



# Indemnity and insolvency

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## Protection for departing trustee: Jersey

Entitlement to reasonable security under TJL, arts. 34 and (since 2018) 43A:

Art. 34(1) ... [W]hen a trustee resigns, retires, is removed or otherwise ceases to be a trustee, he or she shall duly surrender trust property in his or her possession or under his or her control.

Art. 43A(1) A trustee –  
(a) who –  
(i) resigns, retires, is removed or otherwise ceases to be a trustee ...  
may, before ... surrendering trust property ... require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise.

(Compare TGL, s. 43(1) (does not cover death))



## Protection for departing trustee, *contd.*

Typically security given by indemnity

Then:

- Cannot be greater than if trustee had remained in office (compare TGL, s. 43(2))
- So effectively limited to:
  - trust assets being handed over
  - liabilities reasonable in nature and amount

Retention possible but undesirable:

- No provision for remuneration
- Divorces administration from decisions about distributions



## Protection for departing trustee, *contd.*

Court will decide in case of disagreement

DIY security not a good idea – *Stock v. Pantrust International S.A.* [2016] JRC 021 at [41]:

“They have used their powers as trustees to procure security for themselves personally. Such a conflict is not permitted by the trust deeds and has not been approved by the beneficiaries or the Court. The conflict is all pervasive.”



## Protection for departing trustee, *contd.*

Non-possessory lien: no statutory entitlement in TJL (contrast TGL, s. 44(2))

But held to exist in:

- *Investec Trust (Guernsey) Ltd v. Glenalla Properties Ltd* (2014) 18 I.T.E.L.R. 30 (Gsy C.A. but on Jersey law)
- *Re Z Trusts* [2015] JRC 031
- Note doubts on appeal in *Re Z Trusts* [2019] JCA 106 at [268]-[271], [283]-[286] – leave to appeal to P.C. granted [2019] JCA 188

Compare TGL, s. 44:

- Lien continues after trustee leaves office and hands over trust property
- Is without prejudice to indemnity or other security
- Persist even after distribution to beneficiaries



## Protection for departing trustee, *contd.*

Trustee has right by way of lien to follow trust property in hands of successor trustees

Successor trustee must owe duty to ex-trustee as quasi-beneficiary not to dissipate assets

Deliberate attempt to destroy indemnity of ex-trustee by distributing all assets is actionable: *Rothmore Farms Pty Ltd v. Belgravia Farms Pty Ltd* (1999) 2 I.T.E.L.R. 159



## Protection for departing trustee: U.K., Bermuda etc.

No statutory or other right to reasonable security, because English TA 1925, s. 37(1)(d) requires vesting of trust assets in new trustee:

- *Meritus Trust Co. Ltd v. Butterfield Trust (Bermuda) Ltd* [2017] SC (Bda) 82 Civ (on equivalent Bermudian legislation)

But pretty clear that non-possessory lien binds new trustee: *Lewin on Trusts* (19th ed.), para. 17-036



## ‘Insolvent trust’

Many problems:

- What are duties of trustees when trust may be insolvent?
- What insolvency regime, if any, should apply?
- What constraints affect exercise of fiduciary powers?
- Can ex-trustee assert lien over trust assets? (Yes: see above)
- How do claims rank in priority?

Further complications if trustee/ex-trustee personally insolvent:

- Creditors subrogated to right to indemnity
- But can be in no better position than trustee





## ‘Insolvent trust’, *contd.*

Contenders for priority:

- Current trustee for liabilities owed by it
- Current trustee for own remuneration
- Ex-trustee for liabilities owed by it
- Ex-trustee for own remuneration
- Beneficiaries

Clear that beneficiaries come last:

- *Lewin*, para. 21-043
- Approved *Re Z Trusts* [2019] JCA 106 at [140], [155]



## ‘Insolvent trust’, *contd.*

As between ex-trustee and current trustee:

- Priority determined by first in time - *Re Z Trusts* [2019] JCA 106 at [191], [196] – leave to appeal granted [2019] JCA 188
- Unaffected by restriction on liability to creditors under TJL, art. 32 (or TGL, s. 42): see at [208]
- Covers both trustee’s own entitlement to remuneration and liabilities to third party creditors

As between trustee and creditors of trustee:

- Trustee has priority over creditors restricted by TJL, art. 32 (or TGL, s. 42): see at [233]



## **‘Insolvent trust’, *contd.***

May any creditors take advantage of statutory preference?

- See *Carter Holt Harvey Woodproducts Australia Pty Ltd v. The Commonwealth* [2019] HCA 20