In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: 146

IN THE MATTER OF THE ESD 1994 TRUST

AND THE MATTER OF THE MARLBOROUGH TRUST

AND IN THE MATTER OF THE TRUSTEE ACT 1975 AND RSC ORDER 85

MERITUS TRUST COMPANY LIMITED

Plaintiff

-v-

BUTTERFIELD TRUST (BERMUDA) LIMITED

Defendant

JUDGMENT

(in Court)[1]

Removal of trustee-whether trustee's equitable right to an indemnity includes the right to retain sufficient assets to meet actual and contingent liabilities and the right to a contractual indemnity

Date of hearing: October 4, 2017
Date of Judgment: October 13, 2017

Ms Elspeth Talbot-Rice QC of counsel, and Ms Fozeia Rana-Fahy, MJM Limited, for the Plaintiff as Trustee of the Trusts (the "E Trust" and the "M Trust" respectively)

Mr Nicholas Le Poidevin QC of counsel, and Ms Jessica Almeida, Appleby (Bermuda) Limited, for the Defendant

[1] The present Judgment was circulated without a formal hearing to hand down judgment.

Introductory

1. By an Originating Summons dated May 8, 2017, the Plaintiff ("Meritus") sought, *inter alia*, (1) copies of documents listed in the Schedule and (2) an Order requiring the Defendant ("Butterfield") to transfer immediately all assets of two trusts (the E Trust and the M Trust) and to vest title to such assets in Meritus. Butterfield had by that time been removed as Trustee and Meritus appointed in its place on December 21, 2016. The changing of the guard took place under the dark cloud of a threatened claim against the former Trustee and so the transfer process was, from the outset, somewhat prickly.

2. At the hearing of the Originating Summons on October 4, 2017, first two heads of relief were granted without any great controversy. The application for an account was adjourned with liberty to restore as the need for the relief initially sought was likely to be shaped by the nature of the document disclosure which was made. That left for determination one main and one subsidiary issue which were the subject of full argument and which were identified in Butterfield's own interlocutory Summons for directions issued on June 14, 2014.

3. Firstly, Butterfield asserted that it was entitled to retain sufficient trust assets against which to enforce its indemnity in relation to the contingent costs liability (which its estimated at $5 million) in relation to the defence of the threatened claim in respect of its management of the trust assets. Meritus contended that as a matter of law the right of indemnity did not confer such retention rights and that, if any retention right did exist, $750,000 was a generous estimate of the appropriate quantum in the absence of any evidence explaining how the $5 million figure was arrived at. Secondly, Butterfield asserted that it was entitled to a contractual indemnity, particularly as regards the M Trust, while Meritus countered that no such entitlement existed.

Findings: the right of retention

<u>The submissions of counsel distilled</u>

4. Mrs Talbot-Rice QC's submissions on the retention point can be distilled into the following main propositions:

    (1) a former trustee's right of indemnity in equity, putting aside any more generous rights conferred by statute, contract or a particular trust deed, took effect as a non-possessory lien and did not include a right of retention as against a successor trustee, in contradistinction to the position of a beneficiary or creditor of a trust;

(2) this position was consistent with the statutory framework for changing trustees which required all trust assets to be vested in the new trustee upon appointment or as soon as possible thereafter (Trustee Act 1975, section 27(d));

(3) this position was also consistent with a proper analysis of relevant case law (principally *Lemery Holdings Pty Ltd.-v- Reliance Financial Services Pty Ltd* [2008] NSWSC 1344) and textbook authority.

5. Mr Le Poidevin QC relied upon a contrary view of the relevant law on the central issue. Cases he relied heavily on in terms of direct authority included *Apostolou-v- VA Corporation Aust Pty Ltd* [201] FCA 64, while text authorities he referred to included '*Underhill and Hayton: Law of Trusts and Trustees*', 18th edition. He questioned the soundness of his opponent's 'absolutist' thesis that there was a clear conceptual demarcation between transferring assets to a successor trustee and making payments to beneficiary.

