COLLAS CRILL

# Collas Crill explains... Trustee liens

NOVEMBER 2021

This is part of a series of guides in which we examine areas of law that frequently arise in practice. Further guides will be released weekly; click here to subscribe to receive Collas Crill news and insights by email.

## What is a lien?

In general terms, a lien is a right which entitles a party to hold on to assets in their possession pending payment of a debt owed. In the context of trusts, a trustee with a right of indemnity against the trust assets has an equitable lien on the assets of the trust that may continue even if those assets are no longer in the trustee's possession (known as a non-possessory lien).

## Why might a trustee of a Guernsey law trust rely on a lien?

Liens most commonly crop up in the context of a trustee's retirement or removal from office. A trustee would usually be able to reimburse itself from trust property for all expenses and liabilities properly incurred in connection with the trust. But when a trustee retires or is removed, the trust property it previously held, had control of or had vested in it, is passed to its successor trustee. Therefore, they might wish to rely on a lien to be reimbursed for such expenses or liabilities.

A lien may also be relied upon in the context of an appointment of assets to a beneficiary or for insolvent trusts.

## How might a trustee obtain a lien?

A lien can arise in equity, by operation of law, by way of a contract or a lien created by statue. It is this latter statutory lien that a trustee of a Guernsey law trust might more commonly seek to rely on.

## Guernsey law assists trustees – Non-possessory liens

Guernsey law expressly provides that a trustee is entitled to a non-possessory lien over trust property for the purpose of securing a trustee's right to pay and be reimbursed from trust property for all expenses and liabilities properly incurred in connection with the trust.[1] The Trust Law goes further by expressly confirming that the lien continues after the trustee ceases to be a trustee and has surrendered all trust property.

This assists trustees of Guernsey law trusts by giving them a clear security, enshrined in law, on which they can rely after they hand over trust property. In addition, the Trust Law confirms that the statutory lien is without prejudice to any indemnity or other security to which a trustee is entitled – meaning it does not prevent an

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

outgoing trustee from also seeking the usual indemnities in an Instrument of Retirement and Appointment of Trustee (or indeed other reasonable security for liabilities).

## Possessory liens

Non-possessory liens may be difficult and expensive to enforce, particularly if the trust property in question is situated in a jurisdiction that does not recognise non-possessory liens. A possessory lien is an alternative form of security a trustee might seek, whereby it physically retains possession of trust property to enable it to reimburse itself for expenses and liabilities. This might occur in circumstances where, for example, a trustee is due to retire but it is known there is an outstanding tax liability that needs to be settled by the outgoing trustee. The trustee might physically retain a sum of cash to settle the liability and hand over the balance of the trust property. The trustee should carefully consider the assets and value of what it intends to retain. If the maximum liability is known, the trustee could retain that maximum amount. But if the liability is not clearly quantifiable, the trustee should calculate an amount as accurately as possible based on reasonable assumptions.

Where an outgoing trustee does physically retain trust assets, the trustee should ensure that it accurately and fully records it reasons for retention and the calculations of the values retained, to be able to justify the retention.

## Conclusion

A lien can be a useful form of security for a trustee and Guernsey law assists the position of trustees in that regard. It is important that a trustee carefully considers the most appropriate form of security for liabilities and seeks advice where this could assist. It is also crucial, particularly in the circumstance of retaining assets under a possessory lien, to consider wider implications (like potential detrimental impact on beneficiaries), to document the reasons for and details of the assets retained and carefully consider quantum.

[1] Section 44, Trusts (Guernsey) Law, 2007, as amended (**Trust Law**)

## About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

## About Collas Crill

We are a leading offshore law firm. We are easy to do business with and give practical advice to overcome tough challenges. Through our network of offices, we practise British Virgin Islands, Cayman Islands, Guernsey and Jersey law.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

COLLAS CRILL

**For more information please contact:**




### Cerisse Fisher

Group Partner*^ | Guernsey

**t:** +44 (0) 1481 734882 | **e:** cerisse.fisher@collascrill.com



### Angela Calnan

Partner (Advocate) | Guernsey

**t:** +44 (0) 1481 734233 | **e:** angela.calnan@collascrill.com



This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.