

Guidance For Trustees Dealing With Insolvent Trusts: The Z Trust Cases

受托人处理无偿付能力信托的指引：Z Trust 案

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In October 2022, the Privy Council delivered its judgment in the Z Trust case of *Equity Trust (Jersey) Ltd (Respondent) v Halabi (in his capacity as Executor of the Estate of the late Mdam Intisar Nouri) (Jersey)* which was consolidated with *ITG Ltd and others (Respondents) v Fort Trustees Ltd and another (Appellants) (Guernsey)*. The Privy Council considered the nature and scope of the right of a former trustee to recover from or be indemnified out of assets of an insolvent trust in respect of liabilities and other expenditures properly incurred by the trustee. The Privy Council held that the rights of indemnity of successive trustees against the assets of an insolvent trust fund (i.e. a trust fund that is unable to meet those liabilities) rank *pari passu* and not on a first in time basis. This decision is one of the first to discuss the general principles under the English and Jersey law in the context of an insolvent trust and to consider the ranking as well as the nature of the trustee's proprietary interests.

Whilst the case concerns trusts established under the laws of Jersey, the decision is expected to have a great impact on trusts established in other common law jurisdictions and can give guidance to current or former trustees of offshore trusts and creditors.

Background

Equity Trust, the former trustee of ZII trust (a Jersey law governed trust), claimed indemnity from the trust for costs incurred in litigation in England. The successor trustee, Volaw,

2022 年 10 月，枢密院颁布泽西案件 Z Trust 案（*Equity Trust (Jersey) Ltd*（答辩人）诉 *Halabi*（身为已故 Mdam Intisar Nouri 的遗产执行人））的判决，该案与根西岛案件 *ITG Ltd* 及其他人（答辩人）诉 *Fort Trustees Ltd* 及其他人（上诉人）合并审理。枢密院考虑前任受托人就其恰当产生的负债及其他开支追讨无偿付能力信托资产或自有关信托资产获弥偿的权利之性质及范围。枢密院判定，继任受托人针对无偿付能力信托基金（即未能偿还有关债务的信托基金）资产的弥偿权利具同等地位，而非以权益首先出现原则为基础。是项判决为首案探讨英国及泽西法律项下有关无偿付能力信托的一般原则，并考虑受托人所有人权益的顺序及性质。

尽管此案关乎根据泽西法律成立的信托，惟是项判决预期对于其他普通法司法管辖区成立的信托有重大影响，并可为离岸信托的现任或前任受托人及债权人提供指引。

背景

ZII trust（受泽西法律管辖的信托）前任受托人 Equity Trust 就英国诉讼产生的讼费，向信托追讨赔偿。继任受托人 Volaw 则追讨

claimed payment of its professional fees incurred as successor trustee. The ZII trust assets consisted of a loan repayable by the connected (but also insolvent) ZIII trust, such that the liabilities of the ZII trust exceeded its assets. Neither Volaw's request for payment of their fees as trustee, nor Equity Trust's indemnity following compromise of the litigation, could be satisfied from the trust assets.

Equity Trust sought to exercise its equitable lien over the assets held by Volaw as replacement trustee. This gave rise to argument between Equity Trust and Volaw as to their respective entitlements to be indemnified out of the available assets, and the correct method under Jersey law of dealing with trust liabilities in such circumstances. As there were insufficient funds to meet the claim, including those of other creditors, the trust was placed into a bespoke insolvency procedure devised by and administered by the Jersey Royal Court. The question arose as to the order of priority of Equity Trust, which was the original trustee, and third party creditors claiming through it and successor trustees and creditors claiming through them.

Principle issues

The four principle issues considered by the Privy Council were:

- Whether the right of indemnity confers on the trustee a proprietary interest in the trust assets;
- Whether the proprietary interest of a trustee survives the transfer of the trust assets to a successor trustee;
- Whether a former trustee's proprietary interest in the trust assets takes priority over the equivalent interests of successor trustees; and
- Whether a trustee's indemnity extends to the costs of proving its claim against an insolvent trust in the sense that the trustees' claims to indemnity exceed the value of the trust fund.

