



**Investec Trust (Guernsey) Limited et al v
Glenalla Properties Limited et al**
Court of Appeal
29th October, 2014

**JUDGMENT
41/2014**

Appeal against the decision of the Royal Court on 6th December 2013 that Article 32 of the Trusts (Jersey) Law 1984 (as amended) did not apply to transactions entered into between the trustees of a Jersey law trust and companies owned by those trustees.

**Approved Text
29 October, 2014**

**COURT OF APPEAL
(Civil Division)**

(On appeal from the Royal Court of Guernsey Ordinary Division)

29 October 2014

Before:

**James Walker McNeill QC, President
John Vandeleur Martin QC
Robert Logan Martin QC**

**(1) Investec Trust (Guernsey) Limited
(2) Bayeux Trustees Limited**

Plaintiffs

and

**(1) Glenalla Properties Limited
(2) Thorson Investments Limited
(3) Eliza Limited
(4) Oscanello Investments Limited
(5) Rawlinson & Hunter Limited**

Defendants

and

**(1) Glenalla Properties Limited
(2) Thorson Investments Limited
(3) Eliza Limited
(4) Oscanello Investments Limited**

Third Parties

**Advocate J Wessels for the Plaintiffs
Advocate JP Greenfield for the First to Fourth Defendants/Third Parties
Advocate IC Swan for the Fifth Defendant**

JUDGMENT

Logan Martin JA

Judgment of the Court

Introduction

1. The proceedings to which this judgment relates concern the administration of the Tchenguiz Discretionary Trust (“the TDT”). The proceedings were commenced by the plaintiffs who were previously the trustees of the TDT. The issues raised were the subject of trial before the Royal Court in which judgment was given by Lieutenant Bailiff Sir John Chadwick PC on 6 December 2013. That judgment has been appealed and certain of the issues raised were the subject of a judgment of this Court given by McNeill JA on 27 June 2014.
2. The details of the circumstances relating to the formation and administration of the TDT and the background to the dispute were set out in our earlier judgment. It is not necessary to repeat these details but the following salient matters which are material to this judgment may be noted. The TDT was constituted as a Jersey trust on 26 March 2007. The first plaintiff was initially the sole trustee of the TDT and the second plaintiff became a trustee on 21 August 2007. The plaintiffs (hereafter “the former trustees”) were replaced as trustees by the fifth defendant (hereafter “the present trustee”) on a date in July 2010. Clause 9.1 of the declaration of trust which constituted the TDT provided that no trustee was to be liable for any loss to the trust fund unless that loss should arise by reason of the trustee’s own fraud, wilful misconduct or gross negligence.
3. As a result of arrangements which were made in August 2007, the former trustees received the beneficial ownership of shares in a number of companies registered in the British Virgin Islands, including the first to fourth defendants and third parties, and the former trustees assumed the liabilities for monies owed to the first and second defendants and for borrowings under a loan agreement with Kaupthing Bank hf (“Kaupthing”). As a result of further arrangements which were made in December 2007, the third and fourth defendants were interposed between the TDT and the other companies in which assets were held, and further funds were made available by Kaupthing to the fourth defendant which used those funds to make payments including the repayment of identified loans owed to Kaupthing. One of the loans repaid was a loan due by the first plaintiff. On various dates in 2009 and 2010, each of the first to fourth defendants (hereafter “the BVI companies”) was placed in liquidation. The joint liquidators of the BVI companies subsequently sought repayment from the former trustees of the loans said to be due to those companies.
4. The present proceedings were commenced in March 2010. The former trustees have sought a determination of whether they are liable for any sums due to one or other of the BVI companies. Most particularly for the purposes of this judgment, the former trustees have sought declarations (i) against the BVI companies that they have no personal liability in respect of monies said to be due and that any claims by the BVI companies extend only to the trust property of the TDT held by the former trustees, and (ii) against the present trustee that the former trustees have a right of indemnity against the trust assets of the TDT and that the former trustees may retain those assets and realise them in order to meet any liability and thereafter obtain exoneration. By counterclaim, the BVI companies have sought declarations that the monies claimed by their joint liquidators are due and have sought judgment against the former trustees for the sums said to be due, or alternatively, an accounting for the sums due. Also by counterclaim against the former trustees, and by third party notice against the BVI companies, the present trustee has sought declarations that the BVI companies have no claims to monies due and that the former trustees are not entitled to any right of indemnity in respect of the assets of the TDT. The present trustee has sought orders requiring the former trustees to vest title to the assets of the TDT in the present trustee and an accounting against the former trustees on the basis of allegations of wilful default by the former trustees.

5. In his judgment, the learned Lieutenant Bailiff found that the former trustees were liable under binding obligations in respect of loans to the first, second and fourth defendants (and which were referred to as “the Glenalla and Thorson loans and the Oscatello arrangements”). In respect of the former trustees’ claim to a right of indemnity, the Lieutenant Bailiff held that the former trustees were not entitled to rely as against the BVI companies on Article 32 of the Trusts (Jersey) Law 1984 as amended (“the Jersey Law”) and thereby to limit their liability to the extent of trust funds and, separately, that it was not a term of the legal obligations assumed or undertaken by the former trustees in respect of the loans that they were not personally liable. He also held that the conduct of the former trustees did not constitute unreasonable or improper conduct or wilful default and that the liabilities incurred by them were liabilities “reasonably incurred in connection with the TDT” for the purposes of Article 26(2) of the Jersey Law.
6. The former trustees and the present trustee have appealed to this Court against certain aspects of the decision of the Lieutenant Bailiff. For procedural reasons, the individual aspects of the appeals are being heard separately. The judgment of this Court given on 27 June 2014 was primarily concerned with the first ground of appeal for the former trustees which in summary was that the Lieutenant Bailiff was in error to find that Article 32 of the Jersey Law did not apply to the relevant transactions. In that judgment, we addressed our conclusion on that aspect of the appeal for the former trustees as follows:

