done. In creating this new emphasis on Article 34(2), the Commissioner has created greater uncertainty for both former trustees and successor trustees in passing over the assets of the trust and this will lead to significant practical issues in the trust industry

73 Finally, in addressing the Commissioner's alternative approach at paragraphs 146 and 147, Equity Trust contends that each trustee has just one lien, not successive liens. There is no basis in authority for the conclusion that there are successive rights and successive liens. The position is that there is a single lien which extends to all existing, future, contingent or other liabilities incurred by a trustee in its capacity as such and in practice this lien comes into existence the moment the trustee takes office and begins incurring liabilities in the administration of the trust (including in relation to its own remuneration). The existence of a single lien securing all liabilities (actual and potential) is clear from what is said in Lewin at paragraph 21–043 as endorsed by the Privy Council in *Investec*. In that paragraph, there is reference to a "lien" consistently in the singular and in respect of "liabilities, costs and expenses" in the plural. The same is the situation in what was said by the Privy Council in *Investec* at paragraph 59(v). The position for Equity Trust is supported by *Re Amarind* at paragraphs 386 to 388. As the Commissioner recognised at paragraph 147, successive liens ranking in order of time would require a difficult and cumbersome inquiry into when each and every liability, and thus each lien, arose. Equity Trust suggests that it would encourage related parties to accumulate large paper debts rather than settling funds into trust in order to denude the claims of prior trustees and any other secured creditors that have similarly lost the protection of their security against trust assets.

74 The response to these grounds and contentions is set out in the Written Contentions for the Executor. The Executor contends that the Commissioner found correctly in favour of the Executor's primary case that trustees' indemnification rights, and liens to secure them, should be regarded as having equal standing with one another and thus equal priority. They therefore all rank in priority to beneficiaries' interests and those claiming through beneficiaries, and all rank equally as against each other. In the alternative, the Commissioner was correct to determine that if a first in time rule of priorities were to be appropriate, the approach of Equity Trust to the nature of a trustee's lien is misconceived. On the proper analysis, a trustee acquires a right of indemnification in relation to its present, future or contingent liabilities to which it is subject when that liability arises (albeit, in the case of a future liability, it is not presently payable, and in the case of a contingent liability, it is only payable on the contingency arising). A lien is part of a suite of indemnification rights that a trustee acquires in relation to each such liability and it thus acquires successive rights of indemnification, including successive liens, as it incurs liabilities acting as trustee with such individual indemnity rights and liens being extinguished as indemnity is effected (by reimbursement or exoneration from the trust fund). Where more than one trustee is in office, or where former trustees incur indemnifiable liabilities subsequent to leaving office (for example by way of compromise), these rights and liens as against each other rank from the dates when they arise.

75 The Commissioner correctly identified, as was agreed by both parties, that the issue was not addressed directly in any Channel Islands or English authority. In the absence of authority, the approach of the Executor was to explore what a principled and practical working out of the issues would look like. The Court is charged with fashioning an order of ranking of claims and priority of liens in the absence of authority which it should seek to do in a manner which is just and rational in the various contexts in which the issues arise.

76 A trustee's equitable lien arises by operation of law and is not a negotiated charge; it is a form of security generated by law and it is plainly right that its full parameters and effects should achieve rational and just ends. The case for Equity Trust, by contrast, proceeds principally by assertion that the rules of priority for equitable interests developed in other situations should apply. The Commissioner fully took account of the submissions for Equity Trust and gave them careful consideration.

77 What is said to be a *"core vice"* in the case for Equity Trust, is that it fails to grapple with the fact that trusts have ongoing, indeed often very long, durations in the course of which several persons may act as trustees sometimes holding office at the same time as others and at other times retiring in favour of new trustees. They may incur liabilities of different sorts at different times, sometimes jointly and sometimes individually, all of which liabilities may have been properly incurred. If so, all of the trustees will have rights of indemnification to achieve reimbursement or exoneration themselves from the trust fund. In Jersey, Article 32(1)(a) creditors will have a right of subrogation to that right of indemnification, including the trustee's lien. Whilst a trust fund has sufficient assets to discharge all such liabilities, no issues will arise, but where a trust is insolvent, the issues in the present case become

critical.

78 In most common law jurisdictions, trustees are personally liable for all liabilities incurred by them. Where a trustee becomes personally insolvent, that trustee's creditors will be subrogated to its rights of indemnification and lien, and will be in competition with the remaining solvent trustees. In Jersey, the Executor contends that a trustee has no liability in its personal capacity to Article 32(1)(a) creditors but is liable in its capacity as trustee only to the extent that it can discharge those liabilities from the trust fund. The lien in respect of the trustee's right of indemnification in relation to its liability to Article 32(1)(a) creditors is available to that creditor as acknowledged by the Commissioner at paragraph 29(iv) and (v) by reference to the judgment of the Guernsey Court of Appeal in *Investec*. The position of an Article 32(1)(a) creditor is therefore similar to that of the creditor of a trustee of an English law trust who has become insolvent: *Lewin*, paragraph 22–039; and *Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271 per Cozens Hardy MR at pp 275–276.

79 The case for Equity Trust fails to grapple with the issues raised by the examples considered at paragraphs 72 and 128 to 130 of the Priority Judgment by concentrating solely on the particular facts of this case. The approach advocated by Equity Trust permits a former trustee to incur new liabilities for which it can claim indemnification after leaving office, for example as has been done in the present case, by entering into the contract of compromise of the Angelmist proceedings which was a new legal liability which arose only when the contract of compromise was entered into. This would leave the successor trustee perpetually vulnerable to such acts and is inimical to the collective endeavour which they are engaged in. The Executor accepts that the instant case is not one of co-trusteeship but rather of trustees in succession but nevertheless the priority principles to be applied should be coherent and principled in whatever situation they require to be adopted. The fact that a former trustee may have left office cannot affect the proper approach to the issue of how different trustees' liens should interact or be treated by the courts. It cannot be right, for instance, that a trustee who has retired due to a conflict of interest or who has been removed by the court for breach of trust, acquires a priority over continuing trustees just because the former trustee incurred a liability in the course of administering the trust before its successor trustees did. Also, it cannot be right that a trustee who has left office can incur new by liabilities for which it can claim indemnification after leaving office as has happened in this case. The contract of compromise is a new legal liability which arises only when it is executed. The Executor contends that the principled approach avoids the “moral hazards” inherent in the approach for Equity Trust and is consistent in its effect and this means that each of them has priority over beneficiaries' interests which is what the lien was created by the courts of equity to achieve. They collectively share in the trust fund taking shares proportionate to their liabilities when the available assets are insufficient to discharge them all.

80 The Executor suggests that this approach of equality will avoid protracted disputes about which trustee of a number of trustees happened to have incurred an identifiable liability first in time which may be years or even decades previously. The Commissioner has referred to the usual practice whereby contractual liabilities incurred by one trustee are novated on its

retirement to its successor trustee. That practice is conducive to the efficient administration of trusts and in its absence former trustees would be forced to remain connected to a trust's affairs potentially for years after leaving office. If the arguments for Equity Trust were correct, existing creditors of retiring trustees would have every incentive to decline novation to the successor trustee.

81 The Executor refers to a number of features of the position of Equity Trust. The Executor does not admit that Equity Trust has the right of indemnification claimed. Equity Trust participated in the Angelmist proceedings without seeking any approval from the Court in the form of Beddoe relief and it participated in and ultimately compromised the Angelmist proceedings. It is not accepted that Equity Trust is in the position of an Article 32(1)(b) trustee. The contentions for Equity Trust cast doubt on the other debts owed by the Z II Trust. For present purposes, the agreed assumption upon which the Royal Court proceeded and this Court is to proceed is that those debts are owed to creditors who are Article 32(1)(a) creditors. It is not agreed that Equity Trust has no creditors claiming through its lien.

82 The Executor accepts that equitable liens arise by operation of law and refers to the passage from *Snell* at paragraph 44–004 quoted at paragraph 33 of the Priority Judgment. The Executor suggests that this cannot have been intended to give trustees priority over their creditors since the trustees are personally liable to those creditors who only acquire subrogation rights if the trustee becomes personally insolvent or is otherwise unable to pay. It cannot have been intended to give trustees priority in a contest with successor trustees. It is clear that the existence of the lien is simply the means by which English courts explained how trustees' indemnification rights took precedence over the interests and rights of beneficiaries: In *re Pumphrey* at pp 261–262, *Governors of St Thomas's Hospital v Richardson* at p 276, *Lemery Holdings v Reliance Financial Services* at para 46, and *Lewin* at paragraph 21–043. As the trustee's lien arises by operation of law, that should import principles that the courts have found appropriate in other contexts. The wider implications of the form of lien held by trustees should be fashioned in a manner which is principled and practical in the trust context.

83 The Executor accepts the various orthodox equitable principles identified in the Contentions for Equity Trust but does not accept that, because the courts in other contexts have developed a first in time ordering of priorities for equitable security interests, the same ought to be applied as a matter of course in the trust context. With reference to *Lemery Holdings v Reliance Financial Services* at paragraph 21, the Executor does not accept that a successor trustee is analogous to a purchaser of assets from its predecessors. A sale by a trustee of legal title to an asset would extinguish its lien over that asset. It is a matter of course that upon a trustee's sale of a trust asset, the purchaser takes it free from the trustee's lien; the position otherwise would be absurd with trustees' liens subsisting over assets sold for full value years previously. The case of *Re The Exhall Coal Company* is no more than another illustration of the principle that a trustee has a lien in order to give it a priority over a beneficiaries' interests. The correct position is that summarised in *Underhill & Hayton* at paragraph 81.1, and as referred to in the contentions for Equity Trust, which is

that issues of priority as between a trustee and a third party to whom it grants security over trust assets will depend on the terms of the transaction under which they negotiated the form of security issued by the trustee to the third party. That says nothing about the appropriate principle of priority of equitable liens arising by operation of law as between trustees of a trust.

84 The Berkeley Applegate exceptional discretion is not material in the present case, nor of assistance to Equity Trust. The passing reference to a first in time ranking of priorities in *Richardson v Aileen* was made by reference to *Moffett v Dillon* [1999] 2 VR 480, [1999] VSCA 32, which was not a case about trustees but about priorities as between successive charges and mortgagees of real estate. It is not a case about equitable liens.

85 The Executor then responds to the various errors alleged by Equitable Trust. In relation to the "relationship" error, this is based upon an erroneous reading of what was said by the Commissioner. The fact that a trustee's indemnification has priority over the equitable interest of beneficiaries is the reason why trustees' liens came into existence and the Commissioner did not end his analysis there. He did understand that the lien continues to exist as a proprietary security interest and reference is made to paragraph 143(ii).

86 In relation to the alleged "fairness" error, the Commissioner's reasoning at paragraphs 128 to 129 and 136 of the Priority Judgment is sound. It is obviously the case that an incoming trustee will know that an outgoing trustee will have continuing indemnification rights in respect of liabilities incurred by it. The suggestion by Equity Trust that the risk to the new trustee can be mitigated by way of contract with the former trustee is no answer. Equity Trust clearly regarded the risk it faced from the Angelmist proceedings as modest because in 2015 it was willing to compromise its indemnity claim to the assets of the Z II Trust if a pool of just £2 million was ring-fenced for its indemnity. In contrast, it is now seeking indemnification in the sum of over £18 million.

87 It is not accepted that the vulnerability of a former trustee is greater than that of his successor trustee who has control of the trust fund, but even if true, it is not a basis for departing from a *pari passu* regime. Under the *pari passu* regime it will never be in any trustee's interest to administer the trust in a manner which is liable to render it insolvent. The interests of former and incumbent trustees are aligned and it is in the interest of a former trustee to monitor its run-off liabilities as it ought to do and to inform the incumbent trustee expeditiously if and when a liability is likely to arise. The first in time approach, which would allow a former trustee to "scoop the pot", deforms the mutual interests of former and incumbent trustees in a trust's continued solvency.

88 The suggestion that an incumbent trustee has the additional protection of Article 32(1)(a) does not assist Equity Trust since it does not evince a greater vulnerability on the part of a former trustee. The former trustee will also have no personal liability to those Article 32(1)(a) creditors with whom it dealt as trustee and to whom it remains liable.

89 The Commissioner did not fail to acknowledge or give sufficient weight to the Berkeley Applegate principle as an exception to its first in time argument. The point of that exception is that it is an exceptional discretion which a court may exercise to re-order priorities in favour of an incumbent officeholder where exceptional circumstances justify that. This exceptional discretion is of no assistance in demonstrating what should be the usual ordering of priorities to which the discretion is an exception.

90 As to the suggestion that if a former trustee's indemnity rights rank equally with a successor trustee's ones, the former trustee will have to seek materially greater security pursuant to Article 34(2) before parting with the trust assets, that is unrealistic. If a former trustee is aware of any material liability risk, it will be equally incentivised to seek additional security as it would be were the *pari passu* regime to apply. If it is unable to point to any such material risks, then it is equally unlikely to be entitled to any additional form of security upon its retirement. There is no unfairness in the application of the *pari passu* regime and Equity Trust does not claim to be entitled to the exercise of an exceptional Berkeley Applegate exception to the general ordering of priorities.

91 The difficulties put forward by Equity Trust remain speculative and unproven and the actual difficulties for Equity Trust arise from its own alleged “extraordinary conduct” and that of its officers appointed to Angelmist's board. This may have involved breaches of Equity Trust's duty as trustee and it failed to seek Beddoe relief before defending the Angelmist proceedings or directions before agreeing to compromise in the sum of some £16 million to settle a claim for which it had previously sought an indemnity sum of only £2 million. The assertion that the liability of Equity Trust was crystallised as a consequence of the act of its successor trustee is not understood; rather it was the actions of Equity Trust itself including its unilateral decision to defend a claim at great expense which it then compromised without any court directions. If Equity Trust is intending to say that it was Volaw's actions in administering the Z II Trust which caused its insolvency, it does not make out that it would not have acted in the same manner whatever was the state of the trust fund.

92 Equity Trust misunderstands the effects of Article 32(1)(a). In Jersey, a trustee's lien does not protect the trustee against liabilities incurred to third parties who knew that they were dealing with a trustee because, as the Privy Council in Investec has confirmed, such trustee in its personal capacity has no liability under Article 32(1)(a) to such creditors. The Executor contends that in an Article 32(1)(a) situation, the trustee's rights of indemnification and its lien are to protect the creditor of the trustee who transacts knowing he is dealing with a trustee and not to protect the trustee. That is because such a creditor has no direct right of recourse to the trust fund; it is only through the exercise of the trustee's indemnity rights, including its lien rights, that such a creditor can obtain repayment and do so having priority over the trust's beneficiaries. It is no answer to say that a creditor can protect himself by taking security. Such a creditor may be a person with no opportunity to seek negotiated security for the liability incurred by the trustee to him: *Investec*, the judgment of the Privy Council at paragraph 61(i). It is not correct to suggest that the Commissioner said that a trustee such as Equitable Trust is an Article 32(1)(b) creditor.

93 In relation to the allegedly erroneous analogy with priority between trust creditors, the Commissioner did not conflate the position of Article 32(1)(a) creditors claiming by subrogation through one trustee's lien, with the situation where different trustees hold liens and each has creditors claiming through those separate liens. The Executor suggests that there is no sense or justice in a priority regime. It would mean that one set of creditors would "scoop the pot" on insolvency based on the mere fortuity of whichever trustee happens to have the oldest undischarged liability for which they can claim indemnification. It is also not the case that trustees and creditors relying upon rights of indemnification will be equal because these will be affected by the state of account between the trustee and the beneficiaries of the trust. Article 32(1)(a) creditors will not all receive an equal dividend if the general rule of priorities as between liens is one of *pari passu*.

94 In relation to the allegedly strained interpretation by the Commissioner of what was said in *Lemery Holdings v Reliance Financial Services*, it is suggested that it is not clear what point Equity Trust is seeking to make. The case was not a case about the ranking of trustees' liens; it was rather about whether an outgoing trustee could "retain assets pending exercise of its right of indemnity, not as against the beneficiary, but as against a new trustee." The court found that the outgoing trustee had no right to retain assets under Australian law but was "entitled to ensure that the new trustee does not take steps which will destroy, diminish or jeopardise the old trustee's right of security, which subsists in the trust assets after their transfer to the new trustee." That principle was recognised by the Commissioner. The passage on which Equity Trust relies was made merely in passing and it does not address itself to the question of priorities as between trustees' liens as is clear from the cases to which it refers.

95 Having regard to the suggested Article 34(2) error, the Executor contends that the Commissioner had already determined that trustees' liens should rank equally as against one another before he referred to this issue in paragraph 144. It ought to be uncontroversial that a trustee has the right under Article 34(2) to require reasonable security for its liabilities before surrendering the trust property. A competent trustee should have a good idea of its potential liabilities as trustee and in the event of a dispute may seek from the Royal Court additional security from the incoming trustee or from third party beneficiaries or otherwise which go beyond the indemnification rights which it retains as a former trustee. It is not understood what is meant when Equity Trust suggests that the Commissioner has created *"new emphasis"* on Article 34(2).

