Wilberforce CHAMBERS

Wilberforce Jersey Conference 2026

Thursday 14th May 2026

Jersey Conference 2026

Talk papers

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Speakers

Jonathan Davey KC
Jonathan has significant experience in the high value trusts and estates field – onshore and offshore, and both contentious and non-contentious. His expertise in this area is reflected in his recognition in the directories: he is ranked in Private Wealth and Probate (Legal 500); Private Client – Tax; and Traditional Chancery (Chambers & Partners). He won the Tax Silk of the Year Award at the Chambers & Partners Bar Awards 2024 and was shortlisted for Barrister of the Year at the Citywealth Magic Circle Awards 2025. Legal 500 2026 describes Jonathan as *"everything one expects from a leading silk: he has impressive knowledge of numerous areas of law and a powerful court presence"*. Chambers & Partners 2026 call him *"charismatic, pragmatic and laser focused on securing a result for the client"*.

Tiffany Scott KC
Tiffany is a member of STEP and she deals with all aspects of trusts and estates work – contentious and non-contentious, offshore, onshore and multi-jurisdictional. Her solid Chancery-Commercial grounding gives her a particular edge in handling complex cases where trust issues intersect with broader fiduciary/proprietary/fraud claims. She has been recommended in the directories as a leading name in the trusts field, including for her offshore work, for many years. She co-chairs the TL4 Circle "Dispute Resolution relating to Estates" event and is speaking at the TL4 trusts conference in Versailles in June 2026. Legal 500 2026 says, "Tiffany has an instinct for navigating substantial trust cases … Care, foresight, and strategy are her hallmarks and are highly valued". Chambers & Partners 2026 describes Tiffany as "so impressive. She is technically brilliant, a complete team player and a brilliant advocate too."

Edward Sawyer
Edward has been involved in many contentious and non-contentious cases involving trusts, probate and succession, both domestic and offshore. He has had particular experience in recent years of trusts litigation in the Channel Islands, working on contentious breach of trust and disputed blessing cases. He has acted on behalf of trustees and beneficiaries and for and against professional advisers acting for the trust. Edward aims to provide practical client-focused solutions and, where litigation is necessary, a strategic and proportionate approach. He is ranked as a leading junior in Legal 500 in the field of "private client: trusts and probate" which describes Edward as "*an absolute go-to as a premier senior junior*" and adds that "*he combines technical knowledge with commercial awareness*". Chambers & Partners 2026 says Edward is "*a gifted and experienced barrister who has appeared in several high-profile cases affecting the industry*".

Jennifer Seaman
Jennifer is ranked as a leading junior in Chambers & Partners' Chancery: Traditional category and in Chambers & Partners' Chancery: Traditional - High Net Worth. Jennifer's experience in this area includes: the construction and rectification of trusts and wills; probate disputes; inheritance act claims; breaches of trust and the nature and exercise of trustee powers; trusts concerning property and issues under the Trusts of Land and Appointment of Trustees Act 1996; removal and appointment of executors. Her recent trust cases include a Guernsey trust case involving an application for a case management stay

(Royal Court of Guernsey, February 2026), *Dignity Funerals Ltd v Burgess* (Nov 2025, ChD), where she successfully obtained an order for account and related information against trustees on behalf of beneficiaries, with indemnity costs against the trustees personally, and *Representation of Q Limited* [2025] JRC 105 and [2024] JRC 259, a large Jersey trust dispute where she acts for a beneficiary disputing the trustee's exercises of power. Chambers & Partners 2026 praises Jennifer as having "*very good judgment and is really on top of everything strategic*". The directory adds that Jennifer is "*incredibly bright and very quick off the mark*".

Simon Atkinson
Simon is a highly sought-after trusts practitioner. He is frequently instructed on high-value, multi-jurisdictional trusts disputes. He has a keen technical eye as well as a robust and practical approach in both contentious and non-contentious matters. He appears frequently in the High Court on trusts and probate matters and he is regularly instructed in offshore trusts disputes and other high-net worth individual matters. His instructions span the whole spectrum of Chambers' work including: breach of trust / breach of fiduciary duty claims; contentious probate disputes; trustee applications for directions; VTA claims; trustee and personal representative removal applications; Inheritance Act claims; TOLATA and family disputes; and professional negligence claims relating to trusts and estates matters. He accepts instructions relating to onshore and offshore matters. Chambers & Partners 2025 says Simon is "*for complex points of trusts law, he is the one you want to go to*". Chambers & Partners 2026 says "*Simon is an excellent black letter lawyer but adds to that good strategic sense*".

Michel Ashdown
Michael has a specialist practice focusing on all aspects of trusts, probate and estates, charities, and related private client tax and professional liability matters. His experience encompasses advising, drafting trust documents, and litigating, in relation to both domestic and offshore trusts and estates. He has substantial offshore experience in a range of jurisdictions including Guernsey, Jersey, Bermuda, BVI and Hong Kong. Legal 500 2024 says Michael's "*very thorough and meticulous on the detail*". Chambers & Partners describes Michael as "*just amazing. He is already essentially a KC in terms of the quality of his work*". The guide adds that Michael "*is very detail-oriented and great for offshore elements in trust cases. He is client-friendly, his advice is technically good and he is strategically excellent for particularly complicated matters*".

Elizabeth Houghton
Named the 2025 'Star Junior' at the Chambers High Net Worth Awards, Elizabeth has a very broad commercial chancery practice. She frequently appears in Courts and tribunals at all levels. She is often instructed in complex trust, commercial, private client, insolvency and asset-tracing matters with an international element. Elizabeth has extensive experience in multi-jurisdictional trust litigation. She frequently advises on trusts, probate and private client matters, matrimonial disputes, and non- contentious trust issues. Her practice covers the full range of trusts, probate and private client work; advising, drafting, litigation and mediation. Recent matters have involved trust and private client disputes in England & Wales, the Isle of Man, Jersey, Guernsey, Bermuda, BVI and Cayman Islands. She enjoys all aspects of trusts and private client work. Chambers & Partners 2026 describes her as

"unbelievably bright. She makes things happen and constantly looks at the bigger picture", and Legal 500 says she is *"razor sharp and adept at strategic thinking to get the best outcome possible for her client"*.

Jamie Holmes
Jamie's practice is focussed around trusts and probate, corporate and personal insolvency, civil fraud and other commercial work. He has acted in a number of substantial, reported matters in recent years, a number of which made new law. These include *Wythe v. Zavos* [2024] EWHC 2784 (a complex and high-value blessing application), *Re Palmer* [2024] BPIR 1090 (insolvency case arising out of the Post Office scandal), *Re Arnbrow* [2024] 1 BCLC 34 (company case concerning indemnities in double derivative claims), *Raiffeisenbank v. Scully* [2025] CIGC (FSD) 23 (jurisdiction challenge in Cayman civil fraud proceedings), *NBT v. Shishkhanov* (BVIHC (Com) 2023/0087) (a 2025 jurisdiction challenge in US$2bn BVI civil fraud proceedings), and a 2-day appeal to the English Court of Appeal in May 2026 in *GEHC v. Winros* on abuse of process and unjust enrichment. Jamie is ranked in the Legal 500 2026 a Leading Junior in offshore work, civil fraud and insolvency. He has been described in the directories as "*a supremely bright junior*" who is "*exceptionally bright and endlessly hardworking. Tactically astute, he is always three moves ahead*". He has worked as part of a team of Jersey or Guernsey advocates in a number of trust, insolvency and commercial matters in recent years.

Philippe Kuhn
Philippe's commercial chancery practice covers a wide range of areas, principally civil fraud and asset recovery, offshore trusts, banking and financial services, cryptocurrency, shareholder, company and insolvency disputes. Philippe's experience spans complex litigation in England and offshore jurisdictions (including the BVI, Gibraltar and Jersey), as well as in international arbitrations. Prior to commencing practice, Philippe was a Judicial Assistant at the UK Supreme Court to Lord Sumption, Lord Briggs and Lord Sales in 2018/19. He is ranked as a Leading Junior in Commercial Chancery by Chambers & Partners. In the current Legal500 guide, Philippe is described as *"a great asset to any team, and a fantastically safe pair of hands no matter what is thrown at him"*.

Roxane Reiser
Described as *"an exceptional advocate"* with *"phenomenal insight"* and *"a sharp technical mind"*, Roxane specialises in trusts, estates and private client disputes, with a particular emphasis on trusts issues in the divorce context. She has extensive experience in high-value cross-border litigation. Her recent cases involve disputes that may include complex asset structures located abroad, such as in Switzerland, Singapore, the Isle of Man, and the Bahamas. Roxane is called to the Geneva Bar and is recognised as a *"go to"* for disputes involving Switzerland. Roxane is consistently ranked in Chambers & Partners. The directories note that *"she has phenomenal insight and is an exceptional advocate"*, and *"stands out for her deft intelligence"*.

Lemual Lucan-Wilson
Lemuel has a broad domestic and offshore chancery practice with particular emphasis on trusts and property, spanning the contentious and non-contentious area, including providing inheritance tax advice on wills and deeds of appointment, claims for breach of trust, removal of trustees and personal representatives, and approval of trust settlements

for minors. Lemuel regularly appears in both the County Court and the High Court, whether on his own or as part of a larger counsel team. From August to October 2023, Lemuel was seconded to the litigation department at Carey Olsen, Guernsey, where he worked on a variety of trusts, insolvency and commercial disputes.

Benjamin Slingo
Ben is ranked as a Rising Star in Legal 500's English Bar Offshore guide for trusts and private wealth, where he is described as having *"an exceptional drafting ability"*. He has been developing a broad chancery practice that now includes a particular focus on trust disputes. He has substantial experience both in England and Wales and in offshore jurisdictions including Jersey, Guernsey, the British Virgin Islands, the Isle of Man, and the Turks and Caicos Islands. Ben is called to the Bar of the Eastern Caribbean Supreme Court, BVI. Ben's work in this area includes acting, with Jonathan Hilliard KC, for trustees of a very large offshore family trust structure which holds an international business; acting, led by Clare Stanley KC and Elspeth Talbot Rice KC, in offshore proceedings relating to a very substantial estate; acting, with Michael Ashdown, for a beneficiary of an offshore trust in a dispute over the proper construction of the trust instrument; acting, with Clare Stanley KC and Jennifer Seaman, for the beneficiary of a large offshore trust in a dispute with the trustee; acting, as sole counsel, for one the defendants in a High Court claim to set aside various transfers of assets which would otherwise have fallen within the estate of a very wealthy international businessman; acting, as sole English counsel, for the Guardian ad litem of minor and unborn beneficiaries of an offshore trust; acting as sole counsel for an English trust faced with an application for pre-action disclosure under CPR 31.16; and cases involving claims under the 1975 Act.

Andreas Giannakopoulos
Andreas practises across the full range of Chambers' work, including contentious and non-contentious trusts. He previously taught the law of trusts at King's College London and was a research assistant at the University of Oxford. Andreas's work on trusts and conflict of laws has been published in several leading academic journals. He has a strong practice in this area with experience including: acting for the trustees of two multi-million pound trusts in a blessing application and a related application under s.57 of the Trustee Act 1925; acting for trustees of a Bahamian trust in a *Beddoe* application; acting for the respondent in an application for declaratory relief concerning the alleged revocation of a Guernsey trust; and advising on the construction of a trust deed and the effect of firewall provisions on enforcement of a declaratory judgment in a dispute involving issues of conflict of laws and legitimacy under various foreign laws.

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The Court's inherent jurisdiction and getting information out of trustees

Elizabeth Houghton and Jamie Holmes

<u>Introduction – the inherent, supervisory jurisdiction</u>

1. It is well-established that courts have an inherent supervisory jurisdiction over trusts. This jurisdiction is frequently called in aid by parties and exercised by the courts but there is surprisingly little commentary and case law about the jurisdiction, its source and its limits. However, there are a number of interesting examples from the Channel Islands invoking or explaining the inherent jurisdiction over trusts, in particular in relation to disclosure of trust documents, which we want to explore.

2. While the concept of an 'inherent jurisdiction' is not unique to trusts, it is fair to say that the court's inherent jurisdiction with respect to trusts is much more expansive compared with other areas of private law. It extends beyond regulation of the court's procedure into matters of substance, and it is not limited to cases in which there is a dispute that the court must resolve. For example, a court may, in extreme circumstances, step in to execute a trust or accept a surrender of trustee discretion. In more ordinary cases, courts routinely give guidance and directions to trustees and absolve them from liability. That stands in stark contrast with many other areas of private law. For example, there is no inherent or supervisory jurisdiction with respect to the performance of contracts. The same observation was made in *<u>Crociani v. Crociani</u>* [2014] UKPC 40, on appeal from the Jersey Court of Appeal. The Privy Council held at [36]: "*in the case of a trust, unlike a contract, the court has an inherent jurisdiction to supervise the administration of the trust – see e.g. Schmidt*".

3. In one sense, requesting the court to exercise its inherent jurisdiction in a trust matter is entirely orthodox, but the limits of that jurisdiction are unclear and may be incapable of definition. Or as it was rather memorably put by Lieutenant Bailiff Marshall in the first instance decision in *<u>BX v. T Limited</u>* [2024] GRC 036 at [105]: "*one should, as it were, never say "never" to there being jurisdiction as a matter of a rigid principle, but rather retain flexibility to enable the jurisdiction to be applied (or not)…*".

4. A similar point was made by Romer LJ in *<u>Re New</u>* [1901] 2 Ch 534 (EWCA), 545: "*It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the [inherent] jurisdiction*".

5. The instances in which the courts have invoked the inherent jurisdiction are too numerous and varied to be exhaustively listed in a paper such as this. We intend to look the court's supervisory jurisdiction in relation to applications for trust documents, and other more controversial examples including suspending the powers of a protector.

Schmidt v Rosewood

6. The decision of the Privy Council in Schmidt v. Rosewood [2003] 2 AC 709, on appeal from the Isle of Man, remains the leading, modern, orthodox statement of the inherent jurisdiction. [1] The case directly concerned an application for trust information and/or documents, but the Court held that such applications are but one aspect the inherent jurisdiction. Further, as the two key passages quoted below set out, the court held that neither such applications specifically, or the inherent jurisdiction more generally, turn on any bright dividing line(s) on the basis of the interest that the applicant holds (or does not hold). The significance of the wording that we have underlined will become apparent.

   [51]. Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion ...

   [66]. Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts. There is therefore in their Lordships' view no reason to draw any bright dividing-line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character). The differences in this context between trusts and powers are (as Lord Wilberforce demonstrated in McPhail v Doulton) a good deal less significant than the similarities. The tide of Commonwealth authority, although not entirely uniform, appears to be flowing in that direction.