“116. For all these reasons we consider that the former trustees are entitled to succeed in respect of the first ground of appeal and that, in the present proceedings, the provisions of Article 32 of the Trusts (Jersey) Law fall to be applied in considering the liability of the trustees of the TDT under the Glenalla and Thorson loans and the Oscatello arrangements. The precise consequence of this finding will be subject to our determinations on the grounds of appeal to be considered at a later hearing, but, unless arising from those determinations, the former trustees will have no personal liability in respect of the loans beyond the assets of the TDT.”

In reaching that conclusion, we considered the relationship between Article 32 and the relevant provisions of the Trusts (Guernsey) Law 2007 which apply in this jurisdiction. In summary, we held that as a matter of private international law the courts of this jurisdiction should recognise the applicability of Article 32 in determining the disputes which are raised in these proceedings: see paragraph 106 of the judgment of 27 June 2014.

7. We also found in respect of what was said to be a fall-back position for the former trustees that, if Article 32 did not apply, the loan documents properly construed excluded the personal liability of the former trustees: see paragraphs 120-121 of the judgment of 27 June 2014. At present, we are not concerned with that finding and in this judgment we express no opinion on the consequences of the exclusion of personal liability arising from the parties’ contractual relations.
8. In this present judgment, we address the meaning and effect of Article 32 in order that its consequences may be applied to such sums as are confirmed ultimately to be due by the former trustees to the BVI companies.

The contentions for the parties

9. At the outset, it is useful to quote again the terms of Article 32 in its current form:

“32. Trustees' 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.”
- 10. Article 26(2) is also referred to in the competing contentions and it provides:
 - “(2) A trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust.”
- 11. The contentions for the parties on the construction of Article 32 are set out in a number of documents, both pleadings and skeleton arguments, in which the arguments have been developed as the proceedings have progressed both before the Lieutenant Bailiff and before this Court.
- 12. It is contended for the present trustee that where the liability of a trustee is one in respect of which the trustee is entitled to indemnity out of the trust assets, the claim of the trustee’s creditor remains a claim personally against the trustee but that the claim is limited to the value of the trust assets. Where a trustee has no right of indemnity, the claim of a creditor is also a claim against the trustee personally but is not limited to the amount of the trust assets. It is submitted that the words used in Article 32(1)(a) may be read as words of limitation on the extent of the personal liability of the trustee in the same way that that can be achieved under the general law of trusts as it applies in other jurisdictions: see *Muir and others v City of Glasgow Bank* (1879) 4 App Cas 337, the speech of Lord Cairns LC at pp355 and 361-2 where his Lordship considered the case of *Gordon v Campbell* (1842) 1 Bell’s App 428. A trust does not have legal personality; a trustee acts as principal and is liable on his contracts: see eg *Perring v Draper* [1997] EGCS 109. This means that absent any contractual term limiting his liability, the trustee is liable to his creditor for the full amount but would ordinarily have a right of indemnity out of trust funds: see *Re Blundell* [1880] 40 Ch D 370, per Stirling J at p376-7. A creditor who obtains judgment against a trustee may enforce the judgment against the trustee’s personal assets and may be subrogated to the trustee’s right of indemnity against the trust assets: see *In re Johnson* [1880] 15 Ch D 548 and *Jennings v Mather* [1902] 1 KB 1. Article 32(1)(a) is a statutory equivalent which applies where a third party knows that he is dealing with a trustee acting as a trustee. The intention of the legislature in enacting Article 32(1)(a) was to give protection to trustees and not to enhance the rights of creditors: for example, Article 32(1)(a) does not give a creditor any direct right against trust assets held by the trustee. If there were to be a direct right, a creditor who knew that he was contracting with a trustee (ie where Article 32(1)(a) was engaged) would have an advantage because he could go directly against trust assets even where the trustee had improperly incurred a liability. The legislative history of Article 32 provides no support for any form of proprietary claim and there is nothing in Article 32(1)(a) to suggest that it was intended to create direct recourse against trust assets. Article 32(1)(a) does not affect the principle that the third party’s right of recourse is by subrogation to the trustee’s right of indemnity. If Article 32 applies in the present case, the BVI companies’ claims are against the former trustees and not against the trust property of the TDT: they can only enforce their claims against the TDT property by way of subrogation to the former trustees’ right of indemnity. If the former trustees have lost their right of indemnity, the BVI companies cannot be in any better position than the former trustees and cannot enforce against the assets of the TDT.
- 13. In support of these contentions for the present trustee, Advocate Swan submitted that it was necessary to bear in mind the distinction between Article 32 on the one hand and Article 26 on the other, a distinction which was made by the Lieutenant Bailiff in paragraph 217 of his

