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 trusts 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 ss 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. Kirk v A & B [2000] Env LR 194 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 Battlefield Trust (Bermuda) Ltd [2017] SCBA 82. 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 there was no right of retention that existed as a general incident of the equitable lien that trusts enjoy as security for such liabilities. The plaintiff came from principle that this was not so: as the right of indemnity took effect as a non-possessionary equitable lien, a right of retention was inimical to it. The Bermudian statutory vesting scheme on transfer of trusteeship supported this position.

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Discretion

The judge described Paulson as illustrating the existence of a discretion in the court to authorize, or decline, retention by way of security. But given that Wilberforce J in Paulson 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 fund was 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 ongoing trustee's impounding rights as against the beneficiaries, and not their rights as against the trustee. Thus, it may be just that the argument for a right of retention as against a successor trustee could live to fight another day; there may be mileage yet in a Paulson 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 'the right of receiver 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.

Distinction

Kawaley CJ considered that such a distinction should properly exist: a distribution of trust assets out of trust with reservation of rights is a transfer of an unencumbered legal and beneficial interest, and works to encumber the interest; 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 derogated and a right of retention is unnecessary. As regards authority, the judge followed Brettorn J identifying as a distinguishing factor that retention as against a beneficiary was 'the essence' of an incipient right of way-off, which could not apply as regards a replacement trustee (perre Akerman [1993] Ch 212). He also dismissed the defendant's argument that Wilberforce J must have assumed, in re Paulson's Settlement Trusts (No 2) [1963] Ch 576, the existence of a right of retention on a transfer of trusteeship, because otherwise he would not have deferred, as he did, the appointment of new trustees.

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