Trusts - decision with regard to the rights of a former trustee to the assets of an insolvent trust

[2018]JRC119

ROYAL COURT
(Samedi)

3 July 2018

Before : J. A. Clyde-Smith, Esq., Commissioner, sitting alone.

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 the late C**	**Tenth Respondent**

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)

Advocate E. L. Jordan for the Third Respondent.

Advocate J. Harvey-Hills for the Tenth Respondent.

JUDGMENT

THE COMMISSIONER:

1. On 15th and 16th March, 2018, I sat to consider a point of law in relation to the nature of the equitable rights of a former trustee and whether those rights take priority over the rights of other claimants to the assets of an insolvent trust.

2. The issue arises in the context of the Z II Trust (one of a number of similarly named trusts) created on 10th September 2004, which has been the subject of a number of published judgments. I set out the background to the extent necessary to place this particular issue in context.

Background

3. The Z II Trust is a Jersey law discretionary trust established by declaration of trust by the third respondent ("Equity Trust") on 10th December, 2004.

4. Equity Trust retired as trustee on 11th October, 2006 in favour of Volaw Trustees Limited ("Volaw"). Under the provisions of the deed of appointment and retirement of trustees it was given contractual indemnities in relation to all and any actions, proceedings, costs, claims and demands which may be brought or made in connection with the trusts of the Z II Trust or in any way relating thereto. Attached to the deed were documents showing that at that time, there were numerous companies within the trust structure which I believe were predominantly involved in property development in the United Kingdom.

5. On 31st July, 2012, Angelmist Properties Limited (in compulsory liquidation) ("Angelmist"), acting by its joint liquidators, brought proceedings against two of its former directors and Equity Trust in the English High Court. Angelmist is a company registered in England and Wales and is within the Z II Trust structure.

6. The Angelmist proceedings related to a claim for breach of duty against the two former directors, both of whom were employees of Equity Trust, and who were made directors of Angelmist because of that employment. As regards Equity Trust, there were separate claims for vicarious liability and a claim that it acted as a *de facto* and/or shadow director of Angelmist during the relevant period. As pleaded the claims in the Angelmist proceedings totalled approximately £42,500,000, excluding interest and costs.

7. On 22nd April 2013, Equity Trust notified Volaw of its intention to rely upon the indemnities granted by Volaw to Equity Trust and sought confirmation that its rights were not prejudiced as regards the assets of the Z II Trust.

8. On 11th March 2015, Volaw issued this representation before the Court as a result of the insolvency of the Z II Trust. It sought directions from the Court in relation to the implementation of a regime aimed at winding up the Z II Trust. On the 29th April, 2015, it was authorised by the Court to continue administering the assets of the trust and to charge its fees for so doing, to be paid from the assets of the trust in priority to all other claims.

9. On 20th October 2015, Volaw was given leave by the Court to retire as trustee of the Z II Trust in favour of Rawlinson & Hunter Trustees SA ("Rawlinson & Hunter"). Rawlinson & Hunter was appointed trustee on 13th November, 2015 and is administering the assets of the Z II Trust under the direction of the Court, in succession to Volaw. It is trustee on the basis that it will not charge any fees or expenses against the trust fund of the Z II Trust, all of which are being funded from outside the trust.

10. The Angelmist proceedings were brought to a conclusion by way of a settlement agreement dated 22nd Decembe,r 2015, which remains confidential, but I was informed that pursuant to that settlement agreement, Equity Trust made a total payment of £16,500,000 to the liquidators of Angelmist. In addition, it was agreed that the parties would pay their own costs. Equity Trust has incurred costs in the sum of £2,348,075.31 in relation the Angelmist proceedings, and in total therefore, claims to have incurred liabilities as trustee of over £18M which it has funded personally. The payment to the liquidators has been used by them to discharge liabilities of Angelmist and so no value has accrued to the Z II Trust.

11. The only asset of the Z II Trust is a loan due by the Z III Trust in the sum of £186M, written down to £6M, to reflect the likely recovery from the Z III Trust, which is also under the supervision of the Court as an insolvent trust.

12. The liabilities of the Z II Trust, excluding the claim of Equity Trust, total some £211M, and comprise unsecured loans payable to entities which Equity Trust regard as connected. The trust accounts for the period from 6th April, 2006, to 30th September, 2015 (the only accounts that exist) state that some £29.3m is payable by the Z II Trust to the Z Trust and some £165.5m to the X Trust, of both of which Rawlinson & Hunter is also the current trustee. There is also a loan of £1.4m owed to the estate of the late C. It is not clear from the accounts when all of these loans were originally created and with which trustee.

13. To talk of an insolvent trust is of course a misnomer. A trust is not a separate legal entity and cannot, as a matter of law, be insolvent. In the usual way the accounts have been drawn up as if the Z II Trust was a separate legal entity, with assets and liabilities, but in fact, the assets will now be held by the current trustee and, as is made clear below, claims to those assets will be routed through the current or former trustees. For convenience I will continue to refer to a trust being insolvent by which I mean where the assets held on trust by the trustee are insufficient to meet the claims to those assets.

Equity Trust's claim

14. Equity Trust seeks to claim reimbursement of the £18M in costs and liability it has incurred out of the assets of the Z II Trust and maintains that its claim takes priority over the claims of the other creditors.

15. The issue of priority is significant to Equity Trust in that if it has priority, then it will recover all of the assets of the Z II Trust, currently assessed at some £6M, leaving it with a loss of £12M, against receiving the sum of £330,000 if it has to share the assets of the Z II Trust *pari passu* with the other creditors.

16. The entitlement of Equity Trust to make any claim against the assets of the Z II Trust is not accepted by Rawlinson & Hunter, but it was agreed by the parties that it would be helpful to determine the priority issue in advance.

Assumptions

17. It was agreed that the Court would proceed to determine the issue of priority on the following 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 (Jersey) Law 1984 ("The Trusts Law") in relation to the Angelmist proceedings.

    (iii) All of the other unsecured creditors of the Z II Trust are Article 32(1)(a) creditors.

As can been seen below I have found it necessary to make certain other assumptions in order to address the issue before me.

18. Article 32(1)(a) gives a trustee protection against personal liability where the person transacting with it knows that it is acting as trustee. It is in these terms:-

> ***"32 Trustee's liability to third parties***
>
> ***(1) Where a trustee is a 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."***

Indemnification principles not in dispute

19. A number of principles were not in dispute between the parties.

20. As reflected in Article 26(2) of the Trusts Law, and as is considered trite in other common law jurisdictions, a trustee is entitled to be indemnified out of the trust fund in respect of liabilities, costs and expenses reasonably incurred by it in connection with the performance of its duties as trustee.

21. The right of indemnity is not limited to recouping payments actually made by the trustee but extends to liabilities whether existing, contingent, future or otherwise. As observed in Re Blundell [1889) LR 40 Ch D 370 at 376-377:-

"What is the right of indemnity? I apprehend that in equity, at all events, it is not a right of the trustee to be indemnified only after he has made the necessary payments to his solicitor, or to the auctioneer, or to the stockbroker – but that he is entitled to be indemnified, not merely against the payments actually made, but against his liability."

22. As a practical matter, the trustee's entitlement encompasses both:

    (i) A right of reimbursement – a trustee may discharge the liability from his own resources and then reimburse himself from the trust property; and

    (ii) A right of exoneration – a trustee may pay the liability directly from the trust property.

23. This is entirely unsurprising. As observed in Re Grimthorpe [1958] Ch 615 at 623:-

"It is a commonplace that persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified … The general rule is quite plain; they are entitled to be paid back all that they have had to pay out."

24. This observation was recently cited by the New Zealand Court of Appeal in Butterfield v Public Trust [2017] NZCA 367, where Kos P (giving the reasons of the court) observed at paragraph 21 that: "***The proposition is so fundamental that it need not be justified".*** Indeed, Kos P described the trustee's right of indemnity at paragraph 20 as "***one of the fundamental rights of an honest express trustee."***

25. The right of indemnity is the *quid pro quo* for the trustee undertaking onerous duties to the beneficiaries of the trust. It is an entrenched incident of trusteeship. Moreover, a trustee's right of indemnity continues even after a trustee retires or is removed from office (see Lewin on Trusts 19th Edition at paragraphs 17-034 to 17-036).

26. Reference was made to this fundamental principle in the Consultation Paper of the Economic Development Committee published in late 2004 at 2.5.3:

"The fundamental principle underlying this area of the Law is quite simple and uncontentious: namely that a trustee should not face personal liability in relation to liabilities either properly incurred by the trust or in respect of which the trustee bears no personal responsibility. Indeed, although the office of trustee will always carry onerous responsibilities, it is vital to ensure that the rights of and protection offered to trustees are conducive to encouraging trusts business in the Island."

Existence of an equitable lien under Jersey law

27. The existence under Jersey law of an equitable lien was considered by the Guernsey Court of Appeal in Investec Trust (Guernsey) Limited v Glenalla Properties Limited Guernsey Judgments 41/2014, a case in which the former trustees of a Jersey proper law discretionary trust known as the Tchenguiz Discretionary Trust sought declarations as to whether they had personal liability for loans due to a number of BVI companies, that any claims in relation to those loans were limited to the trust property of the Tchenguiz Discretionary Trust and that they were entitled to be indemnified out of the trust property of the Tchenguiz Discretionary Trust. This required the Guernsey Court of Appeal, by agreement of the parties, to construe the meaning and effect of Article 32 of the Trusts Law as if it were construing a statute of Guernsey. Although not technically binding on this Court, it was followed in the case of in Representation of the Z Trust [2015] JRC 031 as representing the law of Jersey.

28. On the 23rd April, 2018 and following the hearing before me, the Privy Council handed down its decision on appeals from the decision of the Guernsey Court of Appeal. Counsel have submitted further written submissions on the effect of the Privy Council decision which I will come to shortly. In the meantime I will set out the contentions made by the parties prior to the Privy Council decision.

29. One of the contentions before the Guernsey Court of Appeal in Investec v Glenalla was whether a creditor claiming against the trust fund through former trustees was affected by allegations of breach of trust against the former trustees. It found that these were separate issues to be resolved separately (paragraph 46). Such a contention does not feature in the issues before me, and I would summarise the findings of the Guernsey Court of Appeal, in so far as they are relevant to the issues before me, in this way:-

    (i) It is a fundamental principle of the general law of trusts that a trust has no distinct or separate legal personality. A third party who engages in a transaction or matter with a person who is a trustee engages with that person, and any proceedings in respect of the transaction or matter are to be taken against that person (paragraph 23).

(ii) Where Article 32(1)(a) is engaged, the consequence is that any "***claim by the other party***" is to be taken "***against the trustee as trustee"***. As a trustee does not have two separate legal personalities, the use of the expression "***as trustee***" confirms that any claim and any proceedings will be taken against the other contracting party, but specifically in his capacity as trustee, and not in any other capacity. The plain meaning of the words "***shall extend only to the trust property****"* is that such a claim cannot extend beyond the trust property to the personal property of the trustee (paragraph 29).

(iii) The obligation of the trustee under Article 32(1)(a) is fulfilled as long as he satisfies a claim by expending all of the trust assets as they exist at the time the claim falls to be satisfied (paragraph 31).