judgment. Article 32 is directed to the rights of third parties and is to be contrasted with Article 26(2) which is concerned with a trustee’s rights against the trust fund. Under the latter a trustee is entitled to an indemnity from the trust fund in respect of costs and expenses which are reasonably incurred. For the purposes of Article 32, there are two types of creditor: a “knowing” creditor and an “ignorant” creditor depending upon whether or not he is aware that the person with whom he is transacting is a trustee. In the case of Article 26(2), there are two types of trustee: an “innocent” trustee and a “guilty” trustee depending upon whether or not the trustee has been responsible for some form of breach of trust. Where a “knowing” creditor has contracted with an “innocent” trustee, which, in Advocate Swan’s submission, is the situation envisaged by sub-paragraph (1)(a) of Article 32, the liability of the trustee to creditors is limited, and although the creditor has subrogation rights he has no form of right *in rem* against trust property. The right is against the trustee and where one has a solvent trustee in possession of sufficient trust assets, then no difficulty arises in satisfying a claim. But, in Advocate Swan’s submission, a difficulty would arise if the interpretation covered a trustee who was personally insolvent and an insolvent trust. It was Advocate Swan’s position that Article 32(2) disapplied paragraph (1) in its entirety, that is to say, both of sub-paragraphs (1)(a) and (1)(b). This meant that where a trustee had been responsible for breach of trust (and was thus a “guilty” trustee in Article 26 terms), he could not rely upon sub-paragraph (1)(a) and it followed that even a “knowing” creditor, who would otherwise have had his claim satisfied out of the trust assets held by the trustee, was denied any recourse to the trust assets.

14. In support of his interpretation, Advocate Swan relied upon the discussion of proposed amendments to the Jersey Law in the consultation paper of the Economic Department Committee apparently published in late 2004 (“the 2004 Consultation Paper”) which indicated that creditors would be looking after themselves and he submitted that there was no support there for the argument that Article 32(1)(a) was introduced to provide protection to creditors. He referred to the principle that a trustee will be liable to a third party where he deals with the trust fund in disregard of what is a *prima facie* reasonable claim which is subsequently established: see *In re Bamford* [2003] JCA 048 (noted at [2003 JLR Note 13]) in which reference was made to *Guardian Trust & Executors Co (NZ) Ltd v Public Trustee (NZ)* [1942] AC 115. He referred again to the principle enunciated in *In re Johnson* that a defaulting trustee must make good his default before he can have access to the trust assets; and he referred to *Smith v Dale* (1881) 18 Ch D 516 for the principle that a creditor can get only what the trustee can get. A creditor is not entitled to go against the trust assets unless the trustee has a right to them.
15. For the BVI companies, it is contended that Article 32(1)(a) applies to the claims against the former trustees without regard to the state of account between the trustee and the trust. Sub-paragraphs (1)(a) and (1)(b) of Article 32 distinguish between the liability of a trustee as trustee and liability personally. The limitation in sub-paragraph (1)(a) applies only where a trustee is acting as trustee: this would be consistent with *Muir v City of Glasgow Bank, supra cit*, per Lord Cairns LC at p355 and Lord Blackburn at p388; and *Lumsden v Buchanan* (1865) 4 Macq 950, per Lord Wrenbury at p955-6 and Lord Cranworth at p960. Where Article 32(1)(a) does apply, the trustee is not personally liable so he cannot by definition have a right of indemnity out of the fund. This is to be contrasted with sub-paragraph (1)(b) where the trustee’s right of indemnity is confirmed.
16. Before us, Advocate Greenfield submitted on behalf of the BVI companies that it was common ground that the BVI companies and the former trustees fell within the scope of Article 32(1)(a). Claims which fell within sub-paragraph (1)(a) were claims against the trustees as trustees, that is to say acting in what he referred to as their representative capacity. The claims should be paid out of the assets of the trust and should be available to a claimant irrespective of the state of account between the trustee and the trust. The BVI companies were not contending that the claimant had a proprietary right in the trust assets but they had an interest in those assets albeit that they were not claiming a direct right of recourse to those assets. Article 32(1)(a) effected a change to what had been the position under general trust

law where a trustee was always personally liable but was entitled to an indemnity, and this position continues to be reflected in sub-paragraph (1)(b). For example, where there was a change of trustee, and in the absence of the earlier trustee taking a right of indemnity from the new trustee, sub-paragraph (1)(a) did not impose personal liability upon the former trustee but it did give a right to a creditor to be paid out of trust assets irrespective of the state of account between the trustee and the trust. Where the trustee with whom the creditor had contracted had resigned or been replaced and trust assets had been transferred to the new trustee, a form of equitable charge was created whereby the creditor had a right to sue the former trustee and through him, either directly or by subrogation, to obtain access to the trust assets held by the new trustee. The BVI companies dispute that sub-paragraph (1)(a) was created simply to protect trustees without reference to creditors. A situation where a creditor was not entitled to payment by the trustee from the trust assets, and would have to depend on the trustees' personal liability, would be likely to discourage lending by third-party creditors. Advocate Greenfield referred to *Swiss Bank Corporation v Lloyds Bank and others* [1982] AC 584, per Buckley LJ at p595 where it was said that the intention to create an equitable charge may be expressed or it may be inferred. Advocate Greenfield referred to the consultation paper of the Trust Law Committee (in England and Wales) on the Rights of Creditors against Trustees and Trust Funds dated April 1997 ("the 1997 Consultation Paper") at paragraph 2.8 where it was suggested that a former trustee retained a right of indemnity over trust assets in the hands of the new trustee by way of equitable lien.