The Judges reached unanimous decisions on the first, second and fourth issues. It was unanimously held that the right of indemnity will confer on the trustee a proprietary interest in the trust assets that would survive the transfer of trust assets to a successor trustee. The Judges also unanimously held that a trustee's indemnity shall extend to the costs of proving its claim against an insolvent trust.

The third issue however attracted different views of the Judges. The minority of the Judges (3 out of 7) were of the view that the first in time, being the former trustee, should enjoy propriety over the competing interests of the successor trustees. On the other hand, the majority of the Judges (4 out of 7) were of the view that the former trustee's proprietary interest and claims to be indemnified out of the trust assets shall rank *pari passu* with the equivalent interests of successor trustees. The basis for such decision is that the Judges were of the view that this issue concerns equity's approach to the ranking of proprietary claims and in the absence of any solutions identified previously, the Judges prefer a *pari passu* solution as it displays equity's

担任继任受托人而产生的专业费用付款。ZII trust 的资产由 ZIII trust (与 ZII trust 有所关连) 应偿还贷款所组成, ZIII trust 同样无偿付能力, 而 ZII trust 的债务多于其资产。信托资产未能满足 Volaw 有关支付担任受托人费用的要求, 亦不足以诉讼和解后赔偿 Equity Trust。

Equity Trust 寻求对 Volaw (作为替任受托人) 持有的资产行使衡平留置权, 衍生出有关 Equity Trust 与 Volaw 之间就各自自可用资产获得弥偿的权利之争辩, 以及在有关情况下根据泽西法律处理信托负债的正确方法之讨论。鉴于信托资金未能满足有关申索 (包括其他债权人的申索), 泽西皇家法院以特设无偿付能力程序处理该信托。问题症结在于, 原受托人 Equity Trust、透过其提出申索的第三方债权人、继任受托人, 以及透过他们提出申索的债权人之顺位排序为何。

原则问题

枢密院考虑四个原则问题为:

- 弥偿权利有否赋予受托人于信托资产中的所有权利;
- 受托人的所有权益于信托资产转让予继任受托人后可否延续;
- 前任受托人于信托资产的所有权益顺位是否先于继任受托人的同等权益; 及
- 在受托人弥偿申索超出信托基金价值的情况下, 受托人的弥偿保证是否延伸至支持其针对无偿付能力信托的申索之讼费。

法官就第一、二及四项问题达成一致裁决, 弥偿权利赋予受托人于信托资产中的所有权利, 而有关权利于信托资产转让予继任受托人后得以延续。法官亦一致裁定, 受托人的弥偿保证延伸至支持其针对无偿付能力信托的申索之讼费。

然而, 法官之间对第三项问题的看法各异。七名法官中, 少数 (三名) 法官认为, 前任受托人 (作为权益首先出现者) 应享有优于继任受托人竞争权益的地位。相反, 多数 (四名) 法官认为, 前任受托人的所有权益及自信托资产获得弥偿的申索, 与继任受托人同等权益的地位相同。判决的理据在于, 法官认为此问题牵涉衡平法对所有人权益申索顺位的处理方式。在未有识别任何过往解决方法的情况下, 法官倾向以地位相同的方式处理, 以彰显衡平法能灵活及实务地提供合适解决方法的特性。多数法官亦指出, 受托人的委任日期与衡平法或正义无关。就于不同日期获委任但为共同事业效

flexible and pragmatic approach to the task of devising an appropriate solution. The majority further noted that the appointments dates of the trustees should have no connection of any kind with equity or justice and it would not make sense for fiduciaries who were appointed on different dates but worked together in a common enterprise for the benefit of others rather than themselves to not be paid *pari passu* from a deficient fund.