96 In relation to the alternative case, the Executor contends that the equitable lien which the trustee is granted by operation of law on incurring an indemnifiable liability is simply one part of the suite of indemnification rights it acquires on incurring such a liability. The submission made that what is said in para 59(v) of the judgment of the Privy Council in *Investec* is " ***irreconcilable with the Executor's alternative case"*** is misleading. In that paragraph, the Privy Council was not addressing the issue of whether trustees are to be understood as acquiring a lien in respect of each identifiable liability to which they are subject or as acquiring one on the first occasion that they incur such a liability which then subsists until all such liabilities are discharged. It is an agreed principle between the parties

that a lien does not exist in isolation but provides for a trustee's right to be indemnified. If at any point a trustee in time has no rights to be indemnified, then it has no lien. If it incurs indemnifiable liabilities which are then exonerated, it again has no lien unless and until it incurs further new liabilities. This means that in any situation with multiple trustees historically involved in the administration of a trust and with undischarged liabilities, it is necessary to identify which of them happened to have the oldest extant liability since it would be that trustee (and any Article 32(1)(a) creditor claiming subrogation to its lien) which would then have priority over all other trustees and Article 32(1)(a) creditors claiming through them. The Executor submits that there is no merit in making the operation of priorities depend upon such a random fortuity.

The submissions for the parties

97 Advocate Jordan supported the Contentions for Equity Trust which had been submitted on its behalf. She began by referring to the factual situation and confirmed that there was no claim on the trust assets by Volaw as its fees had been settled. She referred to the background which had led to the hearing before the Commissioner on the point of law in question and referred to his earlier judgment dated 20 th October, 2015, which I have already mentioned. She stated that it was still unclear whether the claims of any of the connected creditors, that is to say the Estate C and E himself, were being called in. She suggested that if the claims of those connected creditors were not pursued then it was conceivable that the Z II Trust could be restored to solvency. She said that R&H had raised proceedings against Volaw in respect of the loans to E and the Z III Trust which totalled £163.79 million. She explained that what was due by the Z III Trust to the Z II Trust might be reduced but the figures had not been fully investigated. Finally as a matter of background, Advocate Jordan referred to the nature of the Angelmist proceedings and submitted that it did not constitute a claim that Equity Trust had acted in breach of trust. Equity Trust had put Volaw on notice of the claim. In the case of the change of trustee to R&H, its appointment had been subject to the same form of indemnity as previously given upon the change of trustee from Equity Trust to Volaw.

98 Advocate Jordan then addressed the terms of the Priority Judgment. She commenced by confirming that the agreed assumptions referred to above were agreed before the Commissioner in light of an exchange of emails between the parties. The Court can proceed upon those assumptions although Advocate Jordan challenged certain additional assumptions said to have been made by the Commissioner.

99 The situation for Equity Trust was that it was upon retirement as trustee subject to potential liabilities for a period of ten years as a consequence of the statutory limitation and prescription provisions which applied (although these proceedings had been commenced just before six years after Equity Trust had retired possibly in the apparent belief that the limitation period was six years in accordance with English law).

100 Turning to its grounds of appeal, Advocate Jordan stated that the claim by Equity Trust

was to enforce a former trustee's right of indemnity. That is a proprietary right which it is entitled to enforce and that proprietary right attaches to the assets of the trust. It does not concern any insolvency regime provided by statute. It acts like a floating charge. Equity Trust relies upon an equitable lien to which established equitable principles should be applied. The approach of priority in time which relates to such an equitable lien is not absolute. The reference by the Executor to Article 32(1)(b) of the Trusts Law is a “red herring” which does not tell anything about what is the proper priority between trustees. A creditor dealing with the trustee could have had the opportunity to take a legal charge which would have taken priority over the equitable charge being relied upon by former trustee.

101 Advocate Jordan submitted that a former trustee is in a position to rely upon its equitable charge at any time by means of judicial process and she referred to *Octavo Investments v Knight* and *Southern Wine Corporation v Frankland River Olive Co.* She referred to *Lewin* at para 21–043 as mentioned in para 124 of the Priority Judgment. She referred to *Lemery Holdings v Reliance Financial Services* at para 46 and to *National Provincial Bank v Ainsworth* at pp 308 and 310G as authority for the proposition that an equitable lien does bind a successor trustee. The basic principle is that the earlier in time is the stronger in law and she referred to *Snell* at para 4–002.

102 Advocate Jordan submitted that the priority accorded to an equitable charge under English law is equally applicable in Jersey. Jersey law had always recognised the right of indemnity and Equity Trust was not seeking to apply other than generally accepted principles. She referred to what had been said by the Privy Council in *Investec* at paragraphs 57 and 59(v) and (vii), and to *Re Amarind* at para 386. She submitted that a new trustee takes the trust assets subject to these underlying rights as demonstrated in *Underhill & Hayton* at para 81.1(2) (as approved in *ATC (Cayman) v Rothschild Trust Cayman*). This was consistent with the principle of first in time and with what had been said in *Lemery Holdings v Reliance Financial Services* at paras 21 and 31. She referred to *Richardson v Aileen* which concerned a deficit in the trust fund and to *Snell* at para 4–001 as confirming the priority. She suggested that the decision in In re *Berkeley Applegate* was an exception to the principle of first in time.

103 Advocate Jordan then turned to what is said to be the “relationship” error by which the Commissioner had decided that the appropriate approach was to treat trustees' liens as ranking *pari passu*. She submitted that under the trustee's right of indemnity, the trustee's personal claim came first and thereafter creditors' claims, all of which had priority over the claims related to a successor trustee. She submitted that the reliance by the Commissioner at paragraph 124 of the Priority Judgment on *Lewin* at paragraph 21–043 was overstated. By reference to what was said in *Lewin* at para 33–013, it was wrong to say that the only purpose of the lien was to secure the trustee's interest over that of the beneficiaries and that was consistent with what was said by the Privy Council in *Investec*.

104 The result of the Commissioner's view was that the equitable security interest of the trustee was extinguished in the case of the insolvency of the trust. What was said by the

Commissioner at paragraph 126 was to ignore the proprietary interest of a trustee and to ignore the fact that any claim which former trustees have is a claim against successor trustees. What was said in paragraph 126 says nothing about priority between trustees. Advocate Jordan accepted that a former trustee could give notice at any time after its retirement as trustee and enforce its equitable security and lien against the trust assets held by its successor trustee.

105 Turning to the “fairness” error, Advocate Jordan submitted that a successor trustee is already in a better position by reference to paragraphs 128 and 129 of the Priority Judgment. She submitted that there was an inconsistency between paragraphs 143, at which point the Commissioner had accepted the *pari passu* approach, and paragraph 148, which suggests exceptions. With reference to paragraph 148(iii), she submitted that it was difficult to see how any discretion could be exercised to affect the general *pari passu* approach.

106 With reference to what the Commissioner had said regarding Article 34(2), Advocate Jordan referred to paragraph 144 and to what had been the situation in In re Caversham Trustees at para 31. She submitted that there would be uncertainty about how a retiring trustee should deal with unknown future liabilities, and these liabilities might ultimately be more than the value of the fund. The approach of the Commissioner would lead to a greater degree of uncertainty which would not help the trust industry; it would act as a fetter to the trust industry.

107 In relation to Article 32(1)(b), the Commissioner had made assumptions which were not justified, Advocate Jordan referred to paragraphs 41 to 43 and 100 of the Priority Judgment and she submitted that all of these paragraphs were wrong because there were no creditors claiming through Equity Trust's or Volaw's equitable liens. Article 32 was generally not helpful because it told one nothing about priority between competing equitable interests. She referred to the judgment of the Privy Council in Investec at paragraphs 60 to 63 which she suggested did not deal with priorities.

108 In relation to the erroneous analogy with trust creditors, Advocate Jordan referred to paragraphs 137 and 138 of the Priority Judgment and she suggested that the Commissioner had conflated two issues. She referred to the examples given in the Contentions for Equity Trust which demonstrated that the approach of the Commissioner would not result in creditors being treated equally under the *pari passu* regime.

109 Advocate Jordan repeated the criticisms of the Priority Judgment at paragraphs 139 and 140 regarding the decision of *Lemery Holdings v Reliance Financial Services*.

110 Turning to the alternative approach of the Commissioner, Advocate Jordan referred to paragraph 146 of the Priority Judgment. She submitted that there was no basis in authority for the creation of successive liens. She submitted that upon the appointment of every

trustee it was an incident of office that there came into existence a right of equitable lien in favour of the trustee whether that was ever exercised or not. The position was not one to be equated with that which exists in the statutory insolvency regime where one is properly dealing with a *pari passu* regime.

111 In reply, and in support of the Written Contentions for the Executor, Advocate Harvey-Hills began by making a number of background comments. The Executor does not accept that the liability claimed by Equity Trust is one in respect of which it is entitled to indemnification. If there was a liability for compensation, Equity Trust had contracted as a trustee to make payment and it was therefore the case that Article 32(1)(a) was applicable in the Angelmist proceedings. The Executor also did not accept that Equity Trust was necessarily the only party claiming through its lien. There appeared to be a loan due to E of approximately £14 million.

112 Advocate Harvey-Hills then presented what he said was his overview of the case. Equity Trust were arguing that it had an equitable security which takes priority. As trustee, Equity Trust claims that it has acquired a right of lien which operates in respect of increases and reductions in the liabilities which had been incurred. The position for the Executor is that there cannot be such a radical departure from orthodoxy. There was no authority and, with regard to the Australian cases, what was relied upon was *obiter* and not in point. Equity Trust had not taken account of the effect of Article 32. In the absence of authority, the Court should fashion an order of priorities which is just and equitable. This Court is a court of *equité* and is entitled to fashion rules which are fair. Advocate Jordan had relied upon rules of priority which had been developed in other circumstances but in the absence of authority a *priori* approach may have to be imported.

113 Advocate Harvey-Hills submitted that under the customary law of Jersey, there were two ways in which security can be created. These were hypothec over immovable property and security over movables by grant or possession. The Privy Council made it clear in *Investec* that the regime which they described was subject to Jersey law. In the absence of authority or legislation, the Royal Court, and thus this Court, can fashion its own regime. That was what was done in creating the law of désastre commencing in 1771 and he referred to what was described in In the matter of the *Désastre of Overseas Insurance Brokers Limited* 1966 JJ 547 at pp 549–551. This was an example of the Royal Court creating and developing over the years a regime which was the subject of statute for the first time only in 1990.

114 In answer to questions from the Court, Advocate Harvey-Hills accepted that whilst the administration of a trust was continuing, a former trustee could make a claim in respect of the liabilities which it had incurred as trustee and which claim had to be settled by the current trustee.

115 Advocate Harvey-Hills submitted that there were cases where a *pari passu* approach had been followed, for example *EC Investment Holdings v Ridout Residence*. Applying the

approach of priority in time did not grapple with the trust relationships nor with the consequences of Article 32. The cases where a priority in time approach had been applied concerned situations where the creditor was vulnerable, for example the unpaid seller of land. The first in time approach was to protect such a vulnerable creditor but was not to protect a trustee. He submitted that trustees should act in a collegial manner and not as if in competition with one another. Adopting the priority in time approach would not be in the interests of good administration of trusts.

116 Advocate Harvey-Hills did not agree that the ability of a former trustee to incur liabilities ended after it left office and the compromise achieved in the Angelmist proceedings is an example of that. He submitted that the proper and fair approach to the ranking of trustees' liens was equality with one another and that *Re Amarind* was not a case about trustees.

117 Advocate Harvey-Hills then referred to paragraph 103 of the Priority Judgment and to the passage *in Lewin* at paragraph 22–047 and the authorities referred to therein, namely *Finnegan v Yuan Fu Capital Markets* and *EC investment Holdings v Ridout Residence* at paras 10–15. In the latter case, it was the *pari passu* approach which found favour and Advocate Harvey-Hills agreed with a suggestion by the Court that this authority was the closest in support of his argument. In respect of paragraph 108 of the Priority Judgment, the Commissioner was not dealing with an issue between trustees but with where there was more than one creditor claiming through one trustee.

118 Advocate Harvey-Hills then addressed what was said by the Privy Council in its judgment in *Investec* between paragraphs 59 and 62 and how this had been referred to in the Priority Judgment at paragraphs 110 to 118. In relation to the case of *Re Amarind*, he referred to paragraphs 81 and 94 to 96 in the judgment of Robson J.

119 With reference to paragraphs 122 to 124 of the Priority Judgment, Advocate Harvey-Hills submitted that the trustee's right of indemnity which is secured by an equitable lien is to give the trustee a benefit over beneficiaries but it does not arise to give the trustee priority over creditors, and that was because trustees were always personally liable to creditors as a matter of law. It did not give a right to a former trustee to have a right over its successor and he referred to Governors of *St Thomas's Hospital v Richardson* at pp 275–276.

120 Advocate Harvey-Hills submitted that a trustee's lien is not capable of differential application. The successor trustee takes free of that lien and he referred to the Priority Judgment at paragraphs 126 to 127 and 72(ii) and (iii). In paragraph 126, the Commissioner had identified equitable relationships by reference to *Snell*. The priority issue is different. It was suggested to Advocate Harvey-Hills that, if a trustee's lien existed to protect a trustee, it was not actually needed unless there was a change of trustee. He replied that *Re The Exhall Coal Company* is an example of where there was an insufficiency of assets.

121 Advocate Harvey-Hills then referred to what had been said by the Commissioner at paragraph 130 and submitted that if the approach of priority in time of a former trustee's lien were to be adopted, creditors of the former trustee might refuse to novate their claims to a successor trustee. He referred to *Richardson v Aileen* at paragraphs 37, 40 and 50 to 51, and to *Moffett v Dillon* which relates to priority in lending on land and thus is not in point. He referred to the approach demonstrated in the case of In *re Berkeley Applegate* which was referred to by the Commissioner at paragraphs 136 to 137. This was said by Equity Trust to be a conflation but it was not so. Advocate Harvey-Hills said that the application of a *pari passu* regime would not lead to equality amongst all creditors because the claim of individual creditors will depend upon the state of account of the trustee with whom they have transacted.

122 Advocate Harvey-Hills referred to *Lemery Holdings v Reliance Financial Services* at paragraphs 5, 8 and 12 to 21 and he submitted that paragraph 21 simply meant that the lien continues to exist. He referred to the headnote in *Octavo Investments v Knight*, and to *Commissioner of Stamp Duties v Buckle* (1998) 151 ALR 1, and he submitted that these cases do not demonstrate a priority in time approach. He referred to In *re Pumphrey* and again to *Governors of St Thomas's Hospital v Richardson*. He submitted that the judgment of the Privy Council in *Investec* at paragraph 59(v) was not addressing the issue of trustees acquiring a lien. In *Re Amarind* at paragraphs 377 and 386 the judge had rejected the argument, and the concept of a lien which increases and decreases is contrary to the decision in *Governors of St Thomas's Hospital v Richardson*.

123 In her final reply, Advocate Jordan referred to *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326 and to the decision of the Royal Court in *In the matter of the Esteem Settlement* [2002] JLR 53, the judgment of Birt DB at paragraphs 81 to 88. She submitted that the concept of an equitable lien in English law is not in conflict with Jersey law. She referred to *Snell* at paragraphs 4–002 and 4–003, and 44–004 to 44–006, which describe the operation of a lien and which goes further than issues related to land. She submitted that it cannot be correct that where a trustee has a right of indemnity, the result is a number of liens appearing and disappearing as liabilities arise and are discharged. In a case involving the insolvency of a trustee, the creditors of that trustee claim through the one lien.

124 Advocate Jordan referred to *Finnegan v Yuan Fu Capital Markets* at paragraph 60. She did not accept that the priority in time approach was unfair and unprincipled. The submissions for the Executor had failed to take account of how the *pari passu* approach would work and it would always result in unfairness and inequality. She accepted that a potential inequality of outcome for creditors in Jersey is a consequence of the enactment of Article 32.

Conclusion on the issues determined in the Priority Judgment

125 The Commissioner addressed two issues in the Priority Judgment: the first was the claim

to priority of a trustee under its right of lien over the claims of its creditors to the trust assets; the second was the claim to priority of the right of lien of a former trustee over the right of lien of a successor trustee. As will be apparent, the focus of the Notice of Appeal and of the contentions and submissions before this Court was on the second of those issues, perhaps because in the circumstances of this case there are no creditors (at least at present) claiming under the right of lien of Equity Trust. As a result, the first issue is in practical terms academic in the circumstances of this case. I shall therefore deal first and primarily with the second issue which is the priority of a former trustee's right of lien over its successor trustee's right of lien.

126 Before I consider my reasons on that issue, I make the following preliminary observations. The first is that the Court is deciding, as was the Royal Court, the issues of law which have been put before us upon the basis of agreed assumptions. Both Advocate Jordan and Advocate Harvey-Hills referred to a number of factual matters which may or may not be accepted by each party. One was that the Executor does not accept that Equity Trust has a right to be indemnified to the extent that it claims. In particular, Advocate Harvey-Hills stated that the Executor does not accept that Equity Trust has any right of indemnification in respect of its settlement of the Angelmist proceedings. Equity Trust is said to have accepted at one stage a limitation of the liability in respect of the Angelmist proceedings of £2 million whereas its claim now exceeds £18 million. Another is that the financial state of the Z II Trust may be uncertain with the suggestion by Advocate Jordan that it might not actually be insolvent depending upon the extent of particular claims.