17. For the former trustees, it is contended that where Article 32(1)(a) applies, a third party's claims are against the trustee as trustee and not personally, and the claims extend only to the trust property. Article 32(1)(a) affects the entitlement of the beneficiaries to the trust property and thus applies in the execution, administration or enforcement of the TDT. A trustee is entitled to be indemnified against costs and expenses incurred in the administration of the trust by Article 26(2). A beneficiary who believes that a liability has not been incurred reasonably has remedies for breach of trust. There is support from this in what was Article 28 of the Jersey Law as originally enacted and as it was amended in 1989 (Article 28 being what is now Article 32). Article 32(1)(a) displaces the rule in English law seen in *In re Johnson* which is that a trustee is not entitled to indemnity for expenses incurred so long as he is liable for other breaches of trust. The effect of Article 26(2), when taken along with Article 32(1)(a), is to provide a right of indemnity for all expenses regardless of other breaches of trust. The former trustees also refer to the speech of Lord Cairns LC in *Muir v City of Glasgow Bank*, *sup cit*, at pp361-2; and to *Gordon v Campbell*, *sup cit*. The extent of the trust property must be just that: the trust fund as it exists at the date of inquiry. The alternative would mean a claim being made against something other than the trust property whereas Article 32(1)(a) states plainly that that is where the claim lies.

18. In support of the position of the former trustees, Advocate Wessels submitted that Article 32(1)(a) excludes personal liability. There is nothing within the wording to suggest that it is dealing only with the situation of an "innocent" trustee. With respect to paragraph (2) of Article 32, that would need to be rewritten in order to say that its effect was that paragraph (1) was to be disapplied. Under English law, a trustee is personally liable but there is nothing to say that that was preserved in the case of sub-paragraph (1)(a) where a contract is with a known trustee. The words of sub-paragraph (1)(a) clearly exclude personal liability: it is only the trust's assets which are exposed and not the personal assets of the trustee. Paragraph (2) preserves the right of a beneficiary to continue to sue for breach of trust and it is referring to what are existing rights. A trustee is obliged to satisfy a claim irrespective of the state of account between the trustee and the trust. What was said by Lord Cairns LC in *Muir* at p355 demonstrates that as a matter of contract there may be a bargain whereby the creditor is entitled only to look to the assets of the trust, and that assists in confirming how sub-paragraph (1)(a) works: see also *Gordon v Campbell*, *sup cit*, and *Lumsden v Buchanan*, *sup cit*. There is nothing difficult about the situation where one party may sue another party but can get only at trust assets. Sub-paragraph (1)(a) is not just a limitation on the amount of a trustee's personal liability.

19. Advocate Wessels referred to the situation in the United States by reference to *Scott and Asher on Trusts*, 5th edition, at paragraph 271A. He referred to the 1997 Consultation Paper at paragraph 2.5.3. It was his position that the obligation would be enforceable against a successor trustee and he referred to *Lewin on Trusts*, 18th edition (2008), at paragraph 14-59. The position would be equivalent to a non-possessory lien. There is no consultation document which deals with the initial intention of what was the original Article 28. In summary, the position for the former trustees is that there is no ambiguity in the statute.

The meaning and effect of Article 32

20. It is not in dispute that, at all relevant times, the BVI companies were aware that initially the first plaintiff alone and subsequently both plaintiffs (that is, the former trustees) were acting as trustees in the transactions with which this litigation is concerned.
21. In assessing the competing contentions, it can be seen that there is a degree of overlap in the positions of the parties. We see our function in determining this part of the appeals as being to consider and construe Article 32 having regard to the various contentions and the particular practical circumstances which exist. In doing so, and whilst we have sought to construe Article 32 having regard to its potential consequences, we do recognise that in a future case different practical circumstances might give rise to different considerations but these are not before us for our determination.
22. The first matter for consideration is the manner in which the Court should address the issues raised. Article 32 of the Jersey Law is an aspect of a law foreign to this jurisdiction. Upon a strict approach, the meaning and effect of that foreign law is a matter of fact for the courts of Guernsey and evidence given by witnesses skilled in that law might have been led before and deliberated upon in the courts of this jurisdiction. As a matter of agreement, that was not the approach adopted by the parties before the Lieutenant Bailiff who was invited to consider and construe Article 32 as if it were applicable directly as part of the law of Guernsey. The same approach has been adopted before us, and indeed this was not a matter of contention for the purposes of our judgment of 27 June 2014. But the matter has been raised directly by the present trustee and, for this reason, we invited the other parties to agree before us that they were content that we should approach the meaning and effect of Article 32 as a matter for our own construction and consideration, and the agreement of each party was given. We therefore record formally that this Court has been invited to construe the relevant aspects of the Jersey Law directly as if we were construing a statute of Guernsey.
23. Turning to the merits, we begin by observing the fundamental principle of the general law of trusts, which is as much part of the law of Jersey (and of Guernsey) as it is in most other jurisdictions, 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. It is the person with whom the third party has engaged in the transaction or matter who requires to satisfy any liability which arises from it. The liability of the person who is trustee is his personal liability (and *Perring v Draper*, *sup cit*, is an example of that principle in the context of the liability of trustees who were tenants). A trustee is entitled to indemnification out of the trust assets but that does not relieve his personal liability to a third party, and a creditor who obtains judgment against a trustee which is not satisfied by the trustee is entitled to be subrogated to the right of indemnity of the trustee against the trust assets: see *In re Johnson*, *sup cit*, per Jessels MR at p553 where he referred to the judgment of Turner LJ in *Ex parte Edmonds* (1862) 4 DF & J 488, and *Jennings v Mather*, *sup cit*.
24. We also observe that the position in trust law prior to the introduction of the Jersey Law, was that there is no right of indemnification in favour of a trustee where the trustee is in default, unless he makes good his default before seeking to rely upon the indemnity. This principle was acknowledged in the judgment of Jessel MR in *In re Johnson* and, in relation to the right of subrogation in favour of a creditor, his Lordship said at p555:

“If the right of the creditors is, as is stated by Lord Justice Turner, the right to put themselves, so to speak, in the place of a trustee, who is entitled to an indemnity, of course, if the trustee is not entitled, except on terms to make good a loss to the trust estate, the creditors cannot have a better right.”

