Guernsey Trust Law

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Trustees

I. Number of Trustees

The default position is that there must be two trustees, but the exceptions are such that a sole trustee will almost always be sufficient. One trustee is permitted where:

(a) only one was originally appointed;
(b) there is a Guernsey resident corporate trustee;
(c) the Public Trustee is acting;
(d) the terms of the trust provide otherwise.[1]

A 'trustee' is defined in section 1 of the Trusts Law 2007,[2] and includes a corporate trustee and the Public Trustee.[3]

A. Effect of there Being Insufficient Trustees

A trust does not fail if there are fewer than the minimum required, and a trust will not fail even if there is no trustee at all,[4] but the required additional number 'shall be appointed'.[5] Until that is done, the existing trustee may only act to preserve trust property.[6]

The use of the passive voice – 'shall be appointed' – does not specify *who* has the obligation to do the appointing, but presumably if there is someone with the power under the trust to appoint additional trustees, it would be that person.

These provisions are subject to the terms of the trust, so the trust may specify different consequences.

[1] Trusts Law 2007, s 17(1). In *Rothschild Trust Guernsey Limited and Adamantios (Diamantis) Pateras & Katigo-Kalliopi* (Royal Court, 3 May 2011) (Judgment 15/2011), it was confirmed that a corporate Guernsey trustee could act as sole trustee of a Guernsey trust.
[2] See ch 5, section I.
[3] Trusts Law 2007, s 80(1).
[4] Trusts Law 2007, s 17(2).
[5] Trusts Law 2007, s 21(a).
[6] Trusts Law 2007, s 21(b).

II. Appointment of New or Additional Trustees

The trust instrument may – and commonly does – include express powers of appointment.

The statutory provisions apply if:

(a) the terms of a trust contain no provision for the appointment of a new or additional trustee,
(b) any such provision has lapsed or failed, or
(c) the person with power to make any such appointment is not capable of exercising the power …[7]

In those circumstances, the power to appoint new or additional trustees is vested in the existing trustee, the last remaining trustee, the personal representative or the liquidator of the last remaining trustee, or the Royal Court.[8]

So the last remaining trustee may exercise the power after ceasing to be a trustee, in contrast to the more restrictive position under English law, where it is only the personal representatives who have that power.[9] If the last two (or more) trustees cease to act at the same time, it is thought that they are jointly the 'last remaining trustee' for this purpose, as the singular includes the plural. Even if that is wrong and the power must be exercised only by one last trustee, if both of the last trustees join in the appointment, that must be effective, whichever one is, in fact, the last trustee.

However, it is thought that the statutory power does not permit the appointment of an additional trustee where a trustee has lost mental capacity. Under section 18 of the Trusts Law, the power devolves to the 'existing trustee' and then to the 'last remaining trustee'. As both of these would still include the incapable trustee, and as there is a need for both trustees to act together, this will preclude reliance on this section.[10] The same principle applies to trustees who refuse or are unfit to act.[11]

Subject to the terms of the trust, a trustee appointed under the statutory power has the same functions,[12] and may act in all respects, as if he or she had been originally appointed a trustee.[13]

[7] Trusts Law 2007, s 18(1).

[8] Trusts Law 2007, s 18(1)(i)–(iv).

[9] See L Tucker, N Le Poidevin QC and J Brightwell (eds), *Lewin on Trusts*, 19th edn (Sweet & Maxwell, 2015) paras 14-007 ('Section 36 of the Trustee Act 1925') and 14-031 ('Personal representative of the last remaining or continuing trustee').

[10] In contrast to the position under English law: the Trustee Act 1925 permits 'the surviving or continuing trustees or trustee for the time being' to exercise the power of appointing a new trustee, and the trustee that does have capacity can exercise the power alone as the 'continuing' trustee; ibid para 16-020 ('Trustee lacks capacity and no available nominated person but another trustee available to act').

[11] Under English law, the other trustees (as the 'continuing trustees') would have the power of appointment under Trustee Act 1925, s 36; ibid paras 14-016 to 14-017 ('Trustee refusing or is unfit to act'). The court would have power in those circumstances: see section VIII.E.

[12] 'Functions' includes rights, powers, discretions, obligations, liabilities and duties: Trusts Law 2007, s 80(1).

[13] Trusts Law 2007, s 18(2).

A trustee may be removed from office if it fails to exercise its power to appoint trustees.[14]

Beneficiaries do not have the power to appoint or remove trustees.[15]

A. Nature of Powers of Appointment of Trustees

In principle, the question of whether an express power to appoint and remove trustees is fiduciary is a matter of construction,[16] although it is normally a fiduciary power. Where it is fiduciary, consideration should be given at the drafting stage to matters similar to those taken into account for any other fiduciary power.[17]

This also raises questions where trustees wish to sell their fiduciary businesses.[18] That can in principle be covered by the terms of the trust or by the trust company's standard terms of business, as the duty not to profit can be excluded by the terms of the trust instrument.

On general principles, the statutory power is also a fiduciary one when vested in the existing trustee. It seems reasonably clear that the last remaining trustee will also have fiduciary duties in relation to the exercise of the power, by analogy to the position of removed trustees, who continue to owe fiduciary duties 'as though they were trustees in relation to their dealings with the trust property'.[19] However, it is thought that the last remaining trustee cannot have the same duties to be proactive, as he or she is no longer a trustee but may be passive and need not take any action unless and until called upon to do so. Of course, that is a separate question from whether he or she may be liable if he or she took action while a trustee that led to there being no trustees in the first place.

B. *In the Matter of Jasmine Trustees Limited*

In the *Re Jasmine Trustees* case,[20] Sir Michael Birt set out in some detail the reasons why the purported appointment of a successor trustee was invalid. While they

[14] Trusts Law 2007, s 18(3).

[15] There is no equivalent of the Trusts of Land and Appointment of Trustees Act 1996 (England), s 19, which reversed the decision in *Re Brockbank* [1948] Ch 206, which held that the beneficiaries, who are all of full age and capacity and are together absolutely beneficially entitled to the trust property, cannot appoint or remove trustees.

[16] Confirmed by Trusts Law 2007, s 15(2), but it is thought that this is the position under general principles: see ch 10, section V.A; see also ch 5, section VII.G.

[17] As to which see ch 10, section XIX. See also section II.B of this chapter. as an example of circumstances in which a purported appointment was invalid as the appointor had failed to comply with his duties in relation to the appointment.

[18] As an appointment (assuming the power is fiduciary) in return for a sum of money cannot stand: *Sugden v Crossland* (1865) 3 Sm & G 192; while an argument might be made that the principle should not necessarily be applied today given the very different nature of the trust industry, it is thought that the same general principles apply and that *Sugden* does still represent good law.

[19] *Virani v Guernsey International Trustees Limited* (Guernsey CA, 4 December 2002) (Judgment 11/2003).

[20] *In the Matter of Jasmine Trustees Limited* [2015] JRC 196.

will not all be relevant in every case, this does provide a helpful checklist of some of the matters retiring or removed trustees should consider investigating, and in particular those that may give cause for concern. We think it is worth setting out the reasons in full:

> In our judgment, the appointment of Kairos, in the particular circumstances of this case in relation to these Trusts, was invalid. We would summarise our reasons for so concluding as follows:–
>
> (i) There was considerable delay in supplying the standard due diligence information requested of Kairos. Mr Jenner stated in evidence that this was a routine request to a professional trustee and he would have expected there to have been a package of documents and information available for immediate provision on a regular basis.
>
> (ii) No information was provided at any stage about the financial position of Kairos or of its parent companies. Nothing was provided to show that it had expertise and experience in the field of trust administration.
>
> (iii) It appeared ultimately to be 100% owned by an individual director.
>
> (iv) No information was provided as to its insurance cover, its capital base and other matters which might be thought relevant to whether it was suitable to act as a trustee of these two substantial Trusts.
>
> (v) Although in due course the names of the three directors were provided, no information about their careers, experience in trust administration etc was ever provided. The three directors resided in New Zealand, Italy and the Isle of Man respectively and the Isle of Man director was aged 80.
>
> (vi) Kairos appeared to have no presence on the internet nor did it have an internet domain name and related email accounts. Mr Hanley was shown on the website for a company called Pearse Trustees (which appeared from its website to be an international trust company) as the manager of that company which operated from the same address as Kairos; but Kairos was not mentioned at all on the website of Pearse Trustees.
>
> (vii) The beneficiaries of the two Trusts are resident in the United States and the United Kingdom. Whilst the fact that a trustee is incorporated or carries on business in a jurisdiction where none of the beneficiaries live (as is the case for both the Cayman Islands and Jersey in relation to these Trusts), is not a reason to question the appointment of a trustee, the fact that New Zealand is on the other side of the globe and in a wholly different time-zone which would make communication between trustee and beneficiaries more difficult, is at least a factor to be considered by an appointor.
>
> (viii) Highly significantly, the father does not appear to have considered any of these matters prior to making the appointment. Thus he was unable to assist when information was requested by Jasmine/Lutea and he said merely that he expected to be in touch with one of Kairos' legal representatives in New York on 15th March. But this was of course after he had appointed Kairos.
>
> (ix) The father has explained in his affidavits why he wished to replace Jasmine and Lutea. However the sole reason that he has given for choosing Kairos as the replacement trustee is that he was advised in mid-2013 that it might be preferable to relocate the trust to a 'white listed' jurisdiction as considered from the perspective of 'relevant authorities' (Jersey, he said, not being such a white listed

> jurisdiction). He was further advised that New Zealand was such a jurisdiction and that Kairos was a New Zealand trust company which had been identified and was happy to accept the role as trustee. On enquiry by the Court, which understood that Jersey was indeed a white listed jurisdiction for OECD purposes, the Court was informed that the 'relevant authority' which the father had in mind was Italy. As none of the beneficiaries resides in Italy, it was not made clear why that would be a material consideration.[21]

C. Restrictions on the Exercise of the Power

An appointment under an express power must comply with the terms of the power, and it is thought that Guernsey law follows English law in this regard.[22]

As far as the statutory power is concerned, none of the restrictions that apply to the exercise of the statutory powers under English law apply to the Guernsey power, including the restrictions on the power to appoint additional trustees.[23]

III. Power to Remove Trustees

There are no specified statutory grounds for removal as exist under English law[24] and in those jurisdictions whose trust laws are more closely based on English law, so no specific provisions are needed in the trust instrument to exclude the application of those provisions.[25]

Nor are there any provisions that either prevent the discharge of an outgoing trustee unless there is a minimum number of continuing trustees,[26] or which prevent a reduction in the number of trustees by retirement in the guise

[21] ibid para 48.