127 These and other potential factual issues have no bearing upon the matters of legal principle which are before the Court and I say nothing more about them. To the extent that they might affect the ultimate resolution of the claim by Equity Trust, and the position of the Executor and the other parties to these proceedings, that will be a matter for the Royal Court as this case proceeds.

128 With these preliminary observations, I turn to consider the issues of legal principle which are the subject of this appeal. On the issue of the priority of a former trustee's lien over a successor trustee's lien, it is accepted by the parties that there is no authority directly in point whether in Jersey, in Guernsey or England, or elsewhere. In this situation, Advocate Harvey-Hills argued that it was open to this Court, as it was open to the Royal Court, to identify and apply an approach to priority which is fair, principled and just in the context of the administration of trusts. He gave as an example the way that the Royal Court had created and developed the law and procedure on désastre as described in the case of *In the matter of the Désastre of Overseas Insurance Brokers Limited*, a procedure which became the subject of legislation only much later.

129 In the circumstances which are before this Court, I have not found it to be necessary to adopt such an approach and I make no comment upon whether it would be open to the Court in other circumstances where the law of Jersey was uncertain. The reason for this is that I am satisfied that the order of priority of trustees' liens can be identified from what are established legal principles.

130 The starting point is to ascertain what are the relevant features of the law of trusts in Jersey. These are set out comprehensively in the majority judgment of the Board of the Privy Council which was given by Lord Hodge in *Investec*, a decision which was concerned in part with the effect of the introduction into Jersey law of what is now Article 32 of the Trusts Law. At paragraph 57, Lord Hodge explained that the "law of trusts in Jersey is a comparatively recent import from England", and that ***"the international appeal of Jersey trusts is to a significant extent dependent on the certainty which it derives from the English case law."*** His Lordship then said that ***"English trust law must be modified where it conflicts with established principles of Jersey customary law, and it has also been modified by Jersey statutes."*** From these passages, it is apparent that in seeking to identify and to apply the trust law of Jersey, one should look to what is the trust law of England and to the English case law on trusts save where these may need to give way to customary law and Jersey legislation. The Trusts Law is the obvious example of the latter as acknowledged in paragraph 58 of the judgment albeit that it " ***is not a complete code of the law of trusts"*** in Jersey. The result is that ***"English trust law therefore serves as the background against which the provisions of the [Trusts Law] fall to be construed"*** and this means that English case law is available to provide an understanding of the trust law of Jersey where the Trusts Law is silent.

131 The Privy Council confirmed this by what was said in paragraph 59 of the majority judgment which stated insofar as material the following:

> ***"59 For this reason, it is necessary to start by setting out some well-established principles of English trust law which are relevant to the present issue:***
>
> > ***(i) A trust is not a legal person.*** Its assets are vested in trustees, who are the only entities capable of assuming legal rights and liabilities in relation to the trust. In particular, they are not agents for the beneficiaries, since their duty is to act independently .
> >
> > ***(ii) English law does not look further than the legal person (natural or corporate) having the relevant rights and liabilities…***
> >
> > ***(iii) The legal personality of a trustee is unitary.*** Although a trustee has duties specific to his status as such, when it comes to the consequences English law does not distinguish between his personal and his fiduciary capacity. It follows that the trustee assumes those liabilities personally and without limit, thus engaging not only the trust assets but his personal estate…
> >
> > ***(iv) …***
> >
> > ***(v) A trustee is entitled to procure debts properly incurred as trustee to be paid out of the trust estate or, if he pays it in the first instance from his own pocket, to be indemnified out of the***

trust estate: In *re Blundell* (1888) 40 Ch D 370, 376. ***To secure his right of indemnity, the trustee has an equitable lien on the trust assets: Lewin on Trusts, 19th ed (2015), para 21–043.*** Because an equitable lien does not depend on possession, it normally survives after he has ceased to be a trustee: *In re Johnson*; *Shearman v Robinson* (1880) 15 Ch D 548, 552.

(vi) A creditor has no direct access to the trust assets to enforce his debt. His action is against the trustee, who is the only person whose liability is engaged and the only one capable of being sued. A judgment against the trustee, even for a liability incurred for the benefit of the trust, cannot be enforced directly against trust assets, which the trustee does not beneficially own. The creditor's recourse against the trust assets is only by way of subrogation to the trustee's right of indemnity: In re Johnson…

(vii) Because the creditor's recourse to the assets is derived from the trustee's right of indemnity, it is vulnerable. It is exercisable only to the extent that that right exists. It may be defeated if there are insufficient trust assets to satisfy his debt, or if the trustee's right of indemnity is defeated, for example because the debt was unreasonably or improperly incurred and the indemnity does not extend to such debts, or because the trust deed excludes it on account of the trustee's wilful default or gross negligence. More generally a breach of trust by the trustee, even in relation to a matter unconnected with the incurring of the relevant liability, will, to the extent that it creates a liability to account on the part of the trustee, stand in the way of the enforcement of the indemnity. As has frequently been observed, this can be hard on the creditor, who will usually have no knowledge of the state of account between the trustee and the beneficiaries. But the creditor can in principle protect his position, for example by taking a fixed charge over the trust assets, or, as in the present case, by stipulating for a personal guarantee from the principal beneficiary .

It appears to the Board that all of these principles must be regarded as having been part of the law of Jersey before the enactment of the [Trusts Law] or its statutory predecessors."

132 What was said by the Privy Council in paragraph 59, and in particular by reference to the concluding sentence just quoted, can be taken to be a definitive statement of the law of Jersey which must be consistent with the customary law and which is subject only to modification by statute. In other words, what is described in that paragraph is a statement of the law of trusts in Jersey which exists in accordance with the customary law subject only to the effects of the Trusts Law.

133 In the context of what is before this Court, the following may be drawn from that definitive statement of the law of trusts in Jersey, and in particular from sub-paragraph (v) of paragraph 59. A trustee is entitled to procure payment out of the trust estate or to be indemnified out of the trust estate in respect of debts properly incurred as trustee. This means that a trustee has a claim on the trust assets for the debts which it has incurred as trustee. In order to satisfy such a claim, the trustee has a right of indemnity which is secured by an equitable lien on the trust assets. That equitable lien does not depend on possession, and it normally survives after it has ceased to be a trustee. These are all statements of what is the relevant law of Jersey as enunciated by the Privy Council and must be taken to be consistent with, and not altered in any way by, the customary law.

134 That a trustee has a right of indemnity which is secured by a lien is therefore part of the trust law of Jersey. Whilst it may be observed that a right of security over movables is a concept less recognised in the customary law than it is recognised in the common law of England, that is not material because the Privy Council has declared that it is a part of the law of Jersey that a trustee does have such a right of indemnity and consequential right of lien. The concept of a trustee's lien is part of the law of Jersey.

135 Taken overall from what has just been stated, the result is that the law which is applicable to the priority of such a trustee's right of lien in Jersey can be identified by a consideration of the trust law of England subject only to the effect, if any, of the Trusts Law. This means that in order to identify what is the appropriate priority of the rights of indemnification and of lien which are possessed by trustees in Jersey, it is appropriate to begin by considering what is the English law which is relevant to that issue. In the event that the English law demonstrates an answer then that may be taken to be the law in Jersey. I therefore begin by considering the English case law and related textbooks which have been put before the Court, as well as the authorities from common law jurisdictions which draw upon the English law, in order to ascertain whether these provide an answer.

136 In passing, it may be noted that this was the position expressed earlier by the Royal Court, and before the decision of the Privy Council in *Investec*, in the case of *In the matter of the Esteem Settlement*, the judgment of Birt DB at para 84, where it was said that “A Jersey trust is essentially the same animal as is found in English law, subject to certain local modifications.”

137 In reaching these conclusions, I have been assisted by having seen in draft the judgment to be delivered by the learned Bailiff. I agree with his statement that the Norman and civil law origins of the law of Jersey mean that a binding system of precedent does not exist as it does in the law of England (and that is the same in other equivalent jurisdictions). I am also grateful to him for his description of the trust law of Jersey as it existed and was developed before the decision in Investec. Notwithstanding these valuable observations, I am satisfied that this Court should follow and apply the description of the trust law of Jersey given by Lord Hodge in *Investec* because it is a comprehensive description of the law in its modern form which has been provided by the highest court which exercises jurisdiction in Jersey and because, as a result, it is available as a clear and authoritative description of the law of

trusts which may be applied by all of those concerned with the administration of trusts on this Island.

138 Turning then to what may be derived from the law of England, it is helpful to start with what I regard as the most relevant passage in *Lewin*:

> *"21–043 A trustee, and each of the trustees separately where the trustees are more than one in number, has a first charge or lien upon the trust fund, conferring an equitable interest in the trust fund, in respect of the liabilities, costs and expenses covered by his right of indemnity.* The trustee's charge takes priority over the claims of the beneficiaries, and of purchasers or mortgagees claiming under them. The trustee's right of indemnity as secured by the charge or lien comprises rights of reimbursement, exoneration, retention, and realisation, as follows:
>
> *(1) A trustee who incurs a liability may discharge the liability out of his own resources and then reimburse himself from the trust property*.
>
> *(2) Alternatively a trustee may, and usually will, discharge or pay the liability directly from the trust property so as to exonerate himself from the liability.* A trustee, if solvent, may assign or charge his right of exoneration to a creditor to the extent necessary to discharge the liability of the creditor in respect of which the right to indemnity arose. While a right of reimbursement is a proprietary charge or interest freely disposable by a trustee for his own benefit or for the benefit of his own general creditors, a right of exoneration, however, benefits a trustee only to the extent that it allows him to resort to the trust fund for the purpose of payment of an expense of the trustee within the scope of his right of indemnity which otherwise would be borne by the trustee personally and so does not confer any proprietary charge or interest allowing the trustee to resort to the trust property for the purpose of satisfying claims of his own general creditors.
>
> *(3) A trustee may retain trust assets or income until he has been indemnified, both as regards present liabilities, to the extent needed for the purpose, and, in general, as regards contingent or future liabilities for which he may become accountable, to the extent required to meet the worst case on the basis of reasonable but not fanciful assumptions.* A beneficiary cannot compel a transfer of the trust fund to a new trustee, or to a beneficiary who has become absolutely entitled to some or all of the trust property or his assign, until the trustee's just demands have been met. A trustee must make proper enquiries as to what the *contingent or future liabilities consist of and the extent of his potential liability at the time that he asserts a right of retention*.
>
> *(4) A trustee need not wait until the trust property has been turned into money before recovering his proper expenses.* He may realise trust assets for the purpose of meeting his costs, or if need be apply to the court for an order for sale. Ordinarily, in a case where trust money is not readily available to

reimburse a trustee's expenses, the trustee may require assets to be sold at once to reimburse a trustee's expenses, even assets which are held for occupation or use by beneficiaries. However, the court has refused to enforce a lien where the result would be the destruction of the trust itself. In such cases the court goes so far as it can by delivering the deeds into the trustee's custody and prohibiting any disposition of the property without the previous discharge of the trustee's lien…" (emphasis in the original).

139 I have quoted that paragraph at some length because the propositions which it contains are amply vouched by the authorities identified in footnotes, some of which have been referred to before us, and because it was relied upon by the Privy Council in paragraph 59(v) of the judgment in *Investec* as demonstrating that "To secure his right of indemnity, the trustee has an equitable lien on the trust assets". To that extent at least it can be said to describe the trust law of Jersey and in my judgment it can be relied upon to describe a number of other propositions which are relevant to my conclusion.

140 The first proposition which is stated in the opening part of paragraph 21–043 is that the trustee's equitable lien is possessed *"separately"* and thus individually by each trustee and is *"a first charge or lien upon the trust fund"* which *"takes priority over the claims of beneficiaries"* and those claiming through them. To that extent, an individual trustee's right of lien is characterised as having a degree of priority being a first charge over the trust assets which ranks ahead of claims of beneficiaries. The authorities referred to in *Lewin* to vouch these propositions include the English authorities of *Re The Exhall Coal Company, In re Pumphrey, Governors of St Thomas's Hospital v Richardson* and *Jennings v Mather*, as well as the decision of the High Court of Australia in *Octavo Investments v Knight*. As such, I regard the propositions expressed in the opening part of para 21–043 of *Lewin* as ones which can be regarded as definitive. They may therefore be taken as propositions which apply to the trust law of Jersey, not least because of the particular adoption of the paragraph by the Privy Council in *Investec*.

141 The next two propositions (described in sub-paragraphs (1) and (2) of paragraph 21–043) are that a trustee may discharge a liability and then reimburse itself or may discharge the liability directly from the trust assets. These are vouched respectively by authorities including *Re The Exhall Coal Company*and *In re Blundell*. The next proposition (also described in sub-paragraph (2)) is that the right of a trustee to reimbursement, which is the practical situation before us, "is a proprietary charge or interest freely disposable by a trustee for his own benefit". That proposition and the distinction in a case of exoneration is vouched by reference to paragraphs 22–039 and 22–041 in *Lewin*, and the former of those paragraphs cites authorities again including *Jennings v Mather*, *Governors of St Thomas's Hospital v Richardson* and *Octavo Investments v Knight*.

142 The next propositions (described in sub-paragraph (3)) are that a trustee may retain trust assets until he has been indemnified and cannot be compelled to deliver up the trust fund until his reasonable assessment of future or contingent liabilities has been met. These propositions are vouched by authorities including *Re The Exhall Coal Company and*

Governors of St Thomas's Hospital v Richardson.

143 The final propositions (described in sub-paragraph (4)) are that a trustee may require trust assets to be realised in order to meet his liabilities and that a court will go as far as possible to achieve that even where the interests of beneficiaries are affected (although that is subject to a limitation where the realisation would destroy the trust itself). These propositions are vouched by authorities including In *re Pumphrey* and it is noted that the proposition that assets may be sold where the interests of beneficiaries are affected has been approved of in the Grand Court of the Cayman Islands by Smellie CJ in *ATC (Cayman) v Rothschild Trust Cayman*.

144 Each of these individual authorities was placed before the Court by counsel and I have considered them. I am satisfied that each of the propositions stated in paragraph 21–043 and which are material to the issues before the Court are vouched by the authorities to which the Court has been referred.

145 In my opinion, these propositions demonstrate that in the trust law of Jersey, as in the trust law of England, a trustee possesses by virtue of its office an equitable right of indemnification which arises by operation of law upon its appointment as a trustee. The right of indemnification is an equitable interest in, and is secured over, the trust assets and it can be vindicated by the exercise by the trustee of its right of lien which secures that right of indemnification. In particular, the right of a trustee to be reimbursed and indemnified out of the trust assets is demonstrated by *Re The Exhall Coal Company* where Lord Romilly MR said at pp 971–972 that:

> ***"… in my opinion, it is a right incidental to the character of trustee and inseparable from it, that he should be saved harmless from obligations which are attached inseparably to his office, and by which anyone taking a charge … from the cestui que trust is bound."***

146 Thus, a trustee obtains its priority over the trust assets by virtue of its office and it has a priority ranking ahead of beneficiaries and those deriving title from beneficiaries. This is the starting point and it means that each and every trustee which holds office will possess its own equitable interest and right of lien enforceable as a first charge against the assets of the trust.

147 At this point, the nature of a trustee's lien in the law of Jersey, which is derived from the law of England, may be said to have the following characteristics. A trustee obtains by virtue of its appointment as trustee an equitable interest in the trust fund in respect of the liabilities which it incurs as trustee. That equitable interest represents a first charge or lien upon the trust fund which takes priority over the claims of beneficiaries. The trustee need not wait until the trust property has been realised but may by itself or by application to the court bring about a sale of assets so as to satisfy its charge. That may be done even where the interests of beneficiaries are affected (although the court may exercise some ultimate

level of control if the existence of the trust itself would be prejudiced).

148 I now turn to other passages in *Lewin* which have a bearing on this issue. In paragraph 21–044, it is stated that "a trustee's charge or lien extends over the whole of the trust fund so a liability in respect of a part of the trust fund may be discharged out of any other part of the trust fund." In paragraph 21–047, it is stated that as between creditors there is no authority in England as to whether creditors' claims will rank *pari passu* or in order of time, but adoption of the former would tend to *"avoid difficult and cumbersome enquiries"*. It is noted that in the case of *EC Investment Holdings v Ridout Residence* in the High Court of Singapore, competing creditors agreed to a ranking *pari passu*. It may be noted that paragraphs 21–044 and 21–047 appear in the section of *Lewin* on the insolvency of a trustee and they do not on the face of it give guidance on the appropriate ranking between the claims of trustees in succession in the case of an insolvent trust (as does paragraph 21–043 although no point was made about that either before this Court or in the judgment of the Privy Council in *Investec*).