25. This last statement of principle lies at the heart of one of the crucial issues before us. If it is the case (contrary to our views as set out in the judgment of 27 June 2014) that the former trustees as trustees of the TDT have a personal liability arising out of the obligations in respect of the loans to the first, second and fourth defendants (the so-called Glenalla and Thorson loans and the Oscatello arrangements), and if the allegations of misconduct against the former trustees are justified, then, Article 32 apart, the former trustees do not have any entitlement to be indemnified out of the assets of the TDT, and the BVI companies cannot have any entitlement to enforce through the former trustees against the assets of the TDT because they cannot have any right of subrogation to a right of indemnity which might otherwise exist in favour of the former trustees.
26. Whether this will be the case depends upon the consequence for the trust law of Jersey of the introduction of Article 32 of the Jersey Law. Sub-paragraph (1)(a) is engaged where a third party has entered into a transaction or matter affecting a trust with a trustee and he “knows that the trustee is acting as trustee” of that trust. That is a state of knowledge on the part of the third party and it will be a matter of fact to be determined in any particular case. Sub-paragraph (1)(a) does not require any more of the third party or of the trustee. For example, the third party is not required to be satisfied that the trustee is empowered to enter into the particular transaction, nor to take any steps, whether reasonable or otherwise, so to satisfy himself. Sub-paragraph (1)(a) does not require that the third party has come by the requisite knowledge of the capacity of the trustee in any particular way. That may be contrasted with the situation of what was the original embodiment of Article 32 (then Article 28(1)) which provided that the paragraph applied “Where... a trustee informs a third party that he is acting as trustee...” In its current form as applying in this case, Article 32(1)(a) imposes no such requirement: as long as the third party knows that he is transacting with a trustee, then sub-paragraph (1)(a) is engaged.
27. Sub-paragraph (1)(b), in contrast, applies in the situation “where the other party does not know that the trustee is acting as trustee”. Once again, that is a matter of fact. Like sub-paragraph (1)(a), it does not require any more of the other party: he does not have any obligation to take steps to ascertain the capacity of the party with whom he is engaging, whether reasonable or otherwise, nor does the sub-paragraph provide for any situation in which he might be deemed by particular surrounding facts to have known that the party with whom he was transacting was a trustee (although it will always be possible for a court to infer from surrounding facts and circumstances that the other party did know that he was transacting with a trustee).
28. Thus whether sub-paragraph (1)(a) or sub-paragraph (1)(b) is engaged in any particular case where a party has transacted with a person who is actually a trustee will be determined as a matter of evidence or acceptance of the circumstances which existed at the time that the contract was entered into.
29. 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 final words of sub-paragraph (1)(a) provide that any claim “shall extend only to the trust property”. The plain reading of these words is that such a claim cannot extend beyond the trust property and in our opinion the logical consequence is that such a claim cannot extend to the personal property of the trustee. The result is that the trustee is entitled to satisfy a claim which is brought against him as trustee by

expending the trust property and he cannot be obliged to satisfy any part of a claim to which sub-paragraph (1)(a) applies by expending his own property. Once the trustee has satisfied a claim to which sub-paragraph (1)(a) applies by expending the trust property as far as it goes, the trustee will be entitled to discharge as regards the liability in question. The result is that where paragraph (1)(a) is engaged the person who is a trustee does not have personal liability.