(iv) A trustee who has transacted has a right to be indemnified by a subsequent trustee out of and up to the limit of the trust assets held by the latter, to be characterised as an equitable right in the form of or analogous to a non-possessory lien. The Guernsey Court of Appeal cited this passage from Lewin on Trusts 18th edition 2008 at paragraph 14-59:-

> ***"The trustee's rights of indemnity go further than simply giving him something like a common law lien which is dependent upon the ability to exercise legal control. The rights of indemnity give him a proprietary equitable charge over or equitable interest in the trust property, and there is no reason why this charge or interest should disappear upon the appointment of new trustees."***

(v) Article 32(1)(a) does not create a direct right of recourse to the trust assets in favour of the other party who has knowingly transacted with the trustee. That other party has the ability to satisfy his claim by proceeding against the trustee with whom he has transacted and that will require the trustee to settle the claim out of such trust assets as he holds, but that trustee will also have access to such other trust assets as may be held by a subsequent trustee as a result of this equitable right (paragraph 38).

30. I set out the summary contained in paragraph 39 of the judgment of the Guernsey Court of Appeal:-

> ***"39 In summary, Article 32(1) of the Jersey Law operates to fix from the outset the extent of the liability of the person with whom the third party transacts. In the case of sub-paragraph (1)(a), where the third party knows the person with whom he is transacting to be a trustee, then the liability of the***

person who is the trustee extends only as far as the trust assets. Once the person who is the trustee has satisfied any liability up to the amount of the trust assets, then the person who is the trustee cannot be obliged to satisfy any outstanding liability out of his personal assets and he is entitled to discharge in respect of that liability. The fact that sub-paragraph (1)(a) operates when a person knows that he is transacting with a trustee means that that person has had an opportunity to consider and accept the covenant of the other person whom he knows to be a trustee. This will include an opportunity to take security in respect of the ultimate fulfilment of the trustee's obligations or to include any other particular arrangement that the other person might decide was prudent when dealing with a trustee. But in the absence of any such security or other arrangement, sub-paragraph (1)(a) has the effect that a person who knowingly transacts with a trustee must accept that in due course any claim which he makes will be satisfied only to the extent of the trust assets as they will exist at the time.

40 Turning again to sub-paragraph (1)(b) of Article 32, we have already noted that this paragraph will be engaged in the situation "where the other party does not know that the trustee is acting as trustee". As we have said, that again is a matter of fact and the paragraph does not itself provide any particular circumstances from which the particular state of knowledge might be inferred. If the other party is ignorant of the fact that he is transacting with a trustee, then the trustee will not have the benefit of sub-paragraph (1)(a) which would otherwise exclude his personal liability, and the trustee will have personal liability in a situation where sub-paragraph (1)(b) is engaged."

31. Apart from equating the equitable right of the former trustee to a proprietary equitable charge over or equitable interest in the trust property, the Guernsey Court of Appeal did not otherwise analyse the nature of the equitable right and, because it was not concerned with an insolvent trust, the question of priority as between the claims to the trust property brought by the former trustee and the current trustee.

32. As Advocate Jordan commented, the authorities in common law jurisdictions refer interchangeably to a "***charge***" or "***equitable lien***" or "***non-possessory lien***". The Guernsey Court of Appeal referred to an "***equitable right"*** but nothing would appear to turn on the difference in terminology for the purposes of the case before me. For convenience I will refer hereafter to an ***"equitable lien".***

33. Looking to English law, Snell's Equity (33rd edition) describes the nature of an equitable lien in this way:-

"44-004 (a) Nature.

An equitable lien is very different from a common law lien. Unlike common law liens, an equitable lien does not depend upon possession of the property which it covers. Rather than offering the lienee a defence to a claim for possession, as a common law lien does, the equitable lien is a form of equitable charge upon property until certain claims are satisfied. It differs from an equitable charge only in that it arises by operation of equity from the relationship between the parties, rather than by any act of theirs. The equitable lien differs further from common law liens in that it is enforceable by a judicial order for sale. As the equitable lien is a form of equitable charge, it will not avail against a purchaser for value of a legal estate without notice of it.

Equitable liens are thus 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, and they are also not dependent on a transfer of title in the way that a mortgage is."

34. Snell's Equity then goes on to describe the type of equitable liens under English law as follows:-

"44-005 (b) Types of equitable liens.

The principal equitable liens are (i) the vendor's lien for his purchase-money, (ii) the purchaser's lien for his deposit, and (iii) the solicitor's lien on property recovered for his client. Another is the lien of trustees and personal representatives on the trust property for their expenses. An equitable lien may also arise for (iv) money spent on the property of another."

35. An equitable charge is defined in Snell's Equity at paragraph 36-003 as follows:-

"An equitable charge is created when property is appropriated to the discharge of a debt or other obligation. There is no mortgage, because no estate or interest in the land has been conveyed or agreed to be conveyed, either at law or in equity; but there is an equitable charge because the property stands charged with the payment of the stated sum, and the charge is entitled to have this realised by judicial process."

36. The existence of an equitable lien securing the satisfaction of a trustee's right of indemnity has long been recognised under English law. Quoting from the judgment of Kay J in Re Pumfrey, deceased [1882] 22 Ch D 255 at 262:-

> ***"His right of indemnity gives him a right of charge or lien upon the trust estate, he has a right to come at any time and say, 'I claim to have my right of indemnity, I am now called upon to pay a sum of money for which I have a right of indemnity out of the trust estate, and that gives me the right in equity to have a charge against the estate, and to have the charge enforced by the process of the Court of Equity'. It would be extremely harsh upon trustees, who are treated with all proper severity and quite harshly enough by the Rules of this Court, if when they have a right of indemnity it should be held that they are not to be allowed to enforce that right of indemnity …."***

37. It has also been recognised in other common law jurisdictions. Quoting from the judgment of the High Court of Australia in Octavo Investments v Knight [1979] 27 ALR 129, a case involving an insolvent trustee, at page 134:-

> ***"… he is entitled to be indemnified against those liabilities from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets. Vacuum Oil Co. Pty. Ltd. v Wiltshire. The charge is not capable of differential application to certain only of such assets. It applies to the whole range of trust assets in the trustee's possession except for those assets , if any, which under the terms of the trust deed the trustee is not authorized to use for the purposes of carrying on the business.***

38. Southern Wine Corporation Pty Ltd v Frankland River Olive Co [2005] WASCA 236, a decision of the Supreme Court of Western Australia, was concerned with whether the "Responsible Entity" under a managed investment scheme registered under the Corporations Act 2001 had an equitable charge over the scheme assets for its unpaid management fees. Quoting from the judgment at paragraph 30:-

> ***"… A right of indemnity is more than a power over trust assets. The trustee with a right of recoupment and exoneration has an equitable charge or lien which arises by operation of law and which gives to the trustee an equitable proprietary interest in the trust assets: Octavo Investments Pty Ltd. v Knight [1979] HCA 61; (1979) 144 CLR 360 at 367; Commissioner of Stamp Duties v Buckle at 247 …"***

39. The equitable lien does not exist in isolation, in that it provides security for a debt or obligation, or in the case of a trust, a trustee's right to be indemnified. As the Guernsey Court of Appeal said in Investec v Glenalla, in the context of Article 32(1)(a) at paragraph 33:-

> ***"It is our opinion the use of the words 'extend only to the trust property' show that the trustee who has transacted has a right to be indemnified by a subsequent trustee out of and up to the limit of the trust assets held by the latter."***

Contentions of Equity Trust

40. Advocate Jordan drew a distinction between what she said were two different, but easily conflated, issues of law which may arise in the context of an insolvent trust:-

(i) A question of priority as between unpaid "*trust creditors*", in the sense of unsecured creditors claiming through a particular trustee's right of exoneration, pursuant to Article 32(1)(a) – in this case, the question of priority as between the "*connected creditors*" of the Z II Trust claiming, she assumed, through Rawlinson & Hunter's right of exoneration and equitable lien; and

(ii) the question of priority as between (a) the equitable lien of a former trustee securing its right of reimbursement in respect of liabilities properly incurred by it during its trusteeship when the liability falls due and has to be paid after the end of its trusteeship (i.e. the position of Equity Trust) and (b) the equitable lien of a current trustee securing its right of indemnity in the sense of its right of exoneration and reimbursement (i.e. the position of Rawlinson & Hunter).

41. She submitted that it was the second question of competing equitable rights between trustees which arose for determination. I am not sure it is right to say that it is a question of priority between Equity Trust as a former trustee and Rawlinson & Hunter as the current trustee. It would seem that the Z II Trust became insolvent under the trusteeship of Volaw and was insolvent at least by 11th March, 2015, when Volaw applied to the Court for directions. The trust assets have since been administered by Volaw and now Rawlinson & Hunter under the directions of the Court.

42. Whilst I am not making any findings of fact, it seems unlikely to me that any of these unsecured loans were taken out whilst the trust was administered under the directions of the Court (and therefore by Rawlinson & Hunter) and likely that all of the unsecured loans now being claimed

were taken out by Volaw as trustee, when the trust was solvent, or by Equity Trust before it. In this context I note that a single balance sheet drawn up for 12th October, 2006 (the day after the retirement of Equity Trust) shows the existence of a loan payable by the trustee of some £38M to an unnamed creditor/s. Only an inquiry will show definitively with which trustee the unsecured loan creditors transacted, but I assume that the unsecured loan creditors will be claiming either through Volaw or through Equity Trust itself, unless those loans have been novated to Rawlinson & Hunter and there is no indication that any have been novated.

43. Equity Trust may therefore be competing with unsecured creditors with whom it transacted and with the equitable lien of Volaw.

44. Advocate Jordan submitted that the equitable lien arises and remains in existence over all of the trust assets for so long as the trustee's right of indemnity remains in existence. Since the right of indemnity extended, she said, to all existing, future, contingent or other liabilities incurred by the trustee in its capacity as such, in practice this means that the lien comes into existence the moment, or very shortly after, the trustee takes office, and begins incurring liabilities.

45. She referred to this passage from the judgment of Robson J in Re Amarind Pty Ltd (In liquidation) [2017] VSC 127, a decision of the Victoria Supreme Court, Australia, involving an insolvent trustee, at paragraphs 386-388:-

> ***"[386] The trustee's lien applies to all the trust assets without distinction, whether they be fixed or circulating. The value of the lien increases and decreases according to the liabilities incurred by the trustee. The fact that the trustee may dispose of assets free from the lien does not mean that the lien is not fixed.***
>
> ***[387] The Commonwealth relies on the following statement of Brereton J in Re Independent [(2016 305 FLR 222, 231]:***
>
> ***The Trustee's lien does not attach to any particular asset, nor secures any particular liability, but is in the nature of a floating charge over all the trust assets. …***
>
> ***[388] Brereton J does not say that the lien is a floating charge, but rather is in the nature of a floating charge. This is clearly the case, as the charge's value expands and contracts with the liabilities incurred by the trustee on behalf of the trust." [Her emphasis]***

46. As recognised in Investec v Glenalla, since the equitable lien securing the right of indemnity is non-possessory in nature, it is not lost by the trustee when it retires, or is removed as trustee and replaced with a successor trustee. On the contrary, she said, the successor trustee takes the trust fund subject to and with notice of the former trustee's prior equitable lien, and is automatically bound by it and remains bound by it for so long as the former trustee has a continuing right of indemnity. She cited by way of example these extracts from decisions of the Australian courts:-

(i) ***Dimos v Dikeakos Nominees Ltd (1997) 149 ALR 113,*** a decision of the Federal Court of Australia concerning the alleged insolvency of a trustee, at page114:

> ***"A trustee's right of indemnity out of trust property survives the trustee's loss of office."***

(ii) ***Bruton Holdings Pty Limited v Commissioner of Taxation [2009] HCA 32,*** a decision of the High Court of Australia concerning a trustee under administration, at paragraph 43 :-

> ***"The appellant has rights of recoupment or exoneration in respect of all obligations incurred by it in that administration. These rights were supported by a lien over the whole of the trust assets which amounted to a proprietary interest therein and they survived the appellant's loss of office as trustee." (Her emphasis)***

47. She then referred to paragraph 81.1 of Underhill & Hayton Law of Trusts and Trustees (19th edition):-

> ***"81.1 (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 on 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. (Her emphasis)***

48. As to priority between competing equitable liens of trustees, she said this was a novel issue, which only arose because the Z II Trust is insolvent. In the usual course of events, the current trustee will satisfy the claim to an indemnity from the trust assets, and court enforcement of the

equitable lien will be unnecessary. She then referred to the position in equity as applied in common law trust jurisdictions, and under Jersey customary law, and concluded that both led to the same result: the first in time prevails.