[22] See Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) paras 14-002 to 14-003 ('Compliance with terms of an express power').

[23] ibid para 14-034 ('Power to appoint additional trustees'); see also J Kessler QC and T Pursall, *Drafting Cayman Islands Trusts*, 1st edn (Kluwer Law International, 2006) para 5.37 ('Further provisions concerning appointment of additional trustees?') and J Kessler QC, T Pursall and N Chand, *Drafting British Virgin Islands Trusts*, 1st edn (Sweet & Maxwell, 2014) para 5.37 ('Further provisions concerning appointment of additional trustees').

[24] See Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) paras 14-013 to 14-027 ('Circumstances in which the power may be exercised').

[25] See, eg, Kessler and Pursall, *Drafting Cayman Islands Trusts* (n 23) paras 5.33 ('Appointment of foreign trustees') and 5.34 ('Power to remove trustees'); and under British Virgin Island (BVI) law, see Kessler, Pursall and Chand, *Drafting British Virgin Islands Trusts* (n 23) paras 5.33 ('Appointment of foreign trustees') and 5.34 ('Power to remove trustees').

[26] This is a rule that has caused havoc – and much litigation – in a number of trusts subject to English law; see *Jasmine Trustees Ltd v Wells & Hind* [2008] Ch 194; *Adam v Theodore Goddard* [2000] WTLR 349; *LRT Pension Fund Trustee Co Ltd v Hatt* [1993] PLR 227.

of an appointment.[27] Of course, the trust itself can provide that a trustee is not discharged unless there is at least one trustee to continue as trustee.

Unlike the position on a resignation,[28] there is no statutory restriction on the removal of a trustee, even if that would mean that there were fewer than the minimum number of trustees, or indeed no trustees at all in office,[29] although anyone seeking to remove a trustee in those circumstances should be mindful of his or her fiduciary duties, where relevant,[30] and whether it is in the interests of the trust to leave it with no trustees. Such an act is only likely to be justified in fairly unusual circumstances, such as serious concerns about the current trustees, where it is not possible or practical to appoint a successor at the same time.

IV. Vesting of Property in the New Trustees

On a change of trustees or the appointment of an additional trustee, 'anything necessary to vest the trust property in [the new or additional trustee] jointly with his co-trustees (if any) shall be done'.[31] All trust property needs to be vested in the new and continuing trustees – there is no equivalent of the automatic vesting that applies under English law.[32]

V. Disclaimer of Trusteeship

No one can be compelled to accept office as trustee, but he or she is deemed to do so if he or she 'knowingly intermeddles with the trust or its affairs'.[33]

A person appointed as trustee may renounce the trusteeship, before actual or deemed acceptance, either by written notice to the settlor or other trustees, or if the settlor is deceased or cannot be found[34] and there are no trustees, by application to

[27] *Adam v Theodore Goddard* [2000] WTLR 349; Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) paras 14-037 to 14-041 ('Number of trustees'). But see section I.A.

[28] See section VI.

[29] The question of whether this is permitted without the appointment of a new trustee was apparently raised in argument in *Virani v Guernsey International Trustees Limited* (n 19) para 52, but does not appear to have been decided, so this point may not be settled; by contrast, a resignation leaving no trustees in office is not effective: see section VI.

[30] See section II.A.

[31] Trusts Law 2007, s 18(4).

[32] Under the English Trustee Act 1925, s 40.

[33] Trusts Law 2007, s 19(1).

[34] On a literal reading, a notice is effective if given to a settlor who is mentally incapable, but it is submitted that on principle, a notice to a settlor who is incapable of understanding the nature and effect of the notice should not be effective for these purposes.

court.[35] If the person appointed does not do one of those things within a 'reasonable period of time of becoming aware of the appointment', he or she is deemed to have accepted it.[36]

This is in contrast to the position under English law, which permits more informal disclaimers and implied disclaimers, even after long delays,[37] which is consistent with the principle that no one can be compelled to be a trustee. While the Guernsey position has the benefit of greater certainty, it has the potential for harsh consequences. For example, someone may be deemed to be a trustee, with all the responsibilities that entails, without ever having taken any action to accept office; and indeed, it seems, even if he or she has orally declined. If there is no settlor or trustee on whom to serve a valid notice, the deemed trustee may be required to spend money on an application to court for relief, although his or her reasonable costs will normally be payable from the trust fund.[38]

In a Jersey case,[39] a renunciation of an executorship was held to be an effective renunciation of the trusteeship arising under the will, although it seems that was decided as a matter of construction of the deeds of renunciation.

VI. Resignation

Subject to the terms of the trust, trustees (other than a sole trustee) may resign by written notice to their co-trustees,[40] and the resignation takes effect on delivery of the notice, or on such later date or event as is specified in the notice.[41] As the statutory provisions for resignation are subject to the terms of the trust, any express terms of the trust take precedence.

A resignation given to facilitate a breach of trust, or which results in there being no trustees or fewer than the minimum required by statute,[42] is of no effect.[43] This applies irrespective of the terms of the trust.[44]

A trustee ceases to be a trustee on resignation, removal or pursuant to the terms of the trust.[45]

[35] Trusts Law 2007, s 19(2).

[36] ibid.

[37] Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) paras 12-008 to 12-010 ('How a trust is disclaimed') and para 12-026 ('Effect of inaction').

[38] ibid para 12-022; see also ch 12, sections VII and VII.A.

[39] *In the Matter of the Will of Brown* [1997] JLR 137.

[40] Trusts Law 2007, s 20(1). This is in contrast to the position under English law which requires the co-trustees' consent: Trustee Act 1925 (England), s 39(1).

[41] Trusts Law 2007, s 20(2).

[42] As to which, see section I; contrast the position in relation to removal: section III.

[43] Trusts Law 2007, s 20(3).

[44] Trusts Law 2007, s 20(6) provides that only s 20(1) and (2) are subject to the terms of the trust, clearly implying that s 20(3), (4) and (5) are not.

[45] Trusts Law 2007, s 20(4).

VII. Duties of Outgoing Trustee

There are two statutory duties imposed on outgoing trustees. The first is that any trustee who ceases to be a trustee 'under … section [20] shall do everything necessary to vest the trust property in the new or continuing trustees'.

The second is that when a trustee 'resigns or is removed', he or she must 'duly surrender all trust property held by or vested in him or otherwise under his control'.[46] The second duty is subject to the right of an outgoing trustee to reasonable security for 'liabilities (existing, future, contingent or otherwise)' before surrendering the trust property.[47]

On the face of it, the second duty (and the concomitant right to reasonable security) does not apply in other circumstances in which a trustee may cease to be a trustee. In contrast, the section 20 power also applies on the 'the coming into effect of, or the exercise of a power under, a provision in the terms of the trust under or by which he is removed from or otherwise ceases to hold his office'.[48] This point has not yet been decided by the Guernsey courts, but there seems no reason in principle why a trustee who ceases to be a trustee for some other reason should have different rights and duties as an outgoing trustee.

In a Jersey case,[49] the fact that the process by which the trustee was to retire had changed to an appointment onto new trusts did not alter the trustee's duties as an outgoing trustee in any way. It is thought that, in line with that approach, the Guernsey courts would give 'removed' in section 43 a wide meaning, such that the same principles should apply to all outgoing trustees, whatever the means by which they cease to be trustees.

A. Duties in Relation to the Handover

In another Jersey case,[50] it was held:

> On the transfer of a trusteeship the outgoing trustee is under a duty to co-operate fully and actively in the transfer by making all relevant documents and correspondence available promptly to the incoming trustee and by providing any explanation to questions reasonably raised by the incoming trustee.[51]

[46] Trusts Law 2007, s 43(1)(a).

[47] Trusts Law 2007, s 43(1)(b); trustees have the same right to reasonable security before distributing assets on the termination of a trust: see ch 5, section VIII.

[48] Trusts Law 2007, s 20(4)(c).

[49] *In the Matter of the Caversham Trustees Limited* [2008] JRC 065.