Statutory jurisdiction in relation to trust disclosure

7. Jersey and Guernsey have both enacted statutory provisions which deal with the disclosure of trust documents.

8. Guernsey's statutory regime for disclosure of trust documents is at Trusts (Guernsey) Law 2007, Section 26. Broadly, section 1 obliges the trustee to provide "*full and accurate information as to the state and amount of the trust property*" to certain categories of person (enforcer, beneficiary, settlor, or trust official). Save as regards an enforcer, this is subject to the terms of the trust. Sections 2 and 3 then provide, where the terms of the trust prohibit or restrict the provision of information as set out in Section 1, for a trustee, beneficiary, settlor, or trust official to apply to Court. Such

[1] See for example Lewin on Trusts (20th, with supplement, 2023), at [11-110] and fn 356.

an application must make good that the provision of the information is necessary or expedient for certain specified purposes.

9. Section 69 of the 2007 Law further provides, broadly, that certain person may apply to the Court for certain orders concerning a trust. The list includes a trustee, settlor, beneficiary, enforcer, or "*with leave of the Royal Court, any other person*.".

10. Jersey's statutory regime for the disclosure of trust documents is at Article 29 of the *Trusts Law 1984*. In short, following the amendments in 2018:
    a) The terms of a trust may provide for (or restrict) any person's right to request disclosure or information concerning the trust: Art 29(1).
    b) Subject to the terms of the trust, and any order of the court, a beneficiary may request disclosure of documents which relate or form part of the accounts of the trust: Art 29(2).
    c) A trustee may refuse a request for disclosure where the trustee is satisfied that it is in the interests of one or more of the beneficiaries, or the beneficiaries as a whole, to refuse: Art 29(3).
    d) Subject to the terms of the trust and any court order, trustees are not required to disclose trustee deliberations, reasons, or material relating to an exercise of powers or performance of a duty: Art 29(4).
    e) Notwithstanding the terms of the trust, the Court may make such order as it thinks fit determining the extent to which a person may request or receive information or a document concerning the trust, on the application of a trustee, enforcer, beneficiary, or "*with leave of the court any other person*": Art 29(5).

11. Article 51(1) provides that a trustee may apply to the Court for directions. Articles 51(2) and (3) provide that certain individuals may apply for orders including orders relating to the exercise of any power. An application may be brought by the AG, a trustee, enforcer, beneficiary, or "*any other person*" with leave of the court.

Guernsey case law: BX v. T

12. In *BX v. T* [2025] GCA 063 (20 August 2025), the applicant (BX) sought the trustee (T) to disclose documents relating to the trust and its assets. BX was not a beneficiary or the object of a power of appointment, but the object of a power to add beneficiaries. [2] BX lost at first instance and on appeal to the Guernsey Court of Appeal.

13. The Court held that BX was not a beneficiary and so could not rely on Section 26: [28], [30]. Indeed, BX only had standing at all if the Court gave leave to that effect under Section 69.(2).(g): [30], [32]-[33]. One of the consequences of this is that the decision does not turn the proper statutory interpretation of these provisions: [95], [106]. Rather it is reasoned as a matter of the inherent jurisdiction ([19.1], [34]), and is of general application. The point was also a novel one: none of the caselaw was directly on point.

[2] An important detail on the facts of BX was that the exercise of the power to add was also subject to the consent in writing of the protector, whose view on that matter was not known and who was not a party: [2], [22]-[23], [81], [166]-[167].

14. The first, key takeaway is that following what Lord Walker said in _Schmidt_ (at [51], [66], above) the Court did not draw a bright line and decide the application against BX simply on the basis that they were only the object of a power to add beneficiaries: at [95]-[97]. So disclosure to such an applicant remains open as a possibility for another day.

15. Second, the Court held that it was necessary to consider the degree of protection (from a court of equity) that the applicant required: [81], [96] and [168]. Although similar wording can be found in section 26(3), that does not appear to have been the source of the Court's reasoning. Rather, the Court appears to have drawn from _Schmidt_ at [51] as set out above, and a number of further decisions in Nevis and England which themselves applied that same reasoning in _Schmidt_. [3]

16. Third, the court held that this question will be answered on a case by case basis: [95]-[97]. Key considerations will include (a) who is applying, and so what interest they have or don't have, and (b) what relief they are seeking. We expand on this further below.

Beneficiaries vs third parties seeking trust documents

17. BX provides a number of helpful indications as to the factors that the Courts (in Guernsey and elsewhere) will take into account in future decisions.

18. First, where as in BX, the person applying is _not_ the object of a dispositive power (such as a beneficiary, or the object of a power of appointment), and the relief sought is the disclosure of trust documents, they will need to show why it is right to treat them as being in as great a need of protection as a person who is the object of a dispositive power. The Court held that the grant of such relief to such an applicant was "*out of the norm*": [96], [103], [106] and [110]. In particular, see at [96]: "*In ordinary circumstances, that will mean showing, as a minimum, that the object has a strong, if not a very strong, expectation (objectively speaking) of being appointed in due course to the class of objects of the dispositive power*."; and the related guidance at [87] and [110].

19. Second, on the other hand, we see from the Court's consideration of the Nevis decision in _Roussev v. Lehman_ (cited in footnote 3 above), that there are forms of relief that such an applicant would more readily be entitled to seek (or 'forms of protection that such an applicant would more readily be found to require'). Most obviously, at [81]: "*such an object has at least the right to apply to the trustee for the power to add to be exercised in his or her favour, and certainly in that event the trustee would at least have to consider it ... The object of such a power must be able to apply to the court to vindicate that right if necessary.*" The vindication of such a right might go further. Following consideration at [63]-[77] of _Lehman_, the Court held "*that was a case where persons who were objects of a power to add further beneficiaries were held to have standing to apply for and obtain an interlocutory order temporarily removing and replacing a trustee pending the substantive resolution at trial of the applicants' claims of breach of fiduciary duty by the trustee. But that is the obvious interim remedy in a case where the object of a power to add complains of a failure to exercise the power.*

[3] The Nevis decision of _Roussev v. Lehman_ (Unreported: 24 April 2018) at [29] (cited in _BX_ at [64], [73]); and the English decision of _Harvey v. Van Hoorn_ [2023] Ch. 500 (EWHC) at [22] (cited in _BX_ at [78], [79]).

…". The question is whether the degree of protection that such a person requires could ever extend to trust documents, rather than relief to hold the ring whilst a decision is made as to the exercise of such a power.

20. Third, perhaps in the middle of those two, we see how the Court in *BX* summarised some of the considerations in *Schmidt* itself (*BX* at [87]-[90] in particular). The Court took into account the fact that the object of the power to add further beneficiaries: "*may be regarded … as having exceptionally strong claims to be considered*."; was specifically named in a letter of wishes by the co-settlor; was the son of the named beneficiary; and it did not appear that there was anyone else to hold the trustee to account for the stewardship of whatever share or other rights in the trust fund that object might have been entitled to.

Jersey case law

21. Jersey has a long history of applications for trust documentation beginning perhaps with *Re Rabaiotti (1989) Settlement* [2000] JLR 173 (which was concerned with the former version of Art 29), and more recently *A v AB (Re Alpha, Beta and Delta Trusts)* [2023] JRC 138. The Court in *A v AB* confirmed (and it was common ground) that the court had supervisory jurisdiction in relation to applications by beneficiaries for trust documents, in accordance with *Schmidt*. That supervisory jurisdiction was said to be unaffected by Art 29, at least on the facts of *A v AB*: see [77].

What will the Court not do in its inherent jurisdiction?

22. First, the court's inherent jurisdiction may be constrained or overtaken entirely by statute. It will be important in each case to consider the statute in question and relevant authority. There is no uniform approach to this question. Most judges appear to take the approach that the inherent jurisdiction continues to exist and sit behind statutory powers, providing a second, alternative source of power. But in some instances it has been found that there is no longer any inherent jurisdiction. For example, the English court's ability to remove an executive or personal representative has been found to be entirely codified by *Section 50* of the *Administration of Justice Act 1985*, such that the statutory conditions must be met. Our own view is that there may still nonetheless be some residual role for the inherent jurisdiction in cases of true emergency, even when a statute has otherwise codified the law, but that has not yet been tested.

23. Secondly, the court cannot (and will not) do anything in its inherent jurisdiction to alter the beneficial interest(s) under the trust. If what is sought amounts to a variation of the terms of the trust, then a variation must be sought.

24. Thirdly, the existence of the inherent jurisdiction is merely the source of the court's power to grant the relief sought. It does not follow that the relief will be granted. The courts have developed tests as to the circumstances in which the inherent jurisdiction should and should not be exercised. These tests are themselves not always uniform and depend on the power in question. Much may depend on the circumstances of the particular case and the discretion of the court.

25. Fourthly, in general, and absent a surrender of discretion or breach of duty, courts will not intervene in trustee decision-making: see e.g. *Pitt v. Holt* [2013] UKSC 26, at [73].[4] This was described in *Lehtimaki v. Cooper* (cited above) as the "*non-intervention principle*". This point was also made in *S v. Bedell Cristin Trustees Limited* [2005] JRC 109 at [23]:

> *...The Court cannot overturn a decision of a trustee which has not surrendered its discretion to the Court, merely because the Court would have reached a different decision. It may only intervene where the decision is one which no reasonable trustee could arrive at. All of this is consistent with the fundamental concept of trust law which is that the discretion of a trustee is conferred upon that trustee and the beneficiaries have to live with the decision of that trustee unless it is vitiated ...*

26. See also *A v. AB* [2023] JRC 138 at [44]-[48], per Sir Michael Birt, Commissioner.

Other uses of the Court's inherent jurisdiction - some examples

(i) Suspension of the powers of a protector?

27. *M Settlement* [2009] JRC 140 was a decision of the Jersey Royal Court on 14 July 2009. It concerned an application for directions as to the appointment of the (by then limited) remaining assets of the trust, which the Royal Court directed should be paid to the settlor's children. The relevant paragraph is at [17]:

> *The appointment out of any assets of the settlement required the consent of the protector. The settlement creates an office of protector and there is nothing to suggest that the powers vested in the protector were personal. WM [the settlor and protector] was in a clear position of conflict but furthermore we had evidence before us showing that he was not in good health and was alcohol dependent. In addition, doubts had been expressed by those who had dealt with him as to his rationality. In the circumstances and in the exercise of the inherent power of the Court, we suspended the powers of the protector until further order, thus bringing into play the provisions of Clause 22(b) of the settlement to the effect that it would be read as though references to the protector or the consent of the protector were omitted.*

28. As this paragraph suggests, the case involved a number of striking facts, both as to the substance of to whom the remaining funds should be distributed, and the immediate procedural background. The latter includes that the Representors were former trustees (albeit that they continued to hold the trust assets), who had been replaced by the settlor-protector after they had declined his request that they pay the remainder of the trust fund to him. The replacement trustee then surrendered his discretion to the Royal Court. Whilst these matters (and others set out in the judgment) may go to the circumstances in which a court will exercise the inherent

[4] At [73]: "*In my view Lightman J was right to hold that for the rule to apply the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty. Breach of duty is essential (in the full sense of that word) because it is only a breach of duty on the part of the trustees that entitles the court to intervene (apart from the special case of powers of maintenance of minor beneficiaries, where the court was in the past more interventionist: see para 64 above). It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention.*"

jurisdiction to wholesale and indefinitely suspend the powers of a protector, it does not take away from the recognition in this decision that the inherent jurisdiction includes such a power.

29. We consider this to be an interesting and unusual example, it being an instance where the court exercised the inherent jurisdiction to not merely fill a gap but to either or both (a) give effect to a significant development in the law; and/or (b) give little if any guidance as to the principles on the basis of which the inherent jurisdiction was to be exercised, and which might constrain its use in another case. The decision does not appear to have been cited subsequently, in Jersey or elsewhere. [5]

(ii) Is there an inherent jurisdiction over structures created by statute? Eg. foundations?

30. Jersey enacted a fairly comprehensive regime for foundations in 2009: *Foundations (Jersey) Law 2009.* Part 5 sets out the powers of the Royal Court with respect to foundations. This includes the powers one might expect: to order compliance, amendments, to give directions, remove council members etc. So the question arises: are the Court's powers limited to those in Part 5 or is there room for the inherent jurisdiction?

31. The answer seems to be *no*; the Royal Court's powers *are* limited to those given in the statute: see *Re C Trust Company (Re Foundation A)* [2016] JRC 144 and *A Limited v. B, C Limited, D and E (Re F Foundation)* [2013] JRC 075, at [28]-[38]. [6] As the latter provides at [29.(i)] (with emphasis):

    A general point is that ***the sui generis nature of these statutory creations*** *has to be recognised, and legal issues arising from the existence of a Jersey foundation and the uses to which it is put must be addressed from first principles* ***derived from the Foundations Law****, with analogous reasoning that has developed in relation to other legal relationships and entities being cautiously deployed.*

32. The powers of the Royal Court over foundations have since been considered further in *B v. C and Seven Others* [2020] JRC 169, at [17]-[31]; and in *Representation of B and C re the N Foundation and the M Trust* [2023] JRC 166, at [38]-[39]. It is now accepted in these more recent authorities that if the Royal Court is to be said to have the power to do something with respect to a foundation (in both of those cases, to set aside a foundation) then the source of that power must be found in the Foundations Law itself.

[5] It is said to have been cited in the skeletons at first instance and on appeal in the English case of *re CIFF*: Vos C at first instance [2018] 2 WLR 259; Court of Appeal [2018] 3 WLR 1470.

[6] In this case, the application appears to have been brought "*in the inherent jurisdiction of the Royal Court*" but the Court confined its analysis to *Part 5* of the *2009 Law*.

Fiduciary duties, conflicts, commissions and profits

Tiffany Scott KC and Edward Sawyer

1. In this paper, we look at a number of recent UK cases on the above subject. We start with the UK Supreme Court's decision in *Mitchell v Al Jaber* [2025] UKSC 43 on breach of fiduciary duty, considered against the background of a trilogy of other recent UK Supreme Court cases dealing with similar issues. We then look at a recent illustration of those principles in the English High Court case of *Wenda Co Ltd v Wang Jinhong & Ors* [2026] EWHC 909 (Comm). We complete our survey of recent fiduciary law with reference to the UK Privy Council's well-known decision on protectors in *A v C* [2026] UKPC 11.

Mitchell v Al Jaber **– introduction**

2. In *Mitchell v Al Jaber* [2025] UKSC 43, decided in November 2025, the UK Supreme Court has yet again considered the law on claims for breach of fiduciary duty – the fourth time it has done so in a year.

3. *Mitchell v Al Jaber* is concerned with whether a director owes a fiduciary duty to his company after the termination of his powers and with the assessment of equitable compensation for breach of fiduciary duty.