49. The general and time-honoured rule in equity is that competing equitable interests rank according to the order of their creation. As Snell's Equity (33rd edition) at 4-002 states:

> ***"In equity, the result is expressed more directly in terms of temporal priority. The maxim is qui prior est tempore potior est jure: he 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". (Her emphasis)***

50. There was no principled reason, she said, why this rule should not apply to competing equitable liens of former and successor trustees, as reflected in a number of authorities from Australia. In Scaffidi v Scaffidi Holdings Pty Ltd [2010] WASC 29, a case which concerned the transfer of trust assets from a former to a new trustee, the Supreme Court of Western Australia observed at paragraphs 36-37:-

> ***"36 However, there is the potentiality that Scaffidi Holdings Pty Ltd may have incurred obligations and liabilities while properly discharging the office of trustee of the Scaffidi Family Trust for which it is personally responsible but, in respect of which, it has a right of recourse or indemnity to trust assets to reimburse itself for that liability. Should that be the case, it is recognised in the series of authorities discussed by the High Court in Octavo Investments Pty Ltd v Knight [1979] HCA 61; (1979) 144 CLR 360 and in Custom Credit Corporation Ltd v Ravi Nominees Pty Ltd. [1992] 8 WAR 42 that equity will recognise a charge over the assets in favour of the actual or former trustee to protect that right of indemnity….***
>
> ***37 One example where this might arise is if there were any outstanding taxation liabilities with the Scaffidi Family Trust during the period in which Scaffidi Holdings Pty Ltd was trustee and, in respect of which, it would be primarily responsible to the commissioner. To cater for that contingency I have suggested, and counsel for Montevento Holdings Pty Ltd had accepted, that there should be terms in the orders proposed to protect, according to its due priorities, that right of indemnity and the accompanying charge." (Her emphasis)***

51. Xebec v Enthe [1987] ATC 4570, a decision of the Supreme Court of Queensland, concerned a trustee, Xebec, that had been placed in liquidation, resulting in the appointment of a new trustee. Xebec was left with a liability to tax in an amount that exceeded the trust property, and the issue was whether it had incurred that liability as trustee under the trust, entitling it to an indemnity and charge in support. Quoting from the judgment at page 4575:-

> ***"This means that when the right to indemnity arose, Xebec held the trust property, the equitable interest in the Savannah Trust, in trust for the beneficiaries in the Xebec Trust but subject to its own prior equitable proprietary right in that property.***
>
> ***When the trust property was divested from Xebec and vested in Syriac by the combined effect of the appointment of the latter by Mr Ray and by sec. 15 of the Trusts Act, that property the title to which passed was only the equitable property constituted by the Xebec Trust interest in the Savannah Trust, and that was postponed to the prior interest of Xebec itself in that equitable property.'' (Her emphasis)***

52. In Richardson v Aileen [2007] VSC 104, a decision of the Supreme Court of Victoria, a new trustee had by agreement been appointed as trustee to resolve a dispute between a former trustee and the beneficiaries, tasked with completing the sale of the trust properties and distributing the funds. The agreement gave the former trustee priority over everyone else in relation to its fees and expenses, giving rise to a shortfall, with the prospect of the new trustee having to work for no remuneration. It was accepted by the parties in that case, and by the court, that the former trustee's equity had priority. Quoting from the judgment at paragraph 21:-

> ***"It is clear in this case that the new trustee either accepted his appointment with notice of the former trustee's prior equity or, at least, had such notice on the same day as his appointment and before all but negligible costs had been incurred by him. Once the Heads of Agreement had been brought to the attention of Mr Hughes, he had notice of the former trustee's claim against the Trust fund and therefore notice of the prior equity. This is of significance in itself as, in general, an equitable interest acquired with notice of an earlier equitable interest will be postponed to the earlier equitable interest."***

53. However, it was held that the former trustee's equity gave way to the equitable principle applied in the cases of In re Universal Distributing Company (In liquidation) [1933] 48 CLR 171 and In re Berkeley Applegate [1989] Ch 32, 50-51 that the new trustees should be paid for the work done in winding up the trust, because without that work, there would be no funds to pay the former

trustee, or indeed anyone else. The Court expressed the view, at paragraph 54, that the position would not be the same where the new trustee had been appointed merely to carry on the administration of the trust.

54. Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd [2008] NSWSC 1344, a decision of the New South Wales Supreme Court, again involved a trustee in liquidation and the issue arose as to whether it could retain assets in its possession as security for its right of indemnity. The Court set out a summary of the principles concerning a trustee's right of indemnity under Australian law which is worth setting out in full:-

> ***"14 First, as against a third party, a trustee is personally liable for debts and liabilities incurred in its capacity as trustee. [Vacuum Oil Co Pty Ltd v Wiltshire (1945) 72 CLR 319; Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360, 367.]***
>
> ***15 Secondly, however, the trustee has a right of indemnity out of the trust assets for expenses or liabilities incurred by the trustee, by recoupment of expenditure and exoneration from liability. [Octavo Investments, 367; Chief Commissioner of Stamp Duties for New South Wales v Buckle (1998) 192 CLR 226, 245].***
>
> ***16 Thirdly, this right of indemnity, recoupment and exoneration is secured by an equitable lien over the trust assets, which arises by operation of law and confers a proprietary interest, in the nature of a security interest, in the trust assets, and takes priority over the claims of beneficiaries. [Octavo Investments v Knight, 367, 370; Chief Commissioner of Stamp Duties v Buckle, 246].***
>
> ***17 Fourthly, this equitable lien extends to all of the trust assets, save only those that are specifically excluded by the trust instrument. [Dowse v Gorton [1891] AC 190; Octavo Investments v Knight, 357].***
>
> ***18 Fifthly, being an equitable lien, the security is enforceable by the trustee only by judicial sale or appointment of a receiver, and not by foreclosure nor by sale out of Court. [Tennant v Trenchard (1869) LR 4 Ch App 537; ANZ Banking Group Ltd v Intagro Projects Pty Ltd [2004] NSWSC 1054, [14]; Melbourne Tramways Trust v Melbourne Tramway & Omnibus Company Ltd (1887) 13 VLR 487, 490; Re Pumfrey (1882) 22 Ch D 255, 265; Re Stucley [1906] 1 Ch 67; Davies v Littlejohn (1923) 34 CLR 174, 184; Hewett v Court***

(1983) 149 CLR 639, 663; Sykes & Walker, The Law of Securities, 5th ed, (1993) Lawbook Co, 198].

19 Sixthly, the right of indemnity accrues at the time the obligation is incurred, [Xebec Pty Ltd (in liq) v Enthe Pty Ltd (1987) 18 ATR 893; Southern Wine Corp Pty Ltd (in liq) v Frankland River Olive Co Ltd [2005] WASCA 236; (2005) 31 WAR 162, [30]], and is not subsequently lost by cessation of office, whether by retirement or removal. [Xebec v Enthe, 898; Coats v McInerney (1992) 7 WAR 537; Southern Wine Corp v Frankland River Olive Co, [30]; Dimos v Dikeakos Nominees Pty Ltd (1996) 68 FCR 39, 43].

20 Seventhly, upon bankruptcy or liquidation of a trustee, its right of indemnity vests in its trustee in bankruptcy or liquidator. [Official Assignee of O'Neill v O'Neill (1898) 16 NZLR 628; Jennings v Mather [1901] 1 QB 108, 117; Savage & Whitelaw v Union Bank of Australasia Ltd (1906) 3 CLR 1170, 1188, 1196; Octavo Investments v Knight; Re Suco Gold Pty Ltd (in liq) (1983) 33 SASR 99, 109, (1983) 7 ACLR 873, 882].

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. [Belar Pty Ltd (in liq) v Mahaffey [1999] QCA 2 [2000] 1 Qd R 477, [20]; Octavo Investments v Knight, 370; Chief Commissioner of Stamp Duties v Buckle, 246; Re Exhall Coal Co Ltd) (1866) 55 ER 970].

22 Ninthly, a trustee is entitled to retain possession of trust property against a beneficiary until its indemnity is exercised. [Octavo Investments v Knight, 369, 370; Chief Commissioner of Stamp Duties v Buckle, 246; Re Exhall Coal Co Ltd, 972; Re Enhill Pty Ltd [1983] 1 VR 561]."

55. The Court found at paragraph 50 that a former trustee does not have a right to retain, as against a new trustee, the trust assets as security for an agreed right of indemnity ''***though the former trustees are 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.''***

56. The Australian textbook The Law of Trusts by Ford and Lee , deals with the issue of priority in this way at paragraph 14.210:-

''A trustee who has a right of recoupment or exoneration out of the trust assets enjoys ancillary equitable rights over the trust assets as against the beneficiaries and any new trustee. Because the trustee has an equitable proprietary interest it should normally prevail over any subsequent charge of the trust assets or any other person who is not a taker in good faith of the legal title … and without notice of the trustee's rights.'' (Her emphasis)

And at paragraph 14.250:-

''As such it should attract the principles about priority between competing interests so as to enliven concern on the part of a taker of later security over the trust assets. It is conceived that the High Court's reasoning in Buckle rejecting an argument that the trustee's charge or lien was an encumbrance on the beneficial ownership enjoyed by the beneficiaries did not deny that the trustee's proprietary interest will compete with other interests in the trust assets according to equitable and legislative principles of priority. (Her emphasis)

57. Thus, Advocate Jordan argued that on a straightforward application of the general rules of equity, the temporally applied equitable lien of the former trustee takes priority over any equitable lien which may subsequently arise in favour of a successor trustee. That basic rule of priority in equity is, she said, subject to exceptions, as recognised in the comments in Lemery cited above. Firstly, it is clear that it yields in the exceptional case of a bona fide purchaser for value without notice and secondly, although a prior equitable interest will not lightly be postponed, it may be postponed if the owner of the prior interest has by its own act or default prejudiced its claim to priority, or in other words, because the equities are no longer equal. As Lord Wright observed in Abigail v Lapin [1934] AC 491 (Privy council) at page 504:-

''Apart from priority in time, the test for ascertaining which encumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim …"