149 Before I leave what is described in English law as being the nature of the trustee's right of indemnity and lien, I refer to what is said in the other two textbooks which were placed before us. In *Underhill & Hayton*, the following is stated in Article 81 under the heading of "Right to reimbursement and Indemnity":

> *"81.1*
>
> > *(1) A trustee is entitled to be reimbursed out of the trust funds or may pay out of the trust funds all expenses which he has properly incurred when acting on behalf of the trust…*
> >
> > *(2) The trustee's lien covers present and future liabilities and extends ver both capital and income so as to confer upon him a beneficial interest in the nature of a non-possessory equitable lien with priority over the claims of the beneficiaries.* Whether it has priority over charges or other interests created by the trustee depends upon the terms of the transaction creating the charge or other interest. After retirement or removal of a trustee his lien automatically binds the trust fund in the hands of the successor trustees… When trustees are obliged to distribute trust funds to persons absolutely entitled under the terms of the trust they have the right to retain assets to cover future liabilities and a right to preserve their lien (though they may rely on personal covenants of indemnity); if they do not expressly exercise such rights, it seems they will lose them."

150 The authorities cited by footnote in support of the propositions in sub-paragraph (2) include *Octavo investments v Knight* and *Dimos v Dikeakos Nominees*. In the case of the final sentence of paragraph 81.1(2), reference is made by footnote to paragraph 81.34 and I shall address that separately later. Subject to consideration of that final sentence, it appears to me that all that is said in paragraph 81.1(1) and (2) is consistent with what is demonstrated by a consideration of *Lewin*, in particular paragraph 21–043 and the

authorities relied upon.

151 The position is the same as it is described in *Snell* at paragraph 44–004 where an equitable lien is distinguished from a common law lien because "the equitable lien is a form of equitable charge upon property until certain claims are satisfied". The paragraph then states that the equitable lien " *arises by operation of equity from the relationship between the parties, rather than by any act of theirs"* and that it *"differs further from common law liens in that it is enforceable by a judicial order for sale"*.

152 Paragraph 44–004 then continues:

> *"Equitable liens are similar to mortgages in the sense that they provide security without possession.* However, they differ from mortgages in that they arise by operation of law rather than because the parties have consensually created a security interest…"

153 At paragraph 44–005, types of equitable lien are described and these include "the lien of trustees … on the trust property for their expenses".

154 As with the passages in *Lewin*, I consider once again that what is said in *Snell* as identified above describes the existence of a trustee's right of equitable interest and equitable lien as a matter of English law in a way which is consistent with, and which can be applied as part of, the trust law of Jersey.

155 I now turn from what is the nature of the trustee's rights of indemnity and lien to the critical question of what is the priority of such rights where trustees hold office in succession. I begin by noting that the right of charge or lien of a trustee undoubtedly does have a degree of priority in one respect. It has priority over the claims of beneficiaries and that is stated in *Lewin* at paragraph 21–043 and is vouched by authorities referred to there. That priority may become meaningless in practical terms when a trust becomes insolvent and beneficiaries have no achievable claim because the claims of a trustee or trustees exceed the assets of the trust. I also note from paragraph 21–043 that the right of lien of a trustee is possessed by each trustee "separately".

156 Next, I refer to what is said in *Lewin* under the heading of "Priority and Equities Affecting Assignees of Interests":

> *"33–013 The general rule is that an assignee of a beneficial interest under a trust takes it subject to all the equities that affect it.* These include all equitable interests affecting it, and the basic rule applies even if the assignee is a purchaser for value without notice … The reason for the rule is that an assignment of an equitable interest has no tortious operation, but passes only what the assignee is justly entitled to, and it follows that equitable interests take priority according to the order in which they are created: first in time, first in right.

A beneficial interest under a trust is, of course, an equitable interest for this purpose…"

157 One of the authorities referred to as relevant in respect of that passage *is National Provincial Bank v Ainsworth*. *Lewin* then deals with exceptions at para 33–014, including a purchaser in good faith without notice of an earlier assignment, but these are not material.

158 What is said in paragraph 33–013 of *Lewin* suggests that a ranking of priority in time does apply to *"all equitable interests affecting"* a trust, and that these will *"take priority according to the order in which they are created"*. As described earlier in paragraph 21–043, the charge of a trustee is one *"conferring an equitable interest in the trust fund"*. Whilst the form of equitable interest being referred to in paragraph 33–013 is that of an assignee of a beneficial interest, nevertheless it is possible to say that what is stated there does provide support for the appropriateness of a similar ranking of first in time in the case of another form of equitable interest affecting a trust, namely the equitable interest arising from a trustee's right of indemnity.

159 Chapter 4 of *Snell* is entitled "Priorities". At paragraph 4–001, the following is stated:

> *"Many different questions of priorities may arise.* These there may be, for example, rival conveyances of property, or competing assignments of beneficial interests in trust funds, or multiple mortgages of property whose value is enough to satisfy one charge but not both.
>
> *The rules of priority applied to resolve such conflicts depend on a combination of the general law and statutory provisions.* First, there is the basic rule that competing interests rank according to the order of their creation. This basic rule may sometimes be modified by refinements relating to:
>
> > *(i) registration, and*
> >
> > *(ii) overreaching*.
>
> *It will be noted that even these modifications preserve in large measure the basis rule of first in time priority.* In relation to equitable interests of some kinds of property, the basic rule may be modified by:
>
> > *(i) purchase for value without notice of legal interest in the property;*
> >
> > *(ii) the conduct of the parties; and*
> >
> > *(iii) the rule in Dearle v Hall* [(1828) 3 Russ 1] *under which the priority of certain dealings in property is determined by the order in which notice of the dealings has been received."*

160 That passage includes reference to "competing assignments of beneficial interests in trust

funds" and to that extent it is consistent with what is said in paragraph 33–013 of *Lewin*. *Snell* emphasises that there is a *"basic rule"* of priority in time notwithstanding the existence of stated exceptions. A theme of these exceptions is that the basic rule may be modified where the holder of a right created later in time has not received actual or deemed notice of the prior right or where there has been some form of alienation of property held under an equitable interest, but those types of exception cannot apply in a situation where a successor trustee takes on the office of trustee in the knowledge of the existence of a former trustee, and therefore with knowledge of the pre-existing and continuing equitable interest in the trust property of that former trustee.

161 What is said to be "The Basic Rule: Order of Creation" is set out at paragraph 4–002 of *Snell* as follows:

> *"At law, as in equity, the basic rule is that estates and interests primarily rank in the order in which they are created.* The precise explanation of this result differs between the two systems. At law, the result is generally expressed in terms of the disponor's capacity to confer a good title on the disponee of an estate or interest. The maxim is nemo dat quod non habet: no person can confer a better title than he himself has. The disponee therefore takes subject to prior interests affecting the estate or interest … In equity, the result is expressed more directly in terms of temporal priority. The maxim is qui prior est tempore est iure: he who is who is earlier in time is stronger in law. Accordingly, where there are two competing equitable interests, the general rule of equity is that the person whose equity attached to the property first is entitled to priority over the other …".

162 There is nothing in that passage, in my opinion, which would suggest that the equitable interest of an earlier trustee does not rank in time in accordance with the basic rule in both law and equity, in priority to the equitable interest of a later trustee.

163 In dealing with the issue of whether the right of lien of a former trustee ranks in priority of time over the right of lien of a successor trustee, the Commissioner at paragraph 122 of the Priority Judgment acknowledged that such ranking would apply both to the liabilities incurred by the former trustee itself as well as to the claims of its creditors whether being satisfied by the former trustee or being pursued by way of subrogation. I agree that this must be correct.

164 In explaining his reasons for supporting a *pari passu* regime as between successor trustees, the Commissioner stated at paragraph 124 that there "is clear authority that the purpose of the equitable lien is to give trustees priority over the interests of the beneficiaries" and he referred to that as having been confirmed by the endorsement of paragraph 21–043 in *Lewin* by the Privy Council. I agree that that is stated to be a purpose of a trustee's equitable lien but I also agree with Advocate Jordan that *Lewin* does not state that it is the only purpose. At paragraph 125, the Commissioner then went on to note that once a trust becomes insolvent, the beneficiaries no longer have any interest in the trust assets and there is therefore no equitable lien enforceable against them, and that "the only

persons with an interest in the trust assets are the trustees and those claiming through them". Once again, that is correct but it does not deal with the situation where there is more than one trustee, each of which would wish to continue to rely upon its right of lien.

165 At paragraph 126 of the Priority Judgment, the Commissioner expresses his conclusion on this issue as follows:

> ***"It is helpful to consider the circumstances in which an equitable lien arises in the first place.*** As stated in Snell's Equity in paragraph 44–004, cited above, it arises "by operation of equity from the relationship between the parties". In the context of a trust it arises out of the relationship between the trustee and the beneficiaries; it does not arise out of the relationship between the trustees. Its purpose is to secure the rights of the trustee against the beneficiaries; not to secure the rights of the trustees as against each other. As it does not arise out of the relationship between trustees, there is no reason for the general rule that equitable interests rank according to the order of their creation to apply as between trustees."

166 At paragraph 127, the Commissioner then agreed that it was possible to distinguish between the kinds of relationships listed in *Snell* at paragraph 44–005, namely a vendor's lien for purchase money, a purchaser's lien for his deposit, and a solicitor's lien, all of which he had mentioned at paragraph 73(ii) of the Priority Judgment, and all of which the Commissioner said arise out of a "single transaction giving rise to vulnerability to the insolvency of the counterparty".

167 I agree with the Commissioner's observation that there is a "general rule that equitable interests rank according to the order of their creation". That is demonstrated by the "Basic Rule" as explained in *Snell* at paragraphs 4–001 and 4–002. A trustee's right of lien is said in paragraph 44–005 to be one of the types of equitable lien being referred to. There is nothing to suggest that the basic rule of priority in time is subject to an exception where a trust has more than one trustee, and where the trustees have assumed office and incurred liabilities in succession.

168 As long as a trust remains solvent, I understand that it was accepted by both counsel that a former trustee can at any time call upon the successor trustee to satisfy the liabilities of the former trustee which could include its own liabilities and expenses as well as the liabilities which it has incurred to creditors who have contracted with that former trustee. In the event that the successor trustee refused, the former trustee could apply to the court and could enforce its right of lien in that way.

169 I agree that this is the situation in an ongoing trust. The fact that a former trustee is able to enforce its own right of lien *"separately"* (as stated in Lewin at paragraph 21–043) against the trust assets and at a time of its choosing is consistent with that former trustee having its own right of lien separate from the right of lien of any other trustee, whether a co-trustee or a

successor trustee, and with that right of lien being enforceable against the trust assets. Furthermore, the right of lien of a former trustee is a right which continues following its retirement as trustee. These propositions are vouched in paragraph 21–043 of *Lewin* and confirmed in the other passages in *Lewin*, *Underhill & Hayton* and *Snell* which I have referred to, as well as by the authorities relied upon. What this means in practical terms is that a former trustee does have a continuing right of lien against the trust assets which is enforceable separately from, and thus potentially in advance of, the right of lien of any successor trustee which has not yet sought to exercise its own right of lien. To this extent, it appears to me that the right of lien of a former trustee does have a degree of priority over the right of lien of a successor trustee, and that is based upon the fact that the former trustee has incurred liabilities as trustee at a point in time before liabilities have been incurred by the successor trustee. That may be said to be an example of the basic rule of ranking in priority of time.

170 That example of practical priority has no significance so long as a trust remains solvent because in that situation the trust assets will be sufficient to satisfy the liabilities of all trustees in succession, and the exercising of its right of lien by a former trustee at an earlier stage will not cause any disadvantage to a successor trustee, whether to the successor trustee itself or to its creditors. In the situation where a former trustee had already exercised its right of lien against the trust assets, and for reasons unforeseen at the time the trust had subsequently became insolvent and the successor trustee is unable to satisfy its liabilities to creditors or its own claim from the assets of the trust, then that successor trustee and its creditors would suffer a disadvantage which had not been suffered by the former trustee and its creditors because that former trustee's right of lien had already been satisfied in full.

171 It appears to me that the ranking of priority in time of the former trustee's right of lien in a situation where a trust has ultimately become insolvent leads to the same situation. Were the *pari passu* approach to be adopted, then a former trustee which had failed to seek full indemnification by the exercise of its right of lien before that insolvency had occurred, would suffer an obvious disadvantage because, as Advocate Jordan put it, the effect of insolvency would be to extinguish its right of lien. I do not believe this to be so.

172 At paragraph 126 of the Priority Judgment, the learned Commissioner explains his reasoning as being derived from what is said in *Snell* at paragraph 44–004. His conclusion is that because the trustee's right of lien arises out of its relationship with the beneficiaries and not the relationship between one trustee and another trustee, “there is no reason for the general rule that equitable *interests rank according to their order of creation to apply as between trustees.”* Advocate Harvey-Hills supported this approach when he submitted that the reference to a trustee's lien was simply how the English courts had explained a trustee's precedence over beneficiaries and he referred to what had been said in In *re Pumphrey* per Kay J at pp 261–2. I respectfully disagree.

173 From what I have referred to above, in particular *Lewin* at paragraph 21–043, it is clear that the equitable lien of a trustee is a right which the trustee has and may exercise in order to protect itself. It is a right which arises as a consequence of appointment to the office of

trustee. It is a right exercisable against the trust assets. It is a right based upon the trustee's "proprietary charge or interest freely disposable by a trustee for his own benefit" (sub-paragraph (2) of paragraph 21–043) and as such it may be said to be an asset of potential value to a trustee. Whilst *Snell* may say in paragraph 44–004 that it arises *"from the relationship between the parties"*, that does not in my opinion undermine the various characteristics of a trustee's right of lien which are described otherwise, not least in Snell itself.

174 In any event, I see no reason why a former trustee cannot be said to have a relationship with a successor trustee in the context of the ongoing administration of a trust. The former and successor trustees will both know of one another's existence as each will have a continuing relationship with the trust assets being their respective rights of indemnity which are enforceable against the trust assets.

175 I have seen no authority or other source to support the propositions either that a former trustee's right of lien ranks equally with a successor trustee's right of lien at any time whilst the administration of the trust is continuing or where the trust purposes have been fulfilled and it is being brought to a close, or that the ranking of successive trustees' rights of lien is affected in the event that a trust becomes insolvent with the result that the rights of lien rank *pari passu*. In the event that a trust becomes insolvent, the position as expressed by Advocate Jordan would be that any priority of the former trustee's right of lien which exists in accordance with the basic rule of priority would be extinguished upon that insolvency of the trust. Given that the right of lien of a former trustee exists to protect it in respect of the liabilities which it has incurred as trustee, and that right is expressed to be a right against the assets of the trust (and each of these propositions is derived directly from *Lewin*), the practical extinguishment of that right of lien exercisable against the assets of the trust would be surprising, particularly given that the situation where the assets of the trust have become insufficient to meet all of its liabilities is one where the existence of a prior ranking lien is likely to be most critical.

176 I have seen no authority for either of these propositions and in that situation I am satisfied that the right of lien of a former trustee is an equitable right which ranks in priority of time ahead of the right of lien of a successor trustee, and it does so in accordance with the basic rule which applies to the ranking of equitable securities. That ranking in priority exists both so long as a trust remains solvent and if it becomes insolvent.

177 The establishment of the appropriate ranking should be straightforward in any particular case because it will depend solely upon the date when a trustee took up appointment as a trustee. This is because the rights of indemnity and lien are incidents of the holding of the office of trustee. The rights of indemnity and lien exist throughout the period of time that a trustee holds office and they do not, in my opinion, depend upon there being any actual liability to be secured against either at the outset of a trustee's appointment or during its period of office as trustee. There is therefore no question of the right of lien arising and then ceasing as the trustee incurs and discharges liabilities as the administration of the trust

continues as I understood Advocate Harvey-Hills to suggest. This is because it is a right of indemnity and a right of lien which a trustee possesses and these rights continue to exist even if there are no actual liabilities to be secured against at one time or another during the administration of the trust.

178 The nature of the trustee's rights of indemnity and lien as equitable rights, which exist as definitive, individual and continuing rights, is supported consistently by observations made in a number of the authorities cited to us. These include *Re The Exhall Coal Company*, per Lord Romilly MR at p 972, *National Provincial Bank v Ainsworth*, per Lord Upjohn at pp 1238–1239, *Octavo Investment v Knight*, the judgment of the majority in the High Court of Australia at pp 134–135, *Commissioner of Stamp Duties v Buckle*, the judgment of the High Court of Australia in particular at para [47], and *Southern Wine Corporation v Frankland River Olive Co*, per McLure JA in the Supreme Court of Western Australia at para 30.

179 That a former trustee's rights of indemnity and lien take priority over of those of a successor trust is perhaps most clearly expressed in the case of *Lemery Holdings v Reliance Financial Services* in the Supreme Court of New South Wales. Commencing at paragraph 13 of his judgment, Brereton J set out nine principles concerning a trustee's right of indemnity against trust assets. As one of those principles, he said at paragraph 21:

> ***"Eighthly, if the trust property is transferred to a new trustee, the lien survives and the new trustee takes subject to the lien of the old trustee – except perhaps in the exceptional case of a bona fide purchaser for value without notice"*** .

The authorities stated in support of that proposition include *Octavo Investment v Knight*, *Chief Commissioner of Stamp Duties v Buckle* and *Re The Exhall Coal Company*.