30. What this means is that the effect of Article 32(1)(a) is a benefit to the trustee because otherwise he would have personal liability. In our opinion, the effect of the words “as trustee and shall extend only to the trust property” in sub-paragraph (1)(a) is that the personal liability of the trustee is excluded. We are satisfied that these words are clear and their effect can only be to place the trustee in a position where he does not have any personal liability where he has engaged in a transaction or matter with a person who knows him to be a trustee. In *Lumsden v Buchanan*, *sup cit*, at pp961-2, Lord Cranworth considered the nature of the liability of a trustee in both Scotland and England, and he described the position in England as being “If [the trustee] wishes to limit his liability by the amount of the trust funds, he must do this by making express provision for the purpose.” In *Muir v City of Glasgow Bank*, *sup cit*, at p355, Lord Cairns LC said “I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the testator.” In our opinion, the same result has been achieved by the words of sub-paragraph (1)(a) where that paragraph is engaged in relation to a transaction or matter between a third party and a person who is a trustee. Rather than requiring express words in each individual case such as described by Lord Cranworth and Lord Cairns, the same effect is achieved by statute as long as the other party knows that he is dealing with a trustee in respect of a transaction or matter which is subject to sub-paragraph (1)(a).
31. Further, it is our opinion that sub-paragraph (1)(a) also makes it clear that the obligation of the trustee will be fulfilled as long as he satisfies a claim by expending all of the trust assets as they exist at the time when the claim falls to be satisfied. The suggestion that such a claim would require to be satisfied up to the value of the trust assets as they were at an earlier time, for example when the transaction was entered into, is inconsistent with the words of sub-paragraph (1)(a) which provide that the obligation of the trustee extends “only to the trust property”. If what might once have been trust property is no longer trust property at the time when the trustee is required to satisfy a claim, and in a situation where that has come about as a result of the regular administration of the trust, then to require the trustee to satisfy a claim beyond what is available from the trust property would imply an element of personal liability on the part of the person who is the trustee which would be inconsistent with what we have already found to be the effect of sub-paragraph (1)(a).
32. In our opinion there is a further consequence arising from the use of the words “extend only to the trust property”. It seems to us that these words show that any claim is not to be limited to the trust property held by the trustee with whom the other party has engaged in the transaction or matter but is to extend to all of the trust property which exists at the time of the claim. This situation will be most likely to arise when the trustee with whom the other person transacted has in the proper administration of the trust been replaced as trustee and has handed over trust assets to the new trustee. The other person must make his claim against the trustee with whom he transacted but that trustee does not have control over the trust assets so as to enable him to satisfy the claim from “the trust property”. Sub-paragraph (1)(a) does not entitle a trustee to be discharged so long as he satisfies the claim from the trust assets which that trustee holds, and the issue which arises is how does a person who has been a trustee, and who is contractually obliged to satisfy a claim, meet fully that claim when, as the transacting trustee, he does not have control of the assets from which sub-paragraph (1)(a) requires him to satisfy the claim.
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. That limit arises because that is the extent of the original trustee's liability by virtue of sub-paragraph (1)(a), and that is because the obligation of the original trustee "extends only to the trust property". Whilst sub-paragraph (1)(a) does not refer to any entitlement to a form of indemnity in favour of an earlier trustee who requires to satisfy a claim, we consider that this is an inevitable inference from the words used and is thus the effect of Article 32(1)(a). If this inference were not to be drawn, it would leave an earlier trustee in a situation where he could not satisfy a claim to the extent that he is entitled to do by sub-paragraph (1)(a) and thereby to receive discharge, and it would leave the other party in a situation where despite being entitled to have his claim satisfied from "the trust property", some of that trust property would be beyond his reach and beyond the reach of the earlier trustee with whom he had contracted and who was obliged to satisfy his claim.

34. The existence of a right in favour of the earlier trustee to be indemnified by his successor trustee up to the limit of the trust assets held by the successor may be characterised as an equitable right, in the form of, or analogous to, a non-possessory lien. In respect of English law, the learned authors in *Lewin on Trusts*, 18th edition (2008), at paragraph 14-59, discuss the continuance of an outgoing trustee's rights of indemnity after the appointment of new trustees. In particular they state:

"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."

The authors then go on to distinguish between a situation where trustees have distributed assets to beneficiaries, in which case that "should be taken as releasing any equitable rights", and a situation where new trustees are appointed, in which case there is "no reason to take the outgoing trustee as giving up his rights of indemnity merely because new trustees are appointed." In support of the existence of an equitable interest in the trust property, the authors refer to paragraph 21-33 in which they state that a trustee "has a first charge or lien upon the trust fund, conferring an equitable interest", and for that latter proposition they cite as authority *Jennings v Mather* [1901] 1 KB 108, at pp113-114, and *sup cit*, at pp 6 and 9.

35. As far as Jersey is concerned, the possible existence of such an equitable right was considered in the case of *In re Esteem Settlement* where the Deputy Bailiff of Jersey (Birt DB, as he then was) held that the law of Jersey recognises a form of equitable right which is available in circumstances where that is required so as to allow an interest in property to be enforced: see [2000 JLR 119], the judgment at pp136-141, and [2002 JLR 53], the judgment at paras 89 and 90.
36. Whilst we acknowledge immediately that the circumstances which were considered in the case of *In re Esteem* involved criminal conduct, and that is to be distinguished from the issue which is before us, nevertheless we are satisfied that we may find that within the law of Jersey there is a form of equitable remedy which would justify an earlier trustee who had disposed of assets to a successor trustee having an entitlement to recover such of those assets as is necessary for the purpose of satisfying a claim which has been established under Article 32(1)(a). There are three reasons why we have reached this conclusion and we would regard it as being consistent with what was said by the Deputy Bailiff (who is the present Bailiff of Jersey).
37. In the first place, and as we have already observed, it may be said to be an implied consequence of sub-paragraph (1)(a) of Article 32. That paragraph refers to "the trust property" without qualification, and whether such property remains in the hands of an earlier trustee or has been transferred to a subsequent trustee, does not affect its status as trust property. Secondly, we are satisfied that the law of Jersey as described by the learned Deputy Bailiff in *In re Esteem* is sufficient to acknowledge a form of equitable interest where that is

justified in the context of trusts. If it were not to be recognised in circumstances such as the present, it could mean injustice both to an earlier trustee, who could not on the face of it be discharged of his liability, and to a creditor who could not gain access to the extent of all of the trust assets necessary to satisfy his claim. Thirdly, what is said by the learned authors in *Lewin* is consistent with this. We are therefore satisfied that in the present circumstances the former trustees have a right to obtain access to any of the trust assets held by the present trustee insofar as that may be necessary in order to satisfy a claim which is properly justified in favour of the BVI companies.

