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

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| **Jurisdiction:** | Jersey |
| **Judge:** | J. A. Clyde-Smith |
| **Judgment Date:** | 10 September 2018 |
| **Neutral Citation:** | [2018] JRC 164 |
| **Reported In:** | [2018] JRC 164 |
| **Court:** | Royal Court |
| **Date:** | 10 September 2018 |



**Text**

[2018] JRC 164

ROYAL COURT

(Samedi)

Before:

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

In the Matter of the Representation of Rawlinson & Hunter Trustees SA (Originally Brought by Volaw Trustees Limited)

And in the Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984 (As Amended)

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

and

K, adult beneficiary of the Z II Trust
Second Respondent

and

Equity Trust (Jersey) Limited
Third Respondent

and

Fielden Holdings Limited
Fifth Respondent

and

Rawlinson & Hunter Trustees SA (as trustee of the Z Trust)
Sixth Respondent

and

Rawlinson & Hunter Trustees SA (as trustee of the X Trust)
Eighth Respondent

and

E
Ninth Respondent

and

E in his capacity as Executor of the Estate of C
Tenth Respondent

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

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

**Authorities**

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

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

Bankruptcy (Désastre) (Jersey) Law 1990.

*Abell v Screech* [1805] 10 Ves Jun 355, 32 ER 882.

*Investec v Glenalla* [2018] UKPC 7.

Trust — decision relating to a claim for costs by a former trustee in proving its claim against the assets of the now insolvent trust.

**THE COMMISSIONER:**

1 In the Court's judgment of 3rd July 2018, ( *Representation of Rawlinson & Hunter Trustees SA re Z Trusts* [2018] JRC 119) ("the Substantive Judgment"), I left over one issue to be dealt with separately.

2 This judgment deals with that separate issue, and should be read as an extension of the Substantive Judgment (adopting the same definitions), in which I considered whether the equitable lien of a former trustee took precedence over the rights of other claimants to the assets of a trust that are insufficient to meet the claims to those assets (for convenience referred to as an "insolvent trust"). At paragraph 143, I reached this conclusion:-

> ***"(i) The equitable lien is a device of equity granted to trustees by the Court to give them effective rights of indemnity and 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 that trustee under Article 32(1)(b) rank pari passu, the claims against all trustees and the liabilities of all trustees rank pari passu."***

3 The separate issue with which I am now dealing is whether Equity Trust, as a former trustee, can claim for its costs in proving its claim of £90,920.26p against the assets of the Z III Trust which is also an insolvent trust. Those costs are estimated at £247,000.

4 Advocate Jordan put forward powerful arguments for saying that, certainly in the case of a solvent trust, a former trustee's right of indemnity and equitable lien securing that right extends to and encompasses expenses reasonably incurred in making good its claim under that indemnity and equitable lien. This was the conclusion reached by Smellie CJ in

*ATC (Cayman) v Rothschild Trust Cayman Ltd* [2012] 14 ITELR 523, where the Court had been asked inter alia to give directions as to the extent of Rothschild's right of indemnity as outgoing trustee, and where he observed at paragraphs 76–79:-

> ***"[76] As outgoing trustee entitled to and indemnity Rothschild is not to be condemned in the costs of the resultant legal proceedings unless it can be shown that it acted, not only erroneously, but also that (and to the extent that) it acted in bad faith or otherwise misconducted itself.*** This is in the sense as explained long ago by Jessel, MR in *Turner v Hancock* (1882) Ch D 303 ***at 305*** :-
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> ***'These rights [(of a trustee to all their proper costs incident to the execution of the trust)] resting substantially upon contract can only be lost or curtailed by such inequitable conduct on the part of a … trustee as may amount to a violation or culpable neglect of his duty under the contract.*** Any departure from these principles in the general course of the administration of justice in this Court would tend to destroy, or at least very materially to shake and impair … the safety of trustees …
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> ***It is not the course of the Court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust.*** The earlier cases had the effect of frightening wise and honest people from undertaking trusts …'
>
> ***[77] The applicability of this dictum to the even more modern trust context was confirmed by Ungoed-Thomas J in*** *Re Spurling's Will Trusts, Philpot v Philpot* [1966] 1 All ER 745 ***at 755 … where he cited and applied it*** .
>
> ***[78] I adopt his explanation below such that in my view, in the absence of misconduct as defined; if the costs of a trustee incurred in making good its claim for an indemnity and lien were excluded from its right to costs, 'it would drive a coach and four through the very raison d'être which Sir George Jessel MR invoked for the principle which he lays down; namely, the safety of trustees, and the need to encourage persons to act as such by protecting them 'if they have done their duty or even if they have committed an innocent breach of trust'" per Ungoed-Thomas in*** ( *Re Spurling's Will Trusts* ***…***
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> ***[79] In this case, the approach to be taken by this court – where the question is the entitlement to its costs of a professional trustee which is innocent of misconduct – can be no different."*** (Advocate Jordan's emphasis)

5 . It follows, she submitted, that provided the costs have been reasonably incurred, which in the absence of agreement is best left to the taxation process, Equity Trust is entitled in law to recoup its costs on a complete indemnity basis from the available trust assets. The fact

that the Z III Trust is " ***insolvent"*** was no justification, she said, for the Court " ***driving a coach and four"*** through such fundamental principles of trust law, which protect the safety of trustees and prevent ***"the effect of frightening wise and honest people from undertaking trusts."***

6 Just as she had argued in the substantive hearing that the equitable lien of Equity Trust as a former trustee gave it priority to the claims of any other creditors, that priority, she said, extended to the costs it had reasonably incurred.

