

UPDATE

Beyond Buckton – costs follow the event for the insolvent Z Trusts

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The latest decision of the Jersey Royal Court in the long-running Z Trusts litigation is the third published judgement of 2018, and it deals with the costs of the parties in connection with the earlier two judgements. Mourant Ozannes acted for the Executor and were successful in securing a costs award. The case examines the nature of hostile proceedings between competing creditors, and signals a further move away from applying trust law principles in cases concerning insolvent trusts.

This week the Jersey Court published its cost judgment in the matter of In Re the Z Trusts [2018 JRC203]. This judgment follows two earlier decisions of the Royal Court in this case in 2018, being:

1. The judgment on 3 July 2018 where it was confirmed that the former trustee's claim as a former trustee of the trust did not take priority over the other creditors (our briefing on this judgment is [here](#)); and
2. The judgment on 10 September 2018 which confirmed that the former trustee could not recover its historic costs of proving its claim from the assets of the insolvent trust. In reaching this decision the Court applied insolvency law principles rather than trust law principles to the case of an insolvent trust (our briefing on this judgment is [here](#)).

The decision of how to award costs came down to consideration of substance over form. On the face of it, by these proceedings the trustees of two insolvent trusts sought guidance and direction of the Court as to how the trusts should be managed. It is nonetheless clear from the judgments that the matter had taken on the form of hostile litigation between two creditors of those insolvent trusts, each with a potential claim to the assets of the trusts.

Relevant law

It is well-established that in hostile litigation the costs will usually follow the event, meaning that the 'losing' party will be ordered to pay the costs incurred by the 'winning' party (*Watkins v Egglisshaw* [2002] JLR 1).

In the context of proceedings relating to Jersey trusts, the Court will consider and apply the well-known English case of *Re Buckton* [1907] 2 Ch 406, which refers to three types of proceedings:

1. The first is where trustees ask the Court for guidance in order to ascertain the interests of the beneficiaries, or have some question determined which has arisen in the administration of the trusts. In such cases, the costs are incurred for the benefit of the trust estate, and should usually be paid from that estate.
2. The second is in substance the same as the first type, but where the application has been made by the beneficiaries.
3. The third is where an application is brought by a beneficiary who makes a claim which is adverse to the other beneficiaries. Although this may follow the same procedure as the first and second set, the substance of the proceedings is crucially different, and it is possible in this case that the unsuccessful party should bear the costs of all other parties.

Arguments put forward by the parties in the case of the Z Trusts

In the case of the Z Trusts, the former trustee (being the unsuccessful party in each of the earlier two judgments) argued that *Re Buckton* should be applied, and that the litigation fell within the first type in *Re Buckton*. These were Representation proceedings brought within the context of two insolvent trusts which were managed under the supervision of the Court. The former trustee also sought to argue that the arguments put forward in the priority heading sought to clarify a legal point which was for the benefit of all trust creditors.

The Court rejected the former trustee's arguments and preferred the analysis put forward by Maurant Ozannes (acting on behalf of the Executor of a deceased estate), which is party to the proceedings as a creditor to the trusts. In the earlier hearings the former trustee had argued that its own claim should take priority over all other creditors to the trusts. Had the former trustee been successful in the earlier judgments it would have been in a position to "scoop the pot", which would clearly have been to the detriment of the other creditors.

The Court accepted the arguments made by Maurant Ozannes that whilst these proceedings may take the appearance of an application brought by the trustees seeking directions, the substance of the case is that one creditor had a claim which was adverse to the others. The costs incurred by the former trustee were for its own benefit and not for the benefit of the trust estate. The Court therefore applied the ordinary principles set out in *Watkins v Egglshaw* and ordered that the costs should follow the event, and so the former trustee should pay the costs of the Executor of and incidental to both hearings.

Comment

This judgment follows the recent trend of the Court veering away from traditional trust law principles when dealing with insolvent trusts. The Court heard arguments relating to *Re Buckton*, but ultimately decided the case on the basis of *Watkins v Egglshaw*, which is not a trusts case, but relates generally to hostile inter-partes litigation.

In our view, this is clearly the sensible and correct approach for the Court to take. The Z Trusts are insolvent trusts and are being administered for the benefit of the creditors, and the application of ordinary principles of trusts law will not necessarily result in an outcome which is fair and in the interest of the creditors as a whole.

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