And at page 507:-

''It is true that in cases of conflicting equities the decision is often expressed to turn on representations made by the party postponed, as for instance in King v King. But it is seldom that the conduct of the person whose equity is postponed takes or can take the form of a direct representation to the person whose equity is preferred: the actual representation is in general, as in

the present case, by the third party, who has been placed by the conduct of the party postponed in a position to make the representation, most often, as here, because that party has vested in him a legal estate or has given him the indicia of a legal estate in excess of the interest which he was entitled in fact to have, so that <u>he has in consequence been enabled to enter into the transaction with the third party on the faith of his possessing the larger estate.''</u> (Her emphasis)

58. Advocate Jordan also drew an analogy with the Jersey customary law of *hypothec*. Although it was during the 18th and 19th centuries that the 'equitable' lien grew in importance in the Courts of Chancery in common law jurisdictions, it has been suggested by legal history scholars that:-

(i) '***The more likely origins of the equitable lien appear to lie in the Roman law of securities***' (in particular the *hypotheca) and '**the legal inspiration for the equitable lien rested in Roman law',*** see Fiona R Burns *The Equitable Lien Rediscovered: A Remedy for the 21st Century* [2002] UNSWLawJl 1 at pages 5-6, and

(ii) ***'the whole law of hypotheca both tacit and express, being independent of possession bears a very close affinity with the equitable rules as to liens and charges'*** *see Buckland, Equity in Roman Law (1911) at page 63.*

59. As explained by Burns at page 5:-

''A hypotheca was created by pledging the item without the need for its physical transfer to the creditor. Edward Sykes and Sally Walker have stated:

'In the third general class of security (hypotheca) … the property is appropriated to the creditor so that on default he or she is entitled to pursue certain remedies against it and not merely against the debtor. The creditor has certain rights of a proprietary character, but they can be realised only in the event of default. To this general type of security the term charge is frequently applied, but that phrase is itself of ambiguous import and is better used to denote one particular type of hypothecation.

While legal historians have suggested different origins for the hypotheca, it laid the foundations for modern securities which did not require possession, most notably the mortgage and the equitable lien. It was equally important that the hypotheca was capable of being created by the agreement of the parties or created by law. The latter was known as a legal or tacit

hypotheca (or hypotheca tacita or legitima). In turn, the tacit hypotheca was divided into two kinds: the special hypotheca, which was a security imposed by law over specifics property, and the general hypotheca, which was a charge over the whole of the debtor's property to secure liability.''

60. It is also clear that more than one *hypotheca* could arise over the same property and (as is the case under modern equitable principles, see above), Roman law dealt with this by developing a system of administration under which the earlier *hypotheca* took priority: see Nicholas, *An Introduction to Roman Law* [1962], at p153 and The Jersey Law Commission's *Consultation Paper on Security on Immovable Property* (May 2006) at para 3.2.

61. The Roman law of *hypotheca* can be traced into the Jersey customary law of hypothecation (which governed prior to the enactment of the *Loi (1888) sur la Propriété Foncière*).

62. Under customary law, where the debtor becomes bankrupt, the *décret* procedure was implemented. As observed by the Jersey Law Commission at para. 4.4, this followed the Roman law approach of '***first in time***' takes precedence:

''Creditors and other persons who had transacted with the debtor were called in turn, in ascending order of precedence – first the unsecured creditors as a group, then the hypothecary creditors and transactors in reverse date order – and required either to take over the whole of the debtor's property or to renounce their rights or claims.'' (Her emphasis)

63. Accordingly, Advocate Jordan submitted that whether the trustee's equitable lien finds its origins as a matter of Jersey law in equity or in customary law, the rule of '***first in time***' is the applicable rule of priority.

64. In the case of an insolvent trust, priority as between the competing equitable liens of a former trustee and a successor trustee falls, she argued, to be determined according to established principles. Thus:

(i) *Prima facie*, the former trustee's equitable lien takes priority over an equitable lien subsequently arising in favour of the successor trustee because (as a matter of equity and of customary law), first in time prevails.

(ii) The court, however, may (in the exercise of its equitable jurisdiction) depart from this general rule where, as a consequence of an act or default on the part of the former trustee prejudicing his prior equitable right, the equities are no longer equal. In such circumstances, the court may impose an alternative regime.

65. Accordingly, on the facts in this case, she submitted that the equitable lien securing Equity Trust's right of reimbursement, on an application of the basic rule that first in time prevails, takes priority over any successor trustee's right of exoneration secured by its later equitable lien. It follows that Equity Trust's claim takes priority over the connected creditors, who claim through a successor trustee's right of exoneration and lien, even when a demand for payment is made.

66. By way of a ''fairness'' cross check, Advocate Jordan submitted that this result was fair:-

(i) Volaw and Rawlinson & Hunter were protected from personal liability to the connected creditors by Article 32(1)(a). Even if all of the assets of the Z II Trust were taken in satisfaction of Equity Trust's equitable lien, Volaw and Rawlinson & Hunter would have no liability to those connected creditors.

(ii) In contrast, Equity Trust was faced with a substantial personal liability undermining the fundamental right of a trustee to be paid back what it has paid out (see Butterfield v Public Trust above), and undermining what she described as the fundamental principle underpinning Article 32 that a trustee should not face personal liability. It was in any event extremely harsh.

67. It is true that the connected creditors will rank below Equity Trust in priority, but there was nothing, she said, unjust about this, as they knowingly transacted with the trustee, and as pointed out by the Guernsey Court of Appeal in Investec v Glenalla, they had an opportunity to take security before accepting the covenant of the trustee. Without that security, they would know that any claim would in due course be satisfied only to the extent of the trust assets as they exist at the time of the claim.

68. In response to a question raised by the Court, Advocate Jordan submitted that Equity Trust's right of indemnity and associated equitable lien for the personal liabilities it had incurred in respect of Angelmist proceedings would take priority over the claims of any creditors with whom it had transacted as trustee under Article 32(1)(a) seeking to claim through that same right of indemnity and equitable lien, on the basis that the equities were not equal because of the special status and protection given to trustees in both general Trusts Law and the rationale of Article 32.

69. However, she made it clear at the hearing that Article 32(1)(a) creditors claiming through Equity Trust's right of indemnity would, after payment of Equity Trust's personal claim in relation to the Angelmist proceedings (assuming there were sufficient assets), share in whatever remaining assets that may be raised *pari passu*; the main justification for this being the avoidance of cumbersome inquiries.

Contentions of the Estate of C

70. The case of the Estate of C was summarised by Advocate Harvey-Hills in this way:-

(i) Equity Trust's case rests on the proposition that, as soon as a trustee incurs any liability for which it is entitled to indemnification from the trust fund, it immediately gains a lien over that trust fund which secures every liability it ever incurs thereafter, with priority over all other trustees' liens for all time and for all liabilities whenever incurred.

(ii) This is unprincipled, unfair and impractical. It is also inconsistent with the existence of Article 34(2) of the Trusts Law which provides:- ***''(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.''***

(iii) Equity Trust is unable to posit any English or Channel Islands authority to support such an analysis of trustee liens and their priorities as against one another. The Australian cases cited by it are not, on proper analysis, on point.

(iv) The analogy Equity Trust seeks to draw with Jersey's customary law of *hypothec* is inapt. Moreover, it relies on a customary law regime which was found to be so capricious, unreasonable and impractical that it required complete legislative reform as long ago as 1880.

(v) The Executor's primary positive case is that trustees' indemnification rights and liens to secure them should be regarded as having equal standing with one another, and thus equal priority. They will, therefore, all rank in priority to beneficiaries' interests and those claiming through beneficiaries, and all rank equally as against each other.

(vi) The Executor's alternative case is that, if a first in time rule of priorities is appropriate, Equity Trust's approach to the nature of trustees' liens is misconceived and wrong. On the proper

analysis, a trustee acquires a right of indemnification in relation to a present, future or contingent liability 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 one, it is only payable on the contingency arising) and it acquires a lien to secure that right of indemnification. It therefore acquires successive rights of indemnification and liens as it incurs liabilities acting as trustees, with such individual indemnity rights and liens being extinguished as each 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 (by way, e.g. of compromises), their rights and liens as against each other rank from the dates they arose.

(vii) In addition, in the Jersey context, it is necessary to take into account the effect of Article 32. In particular, and following the Guernsey Court of Appeal decision in Investec v Glenalla, it is clear that a trustee with a debt to an Article 32(1)(a) creditor (which all other creditors of Z II are) is obliged to exercise its indemnity and lien rights for the benefit of that creditor. They are not held by the trustee for its own benefit, since it has no personal liability to such creditors, but for the benefit of such creditors (by way of bare trust), who otherwise would be making gifts into the trust and not loans. The priorities competition in this case is, therefore, directly between Article 32(1)(a) creditors such as C's estate and Equity Trust which, presumably, asserts it was subject to an Article 32(1)(b) personal liability in relation to the Angelmist transaction (since otherwise it would appear to have made a gratuitous payment from its own funds).

(viii) The result here, on the Executor's primary case, is that all creditors of Z II, including Equity Trust, have equal ranking claims to the trust assets, if each has a valid claim against the relevant trust at all.

(ix) The result on the Executor's alternative case is that each creditor of Z II will have a claim which ranks against the others from the date the relevant liability arose. In the case of Equity Trust, this will be the 22nd December 2015 when it entered into the compromise agreement in relation to the compromise sum, and the dates it incurred costs in the litigation in relation to its claim to recover those costs from the trust fund. Most, if not all, other creditor claims would in his view pre-date these claims. Certain of them might even pre-date any original liability to which Equity Trust was subject.

71. It was fallacious, he said, to distinguish between, on the one hand, the claims creditors had against trustees, where issues of priorities may arise as between them, and on the other hand, what Advocate Jordan categorised as the priorities competition between a former trustee with a

right of indemnification and a current trustee, who also has a right of indemnification. It ignores, he said, the effect of Article 32(1)(a) as analysed by the Guernsey Court of Appeal in Investec v Glenalla and focuses on the ranking of trustees' liens, when Equity Trust, in reality, makes a much more sweeping contention, which would apply equally to situations where co-trustees held office, namely that where any trustee incurs any liability to which a right of indemnification attaches, that trustee also acquires a lien which operates and secures all subsequent rights to indemnification required by that trustee, whenever they are incurred, the lien dating, for priority purposes, from the date the very first right of indemnification arose, allowing that trustee to claim priority over all other rights of indemnification held by all other trustees, whether co-trustees or successor trustees, whenever they were incurred.

72. Advocate Harvey-Hills posited the example of a trust with two trustees, A and B:-

(i) Trustee A's remuneration provisions entitle it to charge an initial £1,000 take-on charge. Trustee B's do not. Equity Trust asserts that Trustee A acquires an immediate lien over the trust fund to secure its right to the £1,000. That much is uncontroversial.

(ii) Equity Trust also, however, asserts that that lien then subsists to secure all subsequent rights to indemnification acquired by Trustee A as it administers the trust. It asserts, in effect, that the lien operates analogously to a bank's all-monies floating charge (an analogy expressly drawn in the Australian cases it cites).

(iii) Moreover, on Equity Trust's argument, the lien which arises then remains in place even if all presently incurred liabilities of a trustee have been discharged from the trust fund. Hence, it asserts that since the right of indemnification exists in relation to '*all existing, future and contingent or other liabilities incurred by a trustee …"* in practice this means that the lien comes into existence at the moment (or very shortly after) the trustee takes office and begins incurring liabilities.