180 Brereton J then considered three particular authorities including, commencing at paragraph 25, what had been said in *Jennings v Mather*, in particular by Stirling and Matthews LLJ. At paragraph 29, Brereton J observed that what had been said was in the context of "competing claims by a trustee's execution creditor and trustee-in-bankruptcy, and not by a replacement trustee". At paragraph 30, he referred to *Re Pauling's Settlement Trusts (No 2)* [1963] Ch 576 where Wilberforce J observed *in the context of whether the vesting of the trust find in a new trustee would deprive the old trustee of its security that appointing a new trustee whilst leaving another person who was not a trustee in possession of the trust fund "would be to create a most undesirable situation."*

181 At paragraph 31, Brereton J said:

> ***"With great respect, the suggestion that appointing new trustees and vesting the trust assets in them would deprive the old trustees of security for their indemnity is incorrect.*** The cases already referred to establish that the security survives and can be enforced against the trust assets in the hands of the new trustees at the suit of the old trustee: see the eighth proposition

above (at [21]). Thus, while *Re Pauling's Settlement Trust (No 2)* ***suggests that an outgoing trustee is entitled to insist on retaining the trust fund as against the new trustee as security for its indemnity, it appears to overlook the cases that hold that the security survives and is enforceable against the assets in the hands of the new trustee …"***

182 At paragraph 32, Brereton J referred to *Re Suco Gold* in the Supreme Court of South Australia where King CJ had referred to *Jennings v Mather*, and Brereton J then said that " *The right of possession of the trustee, until his right of indemnity is exercised, is superior to those of a new trustee or the cestui que trust."* At paragraph 33, Brereton J said that Re Suco Gold was the only case which expressly addressed the position of a new trustee although he noted that the observation referred to "must have been obiter as no question of a new trustee arose in Re Suco Gold; none had been appointed."

183 Subsequently, at paragraph 46, Brereton J stated, again under reference to *Jennings v Mather*, that the view that the trustee's lien carries with it a right to retain possession was mistaken. At paragraph 50, he concluded that in principle "a former trustee does not have a right to retain, as against the new trustee, the trust assets as security for an accrued right of indemnity, though the former trustee is entitled to ensure the new trustee does not take steps which will destroy, diminish or jeopardise the old trustee's right of security, which subsists in the trust assets after their transfer to the new trustee." In making that observation, he declined to follow the observations of the Full Court of the Supreme Court of South Australia in *Re Suco Gold*.

184 In my opinion, what was said by Brereton J in *Lemery Holdings v Reliance Financial Services* represents a concluded view which accords with my own. In his submissions before us, Advocate Harvey-Hills argued that what was said by Brereton J in setting out his eighth principle in paragraph 21 meant no more than that the former trustee's right of lien continues to exist. In my opinion, it goes further than that because it means that a successor trustee takes the trust assets subject to a former trustee's right of lien and that must mean that the former trustee's right of lien continues to exist and can be enforced against the trust assets in priority to the right of lien of the successor trustee. I do not repeat all that I have said above as to why I have reached this conclusion.

185 Advocate Harvey-Hills also relied on the cases of *Finnegan v Yuan Fu Capital Markets* and *EC Investment Holdings v Ridout Residence*, I observe that these two cases, along with *Re Suco Gold*, are referred to in the final footnotes to paragraph 21–047 of *Lewin* as being consistent in support of a *pari passu* approach. *In Finnegan v Yuan Fu Capital Markets*, which was a decision in the High Court of New Zealand, Associate Judge RM Bell said in his judgment at paragraph [60] that in situations of insolvency, "pari passu distribution tends to be the default solution – the one ordered when no better arrangements seem appropriate." In *EC Investment Holdings v Ridout Residence*, which as I have said was a decision of the High Court of Singapore, Quentin Lob J in his judgment at paragraphs 34 and 65 drew support from the decision in *Re Suco Gold* which was not followed in *Lemery Holdings v Reliance Financial Services*. Having considered each of

these authorities, I have found nothing to cause me to depart from the conclusion which I have already reached and for the reasons explained.

186 In reaching my conclusion that a former trustee's right of lien ranks in priority over the right of lien of a successor trustee, I have noted the arguments both that the priority of first in time might be departed from, perhaps where a former trustee had acted to mislead a successor trustee, and that the court has the ability to determine that a later trustee may be given priority by the making of a so-called Berkeley Applegate order. As far as I am concerned, each of these points is essentially neutral for present purposes. The fact that an order of priority in time might not apply in particular circumstances is a consequence merely of the existence of such an order of priority in time; it does not demonstrate by itself what is the particular order of priority in time which is to be applied in the first place.

187 In relation to the making of a Berkeley Applegate order, that is derived from the decision in In *re Berkeley Applegate* and the Australian cases which have applied it, namely *Richardson v Aileen* and *In Re Universal Distributing Company*. Once again, it can be said that although the ability of a court to determine a priority of ranking of trustees' rights of lien may establish that such a priority of ranking can exist, that does not indicate that any other particular ranking actually does exist as a matter of the pre-existing general law attaching to competing equitable interests. The possibility of the making of a Berkeley Applegate order in any particular case is therefore an essentially neutral factor although it is not inconsistent with the ranking of priority of time which I have found to apply to trustee's rights of lien as an application of the basic rule of ranking of enforcement of equitable interests.

188 As to how the appropriate priority would be determined in any particular case, I foresee no difficulty. The right of lien in question is a right which comes into existence as a result of the appointment of a party as trustee: see again the words of Lord Romilly MR in *Re The Exhall Coal Company*. In my opinion, the right is a single right of lien which exists to indemnify the trustee in respect of all liabilities incurred as trustee during its period of office as trustee, whether current, future or contingent. That is apparent from *Lewin* at paragraph 21–043, in particular sub-paragraph (3), and from the judgment of the Privy Council in *Investec* at paragraph 59(v). In the case of a contingent liability, that liability may only arise, and its amount become known, some time after the trustee has left office but it is nevertheless a liability incurred by the trustee as a result of its holding the office of trustee for the period of time that it held the office of trustee.

189 In passing, I note that on the face of it this is said to be the situation which relates to the settlement of the Angelmist proceedings by Equity Trust. The commencement of the Angelmist proceedings and the ultimate compromise both occurred some years after Equity Trust had ceased to be the trustee of the Z II Trust, but the claims made against Equity Trust were its alleged failings in its actings as trustee and the compromise was an agreed settlement of those claims. There is therefore no question in my opinion of the claim by Equity Trust in respect of the Angelmist proceedings somehow being a new liability incurred by Equity Trust after it had ceased to be trustee; rather it is a contingent liability

incurred whilst Equity Trust was trustee with the contingency and amount of the liability only crystallising later. In saying all of this, I should emphasise that I am not making any definitive statement about the actual enforceability of the claim by Equity Trust in respect of the Angelmist proceedings because that will be a matter for the Royal Court having heard evidence and being in a position to reach a conclusion on matters of fact.

190 Given the character of a trustee's lien as a single right of lien which is enforceable in respect of all and any of the individual liabilities incurred by the trustee, I regard it as reasonable to characterise it as being "in the nature of a floating charge" as was suggested in the judgment of Robson J in the Supreme Court of Victoria in *Re Amarind* at paras 386–388, and by reference to what was said in the judgment of Brereton J in the Supreme Court of New South Wales in *Re Independent* (2016) FLR 222, at p 230 (albeit that the trustee's right of indemnity did not satisfy the requirements to be an actual floating charge under Australian law). Robson J said that it was *"clearly the case"* that a trustee's lien was in the nature of a floating charge *"as the charge's value expands and contracts with the liabilities incurred by the trustee on behalf of the trust."* I agree with that characterisation and description of a trustee's lien. I also observe that in *Snell* at paragraph 44–004 it is said that *"Equitable liens are similar to mortgages in the sense that they provide security without possession"* (although they differ from mortgages because they arise by operation of law rather than being created by the parties). The analogy of a mortgage is also consistent with a single form of security possessed by a party and exercisable by reference to the assets secured against in respect of all of the individual liabilities incurred by that party which are secured by that single security.

191 In conclusion, I regard it as being an established principle that a trustee possesses a right of indemnity which is enforceable by means of an equitable lien, and the order of priority of such equitable lien is that the liabilities secured by the right of lien of the trustee appointed first in time have priority. This means that it is my judgment as a matter of law that, based upon the agreed assumptions in this case, the claim by Equity Trust to enforce its right of lien over what may be the trust assets of the Z II Trust, in priority to any right which its successor trustees may have, has been established and the appeal on this issue accordingly succeeds as a matter of legal principle.

192 Having reached this conclusion, I deal with two final issues. The first of those issues is that Advocate Harvey-Hills argued that the adoption of a first in time approach would give rise to a "fortuity" whereby a former trustee and the creditors of that trustee would "scoop the pot" to the disadvantage of successor trustees and their creditors. Whilst not necessarily accepting the appropriateness of that language, I make three comments. First, the situation where a successor trustee takes over on the retirement of a former trustee is not one where the successor trustee is somehow powerless to avoid obligations being imposed upon it. It is the successor trustee which decides whether or not to accept appointment as a successor trustee and in doing so it can exercise such due diligence as it wishes on the state of the trust and the potential liabilities to which it might find itself subject in due course. Secondly, the successor trustee decides to accept appointment knowing of the fact that there has been a predecessor trustee and that that predecessor trustee will or may have

creditors who will have a claim on the assets of the trust. Thirdly, the critical effect of the priority of a predecessor trustee's right of lien only arises if a trust fund becomes insolvent because otherwise the claims of all trustees and all creditors will be satisfied in full. The potential for a trust to become insolvent can be judged by the successor trustee at the time that it decides to accept office. These are all matters which a party deciding upon becoming a successor trustee can judge for itself in weighing up the advantages and risks of accepting office. I do not consider that a successor trustee is somehow subject to what is a "fortuity"

193 The second final issue arises, as I have mentioned earlier, from what is said in paragraph 81.1(2) of *Underhill & Hayton* which for convenience I repeat:

> *"(2) The trustee's lien covers present and future liabilities and extends over both capital and income so as to confer upon him a beneficial interest in the nature of a non-possessory equitable lien with priority over the claims of the beneficiaries.* Whether it has priority over charges or other interests created by the trustee depends upon the terms of the transaction creating the charge or other interest. After retirement or removal of a trustee his lien automatically binds the trust fund in the hands of the successor trustees… When trustees are obliged to distribute trust funds to persons absolutely entitled under the terms of the trust they have the right to retain assets to cover future liabilities and a right to preserve their lien (though they may rely on personal covenants of indemnity); if they do not expressly exercise such rights, it seems they will lose them."

194 On the face of it, what is said in the final sentence of sub-paragraph (2) might be said to imply that unless a former trustee retains assets upon handing over the trust assets to a successor trustee, then the former trustee will have no further claim against the assets of the trust. In respect of that sentence, reference is made by footnote to paragraph 81.34. The subject of that paragraph is whether assets distributed to beneficiaries are no longer subject to a lien and it is concerned with that situation. The first proposition which it provides is:

> *"Where a trustee exercises discretionary powers of appointment … and appoints an asset in favour of an object, whether the asset will be released not only from the equitable interest of (default) beneficiaries designated in the trust instrument but also from the equitable interest commensurate with any right of indemnity of a trustee must be a matter of intention to be gathered from the circumstances."*

The first authority identified by footnote in support of that proposition is *Octavo Investments v Knight*.

195 What is being addressed in paragraph 81.34 is the situation where a trustee has exercised a power to appoint an asset. Whether or not that asset is released from the trustee's lien will be "a matter of intention to be gathered from the circumstances." That does not seem to me to have any bearing on the issue of principle as to whether a former

trustee's lien to the extent that it does exist after his retirement has priority over the lien of a successor trustee. This means that the final sentence of paragraph 81.1(2) is not addressing that situation either. The issue of whether a beneficiary who is receiving the benefit of an appointment does so free of the lien of any trustee is one which is distinct from the issue of the priority of successor trustees' liens. I am therefore satisfied that the final sentence of paragraph 81.1(2) of *Underhill & Hayton* has no bearing on the conclusion which I have reached.

196 For all of the reasons explained above, I am satisfied that the appeal by Equity Trust should be allowed because as a matter of legal principle a former trustee's right of lien constitutes an equitable charge against the trust assets which can be enforced by the former trustee against the assets of the trust and which ranks in priority of time over the right of lien of any successor trustee which is appointed later. I have reached that conclusion in accordance with the basic rule of priority of ranking in time which applies to the ranking of equitable securities and because I have seen no authority which would justify displacing it in the case of a trustee's equitable security. This conclusion is based upon principles of English law which fall to be applied in Jersey in accordance with what was said by the Board of the Privy Council in paragraph 59 of the majority judgment in *Investec*.

197 This provides my conclusion on the so-called “relationship” error in of the Priority Judgment which was put forward by Advocate Jordan, namely that the Commissioner *erred* in concluding that the proper approach was *pari passu* between the right of lien of Equity Trust as a former trustee and the rights of lien of successor trustees.

198 Having said that, I deal with the other individual criticisms of the Priority Judgment which were put forward by Advocate Jordan and I refer to those by reference to the Contentions for Equity Trust. The first of those other criticisms is the so-called “fairness” error. Having reached a conclusion on the issue of the priority of the rights of lien of successive trustees as a matter of legal principle, any aspect of fairness does not properly arise for consideration because the consequences of what is the legal priority which I have found to be established as a matter of legal principle will be a matter for others. In addition, what was said on the supposed matters of fairness by both parties was essentially speculation about how matters might work out in hypothetical situations and this Court has before it no actual evidence or detailed information on what would be likely to be specific consequences.

199 From what was said on behalf of both parties, it appears to me that each order of priority, namely first in time and *pari passu*, will have potentially negative consequences for one party or another. In the case of a former trustee, its interest would be prejudiced by following the *pari passu* approach but even if that approach were to be the correct one a successor trustee could also suffer disadvantage depending upon the state of account of each trustee. Likewise, creditors of both a former trustee and a successor trustee could potentially be affected for the same reason. Without commenting in detail on the various scenarios, I do not consider as a matter of general impression that the fairness issue would fall strongly one way or the other, and in any event it is not relevant because I have reached my

conclusion as a matter of legal principle.

200 There was one suggestion by Advocate Harvey-Hills which does seem to me to have potential force. If a former trustee's right of lien has priority, then it is conceivable that creditors who have engaged with that former trustee might be reluctant to novate to successor trustees thus potentially requiring the former trustee to maintain an interest in the continuing administration of the trust which would not otherwise be necessary. This may be possible, and it may simply be one of the consequences of having been a trustee at one time, but that nevertheless does not seem to me to be a reason to disrupt the conclusion which I have already reached as a matter of legal principle. No doubt the trust industry in general will take account of the order of priority which is demonstrated by this case and will act accordingly, and only then will it be possible to judge whether or not there is truly any negative consequence such as this one.

201 The next error which has been suggested is said to be the erroneous analogy with priority between trust creditors. This is related to what is said in paragraph 22–047 of *Lewin*. At paragraph 137 of the Priority Judgment, the Commissioner said that because it seems clear that the claims of creditors will rank *pari passu* as against the trust assets, and the claims of creditors of a former trustee would have priority over the claims of the creditors of a successor trustee, this would "involve some kind of mixing of a *pari passu* regime and a ranking in time regime".

202 I do not agree. I am satisfied that the question of priority as between those claiming through one equitable interest is distinct from the question of priority between two competing and separate equitable interests. The fact that creditors claiming under the right of lien of an earlier trustee may rank *pari passu inter se* is compatible in my opinion with the fact that the right of lien itself may rank in priority of time over the separate right of lien of a later trustee and its creditors. That does not involve a "mixing" of the two regimes; rather the regimes are being applied to two separate categories of claim, the one being the claims of trustees (and their creditors) under the trustee's right of lien and the other being the claims of the creditors of a single trustee amongst themselves.

203 The next error suggested by Advocate Jordan related to what was said by the Commissioner about the decision in *Lemery Holdings v Reliance Financial Services*. I have discussed this decision above and do not repeat that. I am satisfied that the judgment of Brereton J did accurately describe the fact that a new trustee takes the trust fund subject to the right of lien of the old trustee.

204 The final error suggested on behalf of Equity Trust concerns what was said about Article 34(2) of the Trusts Law. This provision does acknowledge the fact that a trustee may require reasonable security, and what is reasonable may be judged by the Royal Court. As examples of the power which the Royal Court has to deal with issues relating to the indemnity of retiring trustees, I refer to In *re Carafe Trust*, In *re Caversham Trustees and Crill v Alpha Asset Finance Limited (Re Hickman)* albeit that these cases did not deal

exclusively with the effect of Article 34(2).