4. The facts were that Sheikh Al Jaber had been a director of a company, MBI, which entered into winding-up in 2011. Although Sheikh Al Jaber remained in office as a director, his powers ended upon the winding-up. In 2016, he dishonestly purported to sign two share transfers as "director" of MBI whereby a valuable shareholding belonging to MBI (the "JJW Shareholding"), with an apparent value of Euro 67 million, was misappropriated and transferred to a Guernsey company under the Sheikh's control. In 2017, all the assets and liabilities of JJW were transferred to another group company, in a transaction in which the Sheikh was involved, so that by the time of the trial in 2021 it was common ground that the JJW Shareholding had no value.

5. The liquidators of MBI sued Sheikh Al Jaber for equitable compensation for breach of fiduciary duty for the misappropriation of the JJW Shareholding from MBI in 2016. The main issues of relevance to this paper were (1) whether a director whose powers over the company had come to an end continued to owe a fiduciary duty to the company after the commencement of its winding-up, and (2) if so, the assessment of equitable compensation in circumstances where, by the time of the trial, the misappropriated asset – the JJW Shareholding – was regarded as worthless. (There was another issue about unpaid vendor's liens, which is not relevant to this paper.)

6. The Sheikh argued that he did not owe a fiduciary duty to MBI in 2016, and that MBI suffered no loss because the JJW Shareholding had become worthless by the time

of trial as a result of the 2017 transfer of JJW's assets. Both arguments failed, for reasons discussed later in this paper.

The background to *Mitchell v Al Jaber* – recent trilogy of UKSC cases

7. To set the reasoning in *Mitchell v Al Jaber* in context, it is helpful first to recap on the recent trilogy of UK Supreme Court cases on claims for breach of fiduciary duty.

Rukhadze v Recovery Partners (March 2025)

8. *Rukhadze v Recovery Partners* [2025] UKSC 10 concerned a fiduciary's duty to account for profits earned in breach of fiduciary duty. The appellants were directors/partners who, post resignation, had diverted a maturing business opportunity from their company/LLP and had made profits without the company's/LLP's consent.

9. A fiduciary's obligation to act with single-minded loyalty means that he must account to the principal for any profits he makes from that fiduciary relationship, unless the principal has given his fully-informed consent to the fiduciary keeping the profits. It was previously well-established that a fiduciary is not allowed to defend his retention of the profit by saying that he would have made it anyway, even if he had not committed a breach of fiduciary duty. Thus the fiduciary is not allowed to say, counterfactually, that the principal would, if asked, have given consent or that the fiduciary could have made the same profits with no breach of duty.

10. In *Rukhadze*, the appellants challenged the well-established principle that counterfactuals of that nature were to be excluded. The appellants argued that the Court must always apply a common law "but for" test of causation, by asking if the fiduciary would have made the same profits if he had avoided any breach of fiduciary duty. The Supreme Court rejected these arguments.

11. Citing classic cases such as *Boardman v Phipps* [1967] 2 AC 46 and *Bristol and West Building Society v Mothew* [1998] Ch 1, the majority reaffirmed that single-minded loyalty was the hallmark of a fiduciary relationship, with the no-conflict and no-profit rules serving an essentially prophylactic or deterrent purpose, to prevent the fiduciary being swayed by interest rather than duty. The majority emphasised that a fiduciary's duty to account for profits is an inherent aspect of his duty of single-minded loyalty, rather than a remedy for breach of it. The duty to account was not dependent on a demand from the principal or an order of the Court. Therefore there was simply not the relationship between breach and damages for loss caused by the breach which had to be filled by rules as to causation and remoteness which were routinely applied by the common law, and which almost always involved the erection of a counterfactual. The duty to account arose the moment the profit was received and marched hand-in-hand with an institutional (not remedial) constructive trust obliging the fiduciary to treat the profit as belonging to the principal.

12. The majority explained that the duty to account arose where the receipt of the profit was linked to the fiduciary relationship. But the requisite link did not involve a common law causation test, involving the erection of a "but-for" counterfactual whereby one asks what the relevant financial result would have been had the relevant duty had not been broken ("but-for the breach"). Yet the correct test did not exclude any causative analysis whatsoever. A more protean causation analysis was called for, in which one must ask if the profit owed its existence to a significant extent to the application by the fiduciary of property, information or some other advantage which he enjoyed as a result of his fiduciary position, or from some activity undertaken while he remained a fiduciary which the no-conflict duty required him to avoid altogether.

13. Therefore it was irrelevant to ask whether "but-for" the breach of fiduciary duty, the principal could have made the profit (see *Regal (Hastings) v Gulliver* (Note) [1967] 2 AC 134), or what profit the fiduciary could have made had he not breached his fiduciary duty (see *Gray v New Augarita Porcupine Mines* [1952] 3 DLR 1, PC). The only available defence for a profiteering fiduciary was the principal's informed consent.

14. While it was not necessary to show an earlier breach of fiduciary duty prior to the profit being received, often such a breach is committed. For example, where a former fiduciary uses information obtained from his (now terminated) fiduciary role to make post-termination profits, there is likely to have been a breach of the no-conflict rule, and accountability for the resultant profits is likely to follow. That was the case in *Rukhadze*, where the appellants were consciously disloyal while in post and then, after leaving their fiduciary roles, diverted the corporate principal's maturing business opportunity to themselves.

15. The majority rejected the appellants' policy arguments for changing the law as to the irrelevance of a "but-for" causation analysis. Among other things, the majority reaffirmed the existence of the Court's equitable discretion to make an allowance for the fiduciary's work and skill in making the profit, and considered that this was a sufficient release-valve from the strictures of the no-profit rule. The majority acknowledged that, following *Target Holdings v Redferns* [1996] AC 421 and *AIB Group (UK) v Mark Redler & Co* [2014] UKSC 58, a common law "but-for" causation test had been recognised in the law of equitable compensation, but that reflected that such claims concerned equitable compensation for *loss*, was like chalk to the cheese of accounting for *profits*.

16. The majority's overall conclusion was that the rigour of the no-profit rule, together with the no-conflict rule to which it was closely related, continued to underpin adherence by fiduciaries to their undertaking of single-minded loyalty to their principals and beneficiaries. The discretion to make an equitable allowance was a sufficient answer to the occasional danger that the rigour of the rule would cause disproportionate injustice.

17. In *Stevens v Hotel Portfolio II UK* [2025] UKSC 28, the UK Supreme Court had to consider whether a dishonest assistant in a breach of fiduciary duty could escape liability for helping the fiduciary to dissipate the profits which the fiduciary had received in breach of fiduciary duty.

18. It is well-established that a person liable for dishonest assistance is jointly and severally liable with the defaulting fiduciary for the *loss* caused to the beneficiary, but is not jointly or severally liable to account for an unauthorised *profit* made by the defaulting fiduciary. The accessory is only liable to disgorge the profit he *himself* has made from the breach: see *Ultraframe (UK) v Fielding* [2005] EWHC 1638 (Ch) and *Novoship (UK) v Mikhaylyuk* [2014] EWCA Civ 908.

19. In *Stevens*, the fiduciary (Mr Ruhan) had made a secret profit upon the claimant company's sale at market value of some hotels, dishonestly assisted by Mr Stevens. Mr Ruhan, as a fiduciary, was liable to account to the claimant for the profits and held them on institutional constructive trust. Mr Stevens then dishonestly assisted Mr Ruhan to dissipate the profits.

20. On the claimant's appeal to the Supreme Court, the Mr Stevens argued that the claimant had suffered no loss (the hotels were sold at market value), and he focused on the fact that an accessory is only jointly liable for *loss* suffered by the beneficiary.

21. Among Mr Stevens' arguments, he contended that the constructive trust on which Mr Ruhan held the profits was simply an equitable remedy, and that as the constructive trust represented a remedy for Mr Ruhan's original breach by which the profits had been made, there should be no further compensatory remedy for the breach of the constructive trust. The Supreme Court rejected this, building on the analysis of the majority in *Rukhadze*, on the basis that the constructive trust over the profits was not merely a remedy, but was an automatic institutional trust reflecting Mr Ruhan's duty to account for the profits and hold them for the benefit of the claimant company. This was a freestanding "real" trust. Mr Stevens had thus assisted Mr Ruhan to dissipate property (the profits) belonging beneficially to the claimant and had thus caused a loss.

22. Further, while an accessory is not in general liable to account for profits made by the defaulting fiduciary, that principle is concerned with the original breach by which the fiduciary received the profits in the first place. It is distinct from the latter breach by which the profits, held on trust for the claimant, are dissipated: the principle does not prevent the accessory from being liable for assisting in that latter breach.

23. Another strand of Mr Stevens' argument was that, ever since *Target Holdings v Redferns* and *AIB v Redler* (see above), it had been recognised that an award of equitable compensation for breach of fiduciary duty requires the Court to compare

the position of the beneficiary as the result of the breach with the position in which it would have been if the trustee or fiduciary had performed his duty (i.e. a counterfactual "but-for" causation analysis). That being so, Mr Stevens argued that if one assumed, in the counterfactual, that Mr Ruhan had fulfilled his fiduciary duties, the profit would not have been made in the first place nor would it have been subsequently dissipated, so that the claimant had suffered no loss at all. The Supreme Court rejected this argument. *Target* and *AIB* did not suggest that there was no loss if the trust fund happened to be derived from an earlier breach of the no-profit duty. The claimant had undoubtedly lost the value of the profits held on constructive trust for it. The "but-for" test did not require the two distinct breaches of trust to be aggregated and then for it to be assumed in the counterfactual scenario that neither breach had occurred. It was illogical to assume, when considering equitable compensation for breach of a constructive trust, that the profits and thus the constructive trust had not arisen in the first place, as Mr Stevens' argument required.

24. Finally, Mr Stevens sought to set-off the profits and losses from the successive breaches of trust. The Supreme Court held that there was a general equitable principle that such gains and losses could not be set-off, subject to an exception where disallowance of set-off would be inequitable. The exception did not apply in Mr Stevens' case, as otherwise the integrity and effect of the constructive trust would be undermined.

Hopcraft v Close Brothers (August 2025)

25. In *Hopcraft v Close Brothers* [2025] UKSC 33, test claims were made by customers challenging the lawfulness of commissions paid by finance lenders to car dealers in connection with car hire-purchase agreements. Among the various arguments, the claimants alleged that the car dealer undertook a fiduciary duty to the customer when acting as a credit broker to obtain offers of hire-purchase finance. The alleged fiduciary duty was the foundation for claims in equity in relation to the commission, based on the no-profit and no-conflict rules, and in the tort of bribery.

26. For the purposes of the present paper, the Supreme Court's decision in *Hopcraft* is of interest for the majority's affirmation of what *Rukhadze* and *Stevens v Hotel Portfolio* had said about the draconian nature of the no-profit rule and the fact that the fiduciary holds an unauthorised profit immediately upon receipt on an institutional constructive trust. In *Hopcraft*, the majority emphasised that the no-profit rule was primarily intended to act as a support for the conscientious performance of the fiduciary's duty of single-minded loyalty. The majority also affirmed what *Stevens* had said about the nature of a dishonest accessory's liability.

27. In this part of the *Hopcraft* judgment, the chief focus of the majority was to identify in what circumstances a fiduciary duty arises. The majority described the hallmark of a fiduciary relationship as the duty of single-minded or undivided loyalty. Some types of relationship were settled as being fiduciary (e.g. trustee/beneficiary,

director/company, solicitor/client) but a de facto fiduciary relationship could arise outside those categories.

28. The majority said that the categories of fiduciary relationship were not closed, but the key principle was that a fiduciary acts for and only for another. An objective test was to be applied. Fiduciary duties arose where a person consciously assumed or undertook responsibility in relation to the management of the property or affairs of another, in circumstances where he knew or ought to appreciate that there was an expectation that he would act with loyalty (in the sense of altruistically, without self-interest) to that other.

29. The existence, in a commercial context, of trust and confidence between the parties to a transaction was not of itself sufficient for a fiduciary duty to arise, as that might simply be subjective trust and confidence in the other's performance of a contractual obligation. The trust and confidence characteristic of a fiduciary relationship was trust and confidence in the *loyalty* of the decision-maker to put aside his own interests and act solely in the interests of the principal. The relationship of trust and confidence was the consequence, not the cause, of a fiduciary duty.

30. There was no precise definition or "bright lines" for establishing when an ad hoc fiduciary duty would arise. But there must be an express or implied assumption of responsibility by the fiduciary to act exclusively on behalf of the other, or where objectively-assessed circumstances enable equity to identify such an undertaking in the acts of the fiduciary (such as in the case of an intermeddler in a fiduciary role or a self-appointed agent). The scope of the duty might however be moulded to the terms of any contract between the parties, taking account of the wider commercial context.

31. Vulnerability of the principal (or a power-dependency relationship) was not the touchstone, although vulnerability might be relevant to the existence of a fiduciary relationship. The vulnerability which was typical of a principal (through his trust in the fiduciary's loyalty) was a consequence and not a cause of a fiduciary relationship.

32. Applying the above principles to the facts of *Hopcraft*, the majority concluded that the car dealers did not owe fiduciary duties to the customers. The dealers were arm's length parties pursuing their own separate interests. While the customers may have had an element of vulnerability or dependency, that was not the touchstone of a fiduciary relationship, and any trust and confidence reposed by the customer in the dealer was that typical of a commercial relationship. Therefore the claimants' claims in equity and in the tort of bribery (which were dependent on the existence of a fiduciary relationship) failed.

Mitchell v Al Jaber – the UKSC's decision

33. We now come back to the most recent of the relevant UK Supreme Court decisions, *Mitchell v Al Jaber* [2025] UKSC 43, the facts of which have been summarised earlier in this paper.

The Sheikh's argument on fiduciary duty

34. The first issue raised by the Sheikh on appeal was that he did not owe any fiduciary duties to MBI at the time of the 2016 transfer (his powers as director having terminated in 2011). The Court of Appeal had imposed liability on the Sheikh as an intermeddler with the property of MBI, but the Sheikh argued on appeal that liability as an intermeddler or de facto fiduciary would only arise if a person voluntarily assumed the office of a fiduciary and had fiduciary powers capable of being exercised.

35. The Supreme Court rejected this argument. Following *Rukhadze* and *Hopcraft*, it was recognised that a fiduciary relationship can arise ad hoc. That happens where, upon an objective analysis, the Court concludes that there is a relationship of trust and confidence because a party has, or is treated as having, undertaken to act with loyalty, i.e. not to pursue his own interests.

36. However, the Supreme Court emphasised that equity does not require an express or implied undertaking to act in a disinterested manner in all circumstances. Equity will recognise in the objective circumstances of a case the undertaking of a fiduciary duty by the putative fiduciary in circumstances where he has not made any conscious undertaking (and has indeed acted contrary to the other person's interests). This can arise where a stranger to a trust or company arrogates to himself or purports to exercise a power which carries fiduciary obligations.