[50] *Ogier Trustee Ltd v CI Law Trustees Ltd* [2006] JRC 158; see also *Re Capita Trustees Limited (as trustee of the Dunlop Settlement)* [2011] JRC 138, where the same principle was applied where an individual director refused to provide information and documents to the new trustee and costs were awarded against him on the indemnity basis.

[51] *Ogier Trustee Ltd v CI Law Trustees Ltd* (n 50) 7.

As a result, costs were ordered against the outgoing trustee on the indemnity basis as a result of its delays in providing information on the handover. It is thought that the position is the same under Guernsey law.[52]

The onus lies with the outgoing trustee to show why the normal rule should not be followed:[53]

> [The] incoming trustee, is entitled to be put in the same position knowledge-wise as the outgoing trustees and, on the basis that it has been accepted that there have been documents that the [incoming trustee] has not yet seen, it follows that there is something that in principle is capable of being disclosed.[54]

It has been held in Jersey[55] that legal advice, even where it is paid for out of trust assets, is not trust property. It is arguable that the position under Guernsey law is different, as 'trust property' includes any property a person holds that 'does not form … part of his own estate – for the benefit of another person (a "beneficiary")'. It may therefore extend to legal advice and the documents, although the point has not been decided.[56]

B. *Re Caversham*

The duty of full cooperation with the incoming trustees from the *Ogier* case was confirmed in Jersey in *Re Caversham*.[57]

The Jersey Royal Court also set out the specific matters it thought the outgoing trustee was under a duty to pursue proactively, as part of the duty to surrender the trust property,[58] in the circumstances of that case. These were as follows:

(i) Instructing lawyers in Jersey to draft the formal documents by which the assets would be appointed to the new trust and any indemnities to be given;
(ii) marshalling and preparing the assets so that they were ready to be transferred;
(iii) ascertaining the identity of the entities to whom the assets were to be transferred

[52] *Ogier* was cited with approval in *Rawlinson & Hunter Trustees SA v ITG Limited and Bayeax Limited*) (Royal Court, 30 January 2017) (Judgment 4/2017) para 46; while the decision was in relation to a Jersey law trust, it was held (obiter) that the position was the same under Guernsey law (ibid para 48). See also Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) paras 23–105 ('Transfer of trust papers on change of trusteeship') and 23–106 ('Judicial discretion'), which were cited with approval in *Rawlinson & Hunter Trustees*.

[53] *Ogier v CI Law Trustees* (n 50) para 20, cited with approval in *Rawlinson & Hunter Trustees* (n 52) para 48.

[54] *Rawlinson & Hunter Trustees* (n 52) para 64. This was the same even though the application by the incoming trustee 'could and perhaps should have made sooner than it was' (ibid para 66), and even thought the Deputy Bailiff was 'critical of the [incoming trustee] for the manner in which its position has changed since making the application' (ibid).

[55] *In the matter of the Bird Charitable Trust and the Bird Purpose Trust* [2012 (1)] JLR 62, para 21; cited with approval in *Rawlinson & Hunter Trustees* (n 52) para 49.

[56] It was said to be 'arguable' in *Rawlinson & Hunter Trustees* (n 52) para 51, but was not decided in that case.

[57] *In the Matter of Caversham Trustees Limited* [2008] JRC 065, para 8.

[58] ibid para 10.

(iv) where necessary obtaining advice on the steps required to effect and the tax implications, if any, of and cost to be incurred in the actual conveyance or transfer of the assets in the jurisdictions in which they were sited;
(v) setting out a timetable for the transfer of the assets;
(vi) providing information to the new trustee to enable it properly to accept the assets;
(vii) carrying out due diligence on the new trustee;
(viii) providing explanations to questions reasonably raised by the new trustee in relation to the assets.

Importantly, it was held that the outgoing trustee had a duty to advance all these steps together, not consecutively, so as to not to cause undue delay.

On the other hand, it was also acknowledged that the handover is a two-way process, and the outgoing trustee should not be penalised for any delays caused by the new trustees. The outgoing trustees were justified in raising concerns about the new trustees who were originally proposed, as they were unregulated companies with no assets and no insurance, thus rendering any indemnities effectively of little value, as well as raising questions as to their suitability.[59]

The key consequence was that Caversham were not allowed their trustee fees for the period of the handover, which the Court found was due to their delay or acting unreasonably in negotiations.

C. What is 'Reasonable Security'?

With regard to the question of what 'reasonable security' is, this will depend on the facts of each case. In the *Caversham* case, a proposal that the amount of the fees claimed by Caversham (which was in dispute) should be held in an escrow account under the joint control of Caversham and the new trustees was found to be reasonable. Seeking to retain the whole of the trust fund as security was not reasonable.[60]

The question of what was 'reasonable security' was also considered by the Guernsey Royal Court in 2006,[61] in the context of the amount to be retained to cover the trustee's fees, which were in dispute. The Lieutenant Bailiff adopted one of the main principles in security for costs applications, that 'the amount set by the Court must not be oppressive or unfair to the party from whom the security is required'.[62] And, quoting with approval from an English case[63] on security for costs, stated that 'the simple and single criterion is what is just in the circumstances

[59] As to the factors pointing to unsuitability, see *In the matter of Jasmine Trustees Limited* (n 20) para 48.
[60] See also *In the Matter of the Carafe Trust* [2005] JLR 159.
[61] *Walbrook Trustees (Guernsey) Ltd v Baxter (re Mrs Megan Baxter No 2 Life Interest Settlement)* (Royal Court, 20 April 2006) (Judgment 21/2006); see also *Artemis Trustees Limited and another v Martin John Sandle and Rodney Gray Denton* (Royal Court, 29 June 2016) (Judgment 28/2016) paras 26–28.
[62] *Walbrook Trustees v Baxter* (n 61) para 12.
[63] *Oded Moshe Leyvand v Amnon Barasch & others* (HC, 15 February 2000).

of the particular case'.[64] The duty of the Court in such cases was to strike a balance between the competing principles of protecting an applicant – here, the trustee's legitimate fears that Mr Baxter as successor trustee might remove assets from the jurisdiction – and the respondent – that Mr Baxter should not be prevented from pursuing his just rights (in this case the transfer of the trust property to him as successor trustee).

D. Negotiation of Indemnities

Where security is given in the form of an indemnity against the trust property, it cannot, without leave of the Court or the consent of all the beneficiaries, be greater than that to which the trustee would have been entitled had it remained a trustee.[65]

This codifies the position before the Trusts Law 2007 came into force. In a Guernsey Court of Appeal case in 2003, it was held that '[t]he Respondents had no justification in holding out for anything that went beyond [the indemnity in the trust deed]'.[66]

In the *Caversham* case, it was held that extending the indemnity to cover officers, directors and employees of the outgoing trustee was reasonable, whereas seeking to extend it to cover directors and employees of 'associates' of the trustee, or of companies in which the trustee may have invested the trust fund, was not reasonable.[67] It is thought that *Caversham* would not be followed on this point in Guernsey: if the officers, directors and employees are not entitled to an indemnity under the trust instrument, the indemnity under the instrument of appointment and retirement should not be extended to them. If it is, the new trustee giving the indemnity will be personally liable but may not be entitled to be indemnified from the trust fund in respect of that indemnity. Having said that, where the indemnity is restricted to those liabilities for which the indemnified persons would be entitled to be reimbursed from the trust fund, there would be no liability under the express indemnity in any event. On the other hand, if the restriction is limited to all liabilities except those caused by (say) the indemnified person's own fraud, wilful misconduct or gross negligence, that could create a personal liability.

Interestingly, in *Caversham*, the Court was also 'critical of the conduct of Caversham in amending their standard provisions without first taking legal advice'.[68]

[64] *Walbrook Trustees v Baxter* (n 61) para 45.

[65] Trusts Law 2007, s 43(2).

[66] *Virani v Guernsey International Trustees Limited* (n 19) para 59. In particular, it is not normally reasonable for an outgoing trustee to insist on confirmation that the trust has been properly administered, or on being released from claims from beneficiaries as a precondition for leaving office or handing over the trust property.

[67] *Caversham* (n 57) para 20.

[68] ibid 21.

E. Enforcement of Indemnities

An indemnity in writing given by a trustee or beneficiary and expressed to be in favour of a previous trustee is, subject to its terms, enforceable by the previous trustee even if that previous trustee is not a party to it.[69] It is thought that this will not benefit a director, officer or employee of the trustee – the usual solution is for the trustee to hold the benefit of the indemnity covenant as trustee for those persons.[70]

F. Non-possessory Lien

Statute provides[71] trustees with a non-possessory lien in respect of proper expenses and liabilities, which includes their fees. (If there were any doubt, it has been confirmed that 'liabilities' in section 43 clearly includes trustee fees.[72])

The lien is 'the right of the trustee, where he is not exonerated or reimbursed from the trust property, to follow, recover and appropriate the trust property for the purpose of realisation, payment and reimbursement'.[73] It continues after the trustee has ceased to be trustee and after it has surrendered the trust property, and is in addition to any other indemnity or security to which the trustee is entitled.[74] It is therefore clear that it survives where the outgoing trustee has the benefit of contractual indemnities from the incoming trustee, and even where it has the benefit of additional security, such as an escrow account or charges over trust property to support indemnities.