7 However, in considering the issue of costs, I have to be informed by the decision I have reached in the Substantive Judgment, namely that Equity Trust as a former trustee does not have priority over the claims of others, and that in the case of an insolvent trust, a *pari passu* regime applies.

8 Article 30(2) of the Bankruptcy (Désastre) (Jersey) Law 1990 provides that a creditor in a Désastre has to bear the cost of proving the debt, unless the Court decides otherwise. Advocate Harvey-Hills submitted that this rule has ancient roots and appears in origin to be one of convenience as well as fairness. He referred me to the judgment of Lord Eldon LC in *Abell v Screech* [1805] 10 Ves Jun 355, 32 ER 882, which concerned a motion by a creditor in the estate of an intestate that his costs of proving in the estate, which had been particularly high, be paid from the estate. Reliance was placed on a Chancery Court decision in 1776, in which creditors had been allowed to claim their expenses for proving their claims before the Master in the administration of an estate, again on the basis that proof had been particularly expensive. Lord Eldon was not persuaded:-

> ***"The difficulty upon the precedent in 1776 is, that if any creditors are to be allowed their costs, it must of necessity follow, that all should be allowed their costs.*** That case arose upon the distribution of a great nobleman's estate; and, I believe, some feelings of generosity prevailed in that instance. Upon what ground can it be done in one case, unless there is some special direction in the Will or Deed, creating the trust? …
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> ***The leaning of the Court now is to give the Plaintiff his costs, as far [as] they can; provided there are assets.*** But the general proposition is, that an executor does not pay costs, rather than that he does. That was much discussed in the Court of Common Pleas in the year 1789 or 1790. When this motion was first made, it struck me as of great consequence and much novelty; for the course of the Court in the administration of assets is to compel all creditors to come before it; and the executor could not be safe, unless this Court would prevent their proceeding at Law. This is an application, not for costs according to the ordinary course of the Court, but upon this ground; that ***there has been more than usual difficulty in proving the debt in the Master's office.*** It struck me, that, if this application is to be sustained upon that ground, it must be very familiar; and, if not authorized by precedent, the Court would be called upon in most cases to determine, whether there is not so much difficulty in establishing the debt of each particular creditor, that it would be fit to distinguish his case;

> and to lay down one rule for one class of creditors and a different rule of another class. The cases that have been produced, are only one, in 1776, that has not been followed."

In the same case, Grant MR agreed:-

> ***"Every creditor, coming in before the Master, incurs some expense.*** Yet it is admitted not to be of course, but, that a special application to the Court is necessary to warrant the Master to tax the costs of the creditor; and therefore the degree of expense will come into discussion in each case. In that there would be much inconvenience, and a great deal of difficulty; which ought to be very well considered, before such an application is granted."

9 In summary, Advocate Harvey-Hills argued that if only those creditors who claimed to have incurred particular expense in establishing their proof may obtain the costs of their proof, then all creditors would have an incentive to argue that they fell within this exception. This would, he said, be burdensome for the estate and its administration, and thus detrimental to the interests of the creditors as a whole.

10 By contrast, he argued that for all creditors to be permitted to claim the costs of their proofs from the estate might prove a considerable drain on it, and would effectively force creditors with well established claims to subsidise the cost of the proof of those with claims that are marginal and thus difficult to prove. This would encourage an uncommercial attitude towards putting proofs in insolvent estates, again to the detriment of the creditors as a whole.

11 The potential unfairness caused if that rule were not to be applied is illustrated by this case, in which Equity Trust has incurred costs of some £247,000 in relation to a claim of some £90,000, costs which are arguably disproportionate and which if allowed the other creditors would, in effect, have to subsidise.

12 In my view, the arguments put forward by Advocate Harvey-Hills are persuasive. All claims to the assets of a trust come through the former or current trustees; as the Privy Council said in *Investec v Glenalla* [2018] UKPC 7 at paragraph 59, they are the only persons who can assume liabilities in relation to a trust. Where those liabilities exceed the assets of the trust, and again assuming a *pari passu* regime, the interests of all those creditors, for the reasons put forward, is for this rule to be applied, namely that each creditor should bear the costs of proving that creditor's claim, subject always to the discretion of the Court in any given case.

13 The application of such a rule would not, in my view, have the effect of frightening wise and honest people from undertaking trusteeships. What could well frighten them is the possibility that in the unlikely event of the trust becoming insolvent, the rights of a former trustee would enable it "to scoop the pot" in relation not only to its claim but also to the cost of proving that claim. A far more just result would be for all those trustees involved in the

administration of the trust, acting properly and in good faith, to be treated equally.

14 I therefore conclude that Equity Trust cannot claim for its costs in proving its claim.