37. In support of this analysis, the Supreme Court cited *Soar v Ashwell* [1893] 2 QB 390, where a person who had assumed to act as a trustee was treated as liable as if he were an express trustee. The Supreme Court also referred to the well-established principles governing the liabilities of executors de son tort and trustees de son tort, who are subject to fiduciary obligations. The same applied to a "director in his own wrong", such as self-appointed directors who act as such.

38. For such fiduciary duties to arise, it was not necessary for the intermeddler to have title to or possess property. It was sufficient for the intermeddler to exercise command or control over it.

39. In the present case, the Sheikh had pretended to be a director of MBI with authority to transfer the JJW Shareholding, and it was irrelevant that he did not personally acquire the shares. It was also irrelevant that he did not, as a matter of law, possess the power he purported to exercise (which is also true of executors and trustees de son tort, but they are still liable). The relevant principle, as stated in *Soar v Ashwell*,

was that a person who assumes an office ought not to be in a better position than if he were what he pretends. Accordingly, the Supreme Court concluded that the Sheikh did indeed owe fiduciary duties to MBI at the time of the 2016 misappropriation.

The Sheikh's argument on loss

40. The second issue raised by the Sheikh of relevance to this paper was that MBI had suffered no loss because the JJW Shareholding was said to be worthless by the time of trial in 2021, as a result of the transfer of JJW's assets in 2017. The Court of Appeal had accepted this argument, on the basis that, but for the 2016 misappropriation, MBI would not have sold the shares before 2017, at which point the JJW Shareholding's value fell to zero; and so, valuing the shares at the trial date as part of a trial-date assessment of loss, the Court of Appeal had concluded that MBI had suffered no loss by reason of the Sheikh's 2016 misappropriation.

41. The Supreme Court overturned the Court of Appeal's decision on this point. Once again applying *Target Holdings v Redferns* and *AIB v Redler*, the Supreme Court noted that the aim of an award of equitable compensation was to restore to the trust fund the value of the property misappropriated. Looking backwards from the time of trial with the benefit of hindsight, the Court must ask what would have been the value of the property if it had not been misappropriated.

42. However, the principle that the Court looks back from the date of trial was a concept regarding what *information* was to be taken into account, and did not dictate the relevant date at which the value of the property was to be assessed. In many cases of misappropriation, this will be the trial date. However, this was not an inflexible or invariable rule in equity (as indeed the breach-date of assessment is not the invariable rule at common law).

43. Where misappropriated property has increased in value, it will often be just and equitable to assess loss at the trial date, so as to hold the defaulting fiduciary chargeable with that increase. If the property has fallen in value for reasons unrelated to the conduct of the defaulting fiduciary (e.g. general market conditions) the defaulting fiduciary will not be chargeable for the diminution in value, unless it can be shown that the property would have been sold in the meantime at a higher price.

44. But if the fall in value is caused by the misconduct of the fiduciary, there may be justification for holding him responsible. If the beneficiary suffered an immediate loss at the date when the property was misappropriated, and the defaulting fiduciary wishes to rely on a supervening actual or counterfactual event breaking the chain of causation between the breach and the beneficiary's loss, the burden is on the fiduciary to prove that the supervening event should be treated as breaking the causative link. In other words, once the beneficiary proves an immediate loss, the burden is on the defaulting trustee to show, in a counterfactual "but-for"

analysis, that, even if there had been no breach of duty, the loss would still have been incurred.

45. It followed, on the Supreme Court's analysis, that, with the Sheikh's misappropriation of the JJW Shareholding in 2016, the Sheikh had caused an apparent immediate loss to MBI. It was then for the Sheikh to prove that the 2017 transfer of JJW's assets was a subsequent event which defeated the prima facie causative effect of the 2016 misappropriation, in a way that allowed the Sheikh to take the benefit of it.

46. Not all supervening events can properly be relied on by a defaulting fiduciary in this way. Generally, a supervening event will not qualify if the defaulting fiduciary had a hand in it, in the absence of a clear and convincing innocent explanation. In the present case, the Sheikh had failed to provide such an explanation. He appeared to be the prime beneficiary of the 2017 transfer of JJW's assets and he triggered the process that led to it. He was therefore unable to rely on the 2017 transfer to reduce the loss that had apparently occurred in 2016, for which the Supreme Court held him liable.

***Wenda Co Ltd v Wang Jinhong & Ors* [2026] EWHC 909 (Comm)**

47. We see a very recent application of the *Hopcraft* principles in *Wenda Co Ltd v Wang Jinhong & Ors* (decision of Ms Lesley Anderson KC sitting as a Deputy Judge of the High Court). This was a fraud claim involving misappropriation of monies under a complicated invoice financing arrangement. The Claimant, Wenda, was a Chinese company which manufactured and traded in food ingredient chemicals. Mr Xiong was its Chairman and Ms Wang its CFO initially and latterly a director and shareholder.

48. Wenda's trading involved providing generous credit terms to its purchasers and it needed to improve cashflow. It was decided by Mr Xiong and Ms Wang to set up an English company to seek to raise finance through discounting of invoices. The arrangement was agreed between them orally and neither party produced any documentary evidence which sets out or records the terms on which it was to operate.

49. Pursuant to those discussions, Syner Ltd ("Syner") was incorporated in England as a wholly owned subsidiary of Wenda. Ms Wang was appointed as its director and remained director of Wenda. As to Syner Ltd entered into an invoice discounting agreement with HSBC Invoice Financing (UK) Ltd ("HIF"), which was used to finance a large volume of transactions whereby food ingredient chemicals supplied by Wenda were sold to buyers outside China, especially Latin America. The buyers were invoiced by Syner Ltd, acting as principal. This allowed Syner then to factor the invoice through HIF and obtain better terms of credit than were available to Wenda in China. The agreement was guaranteed by Wenda.

50. In short, Syner did not hand over all the proceeds of the agreement with HIF that it received and large sums were paid to Ms Wang.

51. The question for the Court was whether the arrangement gave rise to purely contractual relations between Wenda and Syner (as Ms Wang and Syner asserted) or whether they gave rise to an express trust or to a fiduciary relationship (as Wenda asserted). Further questions were whether Ms Wang herself owed fiduciary duties to Wenda as the directing mind and will of Syner, and whether she dishonestly assisted Syner in its scheme and/or was liable in knowing receipt.

52. The Deputy Judge concluded that there was no express trust on the facts:

"249. Construed objectively, I find that what was agreed between Xiong Wei and Wang Jinhong in 2012 was that: (i) Syner was to be established as a subsidiary of Wenda solely in order to enable Wenda to access cheaper invoice financing available in the UK; (ii) Syner would sell goods provided by Wenda to Wenda's customers (chiefly in Latin America) using shipping documents provided by Wenda and in accordance with an invoice financing SOP to be drafted by Wang Jinhong and communicated to the Wenda subsidiaries; (iii) Syner would raise finance on the receivables from those sales through HIF; (iv) Syner would timeously account to Wenda for the sums advanced by HIF or customers but without any specific time period for repayment save that (v) Syner was entitled to deduct from the revenue derived from the sale of the goods all its necessary costs derived from the sale of goods (including financing costs, salary and rent for Wang Jinhong, rent for an office in the UK as well as necessary business costs such as travel, entertaining financing companies or required professional services).
250. Although not expressly discussed between them, I find that it was implicitly understood and agreed, because the sole purpose of establishing Syner was to enable it to access cheaper invoice financing, that: (i) Syner was not authorised to make or retain any profit (or arbitrage on the interest rate savings on the financing obtained in the UK) and (ii) Syner was not permitted to carry out its own independent trade or to utilise the HIF invoice financing facility for that purpose.
251. However, in my judgment this arrangement falls well short of being the express or implied trust which has been argued for by Wenda. In this case at least, the real importance of this issue lies in determining where the burden of proof lies. It is common ground that Wenda has the burden of proving that, in 2012, Xiong Wei and Wang Jinhong expressly agreed that Syner would be required to hold the future proceeds of the invoice financing arrangement on trust for Wenda or would be accountable as if it is a trustee. A trustee subject to a duty to account has the burden of proving the authorisation of all retentions and expenses and making good the account insofar as any of those monies cannot be shown to have been authorised. ...
255. Importantly here, there was no express requirement for Syner ... to keep the trust property separately and although I have found that, construed objectively, Syner was not permitted to trade independently, that had not actually been discussed between the parties. The agreement which I have found afforded Syner and Wang Jinhong a significant degree of flexibility and discretion as to: (i) the timescale for payment to Wenda; (ii)

payment of Syner's expenses and (iii) in relation to the crafting and operation of the SOP which is inconsistent with there being a trust."

53. The Court did however conclude that Syner, but not Ms Wang, owed fiduciary duties to Wenda.

257. I have referred extensively to the decision of the Supreme Court in *Hopcraft* which has informed me in reaching my decision on this point. By way of emphasis, I note that:

257.1. At [83], the Court noted that the categories of fiduciary relationships are not closed but that *"[i]n a commercial setting the task is to find in a particular context the boundary between normal (self-interested) arm's length activity and the circumstances in which equity recognises fiduciary duties of one of the commercial parties requiring that party to put aside his or her own interests and act altruistically in the interests of another"* .

257.2. At [89], citing *Mothew*, the Court noted that the distinguishing obligation of a fiduciary is the obligation of loyalty and that a fiduciary is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to those duties that he is a fiduciary.

257.3. At [90] the Court added that *"[t]he key principle is therefore that a fiduciary acts for and only for another. He owed a single-minded loyalty to his principal, meaning that he cannot exercise any power in relation to matters covered by his fiduciary duty so as to benefit himself. Accordingly, if a person is a fiduciary then he must not put himself in a position where his interest and that of the beneficiary might conflict (the no conflict rule), subject to the principal's informed consent. In addition, or perhaps in consequence, he must not receive a personal benefit from his fiduciary position (the no profit rule), subject again to the principal's informed consent"* .

258. In my judgment, Syner and Effs (but not Wang Jinhong personally) were under fiduciary duties in relation to their operation of the invoice financing arrangement as I have found it. Syner was established as a device to reduce Wenda's financing costs, with Wenda's initial payment of US$2.2m and with the benefit of an indemnity as to its costs and Wenda's guarantee of its debts to HIF. As I have found, Syner had no involvement in the agreement or performance of the financed sales. Syner was not intended to profit from the invoice financing arrangement (beyond being able to recover its proper costs and expenses), was not intended to trade independently and was not intended to have any commercial interest of its own in relation to those arrangements. Although the arrangements were essentially commercial, and I have found that Wang Jinhong was given a degree of flexibility and discretion in relation to the operation of the invoice financing arrangement, in my judgment Syner and Effs did owe a single-minded loyalty to Wenda and that the role which Syner and Effs undertook went well beyond *"normal (self-interested) arm's length activity"* .

259. Accordingly, this is a case where Syner and Effs owed fiduciary duties to Wenda when performing its obligations under the invoice financing arrangement because, when viewed objectively, Syner and Effs had undertaken to act exclusively in Wenda's interests and in principle Syner and Effs are liable to account to Wenda as such."

54. Syner had acted in breach of fiduciary duty and had a duty to account to Wenda for the sums received. Ms Wang had dishonestly assisted in that breach.

Protectors: *A v C* [2026] UKPC 11

55. The term "Protector" is not a term of art in trust law. Unlike a trustee, protectorship is not an office to which the law has thus far attached particular responsibilities, duties, liabilities and rights. The duties and the powers of any given protector are defined, subject to any applicable statute, by the trust instrument, and the resolution of any doubts will therefore always begin with a question of construction.

56. There was until recently relatively little judicial guidance on the general principles applicable to the exercise of protector powers. There were then conflicting decisions from Bermuda (*In the Matter of the X Trusts* [2021] SC (Bda) 72 Civ (7 September, 2021), Kawaley AJ and [2023] CA (Bda) 4 Civ, Gloster JA, Clarke P and Maurce Kay JA) and the other from Jersey (*In the Matter of the Piedmont Trust & Riviera Trust* [2021] JRC 248, Sir Michael Birt) in relation to one particular question where the powers conferred on protectors are fiduciary.

57. That question was (in short) whether the default role of protectors when exercising a power to consent or to refuse consent to a proposed exercise by trustees of their powers under a trust instrument is limited to reviewing the lawfulness of the trustees' proposed exercise of their power (the "Narrow Role") or whether the protectors are empowers to use an independent discretion in deciding whether or not to consent by reference to their own view of the merits of the trustee's proposal ("the Wider Role").

58. Bermuda had opted for the Narrow Role. Jersey had opted for the Wider Role. The Privy Council on the final appeal in the Bermudan case (restyled as *A v C*) essentially agreed with Sir Michael Birt's analysis.

59. The protector provisions in the X Trusts conferred powers on persons who were to exercise them as fiduciaries. Therefore they were to be exercised subject to all the constraints undertaken by fiduciaries under the general law, i.e. the well-known no-profit and no-conflict duties and the duty to exercise powers for proper purposes (per *Rukhadze* and *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47). So powers must be exercised selflessly and with single-minded loyalty to and regard for the interests of the beneficiary class rather than to serve their own interests, or the settlor's interests. The proper purpose duty ensures that protectors do not use or abuse their powers of veto to cajole the trustees into accepting their views about other aspects of the administration of the trust about which the trustees have not sought, or may not even be obliged to seek, the protector's consent.

60. Where the protectors are paid professional persons then it is likely that they are required to act with reasonable care and skill and under a professional duty of care (subject to any immunities).

61. The protector's role is otherwise unconstrained, unless there is something in the trust instrument that imposes restraints. If the protector's role were essentially the same as that of the Court, the key requirement for a protector would be a legal

qualification rather than knowledge of the settlor's wishes and sound judgment as to what is in the best interests of particular beneficiaries. In practice, that is rarely if ever the basis on which settlors choose the protectors of the trusts they create: the protector is chosen because he has personal knowledge and understanding of the settlor, his wishes, and the family circumstances. Often and particularly in the case of offshore trusts the trustee is a professional trust company, and the settlor has no personal knowledge of the company or its officers.

62. At the same time, the protector is not another trustee. A protector's discretion lies within a narrower compass than that of a trustee. A protector may often find that he should consent to a discretionary decision of a trustee on the basis that it is for the benefit of one or more of the beneficiaries even though, if he had been the trustee, he might have made a different decision which he thought to be even more beneficial.

63. The fiduciary status of protectors does impose significant constraints upon the way in which they have to exercise their powers to approve or disapprove proposals for appointments and other matters. However, those constraints all operate within and in harmony with the Wider Role.