205 The fact that a former trustee has an enforceable right of lien which ranks in priority over the rights of lien of successor trustees might be said to render Article 34(2) unnecessary. I do not see this as being so. What Article 34(2) is concerned with is the taking of steps to ensure the proper continuing administration of a trust in a situation where an earlier trustee is retiring and a successor trustee is taking over. For the retiring trustee to have a right to seek reasonable security at that time, and for the Royal Court to be able to regulate that, seems to me to be entirely sensible. In cases where a trust continues under proper administration by a successor trustee and remains solvent, no issue will arise. The existence of the mechanism provided by Article 34(2) does not appear to me to undermine my conclusion as a matter of legal principle that a former trustee also has its right of lien which can be enforced in priority to the rights of its successor trustee in the case of unforeseeable events which may take place in a particular trust in the future. Indeed, it is possible to regard Article 34(2) as an implicit recognition that the rights of a former trustee have priority over those of a successor trustee, since it permits the former rights to be secured in a manner which undoubtedly gives them priority over the latter rights.

206 The final aspect which I need to consider is the effect of Article 32. This is the one particular aspect which arises directly under Jersey law and which is not the same as the trust law of England. What the enactment of paragraph (1)(a) and (1)(b) of Article 32 did was in practical terms to create two classes of creditor. In the situation where the trustee is solvent, a creditor who knows that he is transacting with a trustee knows that he is limited ultimately as to what he might recover by the extent of the trust assets. In contrast, a creditor who does not know that he is transacting with a trustee is entitled to the satisfaction of his claim in its entirety from the assets of the trustee with whom he has contracted.

207 The Privy Council made it clear that the enactment of Article 32 has led to a situation where a trustee in Jersey gains an advantage at the expense of its creditors, and not at the expense of beneficiaries: see the judgment in Investec at paragraph 63. In this situation, and unique to Jersey (although probably also in Guernsey as a result of equivalent legislation), an Article 32(1)(a) creditor can suffer a disadvantage. Whilst this may be so, it is the direct and intended effect of the enactment of Article 32.

208 In the situation where a creditor is an Article 32(1)(a) creditor of a successor trustee, and thus reliant ultimately on the right of indemnification and right of lien of that successor trustee, that creditor would suffer a disadvantage if the trust assets were insufficient when compared to an Article 32(1)(a) creditor of a former trustee whose claim had been satisfied in full because, as a result of the priority of the former trustee's rights of indemnification and lien, there is sufficient in the assets to satisfy that priority claim. Of course, the situation is no different in principle in the case of Article 32(1)(b) creditors of former and successor trustees because if the trust assets are sufficient only to satisfy in full the creditor who claims under the right of lien of a former trustee, then the Article 32(1)(b) creditor of a successor trustee suffers a similar disadvantage because he requires to rely upon the right of lien of the successor trustee. For these reasons, I do not consider that the enactment of Article 32 has

made any difference to the issue of the order of priority of the rights of lien of trustees in succession.

209 This leaves only the alternative case referred to in the Priority Judgment at paragraphs 146 and 147. The essence of what the Commissioner said, agreeing with Advocate Harvey-Hills, is that “the trustee acquires successive rights of indemnification and liens as it incurs liabilities acting as trustee, with such individual indemnity rights and liens being extinguished as each indemnity is effected (by reimbursement or exoneration from the trust fund).” The Commissioner then said that as a result “a ranking in time regime would, logically, require all claims and liabilities to be ranked in order of time, in what would be a difficult and cumbersome inquiry into when each and every claim and liability under Article 32(1)(a) and (b) arose”. I do not agree.

210 The Commissioner did refer to the description of a trustee's lien as being akin to a floating charge by reference to what was said in *Re Amarind* and I have already referred to that. I do not repeat what is said above but in summary it is my opinion that a trustee has a single right of indemnity and associated right of lien which arises as an incident if its accepting the office of trustee. That single right of lien secures, and may be relied upon to recover from the trust assets, all of the liabilities which the trustee may incur throughout its period of acting as trustee. The only ranking in time which matters between competing trustees' rights of lien depends upon the dates upon which they were appointed as trustees. The fact that they incurred liabilities during their periods of office, and that they may have future or contingent liabilities which arise as a result of their holding office for the periods of time that they did, does not matter because the priority does not depend upon the date of incurring of any individual liability by the trustee, nor indeed does it matter that some liabilities may have been discharged through reimbursement or exoneration. The trustee's right of lien exists throughout and it secures each and all of the outstanding liabilities which a trustee may come to have as a result of its holding office as trustee.

211 For all of these reasons, I am satisfied that the appeal by Equity Trust should succeed on this principal issue and I find that under the law of Jersey a trustee has a right of indemnification which is enforceable by a right of lien which ranks in priority over any right of indemnification and right of lien of a successor trustee which takes up office at a later date.

212 I now turn to address the other issue considered by the Commissioner, namely whether a trustee has a priority over the claims of creditors with which it has transacted as trustee. This was the first issue addressed in the Priority Judgment but, as I have said, it was the subject of much less attention before this Court.

213 The Commissioner set out (commencing at paragraph 40) the contentions of the parties on this issue and he then (commencing at paragraph 87) discussed the judgment of the Privy Council given by majority in *Investec*. The Commissioner quoted from paragraphs 57 to 63 of that majority judgment and he noted (at paragraphs 92 and 93 of the Priority

Judgment) that Advocate Jordan had argued that the decision of the Privy Council supported Equity Trust. In particular, the Commissioner noted her submission that the judgment vindicated the position that, in a competition between the claim of a trustee and the claim of a creditor both claiming through the same right of indemnity, the trustee's claim is the *"better equity"* and thus should take priority if the equitable lien gives the trustee a proprietary right in the trust fund whereas a creditor does not have that right unless and until a court makes an order granting the equitable right of subrogation. The Commissioner referred to *EC Investment Holdings v Rideout Residence*, the judgment of Quentin Lob J at para 15.

214 The Commissioner noted (at paragraphs 95 to 97) that Advocate Harvey-Hills had submitted that the decision of the Privy Council in *Investec* had only a modest impact on the issues under consideration. The Commissioner then said that Advocate Harvey-Hills had submitted that Article 32 had altered the pre-existing law only in a limited way and that " *Article 32(1)(a) is simply about the removal of the common law personal liability of trustees to creditors who transact with it knowing it is a trustee, and Article 32(1)(b) is simply about the preservation of that personal liability where the other transacting party does not know the trustee is a trustee."* Advocate Harvey-Hills had submitted that Article 32(1)(a) and (b) are not about priorities between creditors.

215 In giving his decision on this issue (commencing at paragraph 98), the Commissioner said this:

> ***"102. Competition between a trustee and creditors claiming through it did not arise under the Jersey law of trusts existing before the introduction of the Trusts Law ("the pre-existing law"). As the Privy Council held, the well-established principles of English trust law to which it referred would then have been part of the law of Jersey. Under those principles a trustee acts as principal in connection with the administration of a trust, and consequently, incurs personal liabilities to all third parties with whom it transacts (see Lewin at paragraph 21–010). It has to discharge those claims in full. In the event of the insolvency of the trustee, and its inability to meet its personal liabilities to those trust creditors, they have the right to apply to be subrogated for the trustee, to stand in its place and enforce their claims against the trust assets to the extent that the trustee would be so entitled (see*** *Lewin* ***21–048***).
>
> ***103. Again, under the pre-existing law, if the trust assets were not sufficient to meet their liabilities, then as between the trust creditors, it would seem that the claims would rank pari passu."***

216 The Commissioner then quoted from *Lewin* at paragraph 22–047 and referred to the decisions in *Re Suco Gold*, *Finnegan v Yuan Fu Capital Markets and EC Investment*

217 The Commissioner concluded (at paragraph 115) that both an Article 32(1)(a) creditor by

subrogation, and the trustee are exercising the same right of indemnity and associated equitable lien and he could see:

> ***"… no principled basis for saying that there can be any inequality between the claims being made by the trustee and somebody standing in the shoes of the trustee, as they both claim through the same right of indemnity and associated equitable lien.*** Furthermore, … the right of both under that indemnity is subject to the state of account between the trustee and the beneficiaries."

218 The Commissioner then referred (at paragraph 116) to what he saw as the further difficulty which was that Article 32 went no further in altering the pre-existing law than allowing the trustee to incur liabilities as trustee and not personally where the other party knows that the trustee is acting as trustee. He continued *"Article 32 did not go further and give the trustee the added protection of priority for its Article 32(1)(b) liability over the subrogated claims of an Article 32(1)(a) creditor"*.

219 The Commissioner then said:

> ***"117. Thus under the pre-existing law the claim of trust creditors, whether they knew they were transacting with a trustee or not, were treated equally both as against the trustee and, if insolvent, against the trust assets. Article 32 acts to the prejudice of Article 32(1)(a) creditors in that they can no longer claim against the trustee personally, but when it comes to claims against the trust assets, Article 32 does not act to further prejudice the Article 32(1)(a) creditors by giving the trustee priority over the trust assets for its personal liability to an Article 32(1)(b) creditor…"***

220 In each of paragraphs 117 and 118, the Commissioner gave an illustration of how the trustee would be in a better financial position in respect of an Article 32(1)(a) creditor in the event that there was a priority. In the view of the Commissioner (at paragraph 117), that "benefit to the trustee … goes beyond that intended by Article 32." His final conclusion (at paragraph 118) was that the claims to the trust assets of an Article 32(1)(a) creditor and the trustee for an Article 32(1)(b) liability rank *pari passu*.

221 As I have already noted, the issue of priority between a trustee exercising its right of lien and any creditors claiming through that right of lien was not really the subject of any detailed contention or submission before this Court and it is not the subject of the Notice of Appeal by Equity Trust. This may be because, as I have also said, there are no creditors of Equity Trust at present seeking to claim through its right of lien; the only claim is that of Equity Trust itself as a consequence of the conclusion of the Angelmist proceedings.

222 Nevertheless, Advocate Jordan did assert before this Court that, under the trustee's right of indemnity, the trustee's personal claim came first and thereafter creditors' claims, all of

which had priority over the claims related to a successor trustee, and the issue of priority between a trustee and its creditors was obviously the subject of detailed consideration by the Commissioner as I have just discussed. For this reason, and whilst what I say is *obiter*, I offer the following conclusions on this issue.

223 I begin by considering the nature of the obligations which are the subject of this issue. In the situation under English law, as also under Jersey law before the enactment of the Trusts Law, every trustee has a personal liability to the creditors with which it has transacted as trustee. Thus, so long as the trustee remains solvent, each and every creditor who contracted with that trustee has an entitlement to be paid in full by the trustee. Having settled with all of its creditors, the trustee will then have the right to be reimbursed from the trust assets. That will be a single composite claim comprising the total of all of the liabilities incurred by the trustee. There will be no distinction within that claim between what might be regarded as the direct liabilities incurred by the trustee itself and the liabilities which it has incurred in settling the claims of its creditors. Indeed, there is probably no real distinction between these two categories because each and every amount paid out by a trustee as trustee will be to creditors of the trustee, whether creditors claiming as a result of providing what might be no more than administrative services to the trustee which allow the trust to function, as well as creditors who have claims related to the substantial fulfilment of the trust purposes.

224 Where the trust in question is solvent, those liabilities incurred by the trustee in acting as trustee will be satisfied in full. Where the trust is insolvent, the claims of the trustee will not be satisfied in full and all elements of the claims by the trustee for reimbursement in respect of all of the liabilities which it has settled will be discounted equally however these claims may have been constituted originally.

225 In a situation where it is the trustee which is insolvent, the creditors may have a first claim against the trustee-in-bankruptcy of the trustee, which may produce little or nothing, and the creditors will then have a claim against the assets of the trust by way of subrogation for the balance of their outstanding claims. Where the trust is solvent, these claims should be satisfied in full. Where the trust is insolvent, the creditors' claims will again be discounted to an equal extent to any claim made by the trustee-in-bankruptcy of the insolvent trustee.

226 In all of these situations, no issue truly arises between a creditor and the trustee with whom it has transacted (or the trustee's representative in bankruptcy) and this is because of the trustee's unlimited liability to the creditors with whom it has transacted as trustee.

227 The situation in which an issue does arise is the result of the enactment of Article 32(1)(a) of the Trusts Law. In this situation, the effect of Article 32(1)(a) is that a trustee which is solvent is not obliged to settle in full the claim of a creditor with which it has transacted knowingly as trustee if the assets of the trust are insufficient to meet that claim. In that situation, the claim of the solvent trustee will be limited to the liabilities which it has been obliged to satisfy, limited as they are by the effect of Article 32(1)(a).

228 This means that this issue is one which can arise only under the law of Jersey because of the particular enactment of Article 32(1)(a) (and the position is potentially the same in Guernsey). It does not appear to me that the issue of a competition between the right of a trustee seeking to enforce its right of lien against trust assets and the right of a creditor of that trustee could arise under English law or the law of any other jurisdiction which continues to apply the established principles of English law.

229 For these reasons, I agree with the analysis of the learned Commissioner as to the critical effect of the enactment of Article 32(1)(a) in bringing about the situation where there is the possibility of a competition between the claim of a trustee for reimbursement and the claim of its creditor. This possibility could not arise under English law and the position is the same as regards an Article 32(1)(b) creditor in Jersey.

230 To take the position as it is said to exist in this case, Equity Trust has a claim from the assets of the Z II Trust for the liabilities and costs which it has incurred in the settlement of the Angelmist proceedings. As long as that is the only claim in existence, there is no potentially competing claim by a creditor who has contracted with Equity Trust (and I emphasise again that I am not approving or disapproving of the claim by Equity Trust but merely using what is being put forward to demonstrate my analysis of the law). In the situation (at present hypothetical) that a creditor who has contracted with Equity Trust as trustee of the Z II Trust were to come forward and make a claim, then if that creditor were an Article 32(1)(a) creditor, the amount of the claim would be limited by what were the assets of the trust. The amount of those assets available to meet the creditor's claim will be affected depending upon whether the claim of Equity Trust is regarded as having priority or not. If the claim by Equity Trust has priority, then (on the figures provided) it will by itself exhaust the assets of the Z II Trust and any Article 32(1)(a) creditor who came forward would get nothing. If the claim by Equity Trust does not have priority, then Equity Trust and that creditor would each receive a pro rata dividend.

231 What this means, in my opinion, is that the answer on this issue cannot be found in any of the English law authorities nor in those from common law jurisdictions which are in line with English law. The answer can only be found in the judgment of the Privy Council in *Investec* which is the primary source of the particular trust law as it exists in Jersey.

232 At paragraph 62 of the majority judgment, the Board of the Privy Council held that the right of a creditor of a trustee in Jersey continued to depend upon a right of subrogation and that Article 32 had not gone so far as to create a direct right of action against the trust assets. The judgment continued:

> ***"63 The creation of a new direct means of recourse by creditors against the trust fund, without the protection to the beneficiaries formerly accorded by the inherited English law, as described above, would be a radical departure which should not lightly be inferred or implied in the***

> ***absence of clear words.*** The Jersey legislature plainly intended by Article 32 to improve the position of trustees by insulating their personal assets from liabilities to third parties expressly incurred as trustees, and must have appreciated that this would have to be at the expense either of creditors or beneficiaries, or both. On the reasonably safe assumption that the legislature intended thereby to promote rather than damage the trusts industry in Jersey, and that its future prosperity would depend upon foreign settlors continuing to choose Jersey as the place for the establishment of their trusts, it seems very unlikely that a deliberate choice would have been made to improve the position of trustees at their beneficiaries' expense. By contrast with beneficiaries, creditors other than tax authorities are usually voluntary, and can choose upon what terms as to security and personal guarantees they are prepared to lend or give credit to trustees. Against that background the Board finds it impossible to discern ***from the terms of Article 32 any intended change in the only method (of subrogation to the trustee's indemnity) whereby the pre-existing law enabled creditors to have recourse to the assets of the trust for the enforcement of liabilities incurred by the trustees."***

233 In my opinion, that passage clearly describes the situation in Jersey as being one where, as a direct and intended result of Article 32(1)(a), a trustee is given an advantage over its trust creditors, and that is something of which the creditor should be aware and can take such security or otherwise as he chooses. That being so, I cannot see any reason why the advantage being given deliberately to trustees should not apply equally to the situation where there are claims by both the trustee itself and its Article 32(1)(a) creditors against the assets of a trust which has become insolvent. If those claims were to rank *pari passu*, the result would appear to be that the advantage given to the trustee by Article 32(1)(a) would no longer exist and that would be inconsistent with the purpose of Article 32(1)(a).

234 I therefore respectfully disagree with the final conclusion of the Commissioner on this issue.

235 In reaching this conclusion, I have once again had the advantage of seeing in draft the judgment to be delivered by the Bailiff as well as that to be delivered by my brother Martin JA, each of whom has expressed views on the significance and effect of the introduction into the trust law of Jersey of what is now Article 32. I do not intend to add to the length of this judgment by expanding upon what I have said above although I would say that, like Martin JA, I am not at present persuaded that it is Article 32 which has for the first time brought about a situation where there can be an insolvent trust (or a *"bankrupt trust"* as the learned Bailiff has described it) without there also being an insolvent trustee. Having said that, I do not repeat the analysis of the effect of Article 32 which I have set out above and I wish to emphasise that this final observation is not intended to qualify or affect that analysis.