(iv) Even if that were not so, Equity Trust's arguments would mean that any trustee will in future be careful to ensure that it always retained some outstanding sum due to it from the trust fund, so that the radical all-monies lien it has, on Equity Trust's case, acquired remained in place.

(v) He returned to his example above, and supposed that, acting properly, trustee B then incurs, a month after the take-on of the trust, a liability of £1M. Suppose further that, with full knowledge of that existing liability of trustee B, trustee A incurs, some years later, a

liability of another £1M, and suppose the trust fund is, at that time, only worth £1.5M. On Equity Trust's argument, trustee A, despite incurring all of its £1M liability after trustee B did so and with full knowledge of it, has complete priority over trustee B and can reimburse itself in full from the fund, leaving trustee B £500,000 out of pocket.

(vi) Such a result would, he said, be unprincipled and have no merit to it. It would be grossly unfair as between trustees. It is, moreover, unsupported by the ratio of any authority, and wholly unsupported by any Jersey, Guernsey or English authority.

73. Advocate Harvey-Hills submitted that the trustee's lien was not intended to rank claims as between trustees or creditors claiming through different trustees, whether by way of subrogation on the insolvency of a trustee with personal liability or through the mechanism implicit in Article 32 of the Trusts Law, as analysed by the Guernsey Court of Appeal in Investec v Glenalla. He made three principal points in this respect:-

(i) The lien is a device of equity, granted to trustees by the Court, to give them effective rights of indemnification in priority over the interests of beneficiaries. Its wider effects can and should be determined by the Court in a sensible and fair manner. This need not, indeed should not, involve the automatic adoption of rules which have been developed in other contexts, including as to priorities.

(ii) The position of trustees incurring liabilities as such for which they are entitled to indemnification is very different to most if not all other situations in which equitable liens are imposed by the courts. The other contexts in which it arises involve discrete transactions, where a party is vulnerable to loss on that discrete transaction absent the grant of proprietary lien in equity: see, e.g., Snell's Equity (33rd edition) at 44-005 above which identifies the three '***principal equitable liens***' as '***(i) the vendor's lien for his purchase-money, (ii) the purchaser's lien for his deposit, and (iii) the solicitor's lien on property recovered for his client'***. In each of those cases, the lien holder is engaged in a single transaction giving rise to vulnerability to the insolvency of a counterparty and the competition on insolvency in each case will be between them and other creditors of the counterparty, who are likely to be strangers to them – certainly, who are not persons with whom they hold a joint fiduciary office. He conceded that, in England at least, the equitable order of priorities between strangers with security interests over an insolvent person's property has been an order of time of creation one. The same ordering also appears to apply in relation to Jersey *hypothecs* over immovable property.

(iii) A trustee's role as trustee, by contrast, will give rise to frequent, on-going liabilities of many differing sorts. Moreover, and critically, where a trustee holds office with other trustees, they operate – and should operate – in a collegial, co-operative manner. Absent provisions in the trust instrument to the contrary, they are required to take decisions with unanimity. They owe the same fiduciary duties to their beneficiaries. They are engaged in a collective endeavour in terms of the administration of the trust, acting for the benefit of their beneficiaries. In that collective endeavour, each may, and frequently will, acquire rights to remuneration and properly incur liabilities to third parties, in contract, tort or otherwise. An approach to their rights of indemnification which sets them against each other and which engenders competition between their interests is destructive of the very collegial relationships and collective endeavour in which they should be engaged.

74. Going back again to his example, he said the approach advocated by Equity Trust was the least consistent with the nature of the joint office of trusteeship and forges a material division between the interests of trustee A and trustee B, permitting trustee A to continue to incur liabilities without regard to the liabilities incurred by B, which A would have if A itself had incurred them. It leaves B perpetually vulnerable to such acts, and is inimical to the collective endeavour in which the trustees are engaged.

75. Where a trust has or has had a number of trustees, all of whom have incurred liabilities which give rise to rights to indemnification, the principled approach, which avoids the moral hazards inherent in Equity Trust's approach and which is consistent with the collective endeavour in which trustees are engaged, is that their liens should rank equally. In effect, this simply means that each of them has priority over beneficiaries' interests, which is what the lien was created by the courts of equity to achieve, and they collectively share in the trust fund, taking shares proportionate to their liabilities when the available assets are insufficient to discharge them all.

76. Such an approach of equality is also practical. It will avoid what would be, on Equity Trust's case and in the case of some long running trusts, what may be protracted and highly contentious disputes about which trustee of a number of trustees happened to have incurred an indemnifiable liability first in time, years, even decades, previously.

77. The appropriateness of such an approach was, he submitted, further enhanced and emphasised by Article 34(2) of the Trusts Law (set out above). If Equity Trust's approach to the issue of priorities were correct, Article 34(2) would make no sense. Each departing trustee of a trust would by process of law have '***reasonable security***' in the form of an all-encompassing and continuing lien, which secured all its '***liabilities whether existing, future, contingent or***

otherwise' with a fixed priorities ranking as against all other trustees' liens, based purely on a first in time rule dating back to each trustee's first incurred liability.

78. He suggested it could be said that Article 34(2) implies that, in Jersey at least, a trustee who leaves office loses the lien rights it had whilst in office, which is why it is entitled in its place to '***reasonable security … before surrendering the trust property.'***

79. Such a radical approach to Article 34(2) is not, however, necessary, if it is recognised that trustees' liens rank equally. What Article 34(2) then permits, where '***reasonable***', is for the outgoing trustee to take additional security, which may expressly rank before any other, to secure particular liabilities to which it is or may be subject. This addresses, moreover, the supposed vulnerability of a former trustee to the conduct of the trust's affairs after it leaves office, to which Equity Trust avers. That Equity Trust did not seek additional security on leaving office, to protect it from, e.g. its possible Angelmist related liabilities, and to which it would have been entitled had that security been '***reasonable***', is a matter for it.

80. Advocate Harvey-Hills pointed out that the Court's approach to the issue of priorities in relation to an insolvent trust is untrammelled by authority. Neither party was able to locate Channel Islands or English authority which directly addressed the question and Equity Trust relied on a number of first instance Australian cases, none of which dealt with the issue of priority as between former and current trustees, save with the exception of Richardson v Aileen, but even there, the former trustee's priority had been agreed without argument, and it did not address the issue of treating priorities in the ordinary case, where a former trustee has retired in favour of a new trustee, who goes on with the administration of the trust.

81. Advocate Jordan's analogy to the Jersey law of *hypothecs* was inapt, he said, firstly because the modern law of *hypothecs* is concerned only with security over immoveable property, save for ships. It was unsurprising that a registered system of security over immovable property should follow a '***first in time***' approach, which is quite different to the ranking of trustees' lien rights and the *Loi (1880) sur la Propriété Foncière* was necessary because the previous system was so capricious.

82. Secondly, there is a much more apt analogy in Jersey customary law, and that is the law of *Désastre*, which had always treated creditors on a *pari passu* basis. Thus, in circumstances of insolvency, Jersey customary law had developed and recognised a system which treated creditors equally on a *pari passu* basis, save in the very limited circumstances where a creditor had security or was recognised as preferential. Jersey law had set its face against the capricious, unjust and unsatisfactory system of widespread hypothecation, and '***first in time***' and there was

no basis for or need for the Court to make the regressive step of introducing such a system in relation to trustee indemnification claims.

83. If the Court took the view that the principle '***first in time***' priority ought to be imported into the context of trustees' liens, then the Executor's alternative case is that:-

(i) The approach of Equity Trust that when a trustee first incurs an indemnifiable liability it immediately obtains a lien, which remains in place for ever, securing every subsequent liability, was not the correct approach. The correct approach is instead to recognise that a trustee will, in the course of its office, acquire multiple rights of indemnification, each of which gives rise to an equitable lien in its favour. It therefore acquires a succession of liens just as it does a succession of rights of indemnification. Each equitable lien dates from the date of the right of indemnification which causes it to arise. Each lien is released on that right of indemnification being satisfied, whether by reimbursement to the trustees of sums paid from its own pocket or by exoneration directly from the trust fund.

(ii) This, he says, is logical because, as even Equity Trust accept, it is not the case that a trustee has an equitable lien over the whole trust fund even before it has incurred a liability which gives rise to a right of indemnification. Take, for instance, a gratuitous trustee who in fact never incurs any liabilities to third parties. He will have no rights to indemnification and has no lien. It is the incurring of an indemnifiable liability by a trustee which gives rise to a lien to secure its enforcement in priority to the interests of beneficiaries and that lien is necessary for and justified by the right of indemnification which gives rise to it. This is, he submitted, wholly consistent with and indeed illustrated by the emphasised passage from Re Pumfrey set out above but which I set out again:-

> ***"His right of indemnity gives him a right of charge or lien upon the trust estate, he has a right to come at any time and say 'I claim to have my right of indemnity, I am now called upon to pay a sum of money for which I have right of indemnity out of the trust estate and that gives me the right in equity to have a charge against the estate, and to have the charge enforced by the process of the Court of Equity." (his emphasis)***

(iii) Advocate Harvey-Hills accepted that certain Australian cases cited by Equity Trust refer to the lien of the trustee increasing or decreasing in value as its liabilities increase or decrease, but none of those cases were concerned, he said, with the sorts of issue that are before this Court. When there is only one trustee or indeed a succession of trustees but a 'solvent' trust, it matters not whether it is regarded as having a single lien that fluctuates in

value over time or a succession of them, referable to each liability incurred by the trustee for which it is entitled to indemnification. Where there are a number of trustees or a succession of them, and the trust fund is insufficient to discharge all their liabilities, it matters greatly.

(iv) Advocate Harvey-Hills submitted it was important to distinguish between the sort of equitable lien granted to trustees by process of law and equitable charges negotiated by a secured creditor. A bank may well negotiate for an all monies floating charge as a condition of making any lending at all, so as to extend security over all assets of a company to secure all future lending made by it, but the holder of an equitable lien has not negotiated for anything. Rather the courts of equity have intervened to grant him security in the form of an equitable lien to protect him from the unconscionable vulnerability he would otherwise have – and no more. In the case of a trustee, it is to protect him from a liability he has incurred, whether presently due or due only in the future or on a contingency eventuating. The lien protects him, as against the interests of beneficiaries and those claiming through them, in respect of that liability. He neither needs nor is entitled in equity to more than that.

(v) Moreover, and to return to his example of co-trustees A and B, this approach he argued was patently fairer and more rational than that advocated by Equity Trust:-

(a) Trustee A will acquire a lien to secure its right to its £1,000 take-on fee when that liability arises.

(b) Trustee B will acquire a lien to secure the £1M it incurs thereafter.

(c) When Trustee A comes later to decide whether to expose itself to a liability of £1M, its own existing lien will secure only its £1,000 take-on fee (if that has remained outstanding). Trustee B will have a lien which dates from the date it incurred its £1M liability. If Trustee B chooses to take on a further £1M liability, it will do so with notice of and subject to Trustee B's lien.

This, he submitted, is a plainly superior and more rational order of priorities than one where Trustee A acquires a permanent and complete priority over Trustee B for all time and whatever happens in the administration of the trust thereafter.

84. Attention he said also needed to be paid to the effects and implications of Article 32 and the mechanism by which an Article 32(1)(a) creditor gains access to the trust assets. The trustee is obliged to exercise its right of indemnification and lien, so as to secure for that creditor the trust

assets that will satisfy its claim. The simplest and most obvious analysis of the position is that the trustee will hold its rights of indemnification and lien rights on bare trust for its Article 32(1)(a) creditors and is obliged to enforce them. The rights of a former or current trustee and each Article 32(1)(a) creditor entitled to have a trustee or former trustee enforce its rights of indemnification in its favour will rank equally.