Wilberforce CHAMBERS

Trustee decision-making after Dawson-Damer

Simon Atkinson, Michael Ashdown and Roxane Reiser

Introduction

The judgment of the Judicial Committee of the Privy Council in *Dawson-Damer v Grampian Trust Co Ltd* [2025] UKPC 32 is an important development in the law of trustee decision-making, addressing questions around ascertaining and taking into account the wishes of the settlor, identifying and having regard to relevant considerations, and in what circumstances a decision vitiated by inadequate deliberation will be set aside.

Although a decision technically concerning the law of the Bahamas, Dawson-Damer is likely to represent the law in England (which was treated as being the same as the law of the Bahamas in this regard), and in other jurisdictions – such as Guernsey – which have followed *Pitt v Holt* [2013] UKSC 26. In jurisdictions which responded to *Pitt v Holt* by adopting statutory *Hastings-Bass* rules – such as Jersey, and also the Cayman Islands – *Dawson-Damer* is likely nevertheless to be important in addressing questions which arise in applying those rules.

The judgment in *Dawson-Damer*

Ashley Dawson-Damer was a discretionary beneficiary of the Glenfinnan Settlement, and Grampian Trust Co Ltd was the Trustee. She sought to set aside Grampian's decision to appoint 98% of the trust assets into a new trust of which Ashley was not a beneficiary. The challenge was put on the basis that Grampian was guilty of inadequate deliberation and therefore had made the appointments in breach of trust. In particular, it was said that (i) Grampian had been wrong in identifying the wishes of the settlor of the Glenfinnan Settlement, Spey Ltd, as being long-term provision for future generations, and (ii) Grampian had failed to take proper account of Ashley's future needs and wishes. Ashley was unsuccessful at first instance and her appeal to the Court of Appeal of the Commonwealth of The Bahamas was dismissed.

Ashley's appeal to the Privy Council was unsuccessful. The Board held that there was no reason to interfere with Winder J's findings as to the wishes and intentions of the corporate settlor. Although the Board held that Grampian was guilty of inadequate deliberation in relation to Ashley's needs and wishes and (reversing the Court of Appeal on this point) this was sufficiently serious to amount to a breach of fiduciary duty, it would nevertheless not set aside the appointments in circumstances where Ashley could not show that, had there been no such breach, Grampian (or any reasonable trustee) would, or might, have acted differently.

The settlor's wishes

It was common ground before the Board both that the settlor's wishes and intentions in settling the assets on trust would be a relevant consideration when a discretionary trustee exercises dispositive powers, and that where – as here – the settlor is a corporate body rather than a natural person, its wishes and intentions have to be discerned in accordance with the ordinary rules of corporate attribution. What was therefore required was to discern the intentions of the directing minds of Spey Ltd, namely its directors – or at least a majority of them. Although Winder J's judgment was not as explicit on this point as it might have been, the Board considered that he had been entitled to infer Spey's intentions from the voluminous factual evidence before him.

This (perfectly orthodox) approach to intentions gives rise to some interesting possibilities for the future. First, that applying the corporate attribution rules may sometimes mean that it is impossible to attribute intentions or wishes to the settlor: there may simply not be a majority in favour of any particular wish or intention. In such a case presumably there is nothing for the trustee to take into account (though doubtless it might also be argued that such a dispute on the board of the settlor could itself be a relevant consideration for the trustee in some cases). There may well also be cases in which a corporate settlor's wishes are – or are at least alleged to be – uncertain and so a trustee decides to seek declaratory relief from the Court before proceeding to take a decision in relation to which the settlor's wishes are a relevant consideration.

Second, that there could be disputes about the "validity" of wishes themselves. For example, it may be possible to dispute the validity of the decision-making of the directors of the corporate settlor, especially where the relevant intention or wish is embodied in a formal decision. This could entail counting directors, as Proudman J held in *Roadchef (Employee Benefits Trustees) Ltd v Hill* [2014] EWHC 109 (Ch) at [129]: *"Where a decision is made a by a group such as a board of directors, and a wrongful intention is held by some but not all who supported the decision, then the exercise of the power is only bad if it can be affirmatively shown that the decision would not have been taken without the concurrence of the persons with the bad intentions."*

Third, it is often said that whilst trustees must take the settlor's wishes into account, it is not their role simply to implement those wishes. They must exercise their own judgment, and the settlor's wishes may be one consideration among many. But *Dawson-Damer* treats the settlor's wishes not merely as relevant, but as the key factor which led the Board not to set aside appointments which it held had been made in serious breach of fiduciary duty: "*Once one accepts (as the Board has on Issue 1) that the wishes and intentions of Spey were that this trust was primarily for the benefit of the next generation, it is clear that Ashley cannot show that the decision would have been, or even might have been, different had there been no breach of fiduciary duty.*" (*Dawson-Damer* at [74]). In other words, it was perfectly obvious that Grampian would do what the settlor wanted, and a challenge based on saying that it might have acted otherwise was doomed to fail.

Relevant considerations and a "sufficiently serious" breach of fiduciary duty

One of the key questions to which *Pitt v Holt* gives rise is when a trustee's failure to take account of some factually relevant matter will amount to a breach of the duty of adequate deliberation so as to form the basis for the potential setting aside of the exercise of a power.

It is an obvious concern about the development of the law in this field that, if too much is expected of trustees, then inadequate deliberation can provide too ready a means to set aside perfectly sensible decisions by reason of trivial errors. After all, as Robert Walker J pointed out in *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 at 718: "[i]*n an imperfect world trustees (like other decision-makers) do often* *make decisions which are based on less than complete information and less than full analysis and discussion*" (some 16 years before his Supreme Court judgment in Pitt v Holt). Not all such decisions should be vulnerable to being set aside.

The authors of *Lewin on Trusts* (20th edn) suggest by way of solution (at [29-042]) that trustees "*will be in breach of duty only if a given matter is so significant that a failure to take it into account would be irrational.*" This seems difficult to fit with Lord Walker's analysis in *Pitt*, which appears instead to rely on the requirement that the breach be "*sufficiently serious*" (and even then, as in *Dawson-Damer*, a decision may still not be set aside). This is also consistent with *Dawson-Damer*: the Board was clear that the question of whether there have been sufficiently serious failings of adequate deliberation so as to amount to a breach of fiduciary duty is quite separate from the question of whether the impugned decision should actually be set aside. There is consequently a double filter: a trivial failing by a trustee will not satisfy either test, and will not lead to an otherwise proper decision being set aside.

That said, the Board also made helpfully clear that the identification of relevant considerations is not just a "tick box" exercise. It was not enough for Grampian to have been alive to the fact that Ashley's needs and wishes were a relevant consideration. The problem was that they did not have up-to-date information about them, and it followed that it had not taken a relevant consideration into account as it should have.

"Would" or "might"

Since *Pitt v Holt* the question of whether a successful claimant has to establish that the trustee *would* have acted differently if it had deliberated properly (i.e. taking all relevant and no irrelevant considerations into account), or merely that it *might* have done so, has remained unresolved. Lord Walker in *Pitt* declined to resolve the tension in the earlier case law, holding instead (at [92] that "*there must be a high degree of flexibility in the range of the court's possible responses*" and that "[t]*o lay down a rigid rule of either "would not" or "might not" would inhibit the court in seeking the best practical solution*".

This is not surprising in view of what had come before. There was clear support in the pre-Pitt v Holt case law for a "would" test e.g. *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587; Sieff v Fox [2005] 1 WLR 3811. But that test qualified a rather different rule: there was no requirement of any breach of duty by the trustee (of any degree of seriousness), and the result of the rule's application was that a decision was void, not voidable (so no discretion could be exercised as to whether to set it aside). It may therefore have been justifiable to require that a demanding causation test be met before finding that a decision was wholly invalid. The changed focus of the law following Pitt v Holt provides much less justification for such a rigid rule.

That is implicitly recognised in *Dawson-Damer*, where the Board declined to go further than Lord Walker in fixing a definite test. It did not need to: it considered (at [74]) that Ashley could not show even that Grampian's breach of duty *might* have made a difference to its decision, still less that it *would* have done so. It also noted (at [66]) that this does not form part of Lord Walker's "*sufficiently serious*" test: that is concerned with the quality of the conduct complained of, and not with the question of causation.

However, this does not mean that this point can be overlooked or treated as unimportant: it was on this point that Ashley lost her appeal in *Dawson-Damer*, which would otherwise have succeeded (it not appearing from the judgment that there was any other reason why the Board would have refused to set aside the appointments following their finding of a "*sufficiently serious*" breach of fiduciary duty).

Setting aside an impugned decision

As already noted, Dawson-Damer addresses the question of whether an impugned decision should be set aside by reference to (i) the distinction between that question and the logically prior question of whether there has been a "*sufficiently serious*" breach of fiduciary duty, and (ii) the would/might debate. It does not indicate that anything more than this is relevant to setting aside.

In taking this stance, *Dawson-Damer* may be read as tacitly endorsing the approach taken by the Guernsey Court of Appeal in *M v St Anne's Trustees Ltd* (2018) 23 ITELR 857. In that case, the Royal Court had held at first instance that a decision could be set aside for inadequate deliberation only if it were shown that it would be unconscionable to let it stand. The Guernsey Court of Appeal held that there was no further unconscionability requirement: once the breach of the duty of adequate deliberation was established, it was open to the Court to exercise its discretion in favour of avoidance if it was just to do so. There was no expectation that this would only occur in extreme cases.

However, this does mean that the question of how the discretion will be exercised will remain to be worked out case by case. *Dawson-Damer* has confirmed that the causation question – whether the trustee would (or might) have made the same decision if it had deliberated adequately – will be relevant. It is likely that ordinary bars to equitable rescission, such as laches and the intervention of third-party rights (as to which see Pitt v Holt at [92]) will be relevant. But more than that remains to be worked out case by case.

Jersey, Cayman and other statutory *Hastings-Bass* jurisdictions

Many of the points arising from *Dawson-Damer* will not be of direct application in jurisdictions which enacted statutory Hastings-Bass rules following *Pitt v Holt*. Jersey is the most prominent of these, and its legislation has provided a model which others have followed. There are nevertheless a number of respects in which *Dawson-Damer* is relevant to these jurisdictions.

First, in relation to the question of ascertaining the settlor's wishes, especially with a corporate settlor, and the possibility of challenging the validity of those wishes. Nothing in articles 47B to 47I of the Trusts (Jersey) Law 1984 (as amended) addresses such questions. Pursuant to article 47H, the Court may declare the exercise of a power to be voidable and of no effect (or of such effect as the Court decares) where there has been a failure to take into account relevant considerations and where the power would not have been so exercised but for that failure (whether or not by reason of any lack of care or other fault). But the question of what counts as a relevant consideration, and what the content of that consideration is which must be taken into account, is left to the Court to determine. We think it is likely that Jersey would follow this aspect of *Dawson-Damer* in relation to corporate settlors.

<u>Second</u>, the signal which <u>*Dawson-Damer*</u> (perhaps inadvertently) sends, that it can be assumed that trustees will implement their settlor's wishes without question in most cases, may be felt more strongly in jurisdictions such as Jersey. Whereas in Guernsey and in England the question of whether the trustee would or might have acted differently is relevant only to an exercise of discretion, in Jersey the "would" test forms part of the statutory regime: see article 47H(3)(b). If the settlor's expressed wishes are treated as more or less decisive as to how the trustees should – and would – have acted, that could determine whether that statutory test is met.

<u>Third</u>, it is notable that the Jersey courts share the concern that trivial errors should not lead to the invalidation of trustees' decisions. In <u>In the matter of the Andha Trust</u> [2023] JRC 080, the Deputy Bailiff (MacRae) observed (at [48]) that: "*Under Article 47H, the requirement is 'would not', not 'might not', and so minor failures to take into account relevant considerations would not normally be sufficient to engage the Court's powers.*" In other words, the Jersey statutory language and the <u>Pitt v Holt</u> test of "*sufficiently serious*" can both be made to perform essentially the same function, of precluding unmeritorious applications.

<u>Fourth</u> and relatedly, there is a conceptual overlap between an assessment of triviality and the test of causation, although it is important not to conflate the two. If a trustee makes a purely trivial error in its reasoning it presumably *would* take the same decision again even if the trivial error were corrected the second time around. Thus trivial errors can be said to be likely – perhaps even inevitably – not to satisfy whichever test of causation applies. The conceptual overlap between an assessment of triviality and the test of causation is not, however, complete. On the facts of any given case a trustee which has made even a non-trivial error may well make the same decision a second time around, with the consequence being that the non-trivial error has had no causative effect on the ultimate decision.

<u>Fifth</u>, and following from this, the fact that <u>*Dawson-Damer*</u> follows <u>*Pitt v Holt*</u> in declining to choose "would" or "might" as a definite requirement might be seen as an implicit criticism of the choice made in Jersey and elsewhere to legislate for "would". The effect is that the Jersey Court does not benefit from the same flexibility to take causation into account in deciding whether to set a decision aside. It will make no difference in clear cases i.e. where it is obvious (as in the case of a trivial error described above) that the failure of deliberation could have had no impact on the decision, or where it is equally obvious (as in the typical case where the error leads to a large and unexpected tax liability being incurred) that the trustees would not have so acted were it not for that failure.

But in more borderline cases, a claim will only succeed where the plaintiff beneficiary can prove that the trustee "would" have acted differently. This may be a difficult threshold to surmount given the (usual) asymmetry of access to information between trustees and beneficiaries. Further, the consequence of this more rigorous statutory test is – as Kawaley J recognised in <u>*Maples Trustee Services (Cayman) Ltd v AB*</u> (2023) 26 ITELR 759 at [24] (applying the Cayman statutory regime, section 64A of the Trusts Act) – that the Court will be asked to make findings which are "*likely in many (if not most) cases to be indistinguishable (legal labelling apart) from having to establish a breach of the fiduciary duty of due deliberation*". In this way <u>*Dawson-Damer*</u> may be seen as highlighting the downside of relying on a "would" test as a strict filter, rather than focusing on the seriousness of the failure of adequate deliberation and treating "would" or "might" as relevant to (but not determinative of) the decision whether to set aside.

Sixth, the question of when a decision should be set aside, and on what terms (if any), remains just as open. In Jersey, there remains a live question as to how far article 47H(2) confers a power to refuse relief, or to refashion an existing transaction. This apparently extends even to making orders which affect contracts with third parties: see *In the matter of the Andha Trust* at [88]-[90]. In Cayman, Kawaley J in *Maples Trustee Services (Cayman) Ltd v AB* suggested at [23] that there may be a "good faith" requirement inherent in the statutory regime, and that some tax avoidance transactions may fall foul of it. This could be seen as akin to the English Court of Appeal's approach to such cases (albeit in the context of mistake) in *Bhaur v Equity First Trustees (Nevis) Ltd* [2023] EWCA Civ 534.