The lien confers an equitable interest in the trust property on the trustee.[75] It would seem to follow that the new trustee may have a duty to consider the former trustee's interest in the trust fund in the exercise of its powers, at least where it is on notice of a potential claim.[76]

The lien also survives distribution to beneficiaries, even if the trust has terminated.[77] In this respect, it appears that Guernsey law differs from English law.[78]

[69] Trusts Law 2007, s 43(4).

[70] For an example of a precedent, see R Williams, A Murphy and T Graham, *A Practical Guide to the Transfer of Trusteeships*, 3rd edn (Globe Law and Business, 2017) App F ('Guernsey law precedents'); see ibid para 14.4.12 ('Indemnities') for a discussion on the point.

[71] Trusts Law 2007, s 44(1).

[72] *Virani v Guernsey International Trustees Limited* (n 19).

[73] Trusts Law 2007, s 44(5).

[74] Trusts Law 2007, s 44(2).

[75] *Jennings v Mather* [1901] 1 QB 108, 113–14; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, refers to 'two classes of persons having a beneficial interest in the trust: first, the cestuis que trust … and second, the trustee in respect of his right to be indemnified out of the trust assets'.

[76] See section XIII.E.

[77] Trusts Law 2007, s 44(4).

[78] Under English law, the lien is normally lost on a distribution to beneficiaries, although that may not apply to a distribution by a new trustee in respect of a former trustee's lien, at least where the new

The lien is lost, however, if it is expressly waived or released,[79] or if the property:

(i) is no longer identifiable,
(ii) is in the hands of a bona fide purchaser for value or a person (other than the trustees) who derived title through such a purchaser, or
(iii) comprises real property.[80]

As the lien is lost in these circumstances, trustees will typically not rely on the statutory provisions but will insist on express contractual indemnities from the recipient of the trust assets.

A waiver of the lien might constitute a disposition and therefore be vulnerable to being set aside through a Pauline action. The required elements for a Pauline action under Guernsey law can be summarised briefly as follows:

(a) the person bringing the Pauline action must have been a creditor at the time of the transaction under attack (here, the waiver of the lien);
(b) the creditor seeking to set aside the transaction must show that the debtor was insolvent at the time of the transaction under attack (or was rendered insolvent by that transaction);
(c) the debtor's insolvency is measured on a balance-sheet basis;
(d) the creditor must show that the debtor carried out the transaction with the intention of defrauding his creditors; if the debtor carried out the transaction with more than one purpose, it suffices that the dishonest intention to defraud was a substantial purpose of the transaction.

A Pauline action is a revocatory action that, if successful, leads to the setting aside of the transaction under attack. As will be appreciated, it would be difficult in practice to establish that a waiver of a lien by a trustee was made with an intent to defraud the trustee's creditors.

G. Discharge of Outgoing Trustee

A trustee who complies with his or her duty to 'duly surrender the trust property'[81] is relieved of liability to any beneficiary, trustee or other person interested under the trust for any act or omission in relation to the trust property or to his or her functions as a trustee. However, a trustee is not by reason only of such compliance relieved of any liability:

(a) arising from a breach of trust to which he (or, in the case of a corporate trustee, any of its officers or employees) was a party or was privy,

trustee knew of the liabilities of the former trustee; *Rothmere Farms Pty v Belgravia Farms Pty Ltd* (1999–00) 2 ITELR 159; Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) paras 17-034 to 17-036 ('Continuation of former trustee's right of indemnity after appointment of new trustees').

[79] Trusts Law 2007, s 44(3)(a).

[80] Trusts Law 2007, s 44(3)(b).

[81] That is, the duty under the Trusts Law 2007, s 43(1)(a).

(b) in respect of an action to recover from him (or, in the case of a corporate trustee, any of its officers or employees) trust property or the proceeds thereof in his possession.[82]

This raises some interesting questions, which may have to be resolved by the courts. First, has an outgoing trustee complied with his or her duty if he or she has surrendered the trust property but has not done so in accordance with the handover duties outlined in cases like *Ogier* and *Caversham*? It is submitted that the trustee ought to be able to rely on this provision in those circumstances (if and to the extent that it does provide substantive protection), and that the appropriate penalty for failure for a breach of the handover duties is that the trustee may be unable to recover some or all of its trustee fees or costs (or both).

Second, however, it is not clear what protection, if any, this gives an outgoing trustee. In what circumstances would an existing trustee be liable, other than in respect of a breach of trust to which it was a party or privy? In fact, if read literally, it may put the trustee in a worse position, for two reasons. The first is that it does not take into account any exoneration clause, so on the face of it, a trustee is liable for a breach of trust even if the trust instrument exempts the trustee from liability except in the case of its own gross negligence. In addition, the trustee is liable under this provision if a director or an officer is a party to or privy to a breach of trust. Does this mean that the trustee is liable for the acts of those officers even in circumstances in which the trustee would not be vicariously liable under normal rules? It is thought that the answer to both questions must be 'no', as it cannot have been intended to put the trustee in a worse position after it has ceased to be a trustee, but that leaves open the question of what the effect of this provision is.

It appears to be based on the provisions dealing with limitation and prescription of actions,[83] which are in turn based on the equivalent provisions in the Limitation Act in England.[84] In the context of limitation periods, the purpose and effect is clear – that no such periods apply to fraud or to recovery of trust property from the trustee – in this context, their effect is less clear.

VIII. Appointment and Removal of Trustees by the Court

A. Guernsey Trusts

The Court has two statutory powers to appoint trustees, the first applying only to Guernsey trusts that have no Guernsey resident[85] trustee. A beneficiary may apply to the Court for the appointment of an additional Guernsey resident trustee.[86]

[82] Trusts Law 2007, s 43(3)(a) and (b).
[83] Trusts Law 2007, s 76; see ch 12, section VIII.
[84] Limitation Act 1980 (England), s 21(1).
[85] A company is resident where it is incorporated: Trusts Law 2007, s 80(1).
[86] Trusts Law 2007, s 54(1).

The Royal Court may appoint an additional trustee:

(a) if satisfied that notice of the application has been served on the existing trustees,
(b) having heard any representations of the existing trustees, of the settlor or his personal representatives, of the other beneficiaries, and of any other person described in section 32(2), and
(c) having ascertained that the person nominated is willing to act …[87]

Section 32(2) of the Trusts Law 2007 provides that the terms of the trust may require a trustee to consult or obtain the consent of another person before exercising any functions.[88]

B. General Power

The Court has a wide statutory power to make orders in relation to trustees generally, whether or not it is a Guernsey trust or a foreign trust, including for the removal of trustees and the appointment of new or additional trustees.[89] The Court also has power to make orders in relation to the appointment and removal of trustees under its inherent jurisdiction in relation to trusts, in line with Jersey authority.[90]

The application may be made by HM Procureur, a trustee, a settlor, a beneficiary, any person whom the trustee must consult or whose consent it must obtain, the enforcer (in relation to a non-charitable purpose) or, with leave of the Court, any other person.[91]

Where the Court removes or appoints trustees:

(a) it may also impose 'such requirements and conditions as it thinks fit, including requirements and conditions as to the vesting of trust property'; and
(b) subject to the Court's order, a trustee appointed by the Court 'has the same functions and may act in all respects as if he had been originally appointed as trustee'.[92]

C. Hostile Removal Applications

The Guernsey Court has not considered this jurisdiction, but a number of cases have come before the Jersey courts in respect of very similar legislation, where there are hostile applications by beneficiaries to remove trustees. In those cases the

[87] Trusts Law 2007, s 54(2).
[88] See ch 10, section II.A.
[89] Trusts Law 2007, s 69(1)(a)(ii); see also ch 12, section III.A.
[90] *West v Lazard Bros* [1987–88] JLR 414.
[91] Trusts Law 2007, s 69(2).
[92] Trusts Law 2007, s 69(3).

Jersey courts have applied English legal principles,[93] in particular those laid down by the Privy Council in *Letterstedt v Broers*.[94]

In particular, the Jersey courts have held that they have discretion to order removal if there is misconduct, or if there is hostility between trustee and beneficiary that is affecting the administration of the trust.[95] Mere friction between the trustee and beneficiary is insufficient if it does not render the trust unmanageable or is caused by the administration of the trustee.[96]

Where the trustee had an obvious conflict of interest, it should resign from one or preferably both offices without applying to the Court for directions.[97] The Court will remove a trustee who fails to recognise an obvious conflict of interest. The trustee does not need to resign immediately, as it is entitled to make reasonable enquiries and seek legal advice on the issue. In addition, it will often be entirely reasonable for the trustee to seek the Court's directions.

It is thought that Guernsey would apply the same principles, having regard to the Jersey cases.

D. Other Removal Cases

In circumstances other than hostile removal cases, it is submitted that the Court will have regard to the English decisions, but care should be taken, as the statutory test that applies under English law[98] does not apply under Guernsey law, although it may be that Guernsey will adopt similar principles. Indeed, there are good arguments for doing so, in that it should create greater certainty and confidence in the jurisdiction, given the substantial body of case law in England on the issue.[99]

[93] *West v Lazard Bros* (n 90); as to the English principles, see Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) paras 13-062 to 13-072 ('By the court under its inherent jurisdiction').

[94] *Letterstedt v Broers* (1884) 9 App Cas 371, [1884] UKPC 18.

[95] *West v Lazard Bros* (n 90).

[96] *Parujan v Atlantic Trustees* [2003] JLR N[11].