The relevance of theTrustee Act 1975

6. Section 27 of the Trustee Act 1975 ("the Act") provides:

"*On the appointment of a trustee for the whole or any part of trust property-*

...

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, in a sole trustee, or jointly in the persons who are the trustees, shall be executed or done." [Emphasis added]

7. Subject to certain exceptions (notably shares or stocks), a deed appointing trustees after the commencement of the Act operates so as to automatically vest trust property in the trustees, unless contrary provision is made in the deed. Section 30 of the Act provides:

"(1) *Where by a deed a new trustee is appointed to perform any trust, then—*

(a) if the deed contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust, the deed shall operate, without any conveyance or assignment, to vest in those persons as joint tenants and for the purposes of the trust the estate, interest or right to which the declaration relates; and

(b) if the deed is made after 1 March 1975 and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the appointor extending to all the estates, interests and rights with respect to which a declaration could have been made.

…

(4) This section does not extend-

(a)…

(b)…

(c) to any share, stock, annuity or property which is only transferable in books kept by a company or other body, or in manner directed by or under any statutory provision."

8. The Deeds of Appointment executed on December 21, 2016 in relation to the E and the M Trust were not, incidentally, silent on the vesting issue. They each provided:

"*3.1 It is HEREBY DECLARED that the Trust Fund of the Trust is hereby transferred (in so far as it is permitted by law without further documentation) to the New Trustee to be held by the New Trustee upon the trusts set out in the Trust.*"

9. It being common ground that neither the Act nor the Trust Deeds conferred retention rights on Butterfield as a former Trustee, in my judgment Meritus' counsel was right to contend the statutory vesting scheme is, in a general sense, inconsistent with the notion of the old trustee enjoying retention of asset rights capable of being asserted by a former trustee as against a new trustee. The Act envisages that when a new trustee is appointed, either:

(a) trust assets (including cash) will automatically vest in the new trustee; or

(b) the old trustee will otherwise be subject to a mandatory obligation to execute whatever instruments of transfer may be required to perfect the vesting process.

10. The proposition that a trustee's fundamental function is to exercise control over the trust assets found only general and somewhat indirect support in the following observation of Wilberforce J (as he then was) in *Re Pauling's Settlement* [1963] 1 All E.R. 857 at 863 (upon which Mrs Talbot-Rice relied):

> "*To appoint new trustees, and at the same time to leave another person not in the position of a trustee in possession of the trust fund, would be to create a most undesirable situation.*"

Case law directly considering the right of retention of an old trustee against a new trustee

11. *Lemery Holdings Pty Ltd. -v- Reliance Financial Services Pty Ltd* [2008] NSWSC 1344 was the only case cited in argument which dealt head-on with the question of whether a trustee's equitable right to an indemnity included a right of retention which could be asserted against a new trustee. It is a decision of the New South Wales Supreme Court Equity Division, a first instance court like this Court. Brereton J's decision was an ex tempore one.

12. That case concerned a change of trustee triggered by the winding-up of the old trustee. The trust deed expressly imposed a duty on the former trustee upon removal to vest the assets in the new trustee and further expressly provided that, in the interim, the old trustee would hold the trust assets as a bare trustee for the new trustee. A dispute arose as to whether certain assets were trust assets and, if so, whether the former trustee could retain them for the purposes of enforcing its indemnity rights. The judge defined the issues falling for determination in the following way:

> "*8 There are two main issues to be decided. The first is whether the causes of action in the third party proceedings, and the loans and securities the subject of those proceedings, are assets of the Reliance Discretionary Trust. The second is, if so, whether the former trustee Reliance is entitled to retain those assets in its possession, notwithstanding its removal and replacement by RFSNSW as trustee, as security for its right of indemnity against the trust assets.*"

13. Having decided that the assets in question were indeed trust assets, Brereton J turned to what he described (at paragraph 12) as the "*much more difficult issue*". He set the legal scene in the following paragraphs to which Meritus' counsel referred:

"*13 The relevant principles concerning a trustee's right of indemnity against trust assets include the following, for which I am indebted in large part to the analysis by Austin J in Trim Perfect Australia v Albrook Constructions [2006] NSWSC 153, [20].*

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, 367].