The situation in both Jersey and Guernsey now appears to be that, if there has been a serious failure of deliberation by a trustee, the critical question is whether the Court will exercise its discretion to set aside. In both jurisdictions it is not completely clear what the Court will (and will not) take into account in making that decision. The fact that the Jersey discretion is statutory, whereas the discretion in Guernsey (and England) is not, should not prevent useful cross-fertilisation of ideas about what seems likely to be key battleground in future cases.

Insolvent trusts - liabilities of office holders and ability to recoup out of a trust fund

Philippe Kuhn and Benjamin Slingo

Introduction

We intend to cover four main areas in this paper. First, what the term 'insolvent trust' describes. Second, the approach to priorities as between current and former trustees. Third, the scope of the possessory lien of both current and former trustees. Lastly, the status of other creditors. This is an evolving area of law, not least because of the paucity of 'insolvent' trusts. It raises novel and conceptually interesting issues. Unlike in corporate or personal insolvency, the principles are judge-made and largely derived from general principles of trusts law. We appreciate there may be or there is at least potential for differences between English, Jersey and Guernsey law in this context, but this paper considers authorities across all three jurisdictions.

What is an 'insolvent trust'?

You might well complain that the subject of this paper does not exist. In *Equity Trust (Jersey) Ltd v Halabi; Investec Trust (Guernsey) Ltd v Fort Trustees Ltd* [2022] UKPC 36; [2023] AC 877 ("***Equity Trust***"), Lord Richards and Sir Nicholas Patten observed that "*it is inaccurate to speak of an insolvent trust*" ([61]).

The reason is simple. A trust is not a legal person. It therefore cannot have assets or liabilities, and cannot be solvent or insolvent. (It is not strictly an "it" at all.)

Instead, it is the trustee who legally owns the assets that are held on trust, and it is the trustee who incurs liabilities in the course of administering the trust.

Yet if a trust is not a legal person at all, then at common law a trustee is only one legal person. That is, he may incur some liabilities in his personal capacity, and some in his capacity as trustee, but they are all *his* liabilities.

This default position can be tempered by contract, if the trustee and his creditor expressly limit the former's liabilities to the extent of the trust property. The default position can also be tempered by statute to the same effect, as of course has happened in Jersey (see [Article 32 of the Trusts (Jersey) Law 1984) and Guernsey (see section 42 of the Trusts (Guernsey) Law 2007). Yet even the statutory protection only applies if the counterparty knows he is dealing with a trustee.

Two contrasting points follow from this state of affairs. First, a trustee is at common law personally liable even for those debts he assumes in his capacity as trustee. As Lord Hodge explained in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2019] AC 271 ("**Investec Trust**"), "*the trustee assumes those liabilities personally and without limit, thus engaging not only the trust assets but his personal estate*" ([59(iii)].

Second, a creditor of the trustee, who lent to the trustee in his capacity as trustee, has direct recourse only against assets the trustee beneficially owns. Even though the debt was incurred "for" the trust, so to speak, the creditor has no direct access to the trust assets. The reason is the same: the trustee is the person liable, and his personal assets are thus the ones exposed. This principle is also enshrined in statute in Jersey (see Article 54(4) of the Trusts (Jersey) Law 1984) and Guernsey (see section 74 of the Trusts (Guernsey) Law).

If that were the end of the story, there would arguably be something of a problem.

The solution is the trustee's indemnity. As Lord Hodge further explained in *Investec Trust*, "*[a] trustee is entitled to procure debts properly incurred as trustee to be paid out of the trust estate or, if he pays it in the first instance from his own pocket, to be indemnified out of the trust estate*" ([59(v)]). Indeed, "*[t]o secure his right of indemnity, the trustee has an equitable lien on the trust assets*" (as considered further below).

The indemnity thus addresses the first strange consequence identified above, i.e. the personal exposure, absent contract or statute, of the trustee for "trust" liabilities. Indirectly, it also addresses the plight of the creditors owed under those "trust" liabilities. Where the trustee is entitled to have a liability paid out of the trust fund, the creditor can claim through the trustee by way of subrogation.

There is thus a mechanism by which the trust assets are made available to pay both the trustee directly and other creditors indirectly. It is at this point that the concept of an "insolvent trust", technically suspect, comes in useful after all. As Lord Richards and Sir Nicholas Patten added in *Equity Trust*, "*An 'insolvent trust' is nonetheless a convenient description of a situation where the trust assets are insufficient to meet the amount due under the trustee's right of indemnity.*" ([61]) It is in that situation, of course, that disputes are liable to arise.

Priorities as between successive trustees

The Privy Council in *Equity Trust* has settled the question of priorities between the current and former trustee of an 'insolvent' trust. The Board concluded that the former trustee's right of indemnification, exercisable by way of possessory lien over trust assets, did not take priority over the equivalent interests of successor trustees. Instead, the current and former trustees rank *pari passi* as regards the trust fund in the event that there are insufficient assets to pay all sums within the scope of their right of indemnity. In doing so, the Board rejected a "first-in-time" rule (which otherwise was the default position as between equitable property interests). That much is now settled law and it is the starting point in resolving more granular issues that arise between current and former trustees in this context, as well as being of interest in relation to the question of the status of other creditors (as discussed further below).

Possessory lien

Both the 2018 decision of the Board in *Investec Trust* and the 2022 decision in *Equity Trust* contain a useful discussion of the nature of a trustee's possessory lien and right of indemnification out of the trust fund. The two concepts go hand in hand. We have already set out above Lord Hodge's pithy formulation in *Investec* at [59(v)]. In the same vein, in *Equity Trust*, Lord Richards and Sir Nicholas Patten, giving the lead judgment, observed at [63]:

"*…**the right of indemnity does not impose any personal liability on any person**. Neither the beneficiaries (except in the case of a trust where all of the beneficiaries are sui juris and the liabilities are incurred with the consent of the beneficiaries) nor any successor trustees are under any personal liability to indemnify a trustee. **The right of indemnity is a right to payment out of the trust assets**, which is enforceable where the assets have vested in a new trustee by an application to the court to which the current trustee, as the legal owner of the trust assets, is a necessary party.*" (Emphasis added.)

One interesting question that arises in relation to the possessory lien of a trustee (whether current or former) is whether there can be *any* such possessory lien where a trust has always been assetless. This might arise in a scenario where a trustee assumes the trusteeship of multiple trusts and some trusts have substantial assets, but no assets are transferred into the remainder, for whatever reason. This scenario might better be referred to as one of 'assetless' trusts rather than 'insolvent' trusts, though neither is a term of art and the perils of the terminology of 'insolvent' trusts has already been highlighted above. A relevant authority on 'assetless' trusts is the decision of the Royal Court of Jersey (Commissioner Clyde-Smith sitting with Jurats) in *Geneva Trust Company (GTC) SA v D & Others* [2020]JRC063. The following passage (at [43]) is noteworthy:

"*…we accept Advocate James' submission that GTC's claim for fees and expenses for each trust is payable out of the assets of that trust, unless of course it has other arrangements for their discharge. **If that trust has no assets at all, then it probably ceases to exist as a trust.** In the case of all of these trusts, GTC does hold shares in an overlying company, **but if there are no realisable assets at all within the underlying corporate structure, then there is nothing to pay GTC's fees and expenses with and GTC has to bear the loss, unless again it has other arrangements for their discharge**. Subject to that GTC cannot expect to be in a better position than it would have been had it continued as trustee or expect the new trustees Fort & Balchan to discharge its fees and expenses out of their own assets or assets procured from another source.*" (Emphasis added.)

The dividing line between 'assetless' and 'insolvent' trusts is not clear, in any event. For example, it might be thought the observations of Commissioner Clyde-Smith apply with equal force to a trust in respect of which there are no longer *any* assets, though there were previously substantial assets held on trust. There is, as yet, no authority on this permutation of the 'assetless' trust scenario, to our knowledge.

Another interesting issue is whether a former trustee can claim both fees (in the sense of remuneration) and expenses following its trusteeship of an insolvent trust, i.e. post-retirement. The summary in *Lewin on Trusts* (20^{th} ed.) at [20-060] is a helpful starting point: "*if the trustee voluntarily retires from office, is removed from office under an express power of removal, or otherwise ceases to hold office in accordance with the terms of the trust, it is doubtful whether he has any right to remuneration in respect of any period after he ceases to hold office, even while he continues to hold trust assets which do not automatically vest in the new or continuing trustees.*"

One of the cases cited in support of this proposition is *ITG Ltd v Glenalla Properties Ltd* [2019] GRC 064 at [219]-[220], in which Lieutenant Bailiff Marshall QC in the Royal Court of Guernsey followed the prior decision of Lieutenant Bailiff Talbot QC in *Re Tchenguiz*

Discretionary Trust (Royal Court of Guernsey, 18 December 2015, unreported). In the latter case, the judge considered the issue of post-retirement trustee remuneration at [11]-[14] and held that there was no authority (whether in England, Jersey or Guernsey) to support a claim for remuneration by a former professional trustee "*for the period after it had either resigned or been removed and was claiming to be entitled to retain the trust assets under a trustee's lien or an equivalent equitable right*" ([13]) and that this would amount to an unjustifiable extension of Jersey law ([14]). This decision was based on Jersey law, as the proper law of the relevant trust. There is unlikely to be a difference of approach between English, Guernsey and Jersey law on this issue. The decision in *ITG Ltd* deals with both post-retirement trustee fees and expenses. Lieutenant Bailiff Marshall QC suggested at [220] that there would be circumstances in which a former trustee could claim "*his proper expenses*" in respect of certain actions, but (consistently with the *Re Tchenguiz Discretionary Trust* decision) added that a former trustee "*cannot, at any rate without more, claim remuneration or payments which could classify as trustee's remuneration*". The reference to 'proper' expenses is properly understood as importing a requirement of reasonableness or equivalent upon assessment.

More generally in relation to trustee's fees, there is ample authority as to the approach to claims for remuneration by fiduciaries which is relevant in this context, particularly given there are competing claims to insufficient assets which is likely to lead to greater scrutiny. In *Re Wejo Limited* [2025] EWHC 135 (Ch) at [48], the High Court stressed: "*the onus is fairly and squarely on them to justify their entitlement to remuneration and to provide a sufficient and proportionate level of information to explain the remuneration that is sought*". Similarly, in *Attorney General of Trinidad and Tobago v CL Financial Ltd (In Liquidation)* [2025] UKPC 41, the Privy Council emphasised the importance of proper particulars of work done and provision of sufficient supporting information when fiduciaries claim remuneration. In that case, in the context of claims by insolvency office-holders acting as fiduciaries (in particular liquidators, administrators and receivers): see at [44]-[46], [48] and [103]-[111].

Status of other creditors

So far, this paper has focussed on the rights of current and former trustees in a case where the trust becomes insolvent (to use the "*convenient description*" referred to in *Equity Trust*). Yet the rights of other creditors has also raised interesting issues—some of which remain unresolved.

First, we explained at the outset that the other creditors' access to trust assets—as opposed to the trustee's personal assets—is only indirect. It depends on the third-party creditor being subrogated to the trustee's right of indemnity. As Lord Hodge noted in *Investec Trust*, this renders the creditor's position "*vulnerable*", since he loses his recourse whenever the trustee's right of indemnity is defeated ([59(vii)]). For example, what if the trustee committed fraud, or wilful misconduct, or gross negligence in incurring the debt, and his indemnity will not cover such scenarios (as indeed it cannot in Guernsey, under section 39(7)(b) of the Trusts (Guernsey) Law 2007)? Or what if the trustee is liable to the beneficiaries for breach of trust, such that his own right of indemnity is diminished or extinguished? (Of course, this might come as a shock to the third-party creditor seeking to piggy-back on the indemnity.) In these cases, the creditor will have no access to the trust assets—however "*hard*" on him that result may be.[7]

Second, this very predicament has led creditors to try to turn to their advantage statutory provisions limiting trustees' liability to the trust property. If a third-party creditor has no recourse to a trustee's personal assets, but does have a claim that expressly "*extends*" to the trust property, should it follow that the creditor may pursue the trust assets even when the trustee's own indemnity does not apply? That would protect the creditor from the worst-case scenario, where he is closed off in both directions. The Privy Council considered this issue in *Investec Trust*, with reference to Article 32 of the Trusts (Jersey) Law 1984 (which for present purposes is in very similar terms to section 43 of the Trusts (Guernsey) Law 2007). The Board held against the creditors: "*There is nothing in that article which modifies the rule that a creditor can access the trust assets only by way of the trustee's right of indemnity and subject to the limits on that right imposed by the trust deed or the general law*." ([62])

Third, different third-party creditors may be subrogated under different trustee rights of indemnity. Trustee 1 may have incurred, during his tenure, a liability to Creditor A. His successor Trustee 2 may then have incurred a liability to Creditor B. In circumstances where the trust property does not suffice to meet all claims in full (and the successive trustees' personal assets are not exposed), an issue of priority therefore arises. Yet that issue is purely parasitic on the issue of priority between the two successive trustees themselves, which was resolved in *Equity Trust* and is discussed above. Like the trustees on whom they piggy-back, the different sets of third-party creditors rank *pari passu* as against each other.

Fourth, a different and far less straightforward issue of priority arises between rival creditors of the *same* insolvent trustee. As regards the personal creditors of such a trustee, the position will be simple. The relevant orders of priority in the statutory insolvency regime will apply. Yet the same is not true of "trust" creditors, i.e. those seeking recourse against the trust assets via subrogation: see *Lewin*, [27-052]. As to them, the position is unsettled (subject to the specific sub-issue dealt with in the next paragraph, which is not entirely clear-cut itself). According to *Lewin*, "*the better view in principle is that the basis for distribution should be determined in a flexible manner in order to achieve a result which is practical and just between the trust creditors in the circumstances, which will ordinarily (but may not invariably) point towards a ranking pari passu by its very nature*". As will be apparent from that formulation, there is considerable room for argument. It is worth noting that the Lieutenant Bailiff tentatively endorsed a *pari passu* approach in *ITG Ltd* [2019] GRC 064 (excepting again the sub-issue dealt with below), but noting that the point had not been fully argued and may not have strictly arisen on the facts.

Fifth, one particular conflict between two "trust" creditors claiming via the same trustee right if indemnity is between the trustee *himself* and a creditor subrogated to him.

In Jersey, this issue was addressed in *Re Z Trusts* [2019] JCA 106.[8] In *Z Trusts*, the Court of Appeal reasoned that the conflict between the trustee and his creditor only arose because

[7] *Investec Trust*, [59(vii)].
[8] *Z Trusts* was then reversed in the Privy Council in *Equity Trust*, but the specific point at issue here did not arise at the apex level: see the discussion later in this paper.

