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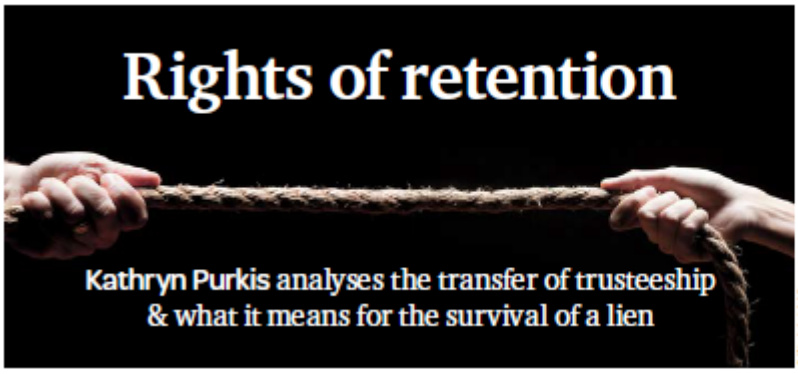
Rights of retention



Kathryn Purkis analyses the transfer of trusteeship & what it means for the survival of a lien

IN BRIEF

▶ Whether a right of retention exists as a general incident of the equitable lien that trustees enjoy as security for such liabilities.

A transfer of representation relating to a deceased estate in the course of administration might occur for a variety of reasons including on the: death of the personal representative; an application under s 50 of the Administration of Justice Act 1985; retraction of renunciation; or, even on the rare occasion of substitution under the Judicial Trustees Act 1896.

A transfer of trusteeship is more common, simply because a trust relationship will often endure longer than an estate administration; also, there are more jurisdictional bases for such a transfer, including out of court and by consent. In those cases, there is the opportunity for a contractual indemnity to be negotiated for liabilities which might subsequently crystallise, and it is usual to do so (other than on hostile removal). If adverse claims are immediately in prospect, security or a retention will often be negotiated at the same. In some cases, the trust deed itself, or certain foreign governing laws by statute (eg Art 34 of Trusts (Jersey) Law 1984) might make provision for this. But where the position is to be determined only under the common law, it may be of relevance to consider whether a right of retention exists as a general incident of the equitable lien that trustees enjoy as security for such liabilities. *X v A, B and C* [2000] Env LR 104 confirms that the lien extends to future contingent liabilities, confirming the relevance of the point.

This point has recently been considered by Kawaley CJ in Bermuda, in the case of *Meritus Trust Company Ltd v Butterfield Trust (Bermuda) Ltd* [207] SC Bda 82 Civ. In *Meritus* there had been a transfer of trusteeship from the plaintiff to the defendant under threat of proceedings, and the plaintiff applied for an order that the trust assets be transferred to them. The defendant sought to argue that it had an entitlement to retain sufficient trust assets to meet a contingent claim for litigation costs as an incident of its right of indemnity. The plaintiff countered from principle that this was not so: as the right of indemnity took effect as a non-possessory equitable lien, a right of retention was inimical to it. The Bermudan statutory vesting scheme on transfer of trusteeship supported this position.

The only case on point was the Australian decision in *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344 (NSW Supreme Court Equity Division).

Common ground

It was common ground that Brereton J in *Lemery* had correctly identified the legal characteristics of the trustee's right of indemnity, including that the lien which secures it confers a non-possessory beneficial interest, in the nature of a security interest, enforceable only by judicial sale or the appointment of a receiver and not by foreclosure or sale out of court; furthermore, that the lien survives a transfer of trusteeship and binds the new trustee. The fact that the lien confers a right of retention against beneficiaries and their creditors until the indemnity is exercised is also settled by such authority as the English cases of *re Exhall Coal Ltd* (1866) 55 ER 970 and *Jennings v Mather* [1902] 1 KB 1. The question for the judge was, therefore, whether there was any sound reason to distinguish between the right of retention as against beneficiaries or those deriving title under them on the one hand, and as against a new trustee on the other.

Distinction

Kawaley CJ considered that such a distinction should properly exist: a distribution of trust assets out of trust without reservation of rights is a transfer of an unencumbered legal and beneficial interest, and works to overreach the lien; therefore the law should recognise an ancillary right of retention to prevent this occurring. But because trust assets remain as such on a transfer to a new trustee, the lien is not destroyed and a right of retention is unnecessary. As regards authority, the judge followed Brereton J in identifying as a distinguishing factor that retention as against a beneficiary was in essence a manifestation of a right of set-off, which could not apply as regards a replacement trustee (per *re Akerman* [1891] 3 Ch 212). He also dismissed the defendant's argument that Wilberforce J must have assumed, in *re Pauling's Settlement Trusts (no 2)* [1963] Ch 576, the existence of a right of retainer on a transfer of trusteeship, because otherwise he would not have deferred, as he did, the appointment of new trustees.

Discretion

The judge described *Pauling* as illustrating the existence of a discretion in the court to authorise, or decline, retention by way of security. But given that Wilberforce J in *Pauling* was actually deciding the question of whether or not to appoint new trustees, it would appear material that the key reason why he did not do so was that the claim on the indemnity, if called upon, might have extended to such a large proportion of the trust fund that he regarded it as problematic to require the outgoing trustee to part with 'the remnant of' the trust fund (and also that it would be undesirable to have an incoming trustee without vested assets). Further, at least to some extent Kawaley CJ seems wrongly to have founded himself on observations of Wilberforce J that were really concerned with the outgoing trustee's impounding rights as against the beneficiaries, and not their rights as against the trustee. Thus, it may just be that the argument for a right of retainer as against a successor trustee could live to fight another day; there may be mileage yet in a *Pauling* argument, though the *Akerman* consideration remains.

Finally, in the estate context, it is also worth considering s 10(1) of the Administration of Estates Act 1971. This in terms abolished '[t]he right of retainer of a personal representative and his right to prefer creditors …'. Such a right had existed under the general law and allowed a representative to take from estate assets a debt due to himself in priority to other debts of the same class. This right, however, did not derive from possession, and was actually concerned with preferment for payment, existing on the basis that because an executor could not sue himself, he was unable to secure any priority by the usual means of doing so. It had nothing to do with the concept of retainer as ancillary to recoupment, and so should not influence the answer. **NLJ**

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