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; Coates 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].

23 At issue in the present case is whether the ninth proposition extends to allow a former trustee to retain assets pending exercise its right of indemnity, not as against a beneficiary, but as against a new trustee. On this issue, the authorities are far from clear."

14. Mr Le Poidevin QC did not take issue with this summary of general principles about the main legal characteristics of a trustee's right of indemnity and I treat these principles as common ground between the parties in the present case. He did take issue with Brereton J's criticism of the reasoning in *Re Pauling's Settlement Will Trusts (No.2)* [1963] 1 All ER 857:

"*31 With great respect, the suggestion that appointing new trustees and vesting the trust assets in them would deprive the old trustees of security for their indemnity is incorrect. The cases already referred to establish that the security survives and can be enforced against the trust assets in the hands of the new trustees at the suit of the old trustee: see the eighth proposition above (at [21]). Thus, while Re Pauling's Settlement Trusts (No 2) suggests that an outgoing trustee is entitled to insist on retaining the trust fund as against the new trustee as security for its indemnity, it appears to overlook the cases that hold that the security survives and is enforceable against the assets in the hands of the new trustee. However, as to the undesirability of a person not in the position of the trustee being in possession of the trust fund, in this case the appointment of a new trustee has already taken place out of Court, so that that position will pertain if the trust fund is not now vested in the new trustee.*"

15. On a careful reading of *Re Pauling's Settlement,* it does appear that Wilberforce J's decision to postpone approving the appointment of new trustees and the vesting of the trust assets in them until the appeal was determined was based on the assumption that the former trustee's indemnity could, in a practical sense, be 'lost' if the trust assets

were passed to the new trustee and that the former trustee was entitled to security for its potentially substantial costs. This was not held to be the strict legal position. It is important to appreciate that :

(1) the case concerned the scope of a statutory indemnity under section 62 of the Trustee Act 1925; and

(2) Wilberforce J expressly found (at page 861H-I, after citing *Fletcher-v-Collis*[2]) that the indemnity extended to a former trustee and that:

> "*It seems to me that this supports the view that the mere parting with the fund is not sufficient to take away from the trustee the right to claim the income. The plaintiffs…have inserted, in the minute of the order…a provision which expressly preserves the right of the trustee to claim recoupment out of the income…Therefore I do not feel that that objection by itself is sufficient to prevent me from appointing new trustees now*";

(3) Wilberforce J was concerned with a case management decision of when to implement an earlier court order directing that new trustees be appointed, in circumstances where there was considerable uncertainty about the extent of a potential liability for estate duty and, by implication, the ability of the new trustee to ascertain what reserve to create for it in the way which ordinarily would be done by a new trustee;

(4) Wilberforce J was accordingly deciding <u>as a matter of judicial discretion</u> whether he should grant security to the outgoing trustee to enable it to exercise its indemnity rights. He was <u>not</u> deciding whether or not a former trustee having been replaced had an equitable right to retain funds as security for its indemnity rights.

16. In my judgment Brereton J was correct to decline to follow *Re Pauling's Settlement*, even if his reasons for so doing were unsurprisingly (in the context of an ex tempore judgment) based on a failure to fully grasp the finer nuances of the factual and legal context in which Wilberforce J made an essentially case management decision to postpone appointing new trustees. That case is not authority for the proposition that a former trustee has a positive legal entitlement to retain some of the trust fund by way of enforcement of its indemnity rights against a new trustee. However, Brereton J clearly appreciated the fundamental distinction between the discretionary jurisdiction vested in a court making a vesting order to authorise the former trustee to retain security and the strict legal position. He later referred in his judgment (at paragraphs

[2] [1905] 2 Ch 24 at page 35

37-40) to various Australian cases where the courts on discretionary grounds, in the context of making vesting orders, permitted funds to be reserved by way of security for the former trustee's indemnity rights. He also cited, in contrast, the following authority which spoke directly to the strict legal position:

"*41 Then, in Ronori Pty Ltd v ACN 101 071 998 Pty Ltd [2008] NSWSC 246, Barrett J returned to the same issue. His Honour said (at [15]-[18]):*

[15] In the present case, therefore, the former trustee continues to enjoy a beneficial interest in the trust property commensurate with its right of indemnity out of that property. Although the trustee's right to resort to trust property is sometimes described as a lien, it is not essential for the enjoyment and effectuation of the right that possession of the trust property be retained. The right entails, as I have said, a beneficial interest in the property. It is not in the nature of a possessory security.