[97] *In the Matter of the E, L, O and R Trusts* [2008] JLR 360. In this case, there was a dispute between the principal beneficiaries of two different sets of trusts with the same trustee, such that the trustee was likely to be required to be both claimant and respondent in the same proceedings.

[98] Under English law, the statutory test is that the appointment of new trustees is 'expedient' and that it is 'inexpedient, difficult or impracticable' to make the appointment without the assistance of the court; Trustee Act 1925 (England), s 41(1). Section 41 expressly confers jurisdiction on the court if a trustee lacks capacity, is bankrupt, in liquidation or has been dissolved. See Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) para 15-005 ('Expediency of making appointment'), paras 15-006 to 15-008 ('Who may be appointed') and paras 15-009 to 15-010 ('Number of trustees to be appointed').

[99] See Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9), chs 15 ('Appointment of New Trustees by the Court') and 16 ('Appointment of New Trustees in Place of Trustees Lacking Mental Capacity) where applicable, and in particular para 15-005 ('Expediency of making appointment'), paras 15-006 to 15-008 ('Who may be appointed') and paras 15-009 to 15-010 ('Number of trustees to be appointed').

E. Incapacity

A trustee does not automatically cease to hold office in the event of mental incapacity.[100] It is therefore prudent to ensure that it is possible to remove trustees and appoint replacements pursuant to the terms of the trust. If that is not done, an application to court can be made under the Trusts Law 2007.[101]

Where the sole remaining trustee is declared incapable by reason of mental disorder, of managing and administering his or her property and affairs by the Royal Court (and so becomes a 'patient'), the Court has power[102] to order the exercise of any powers vested in the patient as trustee. If the Court makes an order for the appointment or removal of trustees, or for retirement from a trust, it may also make any consequential vesting or other orders in relation to the trust property as the case may require, including any orders that could have been made by the Court under the Trusts Law 2007.[103]

If a trustee carries on any regulated activity (which includes acting as a trustee) from the Bailiwick by way of business,[104] it will need to be licensed. Contravention is an offence[105] but does not in itself affect the capacity of the trustee to act as such, and the trust will take effect in accordance with its terms. The position may be different if the trustee is a company and its constitutional documents prevent it from acting as a trustee without an appropriate licence, but that will depend on the law governing that company, a full discussion of which is beyond the scope of this book.

F. Insolvency

As with incapacity, it is prudent to ensure that changes of trustees can be made pursuant to the terms of the trust; but if that is not possible, the liquidator (whether a liquidator of a Guernsey company or of a foreign company) of the last remaining trustee will normally have power to appoint new trustees.[106]

However, where there is no one who has the power to appoint and remove trustees in that situation, it is better not to include a standard provision, still often seen, that a trustee automatically vacates office on becoming subject to insolvency proceedings, as that will necessitate applications to court in each case rather than the passing of powers to the liquidator. On a liquidation of a Guernsey company, the liquidator is able to exercise all the powers that the directors otherwise could

[100] ibid para 16-001 ('Effect of lack of mental capacity on trusteeship').
[101] Under Trusts Law 2007, s 69(1); see section VIII.
[102] Mental Health (Guernsey) Law 2010, Third Schedule, para 3(1)(k).
[103] Mental Health (Guernsey) Law 2010, Third Schedule, para 3(2).
[104] See ch 16 of this volume.
[105] See ch 16, section IV.
[106] Trusts Law 2007, s 18(1)(iii).

have exercised,[107] so that as long as the trust company remains as trustee, the liquidator can carry out the administration of the trust (albeit, in practice, it will usually seek to appoint a new trustee immediately).

IX. Trustee Remuneration

A. General Position

A trustee cannot charge a fee for its services, unless authorised by

(a) the terms of the trust;
(b) the consent in writing of every beneficiary; or
(c) an order of the Court.[108]

In order for (b) to apply, all of the beneficiaries would need to be ascertainable, which is not possible if there is any chance that the class of beneficiaries is not closed, which is often the case with discretionary trusts.[109] If any of the beneficiaries are minors or are not of full capacity, the consent of the Court should be obtained, as a matter of prudence.

It has been held that the following clause authorising trustee remuneration only authorised 'reasonable, proper and proportionate fees or remuneration, for work shown to have been done, and charged in accordance with either an actual fee/remuneration agreement, or with usual practice, dependent on evidence', and that the burden of proving entitlement to any such fees fell on the trustee:

> Any Trustee being a person engaged in any profession or business shall be entitled to … charge and be paid all usual professional and other charges for business transacted time spent and acts done by him or his firm in connection with the administration of the trusts hereof including acts which a trustee not being in any profession or business could have done personally …[110]

B. Court's Power to Approve Trustee Remuneration

Under section 69(1)(a)(ii) of the Trusts Law 2007 the Court has jurisdiction to make an order in respect of 'a trustee, including … the appointment, remuneration or conduct of a trustee'.

In a 2004 case,[111] a trust was created in 1969 that, although it provided for the appointment of new trustees, contained a clause that clearly meant that only

[107] Companies (Guernsey) Law, 2008, ss 395 and 397.
[108] Trusts Law 2007, s 35(1); confirmed in *Artemis Trustees Limited and another v Martin John Sandle and Rodney Gray Denton* (Royal Court, 29 June 2016) (Judgment 28/2016) para 32.
[109] As to the meaning of 'beneficiary', see ch 9, section I.
[110] *Artemis Trustees Limited* (n 108) paras 35–36, although the Lt Bailiff expressly did not make any decision on construction of the charging clause at a 'detailed level, merely as a matter of general approach'.
[111] *In the Matter of the H Sossen 1969 Settlement* (Royal Court, 28 May 2004) (Judgment 16/2004).

the original trustee could charge for its services. In 1971, the group of companies of which the original trustee was a member reorganised and a new trustee was appointed. In 1973, the settlor gave an indemnity in favour of the successor trustee, to the effect that if the successor trustee charged its fees to the trust fund, the settlor would indemnify the successor trustee. The successor trustee acted on the basis of the indemnity and paid its own fees out of the trust fund, with the settlor's knowledge and approval, up to the date of the settlor's death in 1992. After the settlor's death, the remuneration was paid to the successor trustee with the tacit approval of the beneficiaries. When it was proposed to transfer the trusteeship in 2003, it became apparent that the proposed new trustee would not be able to charge for its services. Therefore, an application to Court was made:

(a) to approve the remuneration taken by the successor trustee, whilst it had been in office; and
(b) to replace the existing remuneration clause in the trust instrument with one that would allow any trustee to be remunerated.

The application was first brought to Court by the successor trustee, and a separate advocate was appointed to make enquiries of the secondary beneficiaries. The support of some of the primary beneficiaries had been put before the Court already. A pragmatic view was taken by the Court, to the effect that regard should be had to the letters of wishes made by the settlor. These made clear which of the beneficiaries could expect to benefit under the trust, and only those beneficiaries were consulted. The Deputy Bailiff stated:

> In Guernsey and in other jurisdictions, professional trustees ordinarily undertake business only on the basis of reasonable remuneration usually on the basis of their standard terms and conditions which incorporate remuneration clauses. It would be [a] wholly exceptional case for a professional trustee not to be remunerated and in such a case there would inevitably be features particular to that case. There would appear to have been no special relationship in this case. This case has the hallmark of a normal professional arm's length business relationship as the remuneration clause for the benefit of the Original Trustee indicates.[112]

It was argued that Guernsey customary law had recognised that those who managed the property of others were entitled to remuneration.[113] In addition, English law had developed to the extent that:

(a) the English court has an inherent jurisdiction to approve trustee remuneration;
(b) this could be for past work, and could also be used to increase the remuneration that might be authorised by a trust deed; and
(c) it is in the interests of the beneficiaries that a trust should be well administered, and often this will mean that the trustee is remunerated appropriately.[114]

[112] ibid, para 15.
[113] J. Gallienne, *Traité de la Renonciation par Loi Outrée et de la Garantie* (1845) 244.
[114] In *Re Duke of Norfolk's Settlement Trusts* [1982] 1 Ch 61; *Foster v Spencer* [1996] 2 All ER 672; and *Perotti v Watson* and others [2001] EWCA Civ 116.

The Royal Court concluded that:

(a) it has both an inherent jurisdiction and a statutory power[115] to approve remuneration (including past remuneration) for a trustee;
(b) the arrangement between the successor trustee and the settlor in the particular case had worked well for over 30 years;
(c) the original trustee was entitled to remuneration, and the trust instrument provided for successor trustees but was silent as to whether they should be remunerated;
(d) the successor trustee wished to resolve the issue in order to facilitate the appointment of a new trustee and to avoid any future allegation of a breach of trust;
(e) the 'primary' beneficiaries (that is, those most likely to benefit, in accordance with the letters of wishes) supported the application, and there was no reason to suppose that future beneficiaries or the other unrepresented beneficiaries of the trust would take a different view.