38. Given the construction which we have just outlined, we see no basis for the contention that sub-paragraph 1(a) has also created a direct right of recourse to the trust assets in favour of the other party who has knowingly transacted with a trustee. That other party has the ability to satisfy his claim by proceedings against the trustee with whom he transacted and that will require the trustee to settle the claim out of such trust assets as he holds. That trustee will also have access to such other trust assets as may be held by a subsequent trustee as a result of the equitable entitlement which we have described. The other party may be entitled to a right of subrogation in respect of the original trustee's right against the new trustee but that does not carry the implication that sub-paragraph (1)(a) has established any direct right of recourse to the trust assets in favour of the other party who is referred to in that sub-paragraph.
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.
41. Having said that, and although it is not a matter which is before us for determination, we do observe that in a situation where it might be found that the other person was aware that he was transacting with a person who was a trustee, and was on the face of it a situation falling within sub-paragraph (1)(a), it might be arguable that there should be no entitlement to rely upon that sub-paragraph where it was also found that the other person knew that the person who was a trustee did not have the power as trustee to enter into the transaction in question. In that situation, it can be said that sub-paragraph (1)(b) should apply because the other person knew that the purported trustee was not acting as trustee because he was not empowered to do so. Whilst we acknowledge that sub-paragraph (1)(b) on its words applies in a situation of ignorance, we do conceive that it might be capable of being inferred as covering a state of positive knowledge where that knowledge is that the other person knows

that he is not transacting with a person who has the power to transact as trustee. In such a situation, the person who has purported to transact as trustee would have personal liability.

42. That the person transacting as trustee will have personal liability in a situation where sub-paragraph (1)(b) is engaged, is confirmed by the words that “any claim may be made against the trustee personally”. But these words are subject to the qualification in parenthesis that “without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity”. In our opinion, in order to determine whether that qualification merely reflects the position under the general law or confers a statutory right of indemnity which is distinct from the general law, it is necessary to undertake a consideration of paragraph (2) of Article 32.
43. Paragraph (2) provides that “Paragraph (1) shall not affect any liability the trustee may have for breach of trust”. In our opinion, paragraph (2) is a provision which is separate and distinct from what is provided for in paragraph (1), and it relates to a situation which may exist alongside what is provided for in paragraph (1). Paragraph (1) may be regarded as dealing with the external relations of a trust, whereas paragraph (2) may be regarded as dealing with its internal relations, most obviously those between the trustee and the beneficiaries. Paragraph (2) does not say that either part of paragraph (1) is to be disapplied in the event of a breach of trust, and such disapplication would be inconsistent with the opening words of paragraph (2) which state that “Paragraph (1) shall not affect any liability” for breach of trust. In our opinion, these words imply the simultaneous existence of an allegation of breach of trust and the entitlement of both trustee and other party to rely upon the mechanism provided by paragraph (1). What this means in a situation where sub-paragraph (1)(a) is engaged is that a claim which is made against a trustee is to be satisfied out of the trust assets, and as long as that claim can be properly justified, the person in right of the claim and who has transacted with the trustee will be entitled to have his claim satisfied up to the value of the trust assets. This is because although paragraph (2) preserves such rights as may exist in the case of a breach of trust, it does so separately from the mechanism for the satisfaction of claims which exists in terms of sub-paragraph (1)(a). If a breach of trust were to be proved against a trustee, then the party entitled to a remedy would establish it separately and it would not affect the working of the mechanism provided for by sub-paragraph (1)(a). As a matter of procedure, it is conceivable that a claim made by reference to sub-paragraph (1)(a) and a claim in respect of breach of trust could be determined in the same or collateral proceedings, and protection could be afforded by rights of set-off or similar, but that does not mean that the entitlement to rely on sub-paragraph (1)(a) is compromised by the existence of a possible breach of trust.
44. But paragraph (2) also applies to sub-paragraph (1)(b). It is our opinion that although sub-paragraph (1)(b) may be said to reflect the position under the general law of trusts which is that a trustee has a personal liability along with a right of indemnity against the trust property that may be lost if the liability was unreasonably incurred or the trustee is otherwise indebted to the trust, that position is qualified in the case of Jersey where sub-paragraph (1)(b) is engaged because the creditor still has a right to have his claim satisfied by the trustee personally and the trustee may enforce his right of indemnity against the trust assets even where the trustee may be alleged to be in default. This is because, as in the case of sub-paragraph (1)(a), paragraph (2) preserves the rights which may exist in the case of a breach of trust but does so separately from the mechanism for the satisfaction of claims which exists in terms of both aspects of paragraph (1). It is also because the relevant wording of sub-paragraph (1)(b) is unqualified: it says “the trustee shall have a right of recourse to the trust property by way of indemnity”, not “the trustee shall have such right of recourse to the trust property by way of indemnity as apart from this sub-paragraph he would be entitled to”. In this way, the general trust law position does not remain in Jersey even where a trustee does in principle have a personal liability. The other party is entitled to satisfaction of his claim as long as there are trust assets and he is not prevented from having his claim satisfied even where there may be a question of breach of trust. To that extent sub-paragraph (1)(b) also represents an alteration to the position under general trust law as does sub-paragraph (1)(a).