[16] Where there is a change of trustee, the former trustee's interest remains enforceable against the trust property. It is relevant, in this connection, to quote a passage from the joint judgment of Thomas JA, Shepherdson J and Jones J in Belar Pty Ltd v Mahaffey [1999] QCA 2; [2000] 1 QdR 477 (at [19] to [21]):

> *"In conducting the business of the trust, the trustee becomes personally liable for debts incurred.*
>
> > *'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.' [Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360 at 367]*
>
> *That is a reference to trust assets in the trustee's possession. When there is a change of trustee with the trust assets being vested in the new trustee, the former trustee no longer has direct access to such assets, and should make the necessary claim for indemnity against the trustee who represents the trust.*
>
> *The trustee's right of indemnity out of the trust assets is in the nature of a charge or lien in favour of the trustee and as such takes preference or priority over claims by the cestuis que trust. But of course when the assets have passed out of a trustee's possession the necessary claim for a trustee's indemnity should be made against the new trustee. An unco-operative new trustee who declined to exercise the powers to recover trust property in the hands of the beneficiaries could be made a*

defendant, and orders could be made which would in effect permit the former trustee to exercise such powers by subrogation.

There is ultimately a right to proceed directly against the beneficiaries but that right depends upon exhaustion of any remedy against the personal representative."

[17] This passage was expressly approved by Spiegelman CJ in Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (2002) ATPR 41-864; [2002] NSWCA 29 at [2].

[18] It is thus clear that, even though the trust assets have passed out of the former trustee's possession, the vindication of that person's beneficial interest remains available by way of an appropriately constituted claim against the new trustee. There need therefore be no concern on the part of the court about recognising immediately the right of the new trustee to have the trust property vested in it."

17. The central conclusions reached by Brereton J, which Mrs Talbot-Rice QC invited this Court to endorse, were the following:

"*45 Ultimately, I think it is preferable I seek to resolve this issue as a question of principle, rather than by trying to reconcile what appear to be conflicting authorities, none of which are strictly binding.*

46 The starting point is that it is universally accepted that the nature of the trustee's interest is that of an equitable lien – that is, an equitable security interest arising not by agreement of the parties but by operation of law. It is also universally accepted that the only remedy of the trustee against the trust assets is judicial sale or appointment of a receiver. That is consistent with the nature of an equitable lien as a mere hypothecation. Such a security does not confer on the security holder any right of foreclosure, nor any right to possession of the property. It creates an interest which the security holder can enforce, as I have said, by judicial sale or appointment of a receiver, but such a security holder cannot bring an action for possession of the property the subject of the equitable lien. It seems to me to follow that, insofar as Jennings v Mather – which in turn influenced the observations in Re Suco Gold – depends on the view that the trustee's lien carries with it a right to retain possession, it is mistaken.

47 But it is necessary to consider whether the view that an equitable lien does not confer a right to possession of the subject property can be reconciled with those cases which establish that the trustee is entitled to retain trust property as against a beneficiary or an execution creditor. At least as against

a beneficiary, the answer is that that entitlement is a manifestation of set-off, in that once a trustee has an accrued right of indemnity, the trustee is entitled to set it off against the beneficiary's claim to the trust assets, and to refrain from distributing until the trustee's claim is satisfied. In the closely analogous field of the trustee's personal right of indemnity against a beneficiary, this was explained in Re Akerman [1891] 3 Ch 212 by Kekewich J (at 219):

