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Amendments to the Jersey Trust and Companies Law provide more certainty for lenders

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The latest amendments to the Trusts (Jersey) Law 1984 (**Trusts Law**) are due to come into force this month and provides helpful clarification for secured creditors in relation to the subordination of the trustee's lien.

The long-running *Z Trust (II)* litigation (in which Collas Crill acted) which concluded in the Privy Council as *Equity Trust (Jersey) Limited v Halabi (as Executor) [2022 UKPC 36]* established, for the first time, a number of important principles of trust law concerning:

a. the nature and extent of a trustee's lien (and the right of a trustee to recover liabilities and expenses from the trust assets by way of its indemnity);
b. the priority of the rights accorded by the trustee's lien as against successor trustees; and
c. the impact on the trustee's lien of the solvency of the trust in respect of which it is asserted.

The Z Trust (II) litigation also established that:

a. trustees (present and former) count as secured creditors by virtue of their liens, which rank equally vis-à-vis one another and there is no ‘first in time’ rule in favour of an earlier trustee against a later one; and
b. unsecured creditors of the trust will rank pari passu (subrogated to the lien of the trustee with whom they contracted and alongside the other creditors of that trustee).

However, the Privy Council's decision in *Z Trust (II)* did not address the issue of the position of external secured creditors to a trust and how their security ranked in priority vis-à-vis the current trustee and any former trustee’s lien.

It seemed (although it was not clear) that secured creditors, external to the trust, still benefit from a first-in-time priority vis-à-vis other later secured creditors and rank in priority as against the trustee from whom they were granted their security. However, it was not certain whether they would rank in priority to a former trustee's lien.

In order to mitigate this risk, it was therefore market practice for the lender to insert standard waivers in the finance documentation in relation to liens. However, normally only the current trustee would be bound and the former trustee would not usually be a party to those contractual arrangements.

Amendments to Article 43A of the Trusts Law

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Article 43A of the Trusts Law has therefore been amended to resolve this issue, with a new Article 43A (4) and (5) providing that:

(4) 'An interest in or over trust property, granted or created at any time by the trustee of the trust, that secures the payment or performance of an obligation (including an obligation owed to a trustee or former trustee) takes priority over any lien arising in favour of the trustee or former trustee by operation of law, unless the secured party agrees otherwise.'

(5) 'For the purposes of paragraph (4), it is immaterial whether the interest is granted or created under the law of Jersey or another jurisdiction'

The amendment helpfully confirms that the interest of a lender secured over trust assets takes priority over the lien of a current or former trustee arising by operation of law, unless the lender agrees otherwise. Importantly, the new provision also applies to assets situated in Jersey or elsewhere, and security granted or created under the law of Jersey or otherwise.

This clarification is to be welcomed by lenders and provides greater certainty in relation to financing which involve taking security over the trust assets of a Jersey law Trust.

Proposed amendments to the Companies (Jersey) Law 1991

A consultation on the proposed amendments to the Companies (Jersey) Law 1991 (the **'Companies Law'**) was carried out between October and December 2024 and following this consultation period, the draft Companies (Jersey) Amendment Law 202- (the **'Companies Law Amendment'**) is shortly to be debated by the States of Jersey Assembly and is due to come into force in June 2026. A couple of the amendments relating to the creditors' winding up procedure are of particular interest to secured creditors.

Creditors' winding up

There are two forms of creditors' winding up available being:

1. a Court-ordered procedure which is instigated by an eligible creditor of the company making an application for an order of the Royal Court to commence a creditors' winding up; and
2. a voluntary procedure which is instigated by a special resolution of the shareholders of the company. Court ordered-creditor winding up

Following the introduction of the new creditor winding up procedure it became possible for a creditor to apply to court for an insolvent Jersey company to be wound up and for a liquidator to be appointed to conduct that winding up.

Amongst the amendments proposed in the Companies Law Amendment in relation to the Court- ordered creditor winding up is a helpful confirmation that the moratorium which occurs following the appointment of a

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provisional liquidator, does not prevent a secured creditor from enforcing their security.

Article 157B (Appointment of provisional liquidator) of the Companies Law will therefore be amended by the insertion of a new Article 157B (6) which states as follows:

'Nothing in this Article prevents a person with security over the whole or part of the assets of the company (whether such security was taken before or after the commencement of the Companies (Jersey) Amendment Law 202-) from:

a. *enforcing that security;*
b. *making an application under Article 52 of the Security Interests (Jersey) Law 2012; or*
c. *commencing or proceeding with any action or legal proceeding to enforce that security if it is a hypothec over Jersey immovable property.'*

Creditors' winding up regime

In relation to the creditors' winding up regime, which can be initiated by the shareholders of an insolvent Jersey company, a similar amendment will also be made to Article 159 *(Commencement and effects of creditors' winding up)* of the Companies Law by the insertion of a new Article 159 (6).

The amendments to Article 157B *(Appointment of provisional liquidator)* and Article 159 *(Commencement and effect of creditors' winding up)* to expressly state that the prohibition on taking action or legal proceeding against the company following the appointment of a liquidator does not restrict a person with security over the whole or part of the assets of the company from enforcing that security, is helpful clarification to secured creditors and a welcome addition to the Companies Law.

Conclusion

The aforementioned amendments are very welcome and will assist in modernising and clarifying certain provisions of the Trusts Law and Companies Law, providing greater certainty for secured creditors.

How can Collas Crill help?

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If you would like advice on this area of the law, please get in touch with your usual Collas Crill contact or any of the team listed on the right of this page.

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