That part of the application dealing with the replacement of the trust's limited remuneration clause with a 'standard provision' was brought under variation of trusts jurisdiction in section 52(1) of the 1989 Trusts Law.[116] That provision allows the Court to vary 'the powers of management or administration of any trustees', where such arrangement is for the benefit of those who have not been born or cannot consent for themselves. In that case, it was proposed to appoint a new trustee, and it was noted that any professional trustee would act only on the basis that it could be properly remunerated. In approving the application on this point, the Deputy Bailiff said:

> [I]t is a benefit to all Beneficiaries that any professional trustee with the relevant skill and expertise can undertake the trusteeship. Not to approve it would mean that a new Trustee would have to apply to the Court perhaps at regular intervals. It is so exceedingly unlikely that any professional trust company would agree to take on the trust under such conditions.[117]

C. *Re Kleinwort Benson Trustees (Guernsey) Limited*

In *Kleinwort Benson Trustees (Guernsey) Limited*,[118] an application was made in respect of an English law trust over which the Guernsey Court had jurisdiction, as the trustee was resident in Guernsey.[119] The trust had been set up in 1966 and

[115] Trusts Law 1989, s 30(1), now Trusts Law 2007, s 35(1)(c).
[116] Trusts Law 1989, s 52(1); now Trusts Law 2007, s.57(1); see further under ch 14, section IV.
[117] *In the Matter of the H Sossen 1969 Settlement* (n 111) para 29.
[118] *Kleinwort Benson (Guernsey) Trustees Limited, Gilligan and Robins* (Royal Court, 12 March 1998).
[119] Pursuant to the Trusts Law 1989, s 4(b)(i); now the Trusts Law 2007, s 4(1)(b)(i); see ch 6, section III.

provided that trust corporations (as defined under English law) or professional persons, acting as trustees, could charge fees. The trust was due to come to an end in 2000. Two of the beneficiaries risked incurring substantial fiscal disadvantages if they took outright shares of the trust fund in 2000. Therefore, the trustees wished to re-settle approximately one half of the trust fund due to those beneficiaries. Those beneficiaries, their minor children and their professional advisers supported this proposal. The trustees were able to carry out this proposal under the terms of the trust instrument, without the consent of the Court. However, Kleinwort Benson (Guernsey) Trustees Limited wished to have a clause authorising its remuneration, as it did not fall within the definition of 'trust corporation' within the trust instrument, and therefore it fell outside the terms of the existing remuneration clause. The Court accepted that the Guernsey trust company had built up a good relationship with the beneficiaries and that, if it had been operating in England, there was little doubt that it would have had the status of a trust corporation. On that basis, having regard to English authority[120] and to the fact that the beneficiaries could return to court if they became discontented, permission was granted to insert a clause into the trust instrument authorising general trustee remuneration.

D. Trustee Fees after Ceasing to be Trustees

The Royal Court has held that trustees are not entitled to any fees after they have been validly removed.[121] In another case, the trustees being removed remained as trustees following their removal as trustees, as the trust deed expressly provided that they did not cease to be trustees until such time as reasonable security had been provided. In principle, they were therefore entitled to receive remuneration after their 'removal'.[122] But as the successor trustees had been validly appointed, they were co-trustees with the removed trustees, so the removed trustees would only be entitled to remuneration for work done 'with the authorisation, approval or consent of the [successor trustees]'.[123]

E. Termination Fees

It has been held in a recent Cayman Islands case that a termination fee must be 'reasonable'.[124] A reasonable fee is 'one which is in proportion to the amount of

[120] In *Re Duke of Norfolk's Settlement Trusts* [1982] 1 Ch 61.
[121] *Virani v Guernsey International Trustees Ltd* (Royal Court, 1 August 2003) (Judgment 36/2003) para 37.
[122] *Artemis Trustees Limited* (n 108) para 56.
[123] ibid para 60.
[124] *Scotiabank & Trust (Cayman) Ltd v David Axelrod & others* (FSD 97/13; Grand Court, 1 June 2015).

time spent on non-routine services and the level of skill, training and experience required of those performing the services'.[125]

The 1 per cent termination fee had been agreed by the protectors in accordance with the terms of the trust instrument, and the court heard evidence that a percentage termination fee was usual in the industry. But it held that while an industry standard provides some evidence of reasonableness where there is a free market, it is not conclusive. On the facts, much of the time spent by the trustee was due to its own 'disorganisation' (eg it spent an 'inordinate' length of time trying to track down the fee agreement) and, as such, it could not justify that level of fee.

It is worth noting that Henderson J also said that this was *not* a claim in contract, so the contractual cases on penalties would not seem to be directly relevant.

The basis for this decision is not clear, as there are no reasons given why an agreed fee freely entered into should be unenforceable. It may be that there is a possible public policy issue, but in the absence of any discussion on the point, the decision must be regarded with some caution. It is submitted that this case would not in normal circumstances be followed in the Guernsey courts.

X. Trustees' Expenses

Trustees have a statutory right to pay or to reimburse themselves from the trust property for all expenses and liabilities properly incurred in connection with the trust.[126]

This is in very similar terms to the right under English law, so the Guernsey courts will have regard to English law[127] to the extent it is relevant with regard to the trustee's indemnity provision, in the absence of Guernsey authority. The Guernsey courts have applied the English legal principles in relation to a Jersey law trust,[128] and the Jersey statutory provision[129] is also in very similar terms.

However, subject to the terms of the trust, the cost of purchasing and maintaining professional indemnity insurance is a proper expense for this purpose, except to the extent that it covers the trustee's own fraud, wilful misconduct or gross negligence.[130] This reverses the English common law rule that trustees may not normally pay for indemnity insurance from the trust fund as it is a benefit to the

[125] ibid para 15.
[126] Trusts Law 2007, s 35(2).
[127] Trustee Act 2000 (England) s 31(1); Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) ch 21 ('Indemnity of Trustees').
[128] *The Tchenguiz Discretionary Trust* (Royal Court, 27 November 2015) (Judgment 54/2015) para 7; Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) paras 21-003 et seq ('Indemnity out of trust property in respect of administration expenses – the general principles').
[129] Trusts (Jersey) Law 1984, Art 26(2).
[130] Trusts Law 2007, s 35(3).

trustees, not the trust.[131] There is no reason in principle why the terms of the trust could not permit the purchase of insurance to cover gross negligence.

It has been held that the sole test of whether the trustee has a right to pay or reimburse a liability from the trust fund is whether it was properly incurred, not whether it was properly allowed to continue.[132] Where the liability has been properly incurred but improper conduct by the trustee leaves it in place rather than discharging it, that will be a breach of trust:

> But the measure of the loss thereby caused to the beneficiaries will by no means usually be equivalent to the amount of the liability. Generally speaking, liabilities are not discharged without any cost to the person liable.[133]

It is still an open question as to whether an exoneration provision that excludes the trustee's liability for negligence permits the trustee to pay out of the trust fund liabilities incurred as a result of its own negligence, in the absence of an enlarged indemnity provision.[134]

A. Rights of Former Trustees to Indemnity from the Trust Fund

The general principle is that former trustees are entitled to reimbursement of expenses incurred for the benefit of the trust but not for those incurred for the benefit of the trustee personally.[135] With regard to an outgoing trustee's lien, or the right under a trust deed to have 'reasonable security',

> work done or expense incurred (a) to ascertain the position with regard to whether an outgoing trustee was in law and fact, entitled to such benefits and, once it was ascertained that he was, (b) to identify the nature or extent of any dispute as to such entitlement, would properly be regarded as a trust administration expense in principle. This is because the acceptance of a lien, or, where it is expressly provided in the trust deed, the provision of reasonable security for liabilities, is an obligation of the trust, which would have to be performed in the course of the due and proper administration of the trust. However, once matters progress further and such work or expense becomes identifiable as being for the objective of fighting the trustee's own corner either against

[131] See, eg, *Kemble v Hicks* [1999] PLR 287.

[132] *Investec v Glenalla* [2018] UKPC 7 [106]–[116]; while this concerned an appeal from the Guernsey Court of Appeal, it was in respect of the equivalent Jersey law provision in the Trusts (Jersey) Law 1984, Art 26(2), which refers to liabilities 'reasonably' rather than 'properly' incurred. It is not thought that there is any substantive difference.

[133] *Investec v Glenalla* [2018] UKPC 7 [112].

[134] Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) para 21-008 ('Excluding, restricting or enhancing the statutory right of indemnity').

[135] *Virani v Guernsey International Trustees Ltd* (n 121); *Thommessen v Butterfield Trust (Guernsey) Ltd* [2009–10] GLR 102; *Artemis Trustees Limited* (n 108) paras 43 and 47.

> the trust, or separately from the interests of the trust, that work or expense would clearly fall on the 'wrong' side of the line.[136]

Items are to be excluded 'not because they are of a benefit to the Trustee, but because they are of not sufficient benefit to the trust'.[137]

In applying the test, the Lt Bailiff noted certain general points:

(a) the level of charge may be relevant, so that a piece of work carried out at a low cost may be reasonable while the same piece of work or expense at a high cost would not be;[138]
(b) withholding legal advice from incoming trustees prevents the outgoing trustees' arguing that the advice was taken to any extent for the benefit of the trust;[139]
(c) the actual fee still needs to be justified as appropriate, that is, as reasonable and proportionate, on general principles.[140]

Trustees who had been removed were not entitled to recover the fees of their legal advisers from the trust fund after that date, for resisting their removal, as there was no 'tenable argument to the effect that the former trustees had not been lawfully removed as trustees'.[141]

Conversely, where the outgoing trustees have acted properly and reasonably in retaining the assets so as to enable them to enforce their lien, they are still acting in a fiduciary capacity in relation to those assets and are entitled to an implied equitable indemnity in relation to their expenses in the discharge of those functions.[142]

XI. Trustees *de Son Tort*

A trustee *de son tort* is a constructive trustee.[143] This can arise where someone assumes the character of a trustee without being validly appointed. The Jersey courts have applied English legal principles,[144] and it is thought that the Guernsey courts will do the same.[145]

[136] *Artemis Trustees Limited* (n 108) para 64.
[137] ibid para 68.
[138] ibid para 70.
[139] ibid para 71.
[140] ibid 72; the specific claims for the outgoing trustees' fees and expenses were dealt with in *Artemis Trustees Limited and another v Martin John Sandle and Rodney Gray Denton* (Royal Court, 2 June 2017) (Judgment 7/2018).
[141] *Artemis Trustees Limited* (Judgment 7/2018) (n 140) para 21.
[142] *The Tchenguiz Discretionary Trust* (n 128) para 19.
[143] As to the distinction between the two different types of constructive trustee, see Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) paras 7-010 to 7-026.
[144] *Cunningham v Cunningham* [2009] JLR 227.
[145] As to the position under English law, see Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (n 9) paras 42–101 to 42–125 ('Trustees *de son tort*').