> *A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate; nothing is in strict language set off; but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back.*

48 As the authors of Jacobs' Law of Trusts, 5th ed, point out (at [2111]):

> *'The beneficiary is treated as already having in his hands a portion of the assets and therefore is satisfied pro tanto". This is also reflected in the cases to which I have referred such as Hillig v Darkinjung Local Aboriginal Land Council, Jennings v Mather and Kentrom Industries v Commissioner of Stamp Duties, which establish that the trustee is entitled to retain only sufficient to cover the indemnity and not more.*

49 A second explanation – which applies both to distribution as to beneficiaries, and to execution creditors as in Jennings v Mather – is that a distribution to a beneficiary or seizure by an execution creditor would be destructive of the security interest, whereas transfer to a new trustee is not.

50 To my mind, then, it follows in principle that a former trustee does not have a right to retain, as against a new trustee, the trust assets as security for an accrued right of indemnity, though the former trustee is entitled to ensure the new trustee does not take steps which will destroy, diminish or jeopardise the old trustee's right of security, which subsists in the trust assets after their transfer to the new trustee. This view accords with the conclusions of Rolfe J and Barrett J in the New South Wales cases to which I have referred. It follows that I respectfully decline to follow the observations of the Full Court of Supreme Court of South Australia in Re Suco Gold."

18. Mr Le Poidevin QC attempted to discredit this reasoning but failed to deliver a 'knockout blow'. The suggestion that the judgment reflected a propensity to dismiss out of hand unhelpful previous decisions did not withstand careful scrutiny. He described Brereton J's observation (in paragraph 46) that "*the only remedy of the trustee against the trust assets is judicial sale or appointment of a receiver*" as "*odd*", not wrong. When Brereton J stated in the following paragraph that the right of

retention against a beneficiary was "*a manifestation of set-off", it was argued that "set-off was irrelevant*".

19. However one conceptually characterizes the position, in my judgment there is a clear practical and theoretical distinction to be drawn between making a routine distribution to a beneficiary (which once made ordinarily strips the distribution proceeds of their character as 'trust assets') and the transmission of trust assets from one trustee to another. The fact that it may be possible in exceptional scenarios for a distribution to be held to be, for instance, impressed with a constructive trust or made subject to a reservation of rights by the trustee is beside the point. The relevant equitable right of indemnity reflects the deployment of judge-made law in service of the creation of practical remedial tools; the relevant legal theory is accordingly shaped by practical norms, not by practical exceptions. In most cases if a trustee is making a distribution to a beneficiary the interest conveyed will be an unencumbered legal and beneficial interest in the property distributed. Hence, to give efficacy to the trustee's indemnity, the law has recognized the existence of an ancillary retention right. No practical need for such retention will ordinarily arise when the trust assets are being vested in another trustee, because the trust assets retain their character as such and remain subject to the former trustee's equitable lien by operation of law.

20. These were minor quibbles which did not undermine the central thesis advanced on behalf of Meritus and most directly supported by the decision in *Lemery,* that a fundamental distinction may be found in the case law and textbook authorities between the right of retention as against a beneficiary (or execution creditor) and the position as between a former and a new trustee. A brief review of the main cases and text authorities referred to in argument only confirms the soundness of this thesis.

Authorities supporting through obiter dicta a former trustee's right of retention as against a new trustee

21. There is a reason why the law of precedent distinguishes between those parts of decided cases which are binding (the *ratio decidendi*) and those which are not (*obiter dicta*). Judicial statements which form part of the operative decision-making process are likely to be based on more rigorous analysis than judicial 'side-bar' remarks. Judicial observations in relation to points which have received the benefit of full argument generally carry greater weight than those which have not. These considerations have particular significance when a court is being invited to follow merely persuasive authority. It is also trite law that the persuasive weight of decided cases will depend most significantly on the extent to which, as far as trust cases are concerned, the trust instruments and any relevant statutory provisions, are materially similar to the legal matrix engaged by the case before the relevant court.