85. On the Executor's alternative case, the claim of Equity Trust would rank from the date of the compromise, as a compromise agreement releases and replaces any original liability to which the paying party was subject (see Foskett on Compromise at 6-01 and 6-18). Its claim would therefore rank after those creditors whose rights were created before it.

86. Advocate Harvey-Hills noted that Advocate Jordan had conceded that a *pari passu* regime was the proper one, both in England and in Jersey, in the case of Article 32(1)(a) creditors, but found extraordinary the suggestion that Equity Trust's personal liability incurred under Article 32(1)(b) should take priority over its own Article 32(1)(a) creditors. It suggests that the trustee would be entitled to wholly disregard the obligations it is already under to exercise its right of indemnity for the benefit of its Article 32(1)(a) creditors, who otherwise have no rights at all, so as to be able to satisfy its own personal liabilities.

Privy Council Decision

87. As mentioned earlier, the Privy Council handed down its decision on the appeals from the judgment of the Guernsey Court of Appeal in Investec v Glenalla on 23rd April 2018 ([2018] UKPC 7), a decision which because it relates to Jersey law is binding on this Court. Before addressing the meaning of Article 32 of the Trusts Law, Lord Hodge, giving the majority judgment of the board, made these preliminary observations:-

> ***"57. … 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 law of trusts in Jersey is a comparatively recent import from England. Its widespread use in the custody and management of wealth dates from the rise of a significant financial services industry in the 1960s. 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***

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.

16 The TJL [the Trusts Law] is the principal indigenous source of Jersey trust law. It is not a complete code of the law of trusts. But it gives statutory effect to some principles already well established in England and significantly modifies other principles. English trust law therefore serves as the background against which the provisions of the TJL fall to be construed."

88. He then set out at paragraph 59 some well established principles of English trust law which must be regarded as having been part of the law of Jersey before the enactment of the Trusts Law or its statutory predecessors:-

"59 …

(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. As Purchas LJ observed in dealing with the legal personality of a temple under Indian law in Bumper Development Corpn Ltd v Comr of Police of the Metropolis [1991] 1 WLR 1362, 1271:

'The particular difficulty arises out of English law's restriction of legal personality to corporations or the like, that is to say the personified groups or series of individuals. This insistence on an essentially animate content in a legal person leads to a formidable conceptual difficulty in recognising as a party entitled to sue in our courts something which on one view is little more than a pile of stones.'

(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. As Lord Penzance put it in Muir v City of Glasgow Bank (1879) 4 App Cas 337,

368, where debts are incurred by a trustee for the benefit of the beneficiaries, the trustee

'could not avoid liability on these debts by merely shewing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to shew, in addition, that the creditors of the concern knew all along the capacity in which he acted.'

(iv) This liability may be limited by contract, but the mere fact of contracting expressly as trustee is not enough to limit it. It merely makes explicit the knowledge of the trustee's capacity which Lord Penzance regarded as insufficient: see Lumsden v Buchanan (1865) 3 M (HL) 89. There must be words negativing the personal liability which is an ordinary incident of trusteeship. In Gordon v Campbell (1842) 1 Bell App 428 and Muir v City of Glasgow Bank itself, it was held that the words 'as trustee only' were enough.

(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 asset: Lewin on Trusts, 19th ed (2017), 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 (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 (1880) 15 Ch D 548.

(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."

89. Lord Hodge then turned to the effect of Article 32 of the Trusts Law at paragraph 61:-

61 The Board considers that the effect of article 32(1) is to abrogate the rule of English law that the law looks no further than the legal entity which has assumed the liability. It deals with the status of the trustee against whom the claim is made, introducing a legal distinction between his two capacities, personal and fiduciary. It provides that he may be treated as incurring liabilities not personally but 'as trustee', and therefore without recourse to his personal estate. The reasons are as follows:-

(i) The object of the provision is to limit the exposure of the trustee in respect of liabilities incurred by him as such. Since the law already allowed him to do so contractually, it is reasonable to suppose that the draftsman intended something more than that. This is consistent with the fact that subsection (1) is not limited to contractual or even transactional liabilities. The opening words of the subsection ('Where a trustee is party to any transaction or matter affecting the trust') indicates that it is confined to liabilities arising from some pre-existing relationship to which the trustee can be said to be a 'party', and which has arisen in a manner affecting the trust. But that would extend to certain claims for unjust enrichment (for example claims arising from the frustration of a contract or a total failure of consideration), or tort (for example, claims for negligent misrepresentation).

(ii) Subsection (1) might be read literally as conferring a kind of claim in rem against the assets themselves. But the phrase 'shall be against the trustee as trustee and shall extend only to the trust property' must be read as a whole. The limitation of the trustee's liability is achieved by treating him as having two legally distinct capacities and two legally distinct estates. Only his capacity as trustee is relevant and only the trust estate is engaged. The words limiting the 'claim' to the trust property do not serve to introduce a monetary cap on the trustee's liability, as all parties now appear to accept. It would be unworkable in practice, in particular where there were multiple third party claims against the trustees of a single trust. Nor are they concerned

merely with controlling the execution of judgments. They serve to describe the character of the claim. It is a claim against the trustee in that capacity only. The limitation to trust assets follows on from that.

(iii) That view of the matter is reinforced by the contrast between subsection (1)(a), which deals with a claim against the trustee as such, and subsection (1)(b), which deals with a claim against the trustee personally. Before article 32 was enacted the trustee could incur liabilities in only one capacity, namely his personal one. The effect of the article is to create two.

(iv) it is fair to say that it is unusual for a statutory provision about the status of a person against whom a claim is made to depend on the knowledge of the claimant. But there is no conceptual difficulty about this. Irrespective of the knowledge of the claimant, the trustee has two capacities. The knowledge of the claimant does not determine his status. It only determines in which of his two distinct pre-existing capacities he is to be taken to have acted. The concept is familiar in other common law jurisdictions, and notably the United States, which the draftsman of article 32 is likely to have had in mind. In these jurisdictions, the unsatisfactory features of the English rule have led to the enactment of broadly similar statutory provisions to limit the liability of a trustee incurred in that capacity. The American Law Institute, Restatement of the Law, Trusts 3d (2011), Chapter 21, pp 94-95 observes the principle underlying these enactments that it

'recognizes modern reality rather than traditional concepts. Technically, the trust is still not generally recognized as a legal 'entity', but … in practice trustees act on behalf of their trusts and are sued as trust representatives. Indeed, in this Chapter and elsewhere in this country, the trust is treated as an entity to such an extent that it is no longer inappropriate to refer to claims against or liabilities of a 'trust' (as in the title and content of this Chapter) and to the liability or debt of a beneficiary to a 'trust' (as in Chapter 20), or to refer to and treat trusts, in law and in practice, as if they were entities in numerous other contexts.'"

90. The Privy Council's decision is therefore consistent with that of the Guernsey Court of Appeal in so far as it relates to the capacity in which a trustee acts under Article 32(1)(a), namely its fiduciary as opposed to its personal capacity. However, the Privy Council disagreed with the view of the Guernsey Court of Appeal that Article 32 created a new direct means of recourse to creditors against the trust assets, which did not depend on the state of account between the former trustee and the beneficiaries, for the reasons set out in paragraphs 62 and 63:-

"62 This is, however, the only relevant respect in which the pre-existing law is altered by article 32. There is nothing in that article which modifies the rule that a creditor can access the trust assets only by way of the trustee's right of indemnity and subject to the limits on that right imposed by the trust deed or the general law. On the contrary, the continued subsistence of the rule is acknowledged by section 54(4) of the TJL. This provides:

'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.'

That subsection might have been expressly limited in its effect to a situation where article 32(1)(b), rather than (1)(a) applied, since in an article 32(1)(a) situation the solvency or otherwise of the trustee would be irrelevant, and there could be no distraint or execution upon his personal assets for his liability as trustee. But it was not. It assumes that the creditor's right to go against the trust fund continues to depend upon subrogation. In this regard the Jersey legislature has not gone as far as the legal initiatives in the United States in the personification of a trust by creating a direct right of action against the trust in return for relieving the trustee of personal liability. Instead it has relieved the trustee of personal liability by providing that a person when acting as a trustee acts in a separate capacity.

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 trustees' 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."

91. Thus, the only method whereby creditors, whether under Article 32(1)(a) or (b), can have recourse to the trust assets is by way of subrogation to the trustee's indemnity, and subject to the limits of that right of indemnity, so that it would depend upon the state of account between the former trustee and the beneficiaries.

92. Advocate Jordan argued that the Privy Council's decision supported her position, as it showed that the suggestion that a *pari passu* regime will avoid difficult and burdensome inquiries was misconceived. Before a *pari passu* analysis can be applied, the extent of every former and current trustee's surviving right of indemnity would first have to be ascertained, and thus all intimated breach of trust claims resolved, and if possible, enforced, because only following that accounting process will the Court know the sum to which the creditors of any given trustee can seek to subrogate and thus work out the proportionate shares. On that analysis, she said, Equity Trust's application of the basic equitable principle of "first in time" was likely, in fact, to be simpler in establishing its positive balance following an account. The former trustee would simply "*scoop the pot"* but the current trustee would still have the defence afforded to it under Article 32(1)(a) if the transactions in question were in its capacity as trustee.

93. She said the decision also vindicated Equity Trust's position in respect of priority as between a trustee and creditors claiming through the same right of indemnity i.e. that the trustee's right of indemnity 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 trust creditor does not have that right unless and until the Court makes an order granting it the equitable remedy of subrogation. As summarised in EC Investment Holding Pte Limited v Rideout Residents Pte Limited and another [2013] SGHC 139, a decision of the High Court of Singapore, a creditor:-

"may obtain an order of court that he be subrogated to the trustee's right of indemnity … if the court grants this order, the creditor's in personam right against the trustee is elevated to a claim in rem … subrogation is not a cause of action, but an equitable remedy which is not granted as a right but in circumstances where it is appropriate to do so."

94. In relying on the remedy of subrogation, a trust creditor's ability to gain access to the trust fund was vulnerable and in any event had to follow an accounting process. The equities on that

analysis, she said, were far from equal. The law in this regard is to protect trustees at the expense of trust creditors, and although this may seem harsh on the creditors, as the Privy Council noted, they can choose upon what terms of security and personal guarantees they are prepared to transact with the trustee.

95. Advocate Harvey-Hills submitted that the Privy Council decision has only a modest impact on the issues under consideration, because it did not address the question of priorities between trustees and between creditors and trustees. The *pari passu* approach was both fairest and most practical as it avoids precisely what Equity Trust advocates i.e. the prospect of one trustee or former trustee—or, the logic of its position ought to be--one Article 32(1)(a) creditor—"scooping the pot' on the basis of an arbitrary timing principle. A single lien equivalent to an all monies charge was simply not a fair or appropriate response to the issue of priorities in the context of the administration of a trust by multiple or successive trustees.

96. There was nothing, he said, in the point that a trust creditor had to go through an accounting process; a trustee claiming indemnification for an Article 32(1)(b) liability also has to go through that accounting process. It can only claim indemnification if, as the Privy Council makes clear, it is entitled to such indemnification.

