

# Equity Trust (Jersey) Ltd v E (in his capacity as Executor of the Estate of C)

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Martin JA
<b>Judgment Date:</b>	23 September 2019
<b>Neutral Citation:</b>	[2019] JCA 188
<b>Date:</b>	23 September 2019
<b>Court:</b>	Court of Appeal

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## Text

[2019] JCA 188

Court of Appeal

Before:

Sir William Bailhache, **Bailiff of Jersey, President;**

John Martin, **Q.C;** and

Sir Michael Birt.

Between  
Equity Trust (Jersey) Limited  
Appellant  
and  
E (in his capacity as Executor of the Estate of C)  
Respondent

## Authorities

*Rawlinson & Hunter Trustees SA v Chiddicks and others* [\[2019\] JCA 106](#).

*Parish of St Helier v Minister for Infrastructure* [\[2017\] JCA 076](#).

*Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [\[2019\] AC 271](#).

Judicial Committee (Appellate Jurisdiction) Rules 2009.

Court of Appeal (Jersey) Law 1961.

*Botas v Tepe* [\[2016\] JCA 199D](#).

Court of Appeal — leave to appeal — costs.

## JUDGMENT ON THE PAPERS

Martin JA

- 1 On 28 June 2019 the Court gave judgment ( *Rawlinson & Hunter Trustees SA v Chiddicks and others* [\[2019\] JCA 106](#)) allowing the appeal of Equity Trust in this matter. The background is comprehensively set out in that judgment, and we do not repeat it here. The parties are described in the same way as in that judgment.
- 2 The Executor, the unsuccessful respondent to the appeal, now applies for leave to appeal to the Judicial Committee of the Privy Council (“the JCPC”). Equity Trust makes a cross-application for security for the costs of the appeal to the JCPC if leave is granted. This is the decision of the Court on those applications, which we have determined on the papers with the benefit of extensive written submissions on both sides.
- 3 The Court's conclusion is that leave should be granted unconditionally.

## Leave

- 4 Leave will not be granted unless the projected appeal raises an arguable point of law of general public importance which ought to be considered by the JCPC at this time: see *Parish of St Helier v Minister for Infrastructure* [\[2017\] JCA 076](#). The same case also indicates that in normal circumstances it will be left to the JCPC to decide whether or not leave should be given. The circumstances where this Court may be more sympathetic to an application for leave are those where it is more easily able perhaps than the JCPC to form a view about the public importance of the issue in question to Jersey.

- 5 We consider that this case raises at least two arguable points of law of general public importance. The first is the correct method of dealing with the liabilities of a trust whose assets are insufficient to meet the claims on it. Although such cases are still rare, when they do arise they cause practical and conceptual problems that are novel. There is no authority in this jurisdiction, in England or elsewhere apart from our decision that directly deals with the issues. We think the point is of general importance to this jurisdiction and more widely. The second point is the status of a trustee's lien in Jersey law. The JCPC's conclusion in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [\[2019\] AC 271](#) at [59] that the existence of a trustee's non-possessory lien securing his right of indemnity was one of the principles of English law that must be regarded as having been part of the law of Jersey prior to the enactment of the Trusts (Jersey) Law was fundamental to this Court's decision; but, as both the Bailiff and Martin JA pointed out, a non-possessory lien was on the face of it not something that was recognised by Jersey customary law. Further consideration of this issue is of general public importance to Jersey, in particular because of the necessity to uphold the Island's customs and to recognise the separate origins of its law.
- 6 We consider that both these issues need to be considered by the JCPC at this time. It is important that the proper way of dealing with trusts where there is a deficiency of assets should be established sooner rather than later, so that present creditors can know where they stand and future creditors can decide on what terms to deal with trustees. It is important also, given the importance of the trust industry to the Island, that the law of trusts as it applies in Jersey should be properly understood and that possible conflicts between rules of English trust law and rules of Jersey customary law should be resolved as soon as possible.
- 7 In the circumstances, we think we should ourselves give leave to appeal, and do so.
- 8 We make clear that in identifying these two issues we do not intend to confine the leave to appeal to those issues. If the Executor has other points it may properly raise before the JCPC, it is at liberty to do so. That applies in particular to the issue raised by the appeal in relation to the Recoverable Costs Judgment, which is closely related to the first of the issues we have identified.

## Security

- 9 There is a question whether the Court has jurisdiction to order security as a condition of giving leave.
- 10 Rule 37(2) of the Judicial Committee (Appellate Jurisdiction) Rules 2009 (as amended) provides that "[w]here permission to appeal has been granted by the court below, security for costs of the appeal shall be a matter for that court". This provision does not imply that the lower court has jurisdiction to order security, nor does it confer jurisdiction on the lower court where none otherwise exists. It merely means that, as between the JCPC and the

lower court, security is for the lower court. The jurisdiction must be found, if at all, in the local law of the lower court.

- 11 The Court of Appeal (Jersey) Law 1961 (as revised) (“the 1961 Law”) says nothing expressly about the terms on which the Court may give leave for an appeal to the JCPC. Indeed, it is a curiosity of the 1961 Law that it is only by implication that it provides for the giving of leave at all, article 14(1) stating merely that **“no appeal shall lie from a decision of the Court of Appeal under this Part without the leave of the Court or the special leave of Her Majesty in Council”**.
- 12 The Part in question is Part 2 of the 1961 Law, dealing with appeals in civil causes and matters. It includes article 15, which provides as follows:
- “The jurisdiction vested in the Court of Appeal under this Part shall, so far as regards procedure and practice, be exercised in the manner provided by the Law or by rules of court, and, where no special provision is contained in the Law or in rules of court with reference thereto, any such jurisdiction shall be exercised in such manner as the Court of Appeal considers just and convenient”***.
- 13 In our judgment, this provision permits us, when exercising the jurisdiction to grant leave implicitly conferred by article 14 (1) of the 1961 Law, to attach conditions to the grant of leave if we consider it just and convenient to do so. We note that the ability to order security for the costs of an appeal to the JCPC was assumed in *Botas v Tepe* [2016] JCA 199D. We do not consider that the existence in rule 12.4 of the Court of Appeal Civil Rules of a specific power to order security for the costs of an appeal to this court impliedly excludes a power to order security for an appeal to the JCPC.
- 14 We do not, however, think it would be just to order security in the present case. The Executor is dependent on the assets of a related trust to fund this litigation. The assets of that trust are insufficient to meet the claims to them, and are being administered under the supervision of the Royal Court. Equity Trust itself has a claim against the assets of that trust. If security is ordered and the Executor cannot persuade the Royal Court to fund that security, the appeal to the JCPC will be unable to proceed. Given the importance of the issues, we are not willing to allow that to occur. If, on the other hand, the Royal Court were to fund any security we ordered, the effect would potentially be to give Equity Trust priority to the extent of the security over other creditors of the related trust. We do not consider that we should make an order capable of having that effect when the related trust is under the control of the Royal Court, not of this court.