22. The following brief observations can accordingly be made about the principal authorities which indirectly supported the case for a retention right in favour of a

former trustee, by way of explanation as to why I decline to follow them in the present case:

- *Re Suco Gold Pty Ltd (in liquidation)* (1983) 33 SA SR 99 (King CJ): *obiter dicta*, unsupported by any authority;

- *Apostolou-v-VA Corporation Aust Pty Ltd* [2010] FCA 64 (Finklestein J) at paragraph 50: *obiter dicta*, disapproving of *Lemery*, unsupported by relevant authority;

- *Orconsult Limited-v- Blickle and others* [2008] Bda LR 41 (Kawaley J) at paragraph 10: *obiter dicta*, in the context of a case where the trust deed conferred an express retention right and an application for Court approval of a decision to transfer trust assets to the Jersey-based trustee of three other trusts;

- *Caversham Trustees Limited-v- Crichton* [2008] JLR Note 18: a statutory right to a contractual indemnity existed[3];

- *ATC (Cayman) Ltd-v- Rothschild Trust Cayman Ltd* [2011] 14 ITELR 523 (Smellie CJ) at paragraph 55 (i): *obiter dicta* in a case where the trust deed conferred an express retention right on a former trustee and where *Lemery* was not cited and was not directly relevant.

Textbook authority support for a former trustee's right of retention as against a new trustee

23. The most direct text authority relied upon by Butterfield's counsel was an American text, '*Scott and Ascher on Trusts*', Fifth Edition, which provided as follows:

> "*A trustee who is entitled to reimbursement or exoneration for expenses properly incurred cannot be compelled to surrender the trust property to either the beneficiaries or a successor trustee until the trustee's claims have been satisfied or provided for.*"

24. Meritus' counsel fairly pointed out that the only authority cited for this proposition was seemingly statutory: the Uniform Trustees Powers Act ¢ 3(c) (18)[4]; Uniform

[3] The relevant statutory provision which does not appear in the report but to which counsel referred is found in section 38 of the Trusts (Jersey) Law 1984, 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.*"

[4] My own limited researches did not lead me to this provision.

Trust Code ƍ709(b)[5]. There was no such unambiguous support for a right of retention as against a new trustee from English text authority. Mr Le Poidevin QC was forced to rely on a statement in '*Underhill and Hayton: the Law of Trusts and Trustees*', Eighteenth Edition which dealt with an entirely distinct legal context:

> "*81.28 A trustee who successfully defends proceedings brought against him as trustee by a beneficiary and arising out of the execution of the trust is entitled to his costs out of the trust fund and to a lien for their payment.*"

25. Mrs Talbot-Rice QC submitted that the only passage in that text which spoke to a trustee's retention rights did so in relation to the trustee-beneficiary relationship (paragraph 81.32). This passage cited authority (*X-v-A* [2000] 1 All ER 490) which did not, in any event, directly address the right of retention at all. I agree that this case does not support Butterfield's position. '*Lewin on Trusts*', Nineteenth Edition, provided, at best, mere acknowledgment of the fact that some support for the notion of a right of retention exists. The predominant principled view which is expressed is that no retention right exists after assets had been vested in a new trustee:

> "***17-031*** *A trustee's rights of indemnity under the general law consist of reimbursement, exoneration, retention and realisation. A trustee who ceases to hold office and to have the trust property vested in him must lose his right of retention for he has ceased to retain the trust property….An outgoing trustee might retain his rights of retention by deferring vesting of some or all of the assets pending settlement of claims….*
>
> ***17-033*** *Further, retention of assets by an outgoing trustee is inconsistent with the statutory provision which requires that on an appointment of new trustees any assurance or thing requisite for vesting the trust property in the new trustees should be executed or done. We do not consider that this statutory provision imposes an absolute bar on retention by a former trustee as an incident of his right of indemnity, and indeed there is English[6], Australian and Cayman authority suggesting that there is a continuing right of retention against new trustees. But normally the trust property will be vested in the new and continuing trustees and the former trustee will be protected either under his continuing rights of reimbursement and exoneration under the general law*

[5] My own superficial researches reveal that this provision only expressly creates a lien for expenses reasonably incurred.