The Recoverable Costs Judgment

236 The issue which was the subject of the Recoverable Costs Judgment was a separate one which the Commissioner said had been left over from the Priority Judgment. That separate issue was whether Equity Trust as the former trustee of the Z II Trust was entitled to claim for its costs in proving its claim of £90,920.26 against the assets of the Z III Trust, both of those trusts being insolvent. The costs claimed by Equity Trust are £247,000. With the agreement of the parties, the appeal by Equity Trust against the Recoverable Costs Judgment has been considered by the Court on the written contentions of the parties.

237 Before the Commissioner, Advocate Jordan argued that, certainly in the case of a solvent trust, the trustee's right of indemnity and equitable lien extended to recovering the costs incurred in making good its claim under the right of indemnity and lien. That was the decision reached in *ATC (Cayman) v Rothschild Trust Cayman* which I have already referred to in another context. By reference to the judgment of Smellie CJ, she submitted that, provided the costs had been reasonably incurred, Equity Trust was entitled to recoup its costs on an indemnity basis and the fact that the Z III Trust is insolvent made no difference to that.

238 Advocate Harvey-Hills argued by reference to Article 30(2) of the Bankruptcy (Désastre) (Jersey) Law 1990 ("the Désastre Law"), that a creditor in a désastre has to bear the cost of proving a debt and he submitted that the rule was ancient and based on fairness by reference to what had been said by Lord Eldon LC and Greene MR in *Abell v Screech* [1805] 10 Ves Jun 355. Advocate Harvey-Hills said that if all creditors were to be permitted to claim the costs of their proofs, that might prove to be a considerable drain on an estate. That unfairness was illustrated in this case where the costs of establishing a claim of some £90,000 amounted to £247,000.

239 As confirmed at paragraph 7 of the Recoverable Costs Judgment, the Commissioner decided this issue informed by the conclusion that he had already reached in the Priority Judgment, namely that Equity Trust as a former trustee does not have priority over the claims of others because, in the case of an insolvent trust, a *pari passu* regime applies. The Commissioner decided at paragraph 12 that as trustees are the only persons who can assume liabilities by reference to the judgment of the Privy Council in *Investec*, then assuming a *pari passu* regime, each creditor should assume the costs of proving its claim subject to the discretion of the court in any particular case. The Commissioner expressed the view that this would be unlikely to discourage "wise and honest people" from becoming trustees whereas the possibility that a former trustee would "scoop the pot" could do so.

240 In its Contentions, Equity Trust maintains that the Recoverable Costs Judgment represents an unwarranted departure from orthodox principles of trust law. Equity Trust contends that its right of indemnity extends to all expenses and liabilities reasonably incurred by reason of Article 26(2) of the Trusts Law which, as Equity Trust contends, gives to a trustee an "entitlement secured by a proprietary right to recoup its reasonably incurred costs in making good a claim to an indemnity". The analogy with the law of désastre is inappropriate as the Désastre Law specifically excludes trust property from its ambit and a

trustee is not a creditor proving its debt in the sense envisaged by Article 30(2). The Désastre Law has been held not to apply to the administration of an insolvent estate: *Crill v Alpha Asset Finance Limited (Re Hickman)*. Equity Trust accepts that the costs incurred by a trustee may be subjected to taxation if not agreed and contends that the Commissioner erred in relying upon the *pari passu* approach which he had found to apply in the Priority Judgment.

241 In his Written Contentions on the appeal against the Recoverable Costs Judgment, the Executor supports the conclusion of the Commissioner and relies upon the contentions made in the Royal Court.

242 In my judgment, the appeal against the Recoverable Costs Judgment by Equity Trust should be allowed. The principal reason is that I have already concluded that the appeal against the Priority Judgment should itself be allowed and that, as the former trustee, Equity Trust is entitled to rank in priority over the claims of its successor trustees rather than *pari passu*. This means that the basis upon which the Commissioner decided the issue which is the subject of the Recoverable Costs Judgment was therefore unjustified in my opinion.

243 Furthermore, I can find no basis for the conclusion that a trustee is not entitled as a matter of principle to recover from the trust assets its costs in proving a claim incurred as trustee. That is the effect of Article 36(2) of the Trusts Law and in my opinion there is no justification for importing aspects of the law of désastre where trusts are specifically excluded from that regime by the Désastre Law.

244 Finally, I am satisfied that Advocate Jordan is correct in distinguishing between the entitlement to costs which a party may have, which is a matter for the court, and the recoverable amount of those costs, which is in principle a matter for taxation. The case of *Pearce v States Treasurer* 2016 (1) JLR 435, which was a decision of the Bailiff sitting with Jurats in the Royal Court, was not cited to the Commissioner and in my opinion it provides a clear answer on this aspect. At paragraph 23 of his judgment, the Bailiff confirmed that, in exercising his discretion, the Greffier as taxing master may have regard to all of the relevant circumstances, including the importance of the matter and how much it is appropriate for the paying party to have to pay having regard to the amount or value of money or property involved. I can see no reason why the same approach should not apply to a situation in which a trustee is making a claim to be indemnified for the costs which it has incurred in establishing a claim of moneys due to the trust.

245 What was said by the Bailiff in *Pearce* therefore makes it clear that at taxation the Greffier can exercise his own discretion as to whether the amount of the costs incurred by Equity Trust is reasonable by reference to the amount at issue being the amount of its claim in respect of the Z III Trust. The claim established by Equity Trust was just over £90,000 and the costs claimed to have been incurred are £247,000. That is a comparison which will no doubt feature in the consideration of what ought to be the amount of the costs which Equity Trust can properly claim against the assets of the Z II Trust but that is a matter for the

Greffier as taxing master in the first instance and is not something upon which this Court can make any judgment.

246 It is therefore my opinion that the appeal by Equity Trust against the Recoverable Costs Judgment should be allowed.

The Adverse Costs Judgment

247 At the outset of her submissions, Advocate Jordan confirmed that the appeal by Equity Trust against the Adverse Costs Judgment was confined to seeking an award of costs in the event that the principal appeals which have already been discussed were successful.

248 As I have concluded that the appeals by Equity Trust against the Priority Judgment and the Recoverable Costs Judgment should be allowed, any appeal against the Adverse Costs Judgment on its own merits does not upon my approach arise, and the costs of the proceedings would be at large for this Court. I therefore need say no more about this aspect of Equity Trust's appeal.

Conclusion

249 For all of the above reasons, I would deal with the appeals by Equity Trust as follows:

(a) I would allow the appeal by Equity Trust against the Priority Judgment; and

(b) I would allow the appeal by Equity Trust against the Recoverable Costs Judgment.

250 Having found in favour of Equity Trust in respect of both the Priority Judgment and the Recoverable Costs Judgment, I am minded to invite the Court to award the costs of this appeal and of the proceedings below in favour of Equity Trust on the recoverable basis. In the event that either party has any submission to make on the issue of costs and that proposed determination, contentions should be submitted in writing within fourteen days of the handing down of this judgment, with any responses within fourteen days thereafter. The Court will then determine the issue of costs on the papers.

THE BAILIFF:

251 I would like to pay tribute to the clarity and insight demonstrated by my brother Logan Martin JA in the judgment which he has just delivered. I am very grateful to him for setting out the background and the issues and I completely understand why, given the present state of authorities and in particular the decision of the Judicial Committee of the Privy

Council in *Investec*, he has reached the conclusion which he has. Indeed the hierarchy of courts requires me as a judge to accept that I am in practice bound by the decision in *Investec* even though our Norman and civil law roots do not suggest there is a binding system of precedent in the same way as exists in England and Wales. Accordingly, I do not formally dissent from the judgment which Logan Martin JA has just delivered because I accept the logic of his analysis once one has accepted that the *Investec* decision is a starting point.

252 Nonetheless I wish to make some observations in case either this present case or some future case comes before the Judicial Committee for consideration.

253 This case raises interesting arguments not only in relation to trust law but, although we have not really heard them, potentially in relation to the law of bankruptcy. I will start with trust law.

254 I have not conducted a full review of the rolls of the Royal Court, and in those circumstances will say only that it appears to be the case that the first occasion on which a Jersey trust came up to the Privy Council for judicial consideration is *Godfray v Godfray* (1865) 3 Moo.P.C.C.N.S. 316. In that case a deed of 17 th July, 1835, was upheld as being in every respect in the form of a settlement containing limitations and provisions not in favour of the settlor alone but also in favour of any wife or children he might have, and them failing, in favour of his four brothers. There was no power of revocation contained in the deed. Turner LJ delivered the judgment of the Judicial Committee and between pages 344 and 346 said this:-

> ***"In the view which we have taken of this case it may not, perhaps, be necessary for us to enter into the question of the validity of the deed of 17 th July, 1835; but as it was argued that the whole transaction between these parties was in effect a transaction of settlement of the respondent's successions, and not a purchase, it may be right for us to state our opinion as to the effect of this deed.*** The respondent raises two objections to it: first, that it was not passed on oath, in the usual way; and secondly, that the performance of the trusts cannot be enforced .
>
> ***Until recently trusts were unknown in Jersey (Report of Commissioners of 1859, P.XXV.)***. Within the last half century several instances have occurred of conveyances of land upon trusts for public objects, two instances are given in the appendix (a). In each case the deed, passed on oath in the usual way, served both as a conveyance of the land and for the declaration of the trusts. In the present case the property was first conveyed by the deed of 24 th March, 1835, and the legal ownership has since remained unchanged; but a ***subsequent declaration of trust was made by an independent instrument, that of the 17 th July, 1835.*** Did this require the same formalities as a legal conveyance? Probably the question has never yet arisen in Jersey, and will now have to be determined on principle. There seems to be no ground for

holding that such formalities are necessary. A writing signed by the competent parties ought surely to be sufficient evidence of the trusts, if the law allows such to be created: and the law of Jersey does not, it would seem, forbid the creation of trusts by acts inter vivos. Report of Commissioners of 1859, P.XXV .

Next, were the trusts of the settlement binding upon the parties who executed it? Whatever was the case before the death of the father of the parties, and before the contents of the settlement were communicated to the respondent and acted upon, it would appear, on principle, that when it was so communicated and adopted by him, and acted upon by all parties, it became binding upon them. The respondent adopted it, for he confirmed it twice, and received payments in excess of his annuity from the very first, in strict conformity with its provisions, as appears from the accounts filed in this case. On the other hand, the four brothers were clearly bound by it."

255 The decision of the Royal Court had been to construe the relevant deed as a form of mandate, which, because it was essentially revocable, should be treated as revoked. By finding that the relevant deed was not a mandate but a settlement, creating enforceable trusts, the Judicial Committee overruled the Royal Court's decision and the appeal accordingly succeeded.

256 What is clear is that even in 1865 there were numbers of cases of trusts, including trusts of land, being created in this Island. These were *inter vivos* trusts because at that time, such trusts were incapable of being created by will as a result of Article 6 of the Loi (1851) sur les testaments d'immeubles (that Law introducing a right to make a will of real estate in Jersey in limited circumstances, which had hitherto been impossible) which provided:

"Les substitutions sont prohibées .

Toute disposition par laquelle le légataire sera chargé de conserver et de rendre à un tiers sera nulle, même à l'égard du légataire .

Toutefois la nue propriété peut être donnée à l'un, et l'usufruit à l'autre."

257 In *Abdel Rahman v Chase Bank (CI) Trust Company Limited and others* [1991] JLR 103 one issue was whether or not the terms of the settlement made by the deceased husband of the plaintiff was void for breach of the Jersey rule that *donner et retenir ne vaut*, a rule which applied to gifts and which the plaintiff contended therefore applied to the gift into trust by the settlor. One of the arguments relied upon by the defendants was that in the matter of trusts, the courts of Jersey, until the Trusts Law was enacted, had imported a whole system of law from England – equity and equitable principles which stood apart and took nothing from the customary law. It was accordingly submitted that the Court should not extract from the customary law a rule such as *donner et retenir ne vaut* which at one time and in some form or other applied as part of the customary law, and then apply it to trusts which were unknown to custom.

258 At page 136 line 34, Tomes, Deputy Bailiff said this:-

> ***"The Court was not persuaded by those arguments.*** It is now beyond question that the Court is a court of equity and that in many cases it applies equitable remedies. But the Court does not refuse to enforce or apply well-established customary law rules and principles. The Court has not overturned Promesse à héritage ne vaut and will not grant specific performance but will compensate in damages a breach of a promise à héritage. In *Felard Investments Limited v Church of Our Lady etc (Trustees)*, ***the Court said this (1978 JJ at 9)***:-
>
> ***'Counsel for the Company was unable to cite to us any local authority for the proposition that a servitude may be created or extinguished in Jersey by the application of the doctrine of proprietary estoppel.*** Nevertheless he reminded us that the Royal Court is a court of equity, and he asked us to find that a servitude may be created or extinguished in Jersey by the application of equitable principles, as it can be in England. The Court is indeed a court of equity, but our consideration of the ancient authorities, such as Poingdestre, Basnage, Pothier and Bérault, and of the modern cases, leaves us in no doubt that an interest in land, which of course includes a servitude, can be acquired only by title or in certain cases by prescription or 'destination'.'
>
> ***Here we have a clear example that the customary law prevails, as it does with promesse à héritage ne vaut and, in our judgment, with donner et retenir ne vaut."***

259 I do not share the view that there is the distinction to be made as my brother John Martin JA suggests at paragraph 285 below. In my view, if the customary law operates to strike down a gift into trust, there is no reason why it should not strike down the rights arising from a gift into trust. The greater includes the lesser. Indeed Article 11(2)(a)(ii) of the Trusts Law which provides that a trust is invalid to the extent that "it purports to confer any right or power or impose any obligation the exercise or carrying out of which is contrary to the law of Jersey" would seem to take one to the same conclusion.

260 This approach to the interrelationship with the customary law, although not specifically referred to, was endorsed by the Privy Council in *Investec*. At paragraph 57, Lord Hodge said this:-

> ***"Before addressing Article 32, some preliminary observations need to be made.*** The TDT is a discretionary trust established under the law of Jersey. In their modern form, trusts are a creation of equity judges in England. There are of course concepts in other legal systems, notably in Roman law and in the civil law of France, which have some features in common with an English law trust. But they do not have the elaboration and detailed prescription which the existence of a large and coherent body of case law has given to the English trust law. … The international appeal of Jersey trusts is to a significant extent

> dependent on the certainty which it derives from the English case law. Naturally, English trust law must be modified where it conflicts with the established principles of Jersey customary law, and it has also been modified by Jersey statutes. These general remarks apply equally to the trust law of Guernsey."

261 This reservation that the English law of trusts has not been imported wholesale into Jersey, but must be received subject to any statutory or customary law principles to the contrary is an important reservation which may well in normal circumstances have had an impact not only upon the reasoning in the *Investec* case but also on the decision in the present case.

262 At paragraph 58 of the Privy Council judgment in *Investec*, their Lordships indicated that while the Trusts Law is the principal indigenous source of Jersey trust law, it is not a complete code of the law of trusts. It was said that the statute gives statutory effect to some principles already well established in England and significantly modifies other principles. Thus it is said that English trust law serves as the background against which the provisions of the Trusts Law fall to be construed.

263 There is absolutely no doubt that English trust law provides answers to many of the questions which have arisen in practice in the administration of trusts and in the assessment of the rights of beneficiaries, trustees and others. It is inevitable that in a larger jurisdiction the numbers of trust cases will far exceed those which might have been heard in the Royal Court. Nonetheless the reservations which have been mentioned above do mean that practitioners must exercise caution in simply assuming that English trust law will be the same as Jersey trust law – the powers of the Court to set aside gifts into trust on the grounds of mistake or arrangements made by the trustees reviewed under Hastings Bass applications are cases in point.

264 At sub-paragraph 59(v) of the Privy Council judgment in *Investec* Lord Hodge said this:-

> ***"A trustee is entitled to procure debts properly incurred as trustee to be paid out of the trust estate, or if he pays it in the first instance from his own pocket, to be indemnified out of the trust estate: in*** *re Blundell* (1888) 40 Ch D 370, 376. ***To secure his right of indemnity, the trustee has an equitable lien on the trust assets: Lewin on Trusts, 19 th ed (2017), para 21 – 043.*** Because an equitable lien does not depend upon possession, it normally survives after he has ceased to be trustee: in *re Johnson* (1880) 15 ChD 548, 552."

265 At the end of that paragraph in the judgment, Lord Hodge confirms that the Board considered that all the principles set out in that paragraph must be regarded as having been part of the law of Jersey before the enactment of the Trusts Law or its statutory predecessors.

266 A lien is a right to keep possession of property belonging to another person until a debt due by that person is discharged. An equitable lien which does not depend upon possession sounds like a contradiction in terms but it is given effect as a form of floating charge over trust assets.

267 It might be thought that the current trustee has an equitable right, in one sense similar to the banker's right to combine accounts and set off credit and debit balances against each other, to indemnify itself directly out of the trust assets against liabilities before taking account of any debts due by it in relation to the trust. As the trustee had the legal ownership of the trust asset, such a right would amount to an equitable possessory lien which conceptually at least is consistent with Jersey customary law.