Where the appointment of trustees was invalid but the trustees had been unaware of the problem, the trustees may apply to the Court in Guernsey to have the steps they have taken as trustee ratified. However, there are limits on the powers of the Court to ratify past actions of the trustees. Ratification can be broken down into three different categories:

(a) confirmation by perfection of an imperfect act or transaction;
(b) confirmation by replacement of a tainted or doubtful transaction by an effective one with a similar effect; and
(c) confirmation by non-intervention in acts or omissions which were not or may not have been authorised but have nevertheless actually been acted upon, so that these acts or omissions remain undisturbed.[146]

Category (a) (for example, where a principal ratifies the unauthorised acts of an agent) takes effect retrospectively, but it is thought that it is not normally available to trustees and the Court has no general jurisdiction to validate invalid exercises of powers by trustees *de son tort* and thereby change the trusts on which the trust fund is actually held.[147] If the trust instrument does not already confer the necessary power on the trustees, the Court has a statutory power to do so, under its jurisdiction to approve a variation (as to which, see chapter 14, section IV).

A category (b) confirmation is not retrospective, so if a distribution is confirmed in that way, it is likely to be treated as taking place on the date of the Court order, which may have different tax or other consequences from a retrospective ratification.

Where a trustee *de son tort* has distributed trust property to a beneficiary in breach of trust (i.e. where the purported trustee has exercised a dispositive rather than an administrative power), it is doubtful that the Court could ratify that distribution in the sense of category (a) above. However, the Court can direct the trustee *de son tort* not to seek to recover that distribution and such an order will permit the trustee to administer the trust going forward on the footing that the distribution was validly made.[148]

XII. Dealings with Third Parties

It is trite law that a trust is not a legal person, and that a trustee acts as principal and not as agent for the trust. A trustee incurs personal liabilities subject to a right of reimbursement from the trust fund if those liabilities have been

[146] *In the matter of the Z Trust* [2016] JRC 048 para 64; effectively reversing *In the Matter of the Representation of BB* [2011] JLR 672 (also known as *Re D Retirement Trust*) with regard to the power of the Court to effect a retrospective ratification (ie under category (a)).
[147] Ibid [71].
[148] Ibid [80]; see also *In the matter of the C Trust* [2019] SC (Bda) 44 App (22 July 2019) para 25.

properly incurred. This often causes problems for trustees and third parties when they enter into commercial transactions.[149]

That position has been modified by statute in Guernsey so that (i) the trustee does not incur any personal liability and (ii) the third party's claim extends only to the trust property, provided the trustee has informed the third party, or the third party is otherwise aware that it is acting as trustee.[150] If the trustee fails to inform the third party that it is acting as trustee and the third party is not aware of that fact, the trustee incurs personal liability subject to a right of indemnity against the trust property, unless it has acted in breach of trust.[151]

This provision does not prejudice any breach of trust claim against the trustee, nor any claim for breach of warranty of authority,[152] and applies whatever the law governing the transaction, but of course that other law may not apply the same rules.

A. The Meaning and Effect of Section 42

The equivalent, though not identical, Jersey provisions[153] were considered in some detail by the Privy Council, on appeal from the Guernsey Court of Appeal.[154] This case concerned a Jersey trust (the Tchenguiz Discretionary Trust) with a Guernsey trustee, where the former trustees had entered into loans with a number of BVI companies connected with the trust. The trustee owed large sums to trust-owned BVI companies, which owed large sums to Kaupthing Bank. The bank called in the loans and the BVI companies defaulted and were placed into liquidation. The liquidators then brought proceedings on behalf of the companies against the trustee for recovery of the sums owed by it. The trust lacked the assets to make repayment to the BVI companies of the sums owed by the trustee – thus the trust was 'insolvent'. The question therefore arose as to whether the trustee was personally liable to repay the loans.

It was held that the effect of section 42 was

> to abrogate the rule of English law that the law looks no further than the legal entity which has assumed the liability. It deals with the status of the trustee against whom the claim is made, introducing a legal distinction between his two capacities, personal and fiduciary. It provides that he may be treated as incurring liabilities not personally but 'as trustee', and therefore without recourse to his personal estate …[155]

[149] For a discussion of the issues that arise, see R Grasby, A di Iorio, N Porteous and T Pursall, 'Trustees & commercial transactions: why the BVI is a trust jurisdiction of choice' (24 March 2015), available at www.lexology.com.
[150] Trusts Law 2007, s 42(1).
[151] Trusts Law 2007, s 42(2).
[152] Trusts Law 2007, s 42(3).
[153] Trusts (Jersey) Law, Art 32.
[154] *Investec v Glenalla* [2018] UKPC 7.
[155] ibid [61].

However, the article does not affect the pre-existing law in any other way. A creditor can therefore still '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'.[156] That was based in part on Article 54 of the Trusts (Jersey) Law, which confirms that creditors' rights against the trust fund are only by way of subrogation to the trustee's rights, and there is no exception where Article 32(1)(a) applies. There is a similar provision in section 74 of the Trusts Law 2007:

> Where a trustee becomes bankrupt, or upon his property becoming liable to arrest, saisie or similar process of law, his creditors have no recourse against the trust property except to the extent that the trustee himself has a claim against it or a beneficial interest in it.

It does not therefore give the third party direct recourse against the trust property.

The second Court of Appeal hearing in the *Investec* case[157] noted that the equivalent provisions under Guernsey[158] law 'are to the same effect'.[159]

B. Drafting Issues

There is a good chance that the English courts and others that apply similar conflict rules on this point will reach the same conclusion, but of course there no guarantee that they will do so. For example, it was noted in the *Investec* case that the fact that Guernsey has very similar legislation meant that 'there is no issue as to public policy in Guernsey being offended by such a result'.[160] The same policy consideration would clearly apply in the BVI[161] and, of course, in Jersey, but the same does not apply in England, the Cayman Islands or in most other trust jurisdictions.

There is therefore still no substitute for express provisions in the relevant contract, limiting liability in the appropriate way, but it may also be prudent to refer to section 42 of the Trusts Law 2007 expressly in the contract itself, so that it is incorporated into the contract. In that way, it may be more likely that it will be upheld by the courts of the jurisdiction of the proper law of the contract.[162]

[156] ibid [62].

[157] *Investec v Glenalla* (CA, 29 October 2014) (Judgment 41/2014).

[158] Trusts Law 2007, s 42.

[159] *Investec v Glenalla* (n 156) para 110.

[160] *Investec Trust (Guernsey) Limited et al v Glenalla Properties Limited et al* (CA, 27 June 2014) (Judgment 28/2014) para 106.

[161] See Grasby et al, 'Trustees & commercial transactions: why the BVI is a trust jurisdiction of choice' (n 148).

[162] For a more detailed discussion of some of the issues arising from the *Investec* decision, see T Pursall, 'Limited Liability for Trustees? Part II: Practical Implications of Investec v Glenalla for Trustees and Third Parties' [2019] 5 PCB 132.

C. Protection of Persons Dealing with Trustees

Section 75(1) of the Trusts Law 2007 does provides some protection for third parties dealing with trustees:

> A bona fide purchaser for value without notice of a breach of trust –
>
> (a) may deal with a trustee in relation to trust property as if the trustee were the beneficial owner thereof, and
>
> (b) is not affected by the trusts on which the property is held.

The protection this gives a third party depends on 'notice', and it is thought that this is intended as a statutory enactment of the common law rules, without making any substantive changes to them. Does it mean that a third party should ensure that it does not see the trust instrument so it will not be on notice of the trustee's lack of power or failure to comply with trust requirements? It is thought not, as that approach only works if the doctrine of constructive notice[163] does not apply, and while the extent of the doctrine in this situation may not be entirely settled, it is reasonably clear that a modified form of the doctrine does apply:

> The test is whether a reasonable person in the recipient's position should either have appreciated that it was receiving money subject to another's proprietary right, or should have made inquiries or sought advice which would have revealed the probable existence of the right. The court would take into account the past experience of the recipient; any expert advice available to it; any routine procedures followed in transactions of the kind in question; and whether on the facts known to the defendant a reasonable professional in his position would have serious cause to question the propriety of the transaction. Unless and until the recipient is put on inquiry as to wrongdoing, he is entitled to assume that he is dealing with honest people.[164]

It means that the third party does not need to make any further enquiries about the exercise of the trustee's powers to ascertain if the trustee might be acting in breach of trust, provided it is not on actual notice of a potential breach. Indeed, this suggests that the third party should make reasonable enquiries to satisfy itself that the trustee has power to enter into the transaction and has complied with any formal requirements under the terms of the trust. Provided the third party has no actual notice of a breach, after making such enquiries, it is thought that it is not liable and can rely on section 42.