[6] The English authority cited is *Re Pauling's Settlement Will Trusts (No.2)* [1963] 1 All ER 857 which to my mind provides no real support at all for a right of retention under the general law. This case illustrates the ability of a trustee facing removal to obtain discretionary judicial support for a 'retention' right through delaying vesting the trust assets in the new trustee.

or, most often, under express indemnity and, where appropriate, express security arrangements." [Emphasis added]

26. The above passages provide very cogent reasoned support for the Meritus position that there is no general right of retention as an incident of a former trustee's indemnity in respect of actual and contingent liabilities which is exercisable against the new trustee. The analysis is highly persuasive because the general law in England and Bermuda and the governing statutory provisions on vesting are essentially the same[7]. This base position, or starting assumption, may of course be altered through legislation or the express terms of the trust deed. In summary, I extract the following two further propositions from *Lewin* which were not or not clearly elucidated in *Lemery Holdings Pty Ltd. -v- Reliance Financial Services Pty Ltd* [2008] NSWSC 1344, in part perhaps because of a different statutory trust law context:

    (1) as regards those trust assets which automatically vest in the new trustee upon appointment (for present purposes all assets including cash except for shares), the right of retention is lost as against the new trustee by operation of law;

    (2) as regards those trust assets which do not automatically vest, the former trustee can seek to postpone his statutory obligation to immediately vest them. This could happen either by agreement or with discretionary assistance from this Court, but it would be the only principled basis for obtaining legally valid retention rights against the new trustee.

Summary

27. For the above reasons, I find that Butterfield has no right to retain any trust assets (whether vested or unvested in Meritus) as security for its indemnity rights under the E and M Trusts. For the avoidance of doubt Mr Le Poidevin QC expressly confirmed that Butterfield was not in any way seeking to invoke the discretionary jurisdiction of the Court. That was a sensible concession, because there is no material presently before the Court which would support a finding that Butterfield is not adequately protected by its equitable lien in respect of the actual and contingent liabilities of which it is presently aware.

Findings: is Butterfield entitled to a contractual indemnity

28. No authority was cited which supported the proposition that this Court had jurisdiction to compel Meritus to negotiate and consummate an express contractual

[7] Sections 27(d) and 30 of the Trustee Act 1975 (Bermuda) are substantially based on sections 39(2) and 40 of the Trustee Act 1925 (England and Wales).

indemnity in the absence of any express requirement in the Trust Deeds to this effect. Neither the Trust Deeds nor the Act conferred any such entitlement. The position is entirely straightforward as regards the E Trust and only marginally less so as regards the M Trust. I am bound to conclude that the following clause in the M Trust confers no right on Butterfield as a former Trustee to a contractual indemnity. It merely preserves, for the avoidance of doubt, its ability to seek one:

> "*56.2 Without prejudice to the entitlement of any Trustee who retires or is removed under the provisions of clause 17, to request an express indemnity on such retirement or removal, the rights of indemnity conferred by sub-clause 56.1 shall endure following retirement or removal, death or (as the case may be) liquidation of a trustee…*"

29. Butterfield's application for an Order to this effect (i.e. requiring Meritus to grant Butterfield an express contractual indemnity) must be refused. No jurisdictional basis for granting such relief was established. In *Re Representation of C; Re Z Trusts* [2015] JRC 31; 18 ITELR 544, upon which Mrs Talbot-Rice QC aptly relied, Commissioner Clyde-Smith held:

> "*18. That is as far as I can properly go at this stage. I am not prepared to order Equity to enter into any contractual document which governs its rights personally; apart from doubting the court's power to make such an order it is unnecessary…*"

Conclusion

30. In summary, Butterfield is neither entitled to retain any part of the trust assets as security for its equitable indemnity as former Trustee of the E and M Trusts nor to an equitable contractual indemnity. I shall hear counsel as to costs, if required.

Dated this 13th day of October 2017 _____

IAN RC KAWALEY CJ