268 The former trustee's position, however, is not that merely of a person claiming against the new trustees for the indemnity in question. It is a claim which is said in equity to charge trust assets thus securing the indemnity to which the former trustee is entitled. I have no difficulty with the proposition that there is an equitable right of indemnity available to a former trustee who is actioned in relation to the trust other than in circumstances where he is at fault. However, it is the charge supporting the equitable right which causes the difficulties. It is unclear why this should be assumed to be the position for two reasons.

269 The first difficultly with this line of argument is that it comes up foursquare against a well-established principle of Jersey customary law that *meuble n'a point de suite par hypothèque*. There are many examples of the Royal Court expounding this rule – see for example *Radio & Allied Industries Limited v Gordon Bennett Wholesale (Jersey) Limited* (1959) 252 EX 43 and *Re Désastre G.Lawrence Limited* (1963) 254 Ex 509. Jersey practitioners know that until the passage of the Security Interests (Jersey) Law 1983, no security over movable property was possible as a matter of Jersey law except to the extent that the Court recognised a pledge, accompanied by the delivery of possession, as well as various liens such as the lawyer's lien over papers belonging to his client where the person claiming the lien already had possession. The effect of the 1983 law was to introduce for the first time a regime by which it was possible to take security over movable property provided that one followed the framework of that law. That law has been superseded by the Security Interest (Jersey) Law 2012 but in neither case has the old customary principle been expressly abrogated. My preliminary view is that the customary law principle continues save to the extent that any prospective security arrangement falls directly within the four corners of the new legislation.

270 It is not apparent that these principles were addressed to the Privy Council in *Investec*, and it is therefore unsurprising that they do not seem to have figured in the reasoning of the Court. Indeed, the passage cited at paragraph 260 above would surely not have been set out as part of the law of Jersey without some explanation as to how it might be reconciled with the customary law which I have described.

271 The second difficulty is that Article 43A of the Trusts Law provides that an outgoing

trustee may require to be provided with reasonable security for liabilities, whether existing, future, contingent or otherwise. If the outgoing trustee has an equitable lien over the assets, it already has a form of floating charge which has priority in time over at least subsequent claims. If that floating charge existed already by way of equitable lien, there would be no need for that provision. Of course, Article 43A may only be concerned with a legal charge by way of security but it would be slightly surprising if that were so given the gaps in the island's bankruptcy law in this area, especially as the trust is not currently regarded as an entity which can be technically insolvent.

272 Until the amendment to the Trusts Law which now appears at Article 32, it is not obvious that one could ever have had a bankrupt trust without also a bankrupt trustee – custom in Jersey has been to use the word “bankrupt” in respect of both insolvent individuals and companies, but I accept it is interchangeable with the word “insolvent”. Like English law, Jersey law would not have recognised a principle that one can have a bankrupt trust without a bankrupt trustee because there was no distinction between the personal and fiduciary capacities in which a trustee acted. The reversal of the proposition such that where one had the bankruptcy of a trustee the trust assets were safe caused no difficulty, because the equitable interests in the trust would triumph in the administration by the Viscount of the bankruptcy of a trustee. The latter proposition of course is both statutory (see below) and equitable, because the debts of the trustee should not be enforced against property in which he has no beneficial ownership. This principle additionally demonstrates that the trust, although not a corporate entity, is protected – the beneficiaries can claim that protection as though the trust assets were held as part of a corporate entity.

273 The amendment of the Trusts Law to include what is now Article 32 does seem in my judgement to suggest the possibility that, although there is in law an absence of any corporate status for the trust even though it is a juridical entity for some purposes, in practice in Jersey one can now have unsettled liabilities of a bankrupt trust which is operated by a solvent trustee. That is what we have here. Despite that possibility in practice, there is no obvious mechanism for regulating claims in a bankruptcy. Although the concept of a trust as having its corporate status has not hitherto been accepted, it seems to me it would be more desirable to avoid the equitable lien of a former trustee no longer in possession of the trust asset, because that is alien to our customary law, and instead provide that the corpus of the trust fund ought to be available to whomsoever is trustee at any given time to support the equitable right of indemnity which the former trustee claims. In doing so, the trust may end up with a legal status which reflects the way in which trusts are in fact, though not for the most part in law, currently treated. Indeed, that would not seem far removed from a natural construction of Articles 2 and 3 of the Trusts Law which provide that

> ***“2. Existence of a trust***
>
> ***A trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person's own right) –***
>
> ***(a) for the benefit of any person (known as a beneficiary)***

whether or not yet ascertained or in existence;

(b) for any purpose which is not for the benefit only of the trustee; or

(c) for such benefit as is mentioned in sub-paragraph (a) and also for any such purpose as is mentioned in sub-paragraph (b)

.

3. Recognition of a trust by the law of Jersey

Subject to this Law, a trust shall be recognised by the law of Jersey as valid and enforceable" .

274 So it would not seem a large step to find that the trust in Jersey does have a separate legal status, albeit one which falls short of a full corporate status, and the trust fund be available through the current trustee to meet obligations of former trustees incurred, to the knowledge of the creditor, *qua* trustee.

275 It is clear that the Bankruptcy(Désastre)(Jersey) Law 1990 does not permit a trust to be declared en désastre —see Article 8(3) which provides:

"8. Property of debtor at date of declaration to vest in the Viscount

(1) All the property and powers of the debtor specified in paragraph (2) shall vest in the Viscount immediately upon the making of the declaration .

(2) Subject to paragraph (3) and Article 8A, the property and powers of the debtor to vest in the Viscount under this Article and be divisible amongst the debtor's creditors shall comprise–

(a) all property belonging to or vested in the debtor at the date of the declaration;

(b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of any property as might have been exercised by the debtor for the debtor's own benefit at the date of the declaration .

(3) Property held by the debtor in trust for any other person shall not vest in the Viscount."

276 Where there has been a change in trustee, the creditor of the trust is in a vulnerable position, as Lord Hodge recognised at paragraph 59(vii). Similarly, the former trustee is also in a vulnerable position because he no longer has access to the assets of the trust,

save to the extent of his right of indemnity, to the extent he has one. It might be thought that Article 32 was intended to meet this latter vulnerability, providing as it does that where a creditor knows that the trustee is acting as a trustee, the creditor has a claim against the trustee as trustee only to the extent of the trust property. The decision of the Privy Council in *Investec* considered that the only respect in which the pre-existing trust law had been altered by Article 32 related to the liability of the trustee where the other party knows that the trustee as acting as trustee, and this is achieved by limiting the liability of the trustee in those cases to the trust property. It seems to me that this conclusion was strongly influenced by the concept that the trust itself has no independent corporate personality; and it was perhaps for this reason that reliance was placed upon Article 54(4) of the Trusts Law as indicating that Article 32 was intended to ensure that the trust creditor's right to go against the trust fund remained as previously, i.e. through the trustee's right of indemnity. However my tentative view would have been that Article 54(4) is concerned with a different question – it is concerned with the position where the trustee goes bankrupt and his personal creditors are precluded from exercising any rights against trust property, save to the extent that the trustee himself has such a right. That is not at all the same position as that contemplated by Article 32 which is concerned with the protection of a trustee against claims against him as trustee and not as an individual.

277 It is particularly of interest in this context, as Sir Michael Birt noted extra judicially in his address to the Lewin Conference on 4 th October 2018, that at paragraph 62 of the majority opinion in *Investec*, reference was made to the fact that certain states in the United States have apparently introduced a direct right of access by a creditor against trust assets; and there is apparently proposed legislation in New Zealand to allow a creditor to recover even where a trustee is in default. This concept would seem to represent a further step forward in conferring or at least recognising a distinct legal personality for the trust.

278 At all events, the present position appears to be that the consequence today under Jersey law, assuming the creditor knows that a trustee is acting as trustee, is that he is more vulnerable than ever, having no access to the trustee's personal assets, and only access to the trust assets if the trustee's right of indemnity has not been extinguished for whatever reason – including possibly the fact that a corporate trustee no longer exists, amongst a myriad of other potentialities in that respect, as canvassed at paragraph 59(vii) of Lord Hodge's judgment.

279 If the *Investec* decision has the consequence on the present case which it appears to have, then one would be also left with what is perhaps a strange position in the Jersey law of bankruptcy. If the administration of a trust which is in fact but not in law in bankruptcy is not possible, then there is no obvious mechanism for handling the competing claims of the creditors. On the administration of such a bankruptcy, if that were possible however, no one has any form of floating charge except a former trustee, or creditors of the former trustee, that debt arising in the context of their knowledge the former trustee was acting as trustee. It does not seem to me that the creditors of a current trustee can be said to have such a floating charge, nor indeed the current trustee. At best, it has an equitable lien based on possession, but at worst it has a right of indemnity. Accordingly, absent a valid security

interest, creditors of the current trustees in those circumstances could try as they might to obtain a floating charge by way of security over trust assets prior to the bankruptcy, but that would be unsuccessful because *meuble n'a point de suite par hypothèque*. On the other hand creditors of the former trustees would, acting through subrogation, have a right to such priority. Worse still, neither the current trustee nor the creditors of the current trustee would have any reliable way of ascertaining what potential liabilities the trust faced so not only is there a disadvantage in law, but there is also a disadvantage in practice. The decision to afford priority in time has the consequence that every time there is a change in trustee the ability of the new trustees to raise money in the course of the trust administration will be progressively compromised unless a valid security interest can be offered and even then there may be a question over the competing priorities of the equitable lien and the holder of the valid but later in time security interest.

280 With the greatest respect, I find it difficult to believe that Article 32 was intended to have this effect and at some point one would hope that either the Privy Council will have the opportunity to reconsider the construction of the Article in the light of these comments or the legislature may give further attention to this Article. The problem seems to me to arise largely from the unhappy interplay between the English law of equitable liens and the Jersey law of bankruptcy.

281 For the reasons set out at paragraph 251, I too would allow the appeal.

Martin JA

282 I agree with the judgment delivered by Logan Martin JA. I too wish to pay tribute to the learning and analysis so comprehensively displayed in that judgment. I add two points of my own.

283 First, as the Bailiff points out in his judgment, there is an apparent tension between the statement in paragraph 57 of *Investec* that “English trust law must be modified where it conflicts with the established principles of Jersey customary law” and the statement in paragraph 59 of the same case that certain principles must be regarded as having been part of the law of Jersey before the enactment of the Trusts Law and its predecessors. One of the principles that must be regarded as part of Jersey law is that a trustee has an equitable lien over the trust assets that does not depend upon possession and continues after a trustee has ceased to hold office; and the tension arises because Jersey customary law does not in any other context permit the creation of a non-possessory security over movable property, and Jersey statute law does so only subject to the satisfaction of certain formalities. A trustee's lien arises without any formalities beyond the creation of the trust.

284 Because a trustee's lien arises at the time of his appointment and subsists at least throughout the term of his appointment, it will ordinarily coincide with his possession of the trust assets while he remains trustee. So long as that is the position, it appears to me that

the lien is to be treated as equivalent to a pledge, and as such is consistent with Jersey customary law. Any potential inconsistency with that law can only arise when the trustee parts with possession. That is likely to occur in one of two situations: when the trustee distributes to a beneficiary, and when he is superseded as trustee. In each of those situations, the trustee's lien will continue in English law but – because of the loss of possession – will not on the face of it do so under Jersey customary law. I accept that it is arguable (as the Bailiff suggests in paragraph 271) that article 43A of the Trusts Law proceeds on this basis. So far as material, it provides that a trustee who resigns, retires, is removed or otherwise ceases to be a trustee, or distributes trust property, may, before distributing or surrendering trust property, require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise. It might be thought that the article implies a recognition that a trustee has only an unsecured right of indemnity as a matter of Jersey law, and that his only means of obtaining security once he relinquishes possession of the trust fund is to stipulate for it under article 43A. But article 43A was inserted in the legislation only in 2018, and cannot have affected the prior position; and by permitting an outgoing trustee to stipulate for security it necessarily recognises that a former trustee is entitled to demand priority over the rights of subsequent trustees and their creditors. If, however, the article was introduced in circumstances where a trustee already had an equitable lien, as *Investec* states, it cannot in my view be said to have abolished by implication the security rights a trustee previously enjoyed. Moreover, the two situations contemplated in the article are not the only situations in which a lien may be unaccompanied by possession. As is stated in paragraph 21 – 043 of *Lewin* (quoted at paragraph 138 above), the trustee's rights of reimbursement and exoneration, and the relative liens, may be assigned; and the assignee will not have possession, but will under English law be entitled to enforce the lien. Article 43A does not contemplate that situation.

285 A trustee's lien is an inseparable incident of his office: see the quotation from *Re The Exhall Coal Company* set out at paragraph 145 above. Recognition of the existence of a trust implies recognition of the existence of the rights conferred by it, including those inseparable from the office of trustee. In my view, that in effect means that the importation of the law of trusts from England to Jersey (see paragraph 57 of *Investec*) carried with it the importation of rights otherwise unknown to Jersey customary law. In paragraph 257 above, the Bailiff suggests that a similar proposition was rejected in *Abdel Rahman v Chase Bank (CI) Trust Company Limited*; but that case concerned a gift into trust, not any question of the rights affecting property once validly placed in trust, and I do not myself regard it as authority against the proposition I have stated.

286 Accordingly, it seems to me that there is no actual tension between Jersey customary law and the requirement to recognise a trustee's non-possessory lien. The lien arises from a structure foreign to Jersey customary law that nevertheless exists under Jersey law (and did so before enactment of the Trusts Law), and the incidents of the structure must be regarded as consistent with Jersey customary law. The importation of the alien structure necessarily involved importation of essential elements that would otherwise have been alien to the customary law. The reference to article 11(2)(a)(iii) (paragraph 259 above) appears to me to beg the question: if the trustee's right of lien has been imported into Jersey law as an essential incident of the recognition of trusts, it is not contrary to the customary

law. But even if, contrary to my view, the tension exists, I have no doubt that we are bound by *Investec* to resolve it in favour of the existence of a lien capable of subsisting after a trustee has parted with possession of the trust assets; and, once that is established as the premise, the outcome of this appeal is determined primarily by the rules relating to priority of securities.

287 The second point is this. As I understand his judgment, the Bailiff considers that Article 32 has brought about a situation in which for the first time it is possible to have what he describes as a “bankrupt trust” without there being at the same time a bankrupt trustee, and that this novel situation should lead to a distribution of available assets without recognition of any security rights in former trustees or those who claim through them. I respectfully disagree with this proposition.

288 I think it is a mistake to speak of a trust being bankrupt or insolvent in any technical sense (although, as Logan Martin JA has explained in paragraph 13, the expressions “solvent” and “insolvent” have been used as convenient shorthand in the particular circumstances of this case). As the Bailiff acknowledges, a trust is not a separate entity. It does not hold assets or incur liabilities, and so cannot become bankrupt or insolvent. The correct analysis is that the current trustee has insufficient assets to enable him to satisfy in full third party liabilities created by himself or by his predecessors. The mere fact that there is no direct authority prior to the present case dealing with how that situation is to be managed suggests that the situation does not commonly arise. Trustees do not ordinarily conduct the type of highly leveraged investment business that occurred in *Investec*. When the situation does arise, however, the current trustee may or may not be personally liable in respect of liabilities created by himself, depending on the effect of Article 32; but in either case he has a right of recourse against the trust assets to discharge, or be indemnified against, the liabilities if they were properly incurred. He is not personally liable in respect of liabilities created by predecessor trustees; but he is obliged in dealing with the trust assets to give effect to the previous trustees' rights of indemnity. That is the case whether the rights of indemnity of a previous trustee are pursued by the previous trustee himself after he has personally satisfied the liabilities, or by subrogated creditors of a bankrupt former trustee who has been unable to satisfy the liabilities personally, or by subrogated creditors of a previous trustee who has Article 32 protection against personal liability. The order of priority in which the various rights of indemnity are to be satisfied is, of course, the question in the present case; but, since the same liabilities have to be satisfied regardless of the effect of Article 32, I do not consider that Article 32 has had any effect on the question of priorities or otherwise introduced any additional novelty beyond the potential limitation of a trustee's liability. That is what is said in paragraph 62 of *Investec*, and I respectfully agree with it.

289 Although I do not think that the effects described by the Bailiff in paragraph 278 above are a consequence of the enactment of Article 32 (as he suggests in paragraph 280), except to the extent that that article may leave a creditor without recourse to the personal assets of a trustee, I accept that the effect of our decision is to leave later creditors vulnerable to the rights of earlier creditors. Later creditors may have security in the form of their right to be subrogated to the rights of indemnity of the current trustee, but that is no protection to them

when the current trustee's rights are themselves postponed to the rights of former trustees and those claiming through them. The position is particularly acute in a case such as the present, where it appears that no reasonable investigation would have revealed the possibility of the Angelmist claim. But the possibility of such a disadvantage is inherent in English trust law, as paragraph 59 (vii) of *Investec* demonstrates; and it does not seem to me to afford a principled reason for substituting for accepted principles of the priority of equitable interests a regime based on a notional bankruptcy of a notional entity. As I have indicated, cases where trustees become exposed to substantial third-party liabilities are likely to be rare; and when they do occur, creditors may be expected to be sufficiently alert to their own interests to demand security for the liabilities at the time of their creation.