[163] That is, being deemed to be on notice of matters that would have been ascertained if reasonable enquiries had been made. Contrast the position under Jersey law, where only 'actual notice' is sufficient: Trusts (Jersey) Law 1984, Art 55(1).

[164] J McGhee QC (ed), *Snell's Equity*, 33rd edn (with 4th supplement) (Sweet & Maxwell, 2018) para 4-035 ('Constructive notice –Commercial transactions not involving land').

D. Persons Paying or Advancing Money to Trustees

There is statutory protection for persons paying or advancing money to trustees:

> A person paying or advancing money to a trustee is not concerned to see –
> (a) that the money is wanted,
> (b) that no more than is wanted is raised, or
> (c) that the transaction or the application of the money is proper.[165]

This appears to have been based on section 17 of the English Trustee Act 1925, although that provision is limited to the protection of purchasers and mortgagees.

XIII. Insolvent Trusts

A. What is an Insolvent Trust?

The term 'insolvent trust' is, strictly, a misnomer as a trust is not a legal entity, but we use it here as useful shorthand to refer to a situation in which the trustee is unable to pay the trust liabilities from trust assets as they fall due. It has been held in the Jersey Royal Court that the relevant test for these purposes is a cash-flow test.[166]

In those circumstances, as the trustee's liabilities are normally limited to the value of the trust fund,[167] there needs to be a means of regulating the way in which trust assets are to be realised and applied, and how costs are to be dealt with. Until recently, there had been very little authority on these points, but that has changed with a recent case in Jersey that has resolved a number of those issues, and it is thought that the Guernsey courts would follow the same approach.[168]

B. Appointment of an Insolvency Practitioner

Once there is an insolvency or probable insolvency,

> the trustee and all those holding fiduciary powers in relation to the trust can only exercise those powers in the interests of the creditors. The trustee or fiduciary of such a trust would be wise therefore to exercise his, her or its powers either with the consent

[165] Trusts Law 2007, s 75(2).
[166] *In the Matter of the Z II Trust* [2015] (2) JLR 108, paras 28–29.
[167] See section XII.A.
[168] Although, at the time of writing, the decision is currently the subject of an appeal.

> of all of the creditors or under directions given by the court. A trust being administered on the basis that it is insolvent, is administered for the benefit of the creditors as a class and not for the majority of them, however large that majority may be, in the same way that a liquidator of a company in a creditors' winding up owes his or her duties to the creditors of the company as a class, not to individual creditors.[169]

The Court has the power to appoint an insolvency practitioner to wind up an insolvent trust,[170] but it would usually be more appropriate for the trustees to carry out the winding up:

> Where, however, as here, there are professional trustees in office with no unmanageable conflict, it would ordinarily be much more cost effective, and therefore in the interest of the creditors, for those trustees to remain in office and to conduct the winding up process under the supervision of the Court.[171]

On the other hand, if there were lay trustees who were ill-equipped to conduct the winding up, or the professional trustee had a real conflict that made it impractical for it to conduct the winding up, it may be in the interest of the creditors to appoint a receiver: in this regard, the views of the creditors would 'carry great weight'.[172]

C. Priority of Creditors

In *Re Z*,[173] Equity Trust (the former trustee) retired in favour of Volaw on 11 October 2006, and Volaw retired in favour of Rawlinson & Hunter (the current trustee) in October 2015. In December 2015, the former trustee settled a claim (the Angelmist proceedings), which had commenced in 2012, for over £18m out of its own funds, and claimed reimbursement from the trust fund. The difficulty was that the trust fund was insolvent, as the only asset was a loan due from a related trust, the Z III Trust, which was for £186m but valued at around £6m, and the liabilities (excluding the former trustee's claim) amounted to around £211m, representing unsecured loans to connected parties.

The former trustee argued it had priority over the claims of other creditors, by virtue of being first in time, in which case it would recover the full £6m. On the other hand, if its claim ranked *pari passu*, it would only recover some £330,000. The case was determined on the following assumptions:

(a) The former trustee was and remained entitled to be indemnified from the assets of the Z II Trust in relation to all and any liabilities and costs arising from or in relation to the Angelmist proceedings.

[169] *In the Matter of the Z II Trust* (n 166) paras 32–33.
[170] *In the Matter of the Z III Trust* [2015] (2) JLR 175, para 29; this is based on the statutory jurisdiction in Jersey under Art 51 of the Trusts (Jersey) Law 1984; the equivalent jurisdiction in Guernsey (s 69(1) – see ch 12, section III.B) is, if anything, wider.
[171] *In the Matter of the Z III Trust* (n 169) para 31.
[172] ibid para 30.
[173] *In the Matter of the Z Trusts* [2019] JCA 106.

(b) The former trustee did not enjoy the protection of Article 32(1)(a)[174] of the Trusts (Jersey) Law in relation to the Angelmist proceedings.
(c) All of the other unsecured creditors of the Z II Trust were Article 32(1)(a) creditors (ie they had known the trustee was acting as trustee, so the trustee's liability to them extended only to the trust property).

Two separate questions of priority arose for determination by the Court. It was held (reversing the first instance decision[175]) that the principle of first in time should apply, so that a former trustee's lien ranks in priority to that of a successor trustee:

> I am satisfied that the right of lien of a former trustee is an equitable right which ranks in priority of time ahead of the right of lien of a successor trustee, and it does so in accordance with the basic rule which applies to the ranking of equitable securities. That ranking in priority exists both so long as a trust remains solvent and if it becomes insolvent.[176]

Logan Martin JA went on to say:

> The establishment of the appropriate ranking should be straightforward in any particular case because it will depend solely upon the date when a trustee took up appointment as a trustee.[177]

For the purposes of establishing the relevant date for the purposes of ranking priorities, it does not therefore matter when any particular liabilities had been incurred, or indeed whether the trustee had incurred any liabilities at all:

> [T]hese rights continue to exist even if there are no actual liabilities to be secured against at one time or another during the administration of the trust.[178]

The second question was in relation to the priority between the former trustee (claiming through its right of indemnity and associated equitable lien in respect of its personal Article 32(1)(b) liability[179]) and its own Article 32(1)(a) trust creditors (ie those BVI companies with regard to whom the former trustee had entered into loan obligations). This point was not the subject of detailed submissions in the Court of Appeal (as there were no such creditors), but Logan Martin JA did express the view, obiter, that the first instance decision[180] was wrong and that the former trustee did have priority over its own creditors:

> 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

[174] The equivalent of the Trusts Law 2007, s 42(1); as to which, see section XII.A.
[175] *In the Matter of the Z Trusts* [2018] JRC 119, para 143.
[176] *In the Matter of the Z Trusts* (n 173) para 176.
[177] ibid para 177.
[178] ibid.
[179] That is liability in respect of which the trustee incurs unlimited personal liability, subject to a right of indemnity against the trust property; the equivalent of the Trusts Law 2007, s 42(2).
[180] That they ranked *pari passu*: *In the Matter of the Z Trusts* (n 174) paras 118, 121.

> itself and its Article 32(1)(a) creditors against the assets of a trust which has become insolvent.[181]

Re Z would clearly be persuasive before the Guernsey courts but would not necessarily be followed, as there is some force in the reasoning given in the decision of the Royal Court, not least the argument that it is more likely to be 'conducive to the good administration of trusts'.[182]

D. Creditors' Costs of Proving their Claims

The Court of Appeal also reversed the Royal Court's decision on this point in *Re Z II Trusts*, and held that a creditor's costs of proving its claim are recoverable from the insolvent trust fund. There were two grounds for this decision. The first was that now that the former trustee's lien ranked in priority to the claims of the successor trustee, the basis on which the Commissioner had decided the case was unjustified. The second was a more general point that a trustee should be entitled as a matter of principle to its costs from the trust fund in proving a claim it has as trustee, and that is the effect of Article 26(2).[183]

E. Trustee's Duties to Former Trustees and Creditors Generally

Where a former trustee gives notice to the current trustee of a claim under its right of indemnity, that 'may well give rise to an obligation on the part of the successor trustee not to take steps that would destroy, diminish or jeopardise the former trustee's equitable lien'.[184]

It is arguable that a trustee of a solvent trust has a general duty to creditors where there are limited recourse provisions.[185]

[181] *In the Matter of the Z Trusts* (n 173) para 233.

[182] *In the Matter of the Z Trusts* (n 175) para 107.

[183] The judgment refers to Art 36(2), but this must be a typographical error: Art 26(2) contains the trustee's right of reimbursement from the trust assets; the Guernsey equivalent is the Trusts Law 2007, s 35(2).

[184] *In the Matter of the Z Trusts* (n 175) para 149, citing *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344, 74 NSWLR 550.

[185] There is US authority to that effect: *James Stewart & Co v National Shawmut Bank* (1934) 69 F2d 694; see also AW Scott, WF Fratcher and ML Ascher (eds), *Scott and Ascher on Trusts*, vol 4 (5th edn, Wolters Kluwer, 2006) para 26.2.3.