The position in Bermuda, BVI and the Cayman Islands

The Privy Council's decisions on the first and second issues are consistent with the Bermuda Court's judgment of *Meritus Trust Company Limited v Butterfield Trust (Bermuda) Limited* [207] SC (Bda) 82 Civ (13 October 2017) where Kawaley CJ sets out and confirms the general principles concerning the right of indemnity and proprietary interest of the former trustee. This also seems to be the case in the Cayman Islands judgment of *ATC (Cayman) Limited v Rothschild Trust Cayman Limited* [2016 CILR 73] where Smellie CJ confirms that it is settled principle that the beneficial entitlements under a trust are subject to the right of indemnity to which a retiring trustee is entitled and to the lien which that trustee will have over the assets in his possession for satisfaction of that indemnity.

It is also helpful to note that in the British Virgin Islands and the Cayman Islands both contain similar provisions with Article 32 of the Trusts (Amendment No 4) (Jersey) Law 2006. Sections 97 and 98 of the BVI Trustee Act provide that when a trustee discloses its fiduciary capacity and enters into a contract with a third party, the trustee is personally liable for any sum payable under the contract only to the extent of the value of the trust fund when payment falls due. Sections 21 and 47 of the Cayman Islands Trusts Act (2021 Revision) together allows trustees to enter into certain agreements on behalf of the trust without being responsible for any loss occasioned by the agreement, limits the trustees' liabilities to the amounts they have received on behalf of the trust and permits trustees to reimburse from the trust assets all expenses incurred in or about the execution of the trusts or powers.

Conclusion

Whilst there are limited offshore authorities dealing with the trustees' rights of indemnity against an insolvent trust, and also limited guidance as to how trustees should conduct themselves when unable to pay the trust's debts or where liabilities exceed the available assets held in the trust fund, the Privy Council's decision provides trustees with much needed clarity and guidance as to the ranking of their proprietary interests, and affords a degree of protection to successor trustees and their creditors. The implications of the Privy Council's judgment for incoming trustees are significant, and should prompt a review and update of procedures undertaken when considering taking on the trusteeship of an existing trust.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information. The Chinese translation of

力的受托人而言，信托受益者为其他人而非受托人本身。在资金不足时，若其不能以同等地位收取付款，实言不成理。

百慕大、英属维尔京群岛及开曼群岛的处理方式

枢密院对于第一及二项问题的判决与百慕大法院于 *Meritus Trust Company Limited v Butterfield Trust (Bermuda) Limited* [207] SC (Bda) 82 Civ (2017 年 10 月 13 日) 的判决一致。该案中，Kawaley 首席法官指出并确认有关前任受托人的弥偿权利及所有人权益之一般原则，其看来与开曼群岛于 *ATC (Cayman) Limited v Rothschild Trust Cayman Limited* [2016 CILR 73] 的判决属同一情况。Smellie 首席大法官于上述案件中确认，信托的实益权益受弥偿权益所限乃既定原则。辞任受托人有权享有该弥偿权益，而该受托人将对其管有的资产具留置权，以作履行弥偿保证之用。

另外值得注意的是，英属维尔京群岛及开曼群岛均有与《2006 年信托（第四号修订）（泽西）法》第 32 条类似的条文。《英属维尔京群岛受托人法》第 97 及 98 条规定，当受托人披露及受信身分并与第三方订立合约时，受托人对合约项下的任何应付款项承担个人责任，惟仅以付款到期时的信托基金价值为限。《开曼群岛信托法（2021 年修订）》第 21 及 47 条容许受托人代表信托订立若干协议，而无须对协议导致的任何损失负责，并将受托人责任限制至其代表信托收取的款项，以及允许受托人就与执行信托或权力有关或由其产生的所有开支，自信托资产获得补偿。

结论

尽管处理受托人针对无偿付能力信托的弥偿权利之离岸案例有限，而受托人于未能支付信托债务或负债超出信托基金持有的可用资产时应如何自处的指引亦不多，惟枢密院的判决在受托人所有人权益顺位排序的问题上，为受托人提供了清晰指引，并为继任受托人及其债权人提供一定程度的保障。是项枢密院判决对未来受托人的意义重大。考虑为现有信托担任受托人时，亦应就此检讨及更新予以采取的程序。

本文的内容并非详尽无遗，旨在提供简要概述和一般资料，而不应用于替代法律建议或法律意见。中文译本仅供参考，如有歧义，请以英文原文为准。

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