45. Taking sub-paragraphs (1)(a) and (1)(b) together, we therefore conclude that they represent an alteration to the position of creditors as well as of trustees. In the case of a creditor, paragraph (2) has the effect by reference to each aspect of paragraph (1) of entitling the creditor to have his claim settled out of such trust assets as there are, including trust assets held by a subsequent trustee, notwithstanding any dispute which may exist that the trustee is in breach of trust. That appears to us to improve the position of the creditor who, under the general trust law, would be prevented from satisfaction of his claim out of trust assets, and would be prevented from having any right of subrogation to a claim from the trust assets, so long as an alleged breach of trust was in dispute. In so far as trustees are concerned, there is an improvement at least in accordance with paragraph (1)(a) because where that paragraph is engaged, a trustee is entitled to settle the liability from the trust fund and obtain his discharge in respect of that liability whether or not there remains any allegation of default against him. In the case of paragraph (1)(b), he will still be obliged to settle a claim as a matter of personal liability but will be entitled to exercise a right of indemnity against such trust assets as there are even where an allegation of default is being made. In each case, the other party will be entitled to settlement of his claim by the trustee out of the trust property, whether directly (in the case of sub-paragraph (1)(a)), or indirectly either because the trustee can be indemnified by a subsequent trustee or (in the case of sub-paragraph (1)(b)) because the trustee has a right to be indemnified out of the trust property in respect of the claim even where he may be said to be in default. In each case, the trustee would be settling the claim by reference to sub-paragraph (1) and, in our opinion, the trustee would not be relying upon the general entitlement to settle a claim which is reasonably incurred and which is provided by Article 26(2).
46. This means that in the case of Jersey, and where either aspect of Article 32(1) is engaged, the law is no longer represented by what was said by Jessel MR in the case of *In re Johnson* at p555 because even although there may be an allegation of breach of trust against a trustee, that trustee is entitled to satisfy a liability of the trust from such assets of the trust as exist, whether directly or by the exercise of a right of indemnity. It means also that the principle recognised in the case of *In re Bamford, sup cit*, that a trustee may be liable where he deals with the trust fund in disregard of what is a *prima facie* reasonable claim, is likewise of no relevance. In the case of Jersey, and where Article 32(1) is engaged, the entitlement of a creditor to satisfaction of a claim out of the trust assets, and the entitlement of a trustee to satisfy that claim out of the trust assets, are not affected by the existence of any alleged claim or default against the trustee, whether *prima facie* reasonable or not. Put shortly, where either sub-paragraph (1)(a) or sub-paragraph (1)(b) is engaged, the satisfaction of a claim by the trustee and the establishment of any allegation of default against him are separate issues to be resolved separately.
47. Having reached these conclusions, we do recognise that there may be situations in which it is the beneficiaries who will suffer the ultimate loss where a creditor is entitled to have his liability satisfied from the trust funds and where the trustee is in breach of trust. Whilst the remedy for the beneficiaries would be a claim against the trustee, there may be situations where that cannot succeed because the trustee is entitled to rely upon an exoneration clause. However these possibilities may be viewed, we regard them as a consequence of the ways in which both parts of paragraph (1) of Article 32 have altered the trust law of Jersey.
48. These are accordingly the conclusions which we have reached on the meaning and effect of Article 32 of the Jersey Law. In our view, the words of Article 32 do not give rise to any ambiguity. The words appear to us to be clear in their meaning and effect and when applied as we have discussed above do not give rise to any consequences which are so extreme as to suggest that these consequences cannot have been within the contemplation of the legislature.
49. We have therefore not found it necessary to have regard to any of the supporting material referred to by the parties. In the case of the 2004 Consultation Paper, however, we do note that what we have decided is consistent with paragraph 2.5.3 which sets out a “fundamental

principle” which is “that a trustee should not face personal liability in relation to liabilities... properly incurred”. We are satisfied that our conclusion on the effect of sub-paragraph (1)(a) at least is consistent with that. In the case of the 1997 Consultation Paper, which of course relates to the position in England, we are satisfied that what is said in paragraph 2.8 is consistent with our conclusion that there exists a form of equitable remedy in favour of an original trustee against his successor trustee (although we are doubtful that this part of paragraph 2.8 is vouched by reference to the case of *In re Johnson* which is referred to in the footnote).

50. We have also not found consideration of the statutory history of Article 32, in its form as originally enacted as Article 28 and as amended in 1989, to provide any material assistance. We regard the meaning and effect of Article 32 in its current form as being unambiguous. Although, as we have already observed, one aspect in the original enactment was that a trustee was obliged positively to inform the other party that he was transacting as trustee, whereas that is no longer the case, the change from that position has no impact on the views which we have reached.
51. Finally, if it were to be considered, whether as a result of what we have found or more generally, that Article 32 was seen to give rise to consequences which were said to be unfair, unexpected or unjustified, then that is matter for the legislature to address. As is trite law, it is not for any court to re-write legislation which it finds to be clearly expressed, and whilst the matters of policy urged upon us by the parties might have a bearing on any legislative change, they have no bearing on our consideration where we have found the meaning and effect of Article 32 to be expressed unambiguously.

Conclusion

52. Where a trustee is a party to a transaction or matter to which Article 32(1)(a) of the Jersey Law applies, it is our opinion (i) that the trustee has no personal liability in respect of a claim which arises out of the transaction or matter, (ii) that an earlier trustee has a right to recover from a subsequent trustee such trust property as is necessary to satisfy the claim, (iii) that upon satisfying such liability to the extent of the trust property, the trustee is entitled to discharge in respect of the liability, and (iv) that the ability of the trustee to satisfy the liability out of the trust property does not depend upon whether or not there exists at the time any allegation of breach of trust, whether justified or otherwise, against the trustee.
53. As was the case in our judgment dated 27 June 2014, and as there remain further issues in the appeals which are yet to be heard, we shall again make no Orders following upon this judgment.