97. The Privy Council had made clear the limited way in which Article 32 had altered the pre-existing law. The key point Advocate Harvey-Hills said to bear in mind was 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. Articles 32(1)(a) and (b) are not directed to, and do not speak to issues as to what the priorities are between the 32(1)(a) creditors, or as to the priorities as between those creditors and trustees with Article 32(1)(b) liabilities, if there are insufficient assets to meet all claims. Instead those issues – issues of priority – are left to the Court, as a court of equity, to determine.

Decision

98. Advocate Jordan reminded me that the Court was not a legislative body and cautioned me against the rigid application of theoretical examples. I must, she said, deal with the outcome of the case and the circumstances which are before the Court. I accept the caution, but I have been asked by the parties to rule on an issue of law on assumed facts, in an area where there is a dearth of authority and theoretical examples, which both counsel have used in argument, are helpful. I accept, of course, that the Court is not a legislative body, but a trustee's right of indemnity and associated equitable lien is a creation of the English Courts of equity, imported by

the Court into the law of Jersey. It seems to me therefore that it is for the Court to determine the nature and extent of this equitable remedy as a matter of Jersey Law.

99. I can say at the outset that I am persuaded by the primary positive case put forward by Advocate Harvey-Hills.

100. Unless trust creditors have taken security directly over the trust assets, they can only have recourse to the trust assets through the trustees with whom they transacted, and so in this case, I am assuming that the unsecured loan creditors will be claiming through Volaw or through Equity Trust itself. Equity Trust would appear to be the only trustee which has or had a personal liability under Article 32(1)(b).

101. It is necessary therefore to consider the issue of priorities firstly as between Equity Trust and its own trust creditors and secondly as between Equity Trust and any successor trustee. I am going to assume for the purposes of this judgment that the issue of priority arises:-

(i) As between Article 32(1)(a) creditors of Equity Trust claiming through Equity Trust's right of indemnity and associated equitable lien on the one hand and Equity Trust claiming through its right of indemnity and associated equitable lien in respect of its personal Article 32(1)(b) liability on the other hand; and

(ii) As between Equity Trust claiming through its right of indemnity and associated equitable lien (in respect of its Article 32(1)(a) creditors and its Article 32(1)(b) personal liability) on the one hand and any successor trustee claiming through its right of indemnity and associated equitable lien (in respect of any Article 32(1)(a) creditors and Article 32(1)(b) personal liabilities it may have).

I take first the issue of priorities as between Equity Trust and its trust creditors.

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 para 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 their claims would rank *pari passu*. Quoting from Lewin at para 22-047:-

> ***"22-047…. Between the trust creditors therefore there appear to be only two possible bases of priority: one is a ranking pari passu and the other is a ranking in time, so that the liability which arose first would be met first. There is no authority on the point in England but competing equities do not always rank in order of time and a distribution pari passu would on occasion avoid difficult and cumbersome enquiries. …"***

104. Lewin cites three cases where the point did arise. In re Suco Gold Pty. Limited (in liquidation) [1983] 33 S.A.S.R. 99, a decision of the Supreme Court of South Australia, a ruling was sought as to whether trust assets may be used for the purpose of winding up a corporate trustee that had no assets of its own, apart from its right of indemnity against assets of which it was trustee. It was accepted in that case that the trust creditors claiming through that right of indemnity would rank *pari passu* save where given priority by statute.

105. In Finnigan v Yuan Fu Markets Limited (In liquidation) [2013] NZHC 2899, a decision of the High Court of New Zealand, the liquidators of the corporate trustee sought directions as to how trust assets should be distributed amongst the investors. Quoting from paragraph 48 of the judgment:-

> ***"The liquidators contend that the appropriate distribution after paying their remuneration is to distribute the trust assets pari passu amongst the investors, again after taking into account the liquidators' decisions on the acceptance or rejection of particular claims by investors. In these cases, pari passu distribution tends to be the default solution – one ordered when no better arrangements seem appropriate".***

Having considered a number of other possible arrangements, a distribution *pari passu* was ordered.

106. In EC Investment Holding Pte Limited v Rideout Residents Pte Limited, the competing trust creditors were in agreement that their claims should rank *pari passu*, rather than in order of time.

107. In my view there are good reasons for the claims of trust creditors *inter se* to rank *pari passu.* A temporal rule of priority between them would enliven a concern on their part as to where in time their claim comes, because of the arbitrary and therefore unfair outcome such a rule would give rise to; some would be paid in full, others not at all. Creating such a regime between trust creditors would not be conducive to the good administration of trusts.

108. If the pre-existing law of trusts were to be applied to the assumed facts before me, Equity Trust as a solvent trustee would have been personally liable for all of the transactions it entered into as trustee; all of its trust creditors would have been paid in full. If Equity Trust was insolvent then the claims of trust creditors to the trust assets would, on the basis of the limited authority that exists and for good reason, rank *pari passu*. That much was conceded by Advocate Jordan.

109. Article 32 (and its precursor Article 28) is an innovation into the pre-existing law, by which a trustee is given protection from personal liability where the party to any transaction or matter knows that the trustee is acting as trustee. It introduced a legal distinction between the two capacities, personal and fiduciary, providing that a trustee may be treated as incurring liabilities not personally, but "as trustee" where the other party knows that the trustee is acting as trustee, therefore without recourse to his personal estate. The Privy Council makes it clear that this is the only way the pre-existing law has been altered by Article 32.

110. Take by way of illustration a trustee of a trust with trust assets initially of £5,000 under which it has properly incurred a liability of £1,000 with one creditor with knowledge that it is acting as trustee (an Article 32(1)(a) creditor) and a liability of £1,000 to another creditor without that knowledge (an Article 32(1)(b) creditor). Through no fault of the trustee, the trust fund declines in value to £1,000, so that there are insufficient funds to pay both creditors.

111. Under the pre-existing law, the trustee (assuming it was solvent) would have had to pay both creditors out of its own pockets the full amount of their claims (£2,000) and would have a right of indemnity and associated equitable lien against the trust assets, which being worth only £1,000 would leave it with a personal loss of £1,000. If the trustee was insolvent both creditors would by subrogation have recourse to the trust assets where their claims would rank *pari passu*. They would each recover £500.

112. Under Article 32, the trustee (assuming it was solvent) would have to pay the Article 32(1)(b) creditor in full (£1,000) out of its own pocket and would have a right of indemnity and associated equitable lien for that amount against the trust assets. However, the trustee would have no personal liability to its Article 32(1)(a) creditor, whose recourse to the trust assets would be by way of subrogation to the trustee's same right of indemnity and associated equitable lien.

113. Advocate Jordan argues that the ability of the Article 32(1)(a) creditors to have recourse to the trust assets is vulnerable because they can only have recourse through subrogation, which is a discretionary remedy; accordingly the equities are not equal. It is the case that subrogation is a discretionary remedy, but her argument ignores the fact that, if that remedy is granted, the creditor is put into the place of the trustee, exercising the trustee's right of indemnity and associated equitable lien. The creditor becomes the trustee for that purpose. There is nothing to suggest that, once granted, the trust creditors and the trustee come to the trust assets on an unequal basis. The only vulnerability of the trust creditors recourse to the trust assets referred to by the Privy Council at paragraph 59 (vii) of its judgment (set out above) is that it is derived from the trustee's right of indemnity and is only exercisable to the extent that right of indemnity exists.

114. The Privy Council referred to the case of In re Johnson [1880] 15 Ch D 548, which concerned an executor/trustee who carried on the business of the deceased employing a specific portion of the trust estate for that purpose. Quoting from the judgment of Jessel MR at page 552:-

> ***"With regard to the point that has been argued, I understand the doctrine to be this, that where a trustee is authorized by a testator, or by a settlor – for it makes no difference – to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, 'I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade.'"***

He went on:-

> ***"The trust assets having been devoted to carrying on the trade, it would not be right that the cestui que trust should get the benefit of the trade without paying the liabilities; therefore the Court says to him, You shall not set up a trustee who may be a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade: The Court puts the creditor, so to speak, as I understand it, in the place of the trustee."***

115. So in the illustration I have given, the claim against the trust assets is made by the Article 32(1)(a) creditor standing in the place of the trustee and exercising the trustee's right of indemnity and associated equitable lien. Therefore, both the Article 32(1)(a) creditor, by subrogation, and the trustee are exercising the same right of indemnity and associated equitable lien. I can 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, as Advocate Harvey-Hill points out, the right of both under that indemnity is subject to the state of account between the trustee and the beneficiaries. The burden for both in this respect is the same.

116. The further difficulty for Equity Trust is the finding of the Privy Council that Article 32 went no further in altering the pre-existing law than allowing the trustee to incur a liability as trustee and not personally, where the other party knows that the trustee is acting as trustee. 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. In particular, contrary to the arguments put forward by Advocate Jordan, there is no principle underpinning Article 32 that a trustee should not face personal liability, a principle to be applied to all issues arising on the insolvency of a trust. Article 32 only altered the pre-existing law to the extent identified by the Privy Council.

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. If the trustee's claim was to be given priority over its Article 32(1)(a) creditors, as argued by Advocate Jordan, then under my illustration, it would recover the whole of the trust fund of £1000, "*scooping the pot"* and leaving it with no loss at all. The Article 32(1)(a) creditor would recover nothing; a benefit to the trustee that goes beyond that intended by Article 32.

118. I conclude that the claims to the trust assets, therefore, of an Article 32(1)(a) creditor and the trustee for an Article 32(1)(b) liability rank *pari passu*. In the illustration the Article 32(1)(b) liability would be paid by the trustee in full (£1000) and each of the Article 32(1)(a) creditor and the trustee would recover £500 from the trust assets. The trustee would be left with a personal loss of £500; still in a better position than under the pre-existing law, thanks to it having no personal liability for the claim of the Article 32(1)(a) creditor.

119. Again in the illustration, if the trustee is insolvent, then both the Article 32(1)(a) and the Article 32(1)(b) creditors would by subrogation stand in the shoes of the trustee and, as under the pre-existing law, would rank *pari passu* in their claims against the trust assets, recovering £500 each.

120. If a trustee were to have priority for its Article 32(1)(b) liabilities as argued by Advocate Jordan, then in the event of the trust becoming insolvent, the Article 32(1)(b) creditors would presumably

be able to argue that, by subrogation, they too are entitled to that same priority over the Article 32(1)(a) creditors. Such a result would be inequitable.

121. In summary under Article 32 as between a trustee and its trust creditors:-

(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*.

122. Turning to the assumed facts of this case, if any of the unsecured loan creditors transacted with Equity Trust when it was trustee (and that loan has not been novated to a successor trustee), then the claim of that unsecured loan creditor to the trust assets would rank equally with the claim of Equity Trust for its personal liability in respect of the Angelmist proceedings.

123. Turning to the second issue of priorities, what is the position, therefore, in relation to the claims of a former trustee to trust assets in the hands of a successor trustee? Does Equity Trust's right of indemnity and associated equitable lien (whether it is being exercised by Equity Trust in respect of its personal liability to an Article 32(1)(b) creditor or whether it is being exercised by Article 32(1)(a) creditors of Equity Trust by way of subrogation), have priority over the right of indemnity and associated equitable lien of a successor trustee?