Article 32 confined the creditor's recourse to the trust property. The court therefore held that the resolution of the conflict has to be found not in the English authorities (there never having been an equivalent of Article 32 in England), but rather in the purpose of Article 32 itself. The court stated: "*as a direct and intended result of Article 32(1)(a), a trustee is given an advantage over its trust creditors … That being so, I cannot see any reason why the advantage being given deliberately to trustees should not apply equally to the situation where there are claims by both the trustee itself and its Article 32(1)(a) creditors against the assets of a trust which has become insolvent. If those claims were to rank pari passu, the result would appear to be that the advantage given to the trustee by Article 32(1)(a) would no longer exist and that would be inconsistent with the purpose of Article 32(1)(a).*" The court added that "*the position is potentially the same in Guernsey*" given the equivalent statutory position.

The Royal Court of Guernsey took precisely that view in *ITG Ltd* [9], endorsing submissions based on the first instance decision in *Z Trusts*: see [208]. The Court of Appeal affirmed the Lieutenant Bailiff's reasoning: see *ITG Ltd v Fort Trustees Ltd* [2020] GCA 043 at [105].

In *Equity Trust*, reviewing the *Z Trusts* litigation and the *ITG Ltd* litigation, the Privy Council declined to express a view on priority between the trustee and third-party trust creditors. "*The question*" it said "*is potentially important and it is not straightforward, particularly in the light of article 32. In our view, it is an issue that the Board should consider only after full argument and, save in exceptional circumstances, only after it has been fully considered by the courts below.*" ([44]) Citing this passage, *Lewin* makes the somewhat ominous comment that "*we consider it likely that the conclusions in those decisions above will be revisited in light of what the Privy Council has said on the issue of priorities generally*". Put shortly, this is another issue well worth keeping an eye on.

[9] This case also was also appealed to the Privy Council in *Equity Trust*, but not on this specific issue.

Case management stays in cross-border trust disputes

Jennifer Seaman and Andreas Giannakopoulos

Forum (non) conveniens stays vs Case management stays - When to deploy certain arguments?

1. Stays on the ground of *forum non conveniens*—or *forum conveniens* where the claimant requires permission to serve process on the defendant out of the jurisdiction—are one of the primary remedies in the international litigator's toolbox. Albeit less obvious, case management stays can also prove a useful tool in cross-border litigation and are sometimes available in a wider range of circumstances.

2. As is well known, according to the *Spiliada* principles, a stay on *forum non conveniens* grounds may be granted where the defendant shows that there is another court with competent jurisdiction that is clearly or distinctly the more appropriate forum for the trial of the action and there are no special circumstances by reason of which the claimant could not obtain justice in the foreign forum. Similarly, upon an application for the court's permission to serve process out of the jurisdiction, the claimant will be required to show that England and Wales (or Jersey or Guernsey, as the case may be) is the most appropriate forum for the trial of the action. [10] As Lord Collins put it in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*: [11]

   > "*in both stay cases and in service out of the jurisdiction cases, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice*."

3. However, stays on *forum (non) conveniens* grounds have limitations. Where the court is seised pursuant to an exclusive or non-exclusive jurisdiction clause, "overwhelming" or "exceptional" reasons will be required for a court to grant a stay in favour of a more appropriate forum. The parties will usually be held to their contractual bargain, and a defendant seeking a stay will need to identify some factor which it could not have foreseen at the time the contract was concluded and which means that a stay should be granted in the interests of justice. [12] This is a very high bar indeed. Similarly, where the dispute concerns immovable property in the jurisdiction, it will be most unusual for a stay to be granted on *forum (non) conveniens* grounds. [13]

4. Case management stays pending the outcome of related foreign court or arbitral proceedings can be a useful alternative capable of replicating some of the benefits of *forum (non) conveniens* stays. The circumstances in which the courts may grant case management stays are both narrower and broader than in respect of *forum*

[10] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) at 477-478 and CPR r. 6.37(3) (England and Wales); *Nautech Services Limited v CSS Limited* [2014] (1) JLR 361 at [39]; Service of Process Rules 2019, r. 4(3) (Jersey); RCCR, Rule 8(2) (Guernsey).
[11] [2012] 1 WLR 1804 at [88].
[12] e.g., *Amtec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm) at [7].
[13] *Kireeva v Bedzhamov* [2025] AC 812 (UKSC) at [1].

(non) conveniens stays. They are narrower because they are premised on the existence of parallel proceedings. It is not appropriate to seek a case management stay pending the outcome of proceedings that are yet to be commenced. They are, however, broader in that case management stays may be granted by the court of a contractually agreed forum or the forum of the situs if this serves the interests of justice without the need to show "overwhelming" reasons.

5. The effect of a case management stay also differs from that of a *forum (non) conveniens* stay. Whereas a *forum (non) conveniens* stay is granted to allow the action to be determined in the foreign forum, a case management stay simply suspends further steps in the local proceedings pending the outcome of the parallel proceedings but the expectation is that the action will ultimately resume and be tried in the local forum. The effect of both types of stays may, in practice, be similar since the foreign court's determination on related matters will in some cases be determinative of the local proceedings even in the context of case management stays.

6. By way of illustration, in *Stemcor UK Ltd v Global Steel Holdings Ltd*,[14] a stay of English proceedings brought under an exclusive jurisdiction clause in a guarantee was granted pending the outcome of an arbitration involving cross-claims between the claimant and the primary debtor company. Hamblen J noted that, in practice, the issues determined by the arbitral tribunal were unlikely to be relitigated in court proceedings:

   > "*It might be said that Stemcor's position means that duplicative proceedings remain a possibility even if a stay is granted, but I regard this as unlikely, particularly given the eminence of the arbitration tribunal. Realistically Stemcor is unlikely to wish to relitigate issues determined by such a tribunal.*"[15]

<u>Relevant legal principles for a case management stay pending resolution of foreign proceedings</u>

7. In England and Wales, as in Jersey and Guernsey, the courts have power to order a temporary stay of proceedings to await the outcome of foreign court or arbitration proceedings raising similar or related issues between the same or related parties if the earlier resolution of those proceedings in the foreign court or arbitration would better serve the interests of justice.[16] This power exists both under the court's inherent jurisdiction to control its own proceedings and by virtue of the case management powers set out in legislation.[17]

8. Although it is generally only in "*rare and compelling circumstances*" that the court will grant a stay pending the outcome of foreign proceedings,[18] the court's inherent

[14] [2015] 1 Lloyd's Rep 580.
[15] *Ibid* at [47].
[16] e.g., *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] Bus. L.R. 2422 (UKSC) at [99].
[17] e.g., CPR r. 3.1(2)(g) and r. 3.1(2)(p) (England and Wales); RCCR 2007 r. 50(2)(c) and r. 50(2)(p) (Guernsey).
[18] *Reichhold Norway A.S.A v Goldman Sachs International* [2000] 1 WLR 173 at 186.

jurisdiction to stay its proceedings is ultimately unfettered and depends on whether, in the particular circumstances, it is in the interests of justice for a case management stay to be granted.[19]

9. In *Pilatus (PTC) Limited v RBC Trustees (Guernsey) Limited*,[20] the Royal Court of Guernsey approved the factors, derived from Henshaw J's judgment in *Hulley Enterprises Ltd v Russian Federation*,[21] that may justify a case management stay in the context of parallel proceedings in different jurisdictions:[22]

> "*i) The risk of inconsistent decisions in proceedings in different jurisdictions is "always capable of amounting to a very strong reason for granting a stay, as the cases ... show and emphasise" [...];*
>
> *ii) The "costs and inconvenience of duplicated proceedings" to the parties, the court and other court users may favour a stay [...];*
>
> *iii) The existence of issues that are more appropriate for determination in the foreign proceedings is a factor favouring a stay [...];*
>
> *iv) A stay is more likely to be appropriate where there is a greater degree of overlap of issues between the English proceedings and the foreign proceedings, or where the foreign proceedings are likely to be determinative of all or part of the English proceedings [...];*
>
> *v) The grant of a stay is more likely where any prejudice to the party resisting a stay can adequately be compensated by an award of interest, or is outweighed by the prejudice which would be caused by refusing a stay [...].*"

10. Most of these considerations closely follow the matters that would be taken into account in an application for a stay on *forum (non) conveniens* grounds.[23] As indicated, they may militate in favour of granting a temporary stay even where the court is seised pursuant to an exclusive jurisdiction clause or as the forum of the situs since the risk of inconsistent outcomes, duplication of costs, evidence and submissions, and the waste of court time may all impede the just resolution of the action before the court.

11. It may also be relevant that the local proceedings have been initiated to obtain relief designed to stymie a claim in the foreign proceedings. For instance, in *ACE European Group Ltd v Howden North America Inc*,[24] the claimant sought declaratory relief in the English courts as a defence to future enforcement of a US court judgment in England and Wales. Aikens LJ held that this was not a useful exercise of the court's discretion to grant declarations:[25]

> "*...I would therefore hold that to mount a kind of 'pre-emptive strike' to obtain an English court's judgment on certain, limited, declarations for no other*

[19] *Athena Capital v Secretariat of State for the Holy See* [2022] 1 WLR 4570 a [59].
[20] [2021] GRC063.
[21] [2021] 1 WLR 3429 (QB).
[22] At [19] (case citations omitted).
[23] e.g., *Lungowe v Vendata Resources Plc* [2020] AC 1045 (UKSC) at [66] and [69].
[24] [2012] 2 CLC 969 (CA).
[25] At [39].

reason than to lay the ground for a defence to enforcement of a foreign judgment on the ground that it is contrary to pre-existing English judgment is, at least on the facts of this case, not a 'useful' exercise of the court's jurisdiction."

<u>The issue of recognition and enforcement of the foreign judgments: firewalls and Hague 2019</u>

12. Given the factors set out above, the question of the recognition and enforcement of the foreign court's determination in the forum's legal system will be important in an application for a case management stay pending the outcome of foreign proceedings. If the foreign judgment would in principle be entitled to recognition, a stay will reduce the risk of inconsistent judgments and duplication of evidence and submissions since the parties before the court will be bound by the foreign court's ruling on the related issues. Conversely, if the foreign judgment would not be capable of recognition, it is likely to be of very limited assistance to the court in which the stay is sought. It will therefore be difficult to show that it is in the interests of justice to delay the trial of the action pending the conclusion of the foreign proceedings.

13. In the context of trusts disputes in Guernsey and Jersey, this question will almost inevitably lead to submissions about the scope of the firewall provisions of the Trusts (Guernsey) Law, 2007 and the Trusts (Jersey) Law 1984 respectively. Readers will be very familiar with those provisions, which are reproduced below for ease of reference.
    a. Trusts (Guernsey) Law, 2007, s.14(4): "*Notwithstanding any legislation or other rule of law for the time being in force in relation to the recognition or enforcement of judgments, no judgment or order of a court of a jurisdiction outside Guernsey shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that – (a) it is inconsistent with this Law, or (b) the Royal Court, for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust, so orders.*"
    b. Trusts (Jersey) Law 1984, Art. 9(4): "*No (a) judgment of a foreign court or (b) decision of any other foreign tribunal (whether in an arbitration or otherwise), with respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent with this Article, irrespective of any applicable law relating to conflict of laws.*"

14. As regards the question of whether the foreign judgment is "*inconsistent*" with other provisions of the legislation, this will usually involve considering whether the foreign judgment rules on matters that are defined as falling with the exclusive scope of application of Guernsey law or Jersey law under the Trusts (Guernsey) Law, 2007, s.14(1) and Trusts (Jersey) Law 1984, s.9(1) (as the case may be).

15. Similarly, both statutes contain provisions protecting local trusts against the recognition of foreign judgments ruling on rights arising by reason of a personal relationship to a settlor or beneficiary or by reason of foreign forced heirship rules: Trusts (Guernsey) Law, 2007, s.14(3); Trusts (Jersey) Law 1984, s.9(2).

16. Many questions remain unanswered as to the proper scope of these provisions. This increases the length and complexity of case management applications in this field. Submissions should address the relevant points in detail. These may include, for instance:
    a. What is the scope of the provision submitting any question "arising in relation to"[26] or "concerning"[27] a Guernsey or Jersey trust or any disposition of property upon such a trust to the exclusive application of Guernsey law or Jersey law? Is a judgment ruling on a contractual, restitutionary or statutory obligation relating to the trust "inconsistent" with this provision? Is a judgment ruling on the validity of a transfer of assets to or by a trust-owned corporation caught by this provision?
    b. Is a judicial decision recording the terms of a foreign inheritance pact (*pacte successoral*) an order intended to give effect to foreign forced heirship rights under Trusts (Guernsey) Law, 2007, s.14(3) and Trusts (Jersey) Law 1984, s.9(2)?
    c. Does the Trusts (Guernsey) Law, 2007, s.14(4) apply even if all relevant parties have submitted by appearance to the jurisdiction of the foreign court?
    d. In what circumstances would the Royal Court of Guernsey order that a foreign judgment should be denied recognition "for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust"?[28]

17. English law does not have any corresponding firewall provision, but it does regard property settled on trust before death as falling outside the deceased's estate on death, even if the law applicable to the succession of the deceased provides that such assets should be taken into account to calculate the reserved share of a spouse or child. In *Pescatore v Valentino*,[29] HHJ Paul Matthews (sitting as a High Court Judge) stated that the effect of this rule is that—

    > "*the judgment of a foreign court holding that assets disposed of by a deceased before his death nevertheless form part of his succession and must be reintegrated into his patrimony will not to that extent be recognised or enforced by the English courts*."[30]

18. Further, following the entry into force of the 2019 Hague Judgments Convention[31] for the United Kingdom on 1 July 2025, the question of whether a foreign judgment from a court of a Contracting State[32] ruling on a matter concerning a trust can be recognised in England and Wales will be determined by applying the rules of the Convention and in particular Article 5, which prescribes several bases for recognition. In addition to the bases of recognition founded on a connection between the losing party and the foreign court (e.g., habitual residence, agreement

[26] Trusts (Guernsey) Law, 2007, s.14(1).
[27] Trusts (Jersey) Law 1984, s.9(1).
[28] Trusts (Guernsey) Law, 2007, s.14(4).
[29] [2021] W.T.L.R. 917.
[30] At [81].
[31] The full title is the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.
[32] These currently include the Member States of the European Union, Albania, Andorra, Montenegro, Ukraine, and Uruguay,

or consent),[33] Article 5(1)(k) lays down a specific basis of recognition for judgments concerning trusts. The provision is as follows:

> *"A judgment is eligible for recognition and enforcement if one of the following requirements is met: [...]*
>
> *(k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated. This sub-paragraph only applies to judgments regarding the internal aspects of a trust between persons who are or were within the trust relationship"*[34]

19. The last sentence makes clear that this basis of recognition does not extend to matters that arise "in relation to" or "concern" a trust without being internal trust law matters. As for the meaning of the underlined bases of recognition, this will have to be worked out in the case law over the years. However, it should already be apparent that the same type of questions that were considered by the Privy Council in *Crociani v Crociani*[35] will have to be addressed in the context of this provision:
    a. Is a "forum for administration" clause to be construed as an exclusive jurisdiction clause or as identifying the place of administration of the trust?
    b. What if the State of origin was designated pursuant to the exercise of a power to change the governing law and forum and that exercise is being challenged?
    c. Does it make any difference if recognition is sought against a beneficiary who has not consented (and perhaps was not capable of consenting) to the designation of the State of origin in the trust instrument?

Procedural considerations across jurisdictions

20. When seeking a case management stay pending the outcome of foreign proceedings, it is key to understand the foreign procedural context and to keep abreast of developments in the two forums. Practical steps to take will often include:
    a. Obtaining expert evidence on (a) the jurisdictional rules and applicable law in the foreign forum; (b) the foreign rules of recognition and enforcement; (c) remedies available in the foreign forum; and (d) the progress and expedition of the foreign proceedings.

[33] See Article 5(1)(a), (b), (e) and (f).
[34] Emphasis added.
[35] [2015] WTLR 975 (PC).

b. Monitoring developments in other jurisdictions (e.g., filings of pleadings, extensions of time) and updating the court in which a stay is being applied for.
c. Seeking declarations in the foreign forum on jurisdiction and applicable law to pre-empt an argument that the foreign court would itself decline jurisdiction or apply a law different from that which would be applied by the court in which a stay is sought
d. Considering ways to accelerate the progress of the foreign proceedings (e.g., early depositions). Conversely, if resisting a case management stay, consider steps to avoid the foreign proceedings becoming too advanced (e.g., jurisdictional challenge; applications for extension of time).
e. Considering whether a stay will prejudice a party's position or better preserve the status quo and updating this assessment over time.

Anti-Bartlett clauses

Jonathan Davey KC and Lemuel Lucan-Wilson

First Principles

1. What is known as the *Bartlett* duty derives from the case of *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 ("*Bartlett*"). In *Bartlett* it was held that the trustees were liable for failing to use the powers attached to their majority shareholding in the company in question to prevent the company from entering into speculative and ultimately flawed business transactions which had the effect of reducing the value of the company, and, therefore, the trust's shareholding.

2. The *Bartlett* duty can usefully be analysed as comprising two constituent elements, namely that:

   (1) A trustee must take steps to keep themselves informed as to what is happening within the company;
   (2) A trustee must intervene when the company is being run in such a way as to jeopardise the interests of the trust.

3. An anti-*Bartlett* clause might exclude one or both of (1) and (2), as well as involving any of a number of permutations.

4. At common law, although a trustee has a duty to act as a prudent man of business towards the trust (*Speight v Gaunt* [1883] UKHL 1), trustee obligations outwith the "*irreducible core*" of a trustee's duties, i.e. to act honestly and in good faith for the benefit of the beneficiaries (*Armitage v Nurse* [1997] EWCA Civ 1279), can be excluded.

5. In Guernsey, the duty to act "*en bon pere de famille*" pursuant to Article 22 of the Guernsey Trusts Law cannot be excluded. Similarly, in Jersey, the duties set out under Article 21(1) of the Jersey Trusts Law, i.e. that when exercising his or her duties or powers a trustee is to act with due diligence as would a prudent person to the best of the trustee's ability and skill and with the utmost good faith, are also mandatory. The position is different, however, in respect of other duties. Article 23 of the Guernsey Trusts Law, and Article 21(3) of the Jersey Trusts Law, require trustees to preserve and enhance, so far as is reasonable, the value of the trust property, but these duties are subject to the terms of the trust and can therefore be excluded. Alongside limiting the duties which apply to trustees, settlors may also exclude liability for a trustee for any act which is not dishonest (at common law) and any act less than gross negligence (which is the statutory position in Jersey and Guernsey).

Features and Effects Of Anti-Bartlett Clauses

6. The wording of Anti-*Bartlett* clauses varies. Axiomatically, any Anti-*Bartlett* clause has to be construed according to its particular terms.

7. As well as excluding the two elements referred earlier (paragraph 2(1)-(2) above), an Anti-*Bartlett* clause will often state that a trustee is entitled to: (i) leave the management of the company to its directors; (ii) treat at face value any information

the trustee receives from those directors; and (iii) assume that the company is being properly run.

8. An Anti-*Barlett* clause might require a trustee to intervene if the trustee has knowledge of fraud or wilful misconduct being perpetrated on the company. This can perhaps be seen as a manifestation of the non-excludable "*irreducible core*" of a trustee's obligations (paragraph 4 above) since it is hard to see how a trustee could be within the irreducible core of acting honestly if the trustee were to standby knowing that the trust fund is being actively and deliberately plundered.

9. It might be that the drafting of an Anti-*Bartlett* clause is insufficient fully to insulate the trustee. An Anti-*Bartlett* clause is likely only to be useful if all relevant obligations are excluded, and the trustee adopts an approach of almost complete non-intervention. For instance, in such regard:

    (1) If the trustee is required to intervene but not required to monitor, the clause is in practice likely to be ineffective, since the trustee will inevitably have to monitor so as to ensure that they do not fail to discharge their duty to intervene.

    (2) If only the duty to intervene is excluded, the trustee is still likely to be required to monitor the company to ensure that there has been no fraudulent conduct. In so doing, they may come across conduct which, whilst not fraudulent, could cause damage to the trust. In those circumstances, the trustee has a difficult choice and may decide to intervene, on the basis that the conduct *might* be considered fraudulent by the Court, or that their other duties compel them to do so.

10. Notably, if a trustee intervenes or monitors *despite* an Anti-*Bartlett* clause, they may still end up in danger. Once they are taking active steps, they must follow the general trust obligations. Anti-*Bartlett* clauses can remove obligations, but if a trustee accepts them voluntarily, they might find themselves to be liable; and/or find themselves in possession of information which might then require them to act in any event, bearing in mind the irreducible core of their duties as trustee.

11. Three comparatively recent cases are useful to consider.

12. In *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* [2019] HKCFA 45 (also reported as *IQ EQ (NTC) Trustees Asia (Jersey) Ltd v Arboit)* ("*Zang Hong Li*") the trustees had a comprehensive (multi-page) Anti-*Barlett* clause which effectively excluded all relevant duties, save where the trustees had actual knowledge of fraudulent conduct. Attempts by the beneficiaries to argue for the existence of a residual "*high level supervisory duty*" failed. The trustee's retrospective ratification of the transactions was not sufficient to create liability, nor constitute gross negligence.

13. In *Ivanishvili v Credit Suisse Trust Ltd* [2024] SGCA(I) 5 the trustees had actual knowledge of fraud affecting the trust assets. A distinction was drawn by the court between a high-level supervisory duty as to the propriety of the investments assets and one as to the *safety* of the assets; the former was not workable, but the latter remained. The Anti-*Bartlett* clause required the trustee to intervene if the trustee

had knowledge of fraud. The trustee knew that assets were leaving the trust without its proper authorisation, which was fraud. The trustee was therefore found liable.

14. In *Appleby Corporate Services (BVI) Ltd v Citco Trustees* (BVI) Ltd (2014) 17 ITELR 413 (BVI), the trustee was found liable despite an Anti-*Bartlett* clause. Whilst the trustee was not required to involve itself in the management of the company, it still had a duty to satisfy itself that there was nothing untoward affecting the value of the shares. Had the instrument also excluded the duties to preserve and enhance, it seems quite possible that a different outcome would have occurred.

Knowledge Requirements

15. As most clauses will require the trustee to intervene if there is misconduct, in many cases the way to undermine the Anti-*Bartlett* clause and force trustee involvement relates to the notice requirements – if these are triggered then the trustee is likely to be required to investigate even *possibly* dishonest conduct, which covers a multitude of actions.

16. Whilst the most stringent Anti-*Bartlett* clauses require the trustee to have actual knowledge of dishonesty before intervening, difficult questions can arise as to what is involved in practice. So far as we are aware, there has been no specific discussion as to what constitutes knowledge or notice for the purposes of such a clause, but we think a reasonable starting point would be the categories set out in *Baden v Société Générale* [1993] 1 WLR 509 ("*Baden*"); whilst no longer used in cases of knowing receipt, *Baden* provides a useful scale for differentiating between different levels of awareness. Although actual knowledge can be regarded as the highest threshold (number 1 on the *Baden* knowledge scale), in practice, once beneficiaries are contemplating raising a grievance or litigation, the trustee is likely to be being actively informed by beneficiaries that misconduct is taking place, and will not therefore be able to hide behind a lack of knowledge. Such notifications, if at all credible, are probably sufficient to trigger the requirements of actual knowledge. In *Zhang Hong Li*, the Court of Final Appeal endorsed the view that an actual knowledge requirement would be met where the trustees "*are informed by a credible source that the directors are stealing the company's assets*" (para 61). In such a case, they would then be bound to involve themselves with the company and investigate, even if misconduct was ultimately not found.

17. Whilst in other contexts actual knowledge can include categories (2) and (3) on the *Baden* knowledge scale – shutting one's eyes to the obvious or wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make – it seems to us that liability attaching on this basis may be difficult in the context of an Anti-*Bartlett* clause, provided the duty to monitor has been sufficiently excluded. Category (2) is somewhat more likely to be sufficient since the trustee will simply be ignoring facts that it knows, but category (3) is within the duty to monitor, or potentially within a clause that only requires notice.

18. Where a clause requires a trustee to intervene if the trustee has "*notice*" of dishonest conduct, this seems likely to cover all of the *Baden* knowledge requirements (i.e. including (4) and (5) relating to knowledge of circumstances which

would indicate facts, or which would put someone on enquiry). Once litigation is in contemplation and the beneficiaries have instructed lawyers, that again may mean the beneficiary needs to do relatively little to trigger the trustee's duties – alerting the trustee to circumstances which *might* reflect dishonesty could itself be sufficient in the appropriate case. Indeed, in *Re Alpha, Beta and Delta Trusts* [2023] JRC 138, after the representation was issued, the trustees then decided to take further steps to investigate potential wrongdoing following receipt of reports identifying potential misconduct.

Complex Structures and Professional Trustee Providers

19. The distinction between knowledge and notice may be particularly difficult in circumstances where the trustee or related entities might be providing officeholders to the underlying companies, or intermediary companies that *are* receiving information directly from the companies where wrongdoing is being alleged. Although this can potentially raise knotty questions as to the attribution of knowledge, the Court might choose to adopt a relatively non-technical analysis as regards the attribution of knowledge in respect of such structures, which would likely be to the detriment of trustees seeking to rely on Anti-*Bartlett* clauses. This was the case in *Pilatus (PTC) Limited v RBC Trustees (Jersey) Limited* [2025] GCA 091 where the Court of Appeal declined to entertain issues regarding attribution, partly on the basis that they "*lack[ed] reality*" (para 71) given the intention of those setting up the structure. Whilst having a single service provider might seem to cut across the intention of Anti-*Bartlett* clauses, these clauses are sometimes inserted, possibly as a matter of course/precedent, meaning issues of acquiring knowledge or notice through the boards of subsidiary companies could well then arise.

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Michael Tennet KC	KC 2006	Call 1985
Thomas Lowe KC	KC 2008	Call 1985
James Ayliffe KC	KC 2008	Call 1987
Lexa Hilliard KC	KC 2009	Call 1987
Paul Newman KC	KC 2009	Call 1991
Joanne Wicks KC	KC 2010	Call 1990
Martin Hutchings KC	KC 2011	Call 1986
Thomas Grant KC	KC 2013	Call 1993
Fenner Moeran KC	KC 2014	Call 1996
Marcia Shekerdemian KC	KC 2015	Call 1987
Clare Stanley KC	KC 2015	Call 1994
Tim Penny KC	KC 2016	Call 1998
Jonathan Davey KC	KC 2016	Call 2003
Jonathan Hilliard KC	KC 2016	Call 2003
Max Mallin KC	KC 2017	Call 1993
Julian Greenhill KC	KC 2018	Call 1997
Tiffany Scott KC	KC 2018	Call 1998
Nikki Singla KC	KC 2018	Call 2000
James Bailey KC	KC 2019	Call 1999
Zoë Barton KC	KC 2020	Call 2003
Andrew Mold KC	KC 2020	Call 2003
Thomas Robinson KC	KC 2025	Call 2003
Bobby Friedman KC	KC 2026	Call 2011
Jack Watson KC	KC 2026	Call 2012
Full-Time Arbitrators:		
Jules Sher KC	KC 1981	Call 1968
Sir Paul Morgan	KC 1992	Call 1975
Associate Members		
Professor Lionel Smith		
Professor Ben McFarlane		

David Pollard	Solicitor 1980	Call 2017
Gabriel Fadipe		Call 1991
Graeme Halkerston		Call 1994
Edward Sawyer		Call 2001
Stephen Brown	Solicitor 1991	Call 2013
Daniel Lewis		Call 2003
Emily McKechnie		Call 2005
Sebastian Allen		Call 2006
James Walmsley		Call 2007
Jennifer Seaman		Call 2007
Benjamin Faulkner		Call 2008
Anna Littler		Call 2008
James McCreath		Call 2009
Emer Murphy		Call 2009
Tom Roscoe		Call 2010
Jonathan Chew		Call 2010
Harriet Holmes		Call 2011
Alice Hawker		Call 2011
Simon Atkinson		Call 2011
Sri Carmichael		Call 2012
Jessica Brooke		Call 2012
Michael Ashdown		Call 2013
James Goodwin		Call 2013
Rachael Earle		Call 2013
Elizabeth Houghton		Call 2014
Tim Matthewson		Call 2014
Jamie Holmes		Call 2014
Joseph Steadman		Call 2015
Tara Taylor		Call 2015
Mark Galtrey		Call 2015
Daniel Scott		Call 2016
Jia Wei Lee		Call 2017
Philippe Kuhn		Call 2017
Francesca Mitchell		Call 2017
Roxane Reiser		Call 2017
Daniel Petrides		Call 2018
Lemuel Lucan-Wilson		Call 2018
Caspar Bartscherer		Call 2019
Ram Lakshman		Call 2020
Benjamin Slingo		Call 2020
John Grocott-Barrett		Call 2021
Samuel Cathro		Call 2021
Theo Dixon		Call 2021
Daniel Jukes		Call 2021
Andreas Giannakopoulos		Call 2022
Ernest Leung		Call 2022
James Man	(HK Bar: 2014)	Call 2023
Benedict Evans		Call 2024
Allison Wu		Call 2024
Naomi Kilcoyne		Call 2024
Zihang Liu		Call 2024
Caroline Furze (Door Tenant)		Call 1992

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