124. There is clear authority that the purpose of the equitable lien is to give trustees priority over the interests of the beneficiaries, as confirmed by the Privy Council when it endorsed Paragraph 21 – 043 of Lewin, which is in the following terms:-

> ***"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. …." (My emphasis)***

125. Once a trust becomes insolvent, the beneficiaries no longer have any interest in the trust assets, and there is no equitable lien enforceable as against them. The only persons with an interest in the trust assets are the trustees and those claiming through them.

126. 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.

127. For this reason it is possible to distinguish, as does Advocate Harvey-Hills, between the kinds of relationships listed by Snell's Equity (paragraph 73(ii) above) which give rise to an equitable lien under English law and where priority in time prevails, and the relationship between successive trustees in the ongoing administration of a trust.

128. Indeed in my view there are good reasons, in addition to those put forward by Advocate Harvey-Hills, why that general rule should not apply, partly out of fairness as between trustees administering the trust in good faith and partly because it would be inimical to the good administration of trusts. A new trustee would face the uncertainty that, quite separately from any security given to the former trustee or trustees when they retired, at any time the latter could assert their rights to an indemnity and associated equitable lien over the assets of the trust which would, on the insolvency of the trust, take priority over the rights of the new trustee.

129. It would be a difficult proposition for any new trustee to accept, that in the event of the insolvency of the trust at some stage in the future, the liabilities it had properly incurred in the administration of the trust (whether to Article 32(1)(a) or (b) creditors) would rank behind those of the former trustee, or indeed, former trustees, allowing one of the latter *"to scoop the pot".*

130. There could, for example, be a reluctance on the part of trust creditors to agree to a novation of their claims into the name of the new trustee because of the potential loss of priority in time status that would entail. Because claims have to be routed through the trustee with whom a creditor has transacted, it is not uncommon for a retiring trustee to wish to have all claims novated to the new trustee to fully terminate its involvement in the trust, but agreeing to a novation would expose that unsecured creditor to a loss of ranking and, for example, to an Article 32(1)(b) liability of the former trustee coming to light in the future that gives priority to the old trustee.

131. There is, with one exception, 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.

132. That exception is the Australian case of Richardson v Aileen discussed earlier. In that case, the successor trustee, a Mr Hughes, accepted appointment as trustee on the express basis that the claims of the former trustee to its costs and disbursements took priority over all other claims, including his own claims for costs and disbursements. It was conceded by counsel for Mr Hughes that the claim of the former trustee arose before that of Mr Hughes, and that Mr Hughes took the property subject to the former trustee's prior right of indemnity. That prior right, it was said, had been established in the Australian authorities, most of whom I have cited above, and in a text book, namely The Law of Trusts by Ford and Lee, extracts from which are also set out above.

133. However, it was held that the former trustee's equity gave way to the equitable principle encapsulated in the cases of Universal Distributing Company (in liquidation) and In re Berkeley Applegate, summarised in this extract from the judgment of Edward Nugee QC at page 41:-

> ***"The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest … or by a receiver appointed by the court whose fees would have been borne by the trust property … and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity …".***

134. That principle has been applied by the Court in this case (see paragraph 8 above), the case concerning the Z III Trust and in the case of an insolvent estate (Estate of Hickman) [2009] JRC 040), all cases where a trust or estate was insolvent, and the trustee or executor requires to be remunerated for realising the assets for the benefit of the creditors.

135. Apart from Richardson v Aileen, none of the Australian authorities cited by Advocate Jordan address the issue of the competing claims of trustees where the trust, as opposed to the trustee, is insolvent, and in that case the issue was not argued.`

136. As mentioned above, Mandy J in Richardson v Aileen expressed the view that this principle would not apply where a new trustee had been appointed merely to carry on the ongoing administration of a trust. In that case, Mr Hughes took on the trusteeship of a trust when it was known that a shortfall could arise and the former trustee's priority had been agreed in writing, but where a new trustee has in good faith taken on the administration of a trust which is solvent, it is difficult to see why, as a matter of equity, the liabilities it then properly incurs in the administration of the trust for the benefit of the beneficiaries, should, in the case of insuffiency of trust assets at some point in the future, give way to liabilities incurred by the former trustee and in respect of which the former trustee has not sought security under the provisions of Article 34(2). After all, the new trustee has taken on the "onerous and sometimes dangerous duty of being trustee" (Re Grimthorpe above) and is just as entitled to be indemnified out of the trust assets as the former trustee.

137. Under the pre-existing law, it seems clear that the claims of trust creditors of an insolvent trustee would rank *pari passu* as against the trust assets, and there is no suggestion in paragraph 22-047 of *Lewin* set out above that trust creditors claiming through a former trustee could have priority over trust creditors claiming through a successor trustee, which would involve some kind of mixing of a *pari passu* regime and a ranking in time regime.

138. Having decided that a *pari passu* regime is appropriate to the extent set out under the first priorities issue, it would be inconsistent to then establish a ranking in time regime as between a former and successor trustee, allowing the former trustee and its creditors "*to scoop the pot*". Both trustees would have been involved in the due administration of the trust and one has no better right to be indemnified than the other.

139. The principle enunciated in Lemery Holdings v Reliance Financial Services at paragraph 21 that a new trustee ***"takes subject to the lien of the old trustee"*** is based primarily on the case of Octavo Investments v Knight, but that case concerned an insolvent trustee, not an insolvent trust. It confirmed the right of trustees to be indemnified against liabilities; quoting from paragraph 134:-

> ***"We do not understand the general principles concerning the bankruptcy of a trading trustee to be in dispute. It is common ground that a trustee who in discharge of his trust enters into business transactions is personally liable for any debts that are incurred in the course of those transactions. Vacuum Oil Co Pty Ltd v Wiltshire (1945) 72 CLR 319. However, he is entitled to be indemnified against those liabilities from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets: Vacuum Oil Co Pty Ltd v Wiltshire, supra. The charge is not capable of differential application to certain only of such assets. It applies to the whole range of trust assets in the***

trustee's possession except for those assets, if any, which under the terms of the trust deed the trustee is not authorised to use for the purposes of carrying on the business: Dowse v Gorton [1891] AC 190: [1891-4] All ER Rep 1230.

In such a case there are then two classes of persons having a beneficial interest in the trust assets first the cestuis que trustent for whose benefit the business was being carried on; and secondly, the trustee in respect of his right to be indemnified out of the trust assets against personal liabilities incurred in the performance of the trust. The latter interest will be preferred to the former, so that the cestuis que trustent are not entitled to call for a distribution of trust assets which are subject to a charge in favour of the trustee until the charge has been satisfied: Vacuum Oil Co Pty Ltd v Wiltshire, supra.

The creditors of the trustee have limited rights with respect to the trust assets. The assets may not be taken in execution (Savage v Union Bank of Australia Ltd (1906} 3 CLR 1170 at 1186; Re Morgan; Pillgrem v Pillgrem (1881) 18 Ch D 93) but in the event of the trustee's bankruptcy the creditors will be subrogated to the beneficial interest enjoyed by the trustee. Vacuum Oil Co Pty Ltd v Wiltshire, supra; Ex parte Garland (1803) 10 Ves Jun 110 at 120; 32 ER 786 at 789; [1803-13] All ER Rep 750.)"

140. The case says nothing about an insufficiency in the trust assets and how competing claims of trustees should be treated. To say that a new trustee takes "subject to the lien of the old trustee" is not the same as saying that in the case of an insufficiency of assets, the lien of the old trustee takes precedence over the lien of the new trustee; they both have liens. The point is simply not addressed. In my view ***"subject to"*** means no more than that the former trustee's equitable lien continues as against the beneficiaries after it ceases to be a trustee and the new trustee takes the trust fund subject to that.

141. Bearing in mind that all of these liabilities would have been properly incurred in the administration of the trust, and therefore in the interests of the trust estate, I see no principled basis for treating the claims of former and successor trustees in that unequal way. I agree with Advocate Harvey-Hills that this would be both unfair and impractical.

142. Rather than sweep away the ranking *pari passu* regime to the extent that it has already been established, consistency and fairness in my view favours an extension of that existing regime to claims between former and successor trustees, so that on an insolvency all creditors come to the trust assets, such as they are, on a *pari passu* basis.

143. I therefore conclude 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 that trustee under Article 32(1)(b) rank *pari passu*, the claims against all trustees and the liabilities of all trustees rank *pari passu.*

144. I see no unfairness in this to a former trustee. One assumes that a trustee will be aware from its administration what liabilities it may have incurred which could give rise to a claim being made against it, and it has the right under Article 34(2) of the Trusts Law to require "reasonable security" for those liabilities before surrendering the trust property. What is reasonable will depend on the facts of each case. There may be a retention or a security interest created over a trust asset and it is not unusual for security to constitute contractual indemnities.

145. In this case, when Equity Trust retired in favour of Volaw on 11th October 2006, it agreed under clause 4 of the deed of appointment and resignation of trustees that it had received reasonable security in the form of the releases and indemnities contained in that deed. The usual wide chain indemnities for liabilities were given, it being provided that the liability of Volaw was limited to the value of the trust fund in its possession or under its control from time to time, unless it had parted with any capital without obtaining an equivalent covenant from the recipient, whether a new trustee or beneficiary. After ten years, the requirement for such indemnities was limited to fiscal claims. A special account was established under clause 5(4) in the sum of £2.5 million, to meet specific claims. There was no suggestion in these contractual arrangements that any claims made by Equity Trust following its resignation would have priority over the claims of Volaw in the event of the insolvency of the trust.

146. If I am wrong in accepting the Executor's primary case, then I also agree with his alternative case. The trustee's right of indemnity and associated equitable lien arises with each liability (as per Re Pumfrey). Whilst the equitable lien may have been described in Re Amarind Pty Ltd, as akin to a floating charge, it comprises the constituent elements of the liabilities it secures. Where the

equitable lien is being enforced, the beneficiaries are entitled to know how it is made up and what liabilities it purports to secure. As Advocate Harvey-Hills put it, 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).

147. I also agree that a ranking in time regime would, logically, require all claims and liabilities to be ranked in order of time, in what could be a difficult and cumbersome inquiry into when each and every claim and liability under Article 32(1)(a) and (b) arose, all of which would rank in priority of time. In the case before me, therefore, it would be possible that if one of the unsecured loans was made to Equity Trust before the Angelmist liability arose, that loan would take priority, as being the first in time.

148. It is important to note that the conclusions I have reached on these priorities issues are subject to:-

(i) the assumptions set out above;

(ii) the right of indemnity being exercised by a trustee and by creditors through that trustee (by subrogation) being dependent on the state of account between the trustee and the beneficiaries (as per the Privy Council decision);

(iii) findings of fact on inquiry which may be relevant to and affect the exercise of the Court's discretion in any particular case. There have been no findings of fact in relation to the Z II Trust to date.

149. I also acknowledge that where a former trustee gives the successor trustee actual notice of a claim under its right of indemnity, then that may well give rise to an obligation on the part of the successor trustee not to take steps that would destroy, diminish or jeopardise the former trustee's equitable lien (as per Lemery Holdings Pty Ltd).

150. Finally I should record that there were two issues in relation to the Z III Trust that the parties asked the Court to deal with:-

(i) Equity Trust's claim that interest continued to accrue on the loan due by the Z III Trust to the Z II Trust after the time that the Z III Trust became insolvent. The point was not pursued by Equity Trust at the hearing.

(ii) Whether Equity Trust can claim for its costs in proving its claim against the Z III Trust of £90,920.26. I have not addressed that issue in this judgment